

146 FERC ¶ 61,124  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Eastern Shore Natural Gas Company      Docket No. CP12-461-000

ORDER ISSUING CERTIFICATE

(Issued February 20, 2013)

1. On May 14, 2012, Eastern Shore Natural Gas Company (Eastern Shore) filed an application under section 7(c) of the Natural Gas Act (NGA)<sup>1</sup> and Part 157 of the Commission's regulations<sup>2</sup> for a certificate of public convenience and necessity authorizing Eastern Shore to construct and operate its Greenspring Expansion Project in New Castle and Kent Counties, Delaware. The proposed project will enable Eastern Shore to provide up to 15,040 dekatherms per day (Dth per day) of additional firm transportation service for two divisions of a local distribution company and an electric generator.

2. We will authorize Eastern Shore's proposals, with appropriate conditions, as discussed below.

**I. Background**

3. Eastern Shore is a corporation organized and existing under the laws of the state of Delaware and is a wholly owned subsidiary of Chesapeake Utilities Corporation. Eastern Shore is a natural gas company, as defined by section 2(6) of the NGA,<sup>3</sup> engaged in the transportation of natural gas in interstate commerce and is subject to the jurisdiction of the Commission. Eastern Shore's pipeline extends through the States of Pennsylvania, Maryland, and Delaware.

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<sup>1</sup> 15 U.S.C. § 717f(c) (2006).

<sup>2</sup> 18 C.F.R. § 157 (2012).

<sup>3</sup> 15 U.S.C. § 717a(6) (2006).

## **II. Proposal**

4. In order to gauge interest in an expansion of its pipeline system, Eastern Shore held an open season from July 7 to August 5, 2011. Two shippers expressed interest in capacity. At about the same time, Eastern Shore entered into negotiations with another shipper for firm capacity. As a result of the open season and these negotiations, Eastern Shore entered into binding precedent agreements or binding nominations with three shippers: NRG Center Dover LLC (13,440 Dth per day), Chesapeake Utilities-Delaware Division (1,100 Dth per day), and Chesapeake Utilities-Maryland Division (500 Dth per day). These volumes represent 100 percent of the incremental firm transportation service which will be made available by the proposed Greenspring Expansion Project.

5. In order to provide the requested services, Eastern Shore proposes to construct and operate 1) eleven miles of 16-inch-diameter pipeline loop, from the end of Eastern Shore's existing 16-inch-diameter pipeline near Smyrna, New Castle County, Delaware, south to a new connection to Eastern Shore's existing facilities near Dover, Kent County, Delaware; 2) two mainline 16-inch-diameter valve assemblies; and 3) one pressure regulating station and approximately .01 mile of 10-inch-diameter interconnecting piping.

6. The proposed facilities are to be located solely within Eastern Shore's Delivery Zone 2 (D2) boundaries, but will enable Eastern Shore to provide additional services to shipper delivery points located in zones D2 and D3. Eastern Shore estimates that the Greenspring Expansion will cost approximately \$16.3 million.

7. Eastern Shore proposes to charge incremental recourse rates of \$16.5028 per Dth for expansion deliveries into zone D2 and \$26.1174 per Dth for delivery into zone D3. Eastern Shore proposes to charge its currently-effective interruptible rates for interruptible service utilizing project capacity. Eastern Shore also proposes to charge its currently-effective surcharges and fuel retention percentage for all Greenspring Expansion services.

## **III. Procedural Matters**

### **A. Notice and Interventions**

8. Notice of Eastern Shore's application was published in the *Federal Register* on June 1, 2012 (77 Fed. Reg. 32,624). Chesapeake Utilities Corporation – Delaware Division, Chesapeake Utilities Corporation – Maryland Division, The Easton Utilities

Commission (Easton), Exelon Corporation, and Pivotal Utility Holdings, Inc. d.b.a. Elkton Gas filed timely, unopposed motions to intervene.<sup>4</sup>

9. Delaware Riverkeeper Network (DRN) filed a late motion to intervene. DRN has demonstrated an interest in this proceeding and granting the untimely motion at this early stage of the proceeding will not delay, disrupt, or unfairly prejudice any parties to the proceeding. Thus, we will grant the untimely motion to intervene pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure.

### **B. Protest**

10. Easton, an existing shipper on Eastern Shore's system and a municipality as defined in section 2(3) of the NGA, filed a protest to the application. Easton states that it does not oppose construction of the project but asserts that the Commission should require Eastern Shore to revise the proposed firm and interruptible incremental rates and to submit the precedent agreements and other commitments to firm service underlying its certificate application. We will address Easton's protest below.

11. Eastern Shore filed an answer to Easton's protest to which Easton filed an answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2012), prohibits an answer to a protest and answer unless otherwise ordered by the decisional authority. We will accept the answers filed by Eastern Shore and Easton because they provided information that assisted us in our decision-making process.

### **C. Request for Trial-type Hearing**

12. Easton also filed a request for hearing. It maintains that the rates Eastern Shore proposes in this proceeding raise material issues of fact that should be investigated through discovery in a trial-type evidentiary hearing. A trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.<sup>5</sup> Easton has not raised a material issue of fact that the Commission cannot resolve on the basis of the written record. As demonstrated by the discussion below, the existing written evidentiary record provides a sufficient basis for resolving the issues relevant to this proceeding. The Commission has satisfied the hearing requirement

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<sup>4</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. *See* 18 C.F.R. § 385.214 (2012).

<sup>5</sup> *See, e.g., Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d. 1125, 1128 (D.C. Cir. 1969).

by giving interested parties an opportunity to participate through evidentiary submission in written form.<sup>6</sup> Accordingly, the Commission will deny Easton's request for an evidentiary hearing.

#### **IV. Discussion**

13. Because Eastern Shore seeks to construct and operate facilities used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the proposal is subject to the requirements of subsections (c), and (e) of section 7 of the NGA.<sup>7</sup>

##### **A. Application of the Certificate Policy Statement**

14. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.<sup>8</sup> The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explained that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

15. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the construction. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the

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<sup>6</sup> *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

<sup>7</sup> 15 U.S.C. §§ 717f(c) and 717f(e) (2006).

<sup>8</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

16. As discussed above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. Eastern Shore proposes to recover the cost of the proposed facilities by charging expansion shippers incremental firm transportation rates consisting of the Eastern Shore's applicable existing system firm transportation rate plus an adder to recover the full costs of the expansion facilities. Thus, we find Eastern Shore's existing shippers will not subsidize the project.

17. We also find that the proposal will not degrade service to Eastern Shore's existing customers. The project will allow Eastern Shore to provide the additional transportation services subscribed by project shippers, while continuing to meet its existing firm obligations. Additionally, there will be no adverse impact on existing pipelines in the region or their captive customers because the proposal is not intended to replace existing customers' service on other existing pipelines. Moreover, no existing pipelines or their customers have protested the proposal. Thus, we find the proposed project will not result in any adverse impact on Eastern Shore's existing customers, or on other existing pipelines or their captive customers.

18. Regarding Eastern Shore's efforts to minimize any adverse effects the proposed project may have on the economic interests of landowners and communities, the proposed project facilities are adjacent to or co-located within existing rights-of-way for 98 percent of their length. In addition, as discussed in the Environmental Analysis section below, we are imposing conditions which will further mitigate the potential for negative impacts on landowners and communities. Accordingly, for purposes of our consideration under the Certificate Policy Statement, we find that Eastern Shore has taken steps to minimize any adverse economic impacts on landowners and surrounding communities.<sup>9</sup> Further, on balance we do not find that the residual potential for construction and operation of the Greenspring Expansion Project to negatively impact the economic interests of landowners and the neighboring community to be sufficient to foreclose a determination that the proposed project is required by the public convenience and necessity.

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<sup>9</sup>Other environmental concerns raised by commenters regarding the impact of the project are addressed in the Environmental Assessment and in the Environmental Analysis section of the order.

19. Alice Lane, a property owner, is concerned about compensation for landowners whose property rights will be affected by the Greenspring Expansion Project. Eastern Shore currently possesses easement agreements for a portion of the rights-of-way required and has expressed its commitment to working collaboratively with landowners to acquire necessary rights to the remaining acreage. In the event owners of any property interests are unable to reach agreement with Eastern Shore regarding the compensation to be paid for those rights, Eastern Shore, pursuant to section 7(h) of the NGA, may acquire the property rights necessary for its project through the exercise of eminent domain in state or federal court.<sup>10</sup> In such a proceeding, the court will take into account the fair market value of the necessary property rights in deciding the compensation due.

20. The proposed Greenspring Expansion Project will increase the transportation capacity available on Eastern Shore's system. All of the capacity to be created by the proposed project has been subscribed under either precedent agreements or binding nominations, demonstrating the existence of a market for the project.<sup>11</sup> Based on the benefits the project will provide and the minimal adverse effects the project will have on the economic interests of existing shippers, other pipelines and their captive customers, landowners and surrounding communities, we find, consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, that the public convenience and necessity requires approval of Eastern Shore's proposal, as conditioned in this order.

## **B. Rates**

21. Eastern Shore developed its proposed incremental rates using a multi-step approach. First, Eastern Shore determined that incremental rates would be required for expansion services because revenues that would be generated under its existing tariff rates would not fully cover the project's annual cost of service of \$3,160,840. Eastern

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<sup>10</sup> Under section 7(h) of the NGA, a certificate of public convenience and necessity confers on the certificate holder the right to acquire property rights by exercising the right of eminent domain in a court action if the certificate holder cannot acquire the property rights by contract or is unable to agree with the property owner on the amount of compensation. It is incumbent upon the applicant to make good faith efforts to negotiate with landowners for any needed rights. However, if the parties cannot reach agreement, issues of compensation for property rights taken by a pipeline under the eminent domain provisions of the NGA are matters for state or federal court.

<sup>11</sup> Consistent with long-standing Commission policy we will require Eastern Shore to execute firm service agreements for the entire capacity and term covered by the precedent agreements and binding nominations prior to commencing construction.

Shore states that the expected revenue calculated from expansion service shippers under the existing tariff rates would be \$2,775,264, resulting in a deficiency of \$385,576. Accordingly, Eastern Shore then calculated a single incremental rate for project service of \$17.5135 per Dth using the Greenspring Expansion Project's cost of service of \$3,160,840 divided by the annualized incremental volumes associated with the project.<sup>12</sup>

22. However, Eastern Shore states that using the single rate of \$17.5135 per Dth for all expansion service would not give appropriate recognition to the facts that the transportation paths of the contracted service cross multiple rate zones with progressively more expensive rates and that in certain zones the calculated incremental rate would be lower than the system rate.<sup>13</sup>

23. Eastern Shore states that it therefore developed a two-part incremental reservation charge that would consist of 1) the existing reservation rate for zone D2 or D3 transportation, as appropriate, and 2) an "incremental adder" of \$2.1485 per Dth, which would apply to all expansion services. The incremental adder was calculated by dividing the \$387,761 revenue deficiency Eastern Shore would incur using its currently effective rates by the annualized throughput of the project.<sup>14</sup>

24. As noted above, Easton, a transportation customer of Eastern Shore in zone D3, filed a protest. Easton does not oppose the construction of the Greenspring Expansion Project, but does object to the incremental recourse rates proposed by Eastern Shore. Easton argues a single incremental recourse rate of \$17.5135 per Dth should apply to all expansion customers, because that rate is higher than the existing rate which would be applicable to the bulk of the contracted-for expansion service (which is being delivered in zone D2), even though it would be lower than the existing recourse rate for that portion of the expansion service with deliveries in zone D3. Easton is concerned that approval of Eastern Shore's "adder" proposal could establish precedent for a rate design applicable to future expansion projects. Easton argues that if the Commission does determine that

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<sup>12</sup> Eastern Shore states that in developing the \$17.5135 per Dth rate it used the straight fixed-variable methodology and incorporated the pretax return (13.9 percent) and depreciation rate (2.67 percent) established in its most recent rate case. *See Eastern Shore Natural Gas Co.*, 138 FERC ¶ 61,050 (2012).

<sup>13</sup> While an incremental rate of \$17.5135 per Dth would exceed the existing rate of \$14.3543 for deliveries zone D2 rate, the existing recourse rate for deliveries in Zone D3 is \$23.9689 per Dth, which is significantly higher than calculated incremental rate.

<sup>14</sup> The actual revenue deficiency calculated by Eastern Shore was \$385,576 adjusted upward due to rounding.

rates for service on the project should vary by delivery zone, additional information is necessary in order to determine whether the specific rates that Eastern Shore has proposed are consistent with the public convenience and necessity; accordingly, Easton requests the Commission set this proceeding for hearing.

25. On June 28, 2012, Eastern Shore filed an answer to Easton's protest. Eastern Shore states that Easton has no direct interest in this proceeding as Easton is not an expansion shipper and will not pay the incremental rates established as a result of this proceeding. Eastern Shore states that Easton's only concern is the potential precedential effect of this proceeding in some unidentified future expansion project. Eastern Shore contends that the differential between its proposed incremental zone D2 and D3 rates (58 percent) is hardly "staggering," as characterized by Easton in its protest and, in fact, is lower than the differential between its existing rates (67 percent).<sup>15</sup>

26. Eastern Shore argues that establishing a single incremental rate of \$17.5135 per Dth applicable to all Greenspring Expansion Project service would give those shippers receiving deliveries in zone D3 a 27 percent discount as compared to the currently applicable rate of \$23.9689 per Dth for the same path.

27. In further support of its proposal, Eastern Shore provided an "Alternative Incremental Rate Derivation," which allocates costs based on a hydraulic modeling of the project. Eastern Shore states that the hydraulic modeling demonstrates that at least 16.7 percent of the approximately 11 miles of proposed pipeline looping would be required to achieve the 1,600 Dth per day incremental delivery capacity into delivery zone D3. Based on this model, Eastern Shore calculated alternative incremental rates of \$16.3255 per Dth for delivery in zone D2 and \$27.4927 per Dth for delivery into zone D3.

28. Finally, Eastern Shore states that its June 11 response to the staff data requests and the incremental rate analysis presented in its answer provide sufficient detail to justify different incremental rates for deliveries to zones D2 and D3 and to support Eastern Shore's adder approach. Accordingly, Eastern Shore submits that no hearing in this proceeding is required.

29. On September 4, 2012, Easton filed an answer to Eastern Shore's answer to Easton's protest. Easton reiterated its concerns and disagreed with Eastern Shore's

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<sup>15</sup> Under Eastern Shore's proposal, the recourse rate for expansion deliveries to zone D3 would be \$26.1174 per Dth, 58.26 percent higher than the \$16.5028 rate for deliveries to zone D2. Eastern Shore's existing rate for deliveries to zone D3 is \$23.9689 per Dth, 66.98 percent higher than the existing rate of \$14.3543 for deliveries to zone D2.

assertions in its answer to Easton's protest. No new substantive arguments were put forth. Easton's main concern is that if the Commission accepts the rates as proposed for the Greenspring Expansion Project, the Commission should make clear that its acceptance does not constitute approval of, or precedent regarding, any methodology or issue in any future Eastern Shore certificate or rate proceeding.

30. We will accept Eastern Shore's proposal to charge Greenspring Expansion Project shippers a recourse rate for firm service comprising an incremental rate adder of \$2.1485 per Dth plus the generally-applicable system rate for deliveries to the relevant zone. Doing so will equitably allocate the costs of the expansion among all the project shippers, while ensuring that existing customers will not subsidize the costs of the new facilities.<sup>16</sup> Utilizing the currently effective rates as the first component of the incremental rate continues the cost allocation that currently exists between deliveries made in zones D2 and D3. In addition, as compared to a one component rate for transportation to either zones D2 or D3, the end result of the two-component incremental rate avoids an incremental rate that would be lower for longer-haul transportation as compared to shorter hauls.

31. We note, however, that Eastern Shore states that it used a revenue deficiency of \$387,761 to calculate the adder, instead of the \$385,576 difference between the project cost of service and revenues based on Eastern Shore's current rates. In its response to a Staff data request, Eastern Shore states that the difference is due to "rounding within the calculation." By calculating the adder using the \$387,761, Eastern Shore would over-collect by \$2,185 per year. Therefore, we will require Eastern Shore to revise its proposed adder to be based on a revenue deficiency of \$385,576, which would reduce the adder to \$2.1364 per Dth or to provide further explanation as to the rounding difference.

32. As noted above, Easton requested the Commission require Eastern Shore to submit its precedent agreements and other commitments to firm service underlying its certificate application. Consistent with our standard policy, Eastern Shore is required to execute firm service agreement(s) for the capacity and term of the precedent agreements with expansion shippers prior to commencing construction of the proposed facilities. Further, there is sufficient evidence in the written record to establish initial rates for the proposed incremental services. Therefore, the Commission will deny Easton's request that Eastern Shore be required to file the precedent agreements and binding shipper nominations.

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<sup>16</sup> An incremental rate for an integrated expansion service which is lower than the existing system rate suggests that the expansion service may be subsidized by existing shippers. *See e.g., Trunkline Gas Company*, 119 FERC ¶ 61,078, at P 24 (2007).

### C. Environmental Analysis

33. On June 22, 2012, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed 2012 Greenspring Expansion Project and Request for Comments on Environmental Issues* (NOI). The NOI was mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

34. In response to the NOI, the Commission received comments from four landowners: Alice and Arthur Lane, Rita Flicker, Eugene Maute, and Ralph Schrader. We also received a late intervention from the Delaware Riverkeeper Network (DRN). The primary issues raised concerned impacts from construction, operation and maintenance on waterbodies, aquifers and wetlands, vegetation and wildlife (including tree clearing), public safety, and alternatives.

35. To satisfy the requirements of the National Environmental Policy Act, our staff prepared an environmental assessment (EA) for Eastern Shore's proposal. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, and alternatives. All substantive comments received in response to the NOI were addressed in the EA, as described below.

#### 1. Scoping Comments

36. In their comment letters, Alice and Arthur Lane and DRN expressed concern regarding the potential impacts on vegetation and wildlife as a result of construction and tree clearing. Similarly, Rita Flicker also raised concern regarding tree clearing, indicating that native Lenape Tribe custom is to plant trees in memory of loved ones. Additionally, Mrs. Lane raised concern regarding potential impact on aquifers in the project area due to the pipeline construction and operation.

37. The EA evaluates the potential impact on vegetation and wildlife.<sup>17</sup> The EA concludes that since 98 percent of the project would be co-located or adjacent to existing rights-of-way, disturbance to vegetation, specifically tree clearing would be greatly minimized.<sup>18</sup> The EA also concludes that although project activities could cause some

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<sup>17</sup> EA at pages 27 and 29, respectively.

<sup>18</sup> The proposed pipeline will parallel and is adjacent to the Norfolk Southern Railroad, public roads, and existing Eastern Shore right-of-way.

wildlife species to avoid the construction areas, the indirect impact would be temporary and limited to the relatively short period of active construction. The EA also evaluates the potential impact on aquifers in the region and concludes that the potential effects on these aquifers would not be significant because of the shallow installation depth of the natural gas pipeline.<sup>19</sup>

38. Eugene Maute, Rita Flicker and Mr. and Mrs. Lane requested that Eastern Shore route the pipeline further from existing residences.

39. The EA evaluates the feasibility of placing the pipeline parallel to the Norfolk Southern railroad in Route Deviation MP 1.23 to 1.52.<sup>20</sup> The alternatives analysis in the EA concludes that the deviation would reduce impacts on existing residences, but would have increased construction and operational land requirements and requires new rights-of-way through more forest and wetlands, when compared to the corresponding section of the proposed route. The EA also considers using horizontal directional drilling (HDD) along this segment to reduce impacts on existing residences, but finds that the overall construction footprint and land use requirements would be greater than those of the proposed alignment. Further, the EA states that impacts on existing residences would be largely temporary and would be mitigated through construction in accordance with the site-specific residential construction plans, prepared for residences and commercial buildings within 50 feet of the construction right-of-way, which the Commission staff reviewed and found to be acceptable.<sup>21</sup> Therefore, due to the increased potential environmental impacts, both of these alternatives were not preferred when compared to the corresponding segment of the proposed route.

40. In her comment letter, Rita Flicker, expressed concerns about impacts on public safety of school children, and that her community experiences a high volume of vehicular traffic along the proposed route. Other commenters expressed concerns regarding public safety as a result of the presence of the natural gas pipeline.

41. The EA evaluates the potential impact on reliability and safety.<sup>22</sup> The EA states that The U.S. Department of Transportation (DOT) is mandated to provide pipeline safety under Title 49, U.S.C. Chapter 601. The DOT's Pipeline and Hazardous Materials Safety

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<sup>19</sup> EA at page 19.

<sup>20</sup> EA at pages 51-52.

<sup>21</sup> Site-specific Construction Plans are included as appendix III of the EA.

<sup>22</sup> EA at pages 42-48.

Administration (PHMSA) administers the national regulatory program to ensure the safe transportation of natural gas and other hazardous materials by pipeline. Additionally, routine inspections and maintenance standards are required and enforced. The PHMSA also defines area classifications, based on population density in the vicinity of the pipeline, and specifies more stringent safety requirements for populated areas. As such, the EA concludes that potential impacts on public safety would not be significant.

42. Also, as indicated earlier, the Commission staff reviewed the site-specific residential construction plans prepared for construction activities within 50 feet of residences and commercial buildings, and found them acceptable. Although traffic patterns may be altered during construction, any such alteration is considered to be a temporary impact and will be conducted according to local and state permitting requirements.

43. In its late intervention request, DRN expressed concern regarding the potential impacts on wetlands, fisheries, and waterbodies within the Delaware River Basin as well as the potential impact on the recreational use and aesthetics of the various waterbodies that the pipeline will cross in the Delaware River Basin. DRN also expressed concern that Eastern Shore may be improperly segmenting their pipeline upgrade projects. DRN reiterates this concern in a later filing that is discussed in further detail later in this order.

44. The EA evaluates the potential impact on fisheries, waterbodies and wetlands and concludes that although project activities could cause some disturbances to these areas, the impacts, in most cases, would be temporary.<sup>23</sup> Although the project would permanently affect 1.47 acres of vegetation and forested wetlands due to operation of the pipeline, the pipeline will parallel existing rights-of-way for 98 percent of its length.<sup>24</sup> The EA states that the 13 waterbodies crossed by the project are classified as either impaired or have no special designation.<sup>25</sup> In addition, we believe that the implementation of the mitigation measures discussed in the EA<sup>26</sup> will adequately minimize the impacts on these resources within the Delaware River Basin.

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<sup>23</sup> EA at pages 17-25.

<sup>24</sup> EA at page 23.

<sup>25</sup> EA at page 20, Table 9.

<sup>26</sup> The mitigation measures include best-management practices contained in Eastern Shore's Upland Erosion Control and Revegetation Plan and Eastern Shore's Wetland and Waterbody Construction and Mitigation Procedures.

## 2. Comments Received on the EA

45. The EA was issued for a 30-day comment period and placed into the public record on September 7, 2012. The Commission received comments from two federal agencies: the U.S. Fish and Wildlife Service (FWS) and the U.S. Geological Survey (USGS); three organizations: DRN, Damascus Citizens for Sustainability, and Berks Gas Truth; several comment letters from Alice Lane; and three supplemental filings from Eastern Shore. Berks Gas Truth, Damascus Citizens for Sustainability, and Mrs. Lane all filed comments supporting DRN's comments on the EA.

46. The DRN requests an extension of the EA's comment period by 60 days stating that three and a half weeks for public comment is insufficient to adequately review and assess the project, and to ensure the public has a genuine and meaningful opportunity for review and comment. Karen Feridun, representing Berks Gas Truth, supports DRN's comment to extend the comment period. Similarly, Mrs. Lane requests the comment period be extended until October 17, 2012 because she did not receive the EA in the mail until September 18, 2012.

47. We note that the Commission and its staff routinely reviews and attempts to address all comments received after the EA comment period expires, provided there is sufficient time before a Commission decision is made. We have reviewed all late comments in this case.

48. Mrs. Lane questions the purpose of Eastern Shore's project. DRN echoed these concerns adding that the EA should have considered genuine need for the project and not used the need for an additional pipeline to bring more gas to the area as a guiding principle. As indicated earlier, the need of the project is addressed in the application of the Certificate Policy Statement in section III.A, which concludes that the project is consistent with the criteria discussed in the Certificate Policy Statement, subject to conditions set forth in this order.

49. The DRN states that Eastern Shore has a track record of failing to comply with Commission-mandated timeframes because it was unable to complete construction and had to request time extensions for its New Castle and Eastern Shore Expansion Projects.<sup>27</sup> DRN argues that this demonstrates that Eastern Shore cannot be relied upon to comply with obligatory timelines or with Commission staff's suggested mitigation measures proposed in the EA.

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<sup>27</sup> Docket Numbers CP11-303-000 and CP11-333-000, respectively.

50. Eastern Shore filed and constructed the New Castle and Eastern Shore Expansion Projects pursuant to its Blanket Certificate, Prior Notice requirements. Eastern Shore did not have all of the permits necessary to begin construction at the time of filing its prior notice application, but it did have the necessary environmental clearances required to move forward under Prior Notice authority.<sup>28</sup> Without the necessary permits, the projects were delayed.<sup>29</sup> Because Eastern Shore was only delayed in obtaining permits, we do not agree this creates a track record of non-compliance as DRN suggests.

### **3. Wetlands, Waterbodies, and Soils**

51. The USGS comments that in wetlands, the topsoil should be retained separately and placed back to its original location after the ditch has been filled. As the EA states, Eastern Shore would follow regional and general conditions of the National Wetlands Permit and would comply with all US Army Corp of Engineers authorizations.<sup>30</sup> In accordance with section V.B.2.h. of Eastern Shore's Wetland and Waterbody Construction and Mitigation Procedures (Eastern Shore's Procedures), during construction across wetlands that are unsaturated at the time of construction, Eastern Shore would segregate topsoil and return it to its original location after the ditch has been filled. We believe that the EA adequately discusses the impacts on topsoil segregation through wetlands and that the incorporation of Eastern Shore's Procedures will sufficiently minimize impacts on wetland topsoil.

52. The DRN questions which method of dry ditch crossings will be employed by Eastern Shore and claims that this information is needed to assess impacts to the waterbodies in the project area. The EA fully discusses potential impacts associated with dry crossings in section B.2., and states that site-specific crossing diagrams for each waterbody are required for state permits and would be included in the final alignment sheets provided with the Implementation Plan.<sup>31</sup>

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<sup>28</sup> Eastern Shore received the appropriate "no effect" clearance letters from the Maryland and Delaware State Historic Preservation Offices and U.S. Fish and Wildlife Service, as well as Coastal Zone clearances for these projects. See footnote 32.

<sup>29</sup> On May 17, 2012, Eastern Shore filed a letter to the Director of OEP stating that it is unable to complete construction of the facilities within one year of the final authorization of the project due to unforeseen delays in permitting authorizations and construction resource constraints.

<sup>30</sup> EA at page 23.

<sup>31</sup> See Environmental Condition 6 in Appendix C of this order.

53. The DRN also questions the Commission's ability to assess the success of wetland revegetation. As discussed in the EA, we believe that the provisions of Eastern Shore's Procedures are sufficient to protect waterbodies and wetlands. Further, the Commission provides adequate monitoring and enforcement capabilities to ensure compliance. DRN's concerns regarding the use of open-cut waterbody crossings and wetland restoration fail to take into account that the restoration goals, such as ensuring waterbody bank stabilization and revegetation of wetlands, will continue during restoration monitoring until deemed successful. The existence of other permits and requirements, including hydrostatic test water withdrawal permits, seeding recommendations from the Natural Resources Conservation Service (NRCS), state-issued trench dewatering permits, and a National Wetlands Permit, will provide further protection of these resources.

54. The DRN contends that the EA fails to adequately disclose and analyze potential impacts associated with hydrostatic testing, trench dewatering, blasting, use of horizontal directional drill, invasive plants and native vegetation, NRCS recommended seed mixes and soil amendments, open-cut waterbody crossings, and wetland crossings. DRN claims that the analyses for these resource areas were cursory and incomplete.

55. We disagree. These resource areas were adequately analyzed in the EA at the level of detail necessitated by the degree of potential impact. The EA discusses potential sources of hydrostatic test water and states that any withdrawal of water would be subject to state approval.<sup>32</sup> Hydrostatic testing, water discharge, and trench dewatering would comply with established measures outlined in Eastern Shore's Procedures to minimize erosion potential. Also, the EA explains that trench dewatering would comply with the requirements of an appropriate state permit.<sup>33</sup> We found no resource that would benefit from use of the HDD method and believe impacts will be adequately minimized.

56. Blasting is not proposed for the Project; however, the EA states that if blasting is deemed necessary, Eastern Shore would be required to obtain all appropriate permits, as well as approval from the Director of the Office of Energy Projects (OEP) prior to its use.<sup>34</sup> We maintain that this approach is appropriate for addressing potential blasting impacts.

57. The DRN and the USGS request disclosure of the specific seed mix proposed by Eastern Shore. The EA states that once construction has concluded, as well as surface

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<sup>32</sup> EA at page 21.

<sup>33</sup> EA at page 11, table 5.

<sup>34</sup> EA at page 13.

preparation, the right-of-way would be seeded with an appropriate seed mix.<sup>35</sup> As indicated in section V. B. 3 of Eastern Shore's Upland Erosion Control, Maintenance and Revegetation Plan (Eastern Shore's Plan), disturbed areas would be seeded according to written recommendations for seed mixes, rates, and appropriate dates for seeding, from the local soil conservation authorities, likely located in New Castle and Kent Counties, or requested by the landowner or land managing agency. Since the majority of this pipeline will be laid adjacent to county roads, the state or county transportation agency may recommend a specific seed mix consistent with their requirements. In addition, many homeowners may request sod or other ornamental species in accordance with easement requirements.

58. The DRN questions how the measures employed for successful revegetation (i.e., invasive species management, seed mix and soil amendment use, and habitat restoration) would be assessed to determine effectiveness. Similarly, the USGS suggests a description of the monitoring plan in order to determine if the revegetation goal has been met. The definition of a successful restoration of vegetation and description of monitoring are included in Eastern Shore's Plan.<sup>36</sup> The measures contained in Eastern Shore's Plan are not prescriptive (i.e., requiring a specific soil amendment or seed mix) but rather performance or response-driven. This means that the Project will be monitored through all project phases to ensure successful revegetation. In addition, Commission staff will conduct monthly inspections during the active construction phase and at intervals throughout the restoration and final reclamation phases of the project. The results of these inspections, and any Commission staff recommendations to correct problems or noncompliance issues, will be contained in the Commission staff's compliance reports filed in eLibrary under the project's docket number.

59. The DRN also states that although Eastern Shore adopted the Commission's Plan and Procedures to construct its Project, these measures do not provide sufficient environmental protection. DRN suggests that the Commission diluted its environmental review of the project as a result of this adoption. DRN also attached its comments submitted in another Commission proceeding pointing to various deficiencies in the Commission's Plan and Procedures. Finally, DRN states that Commission staff recognizes these documents and protocols are insufficient because our staff is in the process of updating them.

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<sup>35</sup> EA at page 16.

<sup>36</sup> Eastern Shore's Plan, section VII.A.2 states, "Revegetation in non-agricultural areas shall be considered successful if upon visual survey the density and cover of non-nuisance vegetation are similar in density and cover to adjacent undisturbed lands."

60. Eastern Shore's adoption of the Commission's Plan and Procedures into the project does not dilute or change our internal environmental review, it simply adds to the content of the application. Further, the Commission has expressed nothing to suggest that these measures are insufficient. Commission staff periodically reevaluates measures contained in the Plan and Procedures and invites the public, industry, and agencies to submit suggested modifications based on their experiences with implementation practices and variance requests.<sup>37</sup> We use this feedback to consider future changes and/or modifications of the measures. Because the Plan and Procedures are performance based, the Commission's 20 years of experience in their successful implementation proves their effectiveness as best management practices in the natural gas industry. Further, DRN's comments and suggested changes to the Commission's the Plan and Procedures are beyond the scope of this proceeding and need not be addressed further.

#### **4. Wildlife and Endangered Species**

61. The DRN's concern that the EA lacks an adequate assessment of baseline wildlife habitat data fails to consider the type of land that would be disturbed. As noted in the EA, most of the Project disturbances would occur on relatively poor-quality habitat such as active agricultural areas, industrial lands, and residential property, and would parallel existing disturbed railroad and utility corridors.<sup>38</sup> The existing disturbed nature of these cover types limits its use as sensitive habitat, making it compatible with the Project's operational footprint.

62. The FWS indicates that it was waiting for Delaware Department of Natural Resources and Environmental Council (DNREC) - Natural Heritage and Endangered Species Program (NHESP) to concur with the findings of Eastern Shore's bog turtle survey report, which was provided to both the FWS and the DNREC- NHESP for review. To comply with the Endangered Species Act, the EA recommends that Eastern Shore not begin construction activities until consultation with the FWS regarding the survey results is completed.<sup>39</sup> Eastern Shore's supplement contained a concurrence letter from DNREC-NHESP indicating that it reviewed the bog turtle survey report and concurs with its results, adding that, "there will be no impact to bog turtles as a result of this project."<sup>40</sup> We received final concurrence from the FWS on October 31, 2012. Therefore, we find

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<sup>37</sup> Request for Comments on Revised Plan and Procedures in Docket No. AD12-2.

<sup>38</sup> EA at page 26, table 12.

<sup>39</sup> EA at page 32, recommendation number 13.

<sup>40</sup> Eastern Shore's filed supplement of 9/19/12.

that there will be no effect on the federally endangered bog turtle. Section 7 consultation is complete for this project, and we omit environmental recommendation number 13 of the EA from this order.

## 5. Land Use and Public Safety

63. Mrs. Lane questioned whether the project could be installed across her property in New Castle County, Delaware due to her home residing in a NC40 (Neighborhood Conservation) zone. In fact, according to the county's Unified Development Code Section 33.2.7.0, subpart G, "minor" utilities are permitted in every zoning district across the county. Commission staff consulted with a New Castle County official, and found that Eastern Shore's natural gas pipeline is considered a "minor" utility and thus, is allowed in an NC40 zone.<sup>41</sup>

64. DRN commented that construction potentially will harm landowners and effect private properties crossed by the Project. The EA adequately describes residential impacts and includes as Appendix III Eastern Shore's site-specific residential construction plans, which the Commission staff reviewed and found acceptable.

65. As recommended in the EA, environmental condition number 9 of this order requires Eastern Shore to develop and implement an environmental complaint resolution procedure providing landowners with clear and simple directions for identifying and resolving their environmental mitigation concerns during construction and restoration of the pipeline right-of-way. These procedures will be mailed to each property owner prior to construction. Eastern Shore will also file landowner complaint information in its biweekly construction report, including an explanation of how and when any problems were resolved. We believe the EA adequately discussed impacts on private properties and that landowners will have adequate notification and opportunity to resolve their specific concerns for the life of the project.

66. The DRN also believes that any pipeline installed using the open-cut method needs to be installed at least 24 feet below the streambed to prevent pipeline exposure from scour.<sup>42</sup> DRN is concerned that the scour could lead to rupture and subsequent water contamination. DRN states that the EA fails to discuss the depth at which the

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<sup>41</sup> Telephone conversation between Commission staff and New Castle County, DE on December 12, 2012.

<sup>42</sup> Based on a DRN cited report from HydroQuest for a crossing of the Brandywine Creek.

pipeline would be set and how the risk of scour and rupture could impact the health and safety of the environment.

67. As stated in section B.7 of the EA, the project must be designed, constructed, operated, and maintained in accordance with the DOT's Minimum Federal Safety Standards.<sup>43</sup> The EA also provides examples of various depth requirements for pipelines under DOT's regulations.<sup>44</sup> DOT requires a minimum cover on top of the pipeline of 36 inches of soil or 24 inches of consolidated rock. In addition, DOT regulations require pipelines installed in a navigable river, stream, or harbor to be installed with a minimum cover of 48 inches of soil or 24 inches of consolidated rock between the top of the pipeline and the underwater natural bottom.

68. The waterbodies crossed by the Project are mostly minor, perennial ditches that have been previously crossed by other pipelines or utilities. The depth of the crossings for each waterbody would be designed to avoid scour or damage to the pipeline and comply with all applicable permits.<sup>45</sup>

69. Mr. and Mrs. Lane ask whether an incident along the pipeline would be considered an effect on the human environment. The results of our staff's evaluation of the Project's safety are presented in the EA in section B.7, Reliability and Safety. The number of significant incidents over the more than 300,000 miles of natural gas transmission lines indicates the risk is low for an incident at any given location. Overall, natural gas transmission pipelines continue to be a safe, reliable means of energy transportation and the EA concludes that operation of the project would represent a slight increase in risk to the nearby public.<sup>46</sup>

## **6. Air Quality**

70. The DRN comments that the project crosses a non-attainment area for ozone and particulate matter less than 2.5 microns in aerodynamic diameters (PM<sub>2.5</sub>). DRN states that EA's discussion about air emission impacts fails to consider the impacts of methane

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<sup>43</sup> 49 C.F.R. § 192 (2012)

<sup>44</sup> EA at page 43.

<sup>45</sup> Applicable permits include the Tax Ditch Crossing permit, received from the Delaware Department of Natural Resources and Environmental Control (DNREC) - Division of Soil and Water as well as the Subaqueous Lands permit issued by the DNREC - Division of Water.

<sup>46</sup> EA at page 48.

emissions leaking from the pipeline, the contribution to greenhouse gas emissions, and air quality impacts the project would generate. DRN notes that 0.07 percent to 10 percent of methane produced over the lifecycle of a natural gas well is lost during the storage and transmission phase.<sup>47</sup> DRN asks that the EA be revised to address the increase in methane emissions along the additional pipeline of the project.

71. The EA fully identifies and addresses impacts on the ozone and PM<sub>2.5</sub> non-attainment areas. The EA includes a General Conformity Applicability analysis of the non-attainment area pollutants and the precursor pollutants that form ozone and PM<sub>2.5</sub>. Methane is not a precursor pollutant and therefore does not contribute to the non-attainment status.<sup>48</sup> As shown in Table 16 of the EA, none of the pollutants or precursor pollutants exceed the General Conformity Applicability Thresholds. Therefore, air quality impacts on the non-attainment areas are not considered to be significant.

72. Regarding DRN's concerns about greenhouse gas emissions and methane, the EA includes estimates of these emissions for construction activities related to the project. Fugitive methane emissions are typically estimated as part of the operating emissions for projects that include compressor stations. The Project does not include any new or modified compressor station equipment. Specific factors needed to determine emission estimates from leaks along a pipeline based on the lifecycle of a natural gas well are unknown. In addition, the DRN reference material more accurately states that the cited 0.07 percent to 10 percent methane loss from transmission systems is not a reliable method for accounting for methane leaks.

“As discussed below, these methane emission estimates from natural gas systems are based on limited data and remain uncertain. Recent estimates in the peer-reviewed literature for downstream emissions of methane from natural gas systems range from 0.07% to 10% of the methane produced over the lifetime of a well (Table 1). It is important to note that only Lelieveld et al. (2005) presented actual data on emissions, in their case leakage from high-pressure transmission pipelines. Other estimates are based on emission factors from the 1996 EPA study, on emission factors from a more recent report from the American Petroleum Institute, or on reports of “lost and unaccounted for gas” to governmental agencies, leading to high uncertainty.”

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<sup>47</sup> Citing *Methane Emissions from Natural Gas Systems*, a background paper prepared for the National Climate Assessment, Reference number 2011,0003. February 25, 2012.

<sup>48</sup> EA at page 40.

73. The DRN also assumes that methane loss occurs along the entire transmission and storage phase. Although, the project will add an additional 11 miles of transmission pipeline, methane produced over the lifetime of a well may travel through many interconnected pipelines in a system. We cannot determine what well the gas will come from, or how far it will travel before or after going through the new 11 miles.

74. Mr. and Mrs. Lane question whether dust and fumes from construction, which result in breathing problems, can be considered an effect on the human environment. The EA estimates air emissions and fugitive dust associated with construction of the project.<sup>49</sup> The EA also identifies mitigation measures that Eastern Shore would employ to control fugitive dust, including application of water on unpaved areas and regulating the speed of vehicles. The EA concludes, and we agree, that construction emissions would result in a minor, intermittent and temporary impact to air quality, but would not cause a violation of any applicable air quality standard or significantly impact local or regional air quality.

## 7. Alternatives

75. Both the DNR and Mrs. Lane comment on the lack of alternatives explored in the EA. The EA does consider a number of alternatives to the proposed action, including: the no-action alternative; system alternatives (that is, alternatives that would use other existing or proposed facilities to meet the stated objectives of the proposal); and pipeline route variations (which differ from alternatives in that they are identified to avoid or reduce construction impacts on specific, localized resources that may include cultural resource sites, residences, or site-specific terrain conditions).<sup>50</sup> The EA concludes, and we agree, that none of the alternatives were environmentally preferable to the proposed project.

76. The DRN states that the development of renewables should have been considered in the EA as an alternative. The Project objective is to provide 15,040 Dth/d of firm natural gas transportation capacity to Eastern Shore's customers in the Delmarva Peninsula. As described in the EA, evaluation of the No-Action Alternative, without the additional capacity on Eastern Shore's system, shippers would seek alternative projects that could require the construction of additional and/or new pipeline facilities in the same or other locations to transport the gas volumes proposed by the Project. These projects would result in their own set of specific environmental impacts that could be equal to or greater than those described in the current proposal. While in some circumstances it may be possible that alternate energy forms could be used to meet increased demands,

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<sup>49</sup> EA at page 40.

<sup>50</sup> EA at pages 49-52.

renewable energies such as solar, hydroelectric, and wind are not yet available in sufficient quantities to meet the market requirements served by this Project, and thus would not be an appropriate substitute to meet this Project's objective. Further, the timing and exact impact of developments in renewable energy in the project area cannot be quantified with any certainty.

77. Mrs. Lane questions why Eastern Shore couldn't use the existing 10-inch-diameter pipeline that is already in place west of Blackbird Greenspring Road, rather than installing the proposed Project pipeline, and why the proposed 16-inch-diameter pipeline can't be connected to the existing 10-inch-diameter pipeline. She also questions whether the existing 10-inch-diameter pipeline would be removed or abandoned after construction of the Project.

78. As indicated in Eastern Shore's application, the Project consists of a 16-inch-diameter loop of the existing 10-inch-diameter pipeline. Looping means that the new pipeline would be installed adjacent to the existing 10-inch-diameter pipeline and connected to it at both ends, allowing more gas to be moved through the system. The existing pipeline is not able to transport the additional volumes of natural gas proposed for this project. The project design for the increased capacity requires the existing pipeline to continue to operate.

79. Mrs. Lane commented that the NRG Energy Center Dover should implement clean coal technology rather than convert to natural gas as planned. A November 11, 2011 press release from the Delaware Department of Natural Resources and Environmental Control (DNREC) stated that NRG Energy Center Dover has all necessary permits for the conversion from coal to natural gas, including an air quality construction permit. Therefore, the NRG Center Dover's conversion to natural gas has appropriately received consideration at the state level.

## **8. EA vs. EIS**

80. Many commentators advocate for an environmental impact statement (EIS) rather than an EA. DRN specifically states that the Commission staff's EA is inadequate and cannot support a finding of no significant impact (FONSI), and therefore, a full EIS should be prepared to fully satisfy the Commission's obligations under NEPA. DRN further claims that the FONSI determination in the EA fails to fulfill NEPA's requirements because it was based on the Commission's "unenforceable mitigation measures," which the applicant may or may not embrace.

81. The DRN misunderstands the Commission's NEPA review process. From the time the Commission staff prepares the EA through the issuance of a Certificate, most projects are modified either by the applicant or by the recommendations of the Commission staff in the EA to address environmental and other concerns. The Commission frequently attaches the staff's recommendations contained in the NEPA

document as conditions to its final authorization specifically to address environmental concerns. A project sponsor can decline to proceed with a planned project if it determines that modifications required by the Commission are unacceptable. However, if the project sponsor accepts the Certificate, the environmental conditions are incorporated into the project design and are, in fact, enforceable.

82. The DRN also believes that the EA is too long; and an EIS should have been prepared instead. DRN cites CEQ guidance that states that agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of 40 C.F.R. § 1508.9 and where it is extremely difficult to determine whether the proposal could have a significant impact. DRN specifically asserts the CEQ has generally advised agencies to limit EAs to not more than 10-15 pages and that since the Commission's EA is comprised of 115 pages including appendices and attachments, the Commission should have undertaken an EIS.

83. The CEQ's advisory memorandum is general guidance to agencies that urges brevity in the preparation of an EA and does not require an agency to prepare an EIS after issuance of an EA with more than 15 pages. The CEQ's guidance recognizes that a lengthy EA may be appropriate in cases of complexity, and while a lengthy EA may suggest that an EIS may be needed in some cases, the CEQ's guidance does not establish a blanket requirement. In this case, the broad range of environmental issues in the resource reports and the workability of the required mitigation to reduce the project's effects below the level of significance warranted a relatively lengthy EA, but not further analysis in an EIS. The EA adequately addresses the myriad of issues as concisely and briefly as possible as Commission and CEQ regulations require. The fact that all the analysis of environmental issues consumed approximately 115 pages does not imply that an EIS is warranted. Moreover, the CEQ guidance cited by DRN is over thirty years old.<sup>51</sup> Courts have held that the length of an EA "has no bearing on the necessity of an EIS."<sup>52</sup> "What ultimately determines whether an EIS rather than an EA is required is the scope of the project itself, not the length of the agency's report."<sup>53</sup> A rule requiring an

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<sup>51</sup> <http://ceq.hss.doe.gov/nepa/regs/40/40P1.HTM> (originally published in the *Federal Register* on March 23, 1981 (46 Fed. Reg. 18,026)).

<sup>52</sup> *Tomac v. Norton*, 433 F.3d 852, 862 (D.C. Cir. 2005) (citing *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985)).

<sup>53</sup> *Id.* quoting *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 434 (8th Cir. 2004).

EIS for any EA over a certain number of pages would create a perverse incentive for agencies to produce bare-bones EAs.<sup>54</sup>

84. The DRN also believes an EIS is required because it believes the project will significantly affect the quality of the human environment. DRN states that both the context and intensity of the project mandates a finding of significant impacts. Under the CEQ regulations, context refers to “society as a whole (human, national), the affected region, the affected interests, and the locality.”<sup>55</sup> DRN continues that the context of the project includes the rapid development of shale gas and that the project will require large quantities of land and water, open cut crossings, and will disturb wetlands and other sensitive habitats. “Intensity” “refers to the severity of the impact” and DRN argues that intensity factors 2, 6, and 7 listed in 40 C.F.R. § 1508.27(b) weigh in favor of a finding of severe and significant impacts necessitating an EIS rather than an EA.<sup>56</sup> We disagree.

85. The DRN states that the project poses a significant threat to public health and safety, the second intensity factor.<sup>57</sup> We have already addressed DRN’s arguments regarding the potential threat to public health and safety, intensity factor 2, as well as DRN’s cumulative impacts arguments, intensity factor 7. We address DRN’s arguments with respect to intensity factor 6 below.

86. The DRN believes an EIS is required because the project is likely to establish precedent for future actions with significant effects, the sixth intensity factor.<sup>58</sup> DRN repeats several previously addressed arguments and argues that the EA’s failure to address these concerns sets a dangerous precedent for other pipelines now and in the future.

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<sup>54</sup> *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d at 434.

<sup>55</sup> 40 C.F.R. § 1508.27(a) (2012).

<sup>56</sup> DRN cites intensity factors 2, 6, and 7 (40 C.F.R. §§ 1508.27(b)(2), (b)(6), and (b)(7) (2012)) arguing that the project: poses a significant threat to public health and safety (27(b)(2)); is likely to establish a precedent for future actions with significant effects (27(b)(6)); and will have cumulatively significant impacts on the environment (27(b)(7)).

<sup>57</sup> 40 C.F.R. § 1508.27(b)(2) (2012).

<sup>58</sup> 40 C.F.R. § 1508.27(b)(6) (2012).

87. DRN's argument that Commission staff's EA for the project would establish a precedent is without merit because the EA is a non-binding document and creates no precedent to which the Commission is bound.<sup>59</sup> Each proposed project is unique and has different effects on different resources. In determining whether to prepare an EIS or an EA, Commission staff relies upon the Commission's regulations and makes an individual determination for each new proposal. Just because Commission staff has decided one action requires an EA, does not mean that a seemingly similar action will not require an EIS.

88. In conclusion, we have reviewed the information and analysis contained in the record, including the EA, regarding the potential environmental effect of the project. Based on our consideration of this information, we agree with the conclusions presented in the EA and find that if constructed and operated in accordance with Eastern Shore's application, as supplemented, and the conditions imposed herein, approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

## **9. Future Expansion**

89. The DRN states that the EA does not include Eastern Shore's plans for future expansion, and points to Eastern Shore's website, which describes an "open season" plan for Eastern Shore facilities to be constructed and phased into service over the next three years. DRN states that Eastern Shore should be required to submit to the Commission its potential plans for additional upgrades along its entire system, and that without such disclosure, this section of the EA is both factually and legally deficient.

90. The EA indicates that "no known future projects were identified."<sup>60</sup> The Commission staff did research to identify any publically announced future projects planned by Eastern Shore at the time of printing of the EA. We also recognize that interstate natural gas companies conduct "open seasons" to generate interest in system expansion or serving market needs. Any response to an open season for natural gas service for any future project under development by Eastern Shore, depending on its project scope and location, will undergo its own independent environmental review if the project is ripe for use of the pre-filing review and/or application at the Commission.

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<sup>59</sup> See e.g. *Town of Cave Creek v. FAA*, 325 F.3d 320, 332 (D.C. Cir. 2003) (finding that the Federal Aviation Administration reasonably concluded that an EIS was unnecessary and preparing an EA for the agency review of high-altitude arrival and departure procedures would not be binding precedent).

<sup>60</sup> EA at page 10.

Each newly planned project will have its own specific customer requirements, timelines and routing options to be developed. We do not believe the EA is factually and legally deficient as DRN alleges.

## 10. Cumulative Impacts

91. The DRN argues that the project will have cumulatively significant impacts on the environment, and that the Commission, therefore, should have prepared an EIS rather than an EA.<sup>61</sup> DRN further argues that the cumulative impacts analysis presents only a general, perfunctory analysis and is not sufficiently quantified or detailed to support its conclusions. Additionally, DRN argues that the EA's treatment of the cumulative impacts falls short of what NEPA requires by failing to consider the full scope of impacts of the project. Finally, DRN argues that Eastern Shore may be improperly segmenting pipeline upgrade projects, and that functionally dependent projects must be evaluated together. DRN also argues that the Commission must consider the cumulative impacts of the Project's direct and indirect greenhouse gas (GHG) emissions, which are caused by the project.

92. Under CEQ's NEPA regulations, agencies must consider the three types of impacts: direct, indirect, and cumulative.<sup>62</sup> The regulations state that "direct effects" of a proposed action are "caused by the action and occur at the same time and place."<sup>63</sup> "Indirect effects" are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."<sup>64</sup> "Cumulative impact" is defined as the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."<sup>65</sup>

93. The EA includes an analysis of the cumulative impacts of related past, present and reasonably foreseeable activities in the project area.<sup>66</sup> As noted in the EA, the only activity within the vicinity of the project is the ongoing work at the NRG Energy Center Dover.

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<sup>61</sup> 40 C.F.R. § 1508.27(b)(7) (2012).

<sup>62</sup> 40 C.F.R. § 1508.25 (2012).

<sup>63</sup> 40 C.F.R. § 1508.8(a) (2012).

<sup>64</sup> 40 C.F.R. § 1508.8(b) (2012).

<sup>65</sup> 40 C.F.R. § 1508.7 (2012).

<sup>66</sup> EA at 49.

94. The DRN argues that the Commission must analyze the impacts of the NRG Energy Center Dover. As the EA explains, these non-jurisdictional facilities have received authorization from the permitting agencies and are under construction. The EA appropriately considers the NRG Energy Center Dover in cumulative impacts.<sup>67</sup>

95. When looking at project impacts, the U.S. Supreme Court held in *U.S. Dep't of Transp. v. Public Citizen (Public Citizen)*,<sup>68</sup> that NEPA requires a “reasonably close causal relationship” between the environmental effect and the alleged cause.<sup>69</sup> The Court further explained that this is similar to “the familiar doctrine of proximate cause from tort law.”<sup>70</sup> In *Public Citizen*, the Court upheld the Federal Motor Carrier Safety Administration’s (FMCSA) decision not to consider the potential environmental impacts of an increased number of Mexican trucks on U.S. roads in its EA assessing new safety regulations governing Mexican motor carriers. The Court based its decision upon the agency’s finding that the relationship between the increased number of trucks and the safety regulations was not a reasonably close causal relationship.<sup>71</sup> Similarly, there is not a reasonably close causal relationship between the development or combustion of natural gas from the Delaware River Basin and our approval of the Greenspring Expansion Project.

96. The DRN states that because the Greenspring Expansion Project will likely induce further development of the source of gas to be transported, that the scope and scale of this development is a reasonably foreseeable consequence of the project, and that the impacts of the increased shale development must be weighed in the cumulative impacts analysis. The DRN continues that because the project will transport Marcellus Shale gas, the combustion of this gas is a reasonably foreseeable consequence of the project and the resulting GHG emissions must be weighed in the cumulative impacts analysis.

97. We disagree. Development of the sources of natural gas to be transported in the Greenspring Expansion Project will occur with or without the project and will find other avenues to market. The EA considers past, present, and future natural gas activities in the

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<sup>67</sup> EA at 4.

<sup>68</sup> 541 U.S. 752, 767 (2004).

<sup>69</sup> *Public Citizen*, 541 U.S. at 767 (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

project region and only identified the NRG Energy Center Dover as proximal to the project. Marcellus shale projects are so far removed geographically that their consideration is speculative at best.

98. DRN claims that there are at least twelve separate large-scale transmission pipeline projects that either currently traverse or are planned to cross the Delaware River Basin. DRN provided a list of projects, arguing that they should be included in the cumulative impacts analysis for the Greenspring Project because they cumulatively affect the watershed of the Delaware River.

99. In evaluating cumulative impacts, Commission staff generally follows the methodology set forth in relevant guidance (CEQ, 1993; USEPA, 1999). Under these guidelines, inclusion of other projects within the cumulative impacts analysis is based on identifying commonalities of impacts from other projects with impacts that would result from the proposed Project. The cumulative impacts analysis includes actions meeting the following three criteria:

- impact a resource potentially affected by the proposed project;
- cause this affect within all or part of the proposed project area; and
- cause this affect with all, or part, of the time span for the potential affect from the Project.

100. The Project affects a confined corridor within the Atlantic Coastal Plain. In designating the area for cumulative impacts analysis, we considered both the spatial and temporal extent of the Project's impacts. We specifically considered the Project's effects to the Delaware River Basin, limiting the geographic scope for analysis to incorporate New Castle and Kent Counties, Delaware.<sup>72</sup> As discussed, the EA concluded that impacts to this area would be temporary and minor.

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<sup>72</sup> The surface waters analysis in the EA at page 19 indicated that the Project would cross 13 waterbodies within the Delaware River Basin. Two crossings will use HDD and the remaining 11 will comply with Eastern Shore's procedures, limiting construction to 24 hours for minor waterbodies (ten feet wide or less) and 48 hours for intermittent waterbodies (greater than ten feet wide, but less than 100 feet wide). Nine of the waterbodies are minor (ten feet or less in width). Construction at any point on the pipeline is expected to last six to ten weeks. Restoration of stream banks and adjacent vegetation is expected to be successful by the end of the next growing season.

101. The projects listed by DRN are neither temporally nor spatially within the Project's area of affect. Several of the projects listed are currently completing final restoration and reporting a stable right-of-way and no significant environmental concerns. The projects listed as not yet in pre-filing would not be constructed for at least two to three years, well beyond the construction and restoration window expected for the Greenspring Project. The three remaining projects that may be constructed around the same time as the Greenspring Project are located between 50 and 175 miles away from the Project area, clearly too distant to be spatially related to the Project. Because the listed projects are neither temporally nor spatially related to the project, the EA correctly concluded that the Project's impacts when added to other known past, present and reasonably foreseeable impacts would not be significant.

102. The DRN also argues that Eastern Shore may be engaged in improper segmentation of their projects. Specifically, the DRN points to the New Castle and Eastern Shore Expansion Projects, and argues that this situation is analogous to *Thomas v. Peterson*,<sup>73</sup> where the court considered an EA prepared by the Forest Service for a timber road through a National Forest and held that the cumulative impacts of the road and any future timber sales had to be considered together. The court rejected the argument that "sales are too uncertain and too far in the future for their impacts to be analyzed along with the road" reasoning that "if sales are sufficiently certain to justify construction of the road, then they are sufficiently certain for their environmental impacts to be analyzed along with the road."<sup>74</sup>

103. However, *Thomas v. Peterson* is inapplicable here. In that case, the court held that the Forest Service's plan to prepare separate EAs for the forest road approval and timber sales approvals was an impermissible segmentation of connected actions.<sup>75</sup> The court first found the approval of the new road and timber sales were "connected actions" under NEPA,<sup>76</sup> stating that "[w]here agency actions are sufficiently related so as to be

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<sup>73</sup> 753 F.2d 754 (9th Cir. 1985).

<sup>74</sup> *Id.* at 760.

<sup>75</sup> *Id.* at 759.

<sup>76</sup> CEQ regulations state that "Connected actions, which means they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25 (2012).

‘connected’ within the meaning of NEPA, the agency may not escape compliance with the regulations by proceeding with one action while characterizing the others as remote or speculative.”<sup>77</sup> Therefore, the issue in *Thomas v. Peterson* was the Forest Service’s attempt to segment several federal actions into small enough parts to avoid the preparation of an EIS.

104. Here, the New Castle and Eastern Shore Expansion Projects are separate actions, already approved and constructed, wholly distinct from the project at issue. Further, our staff reviewed Eastern Shore’s New Castle and Eastern Shore Expansion Project applications and verified that the projects complied with section 157.206(b) of the Commission’s environmental regulations.<sup>78</sup>

105. More analogous to the instant case is *Sylvester v. U.S. Army Corps of Engineers (Sylvester)*,<sup>79</sup> where the court addressed the scope of analysis that federal agencies must conduct in determining whether their actions, when combined with private actions, require an EIS under NEPA.<sup>80</sup> The court in *Sylvester* upheld the Corps decision to limit its NEPA review to impacts of the construction of a golf course for which the Corps issued a permit, rather than look at the impacts of the larger resort complex.<sup>81</sup> The court explicitly distinguished *Sylvester* from *Thomas v. Peterson* finding that the federal actions in *Thomas v. Peterson* were joined to each other as links in the same chain in a way that the golf course and resort were not.<sup>82</sup> The court explained that the golf course and the resort complex were separate segments of chain and, although the golf course and resort complex would each benefit from the other’s presence, each project could exist without the other.<sup>83</sup> The Greenspring Expansion Project and the New Castle and Eastern Shore Expansion Projects are related in a similar way as the golf course and the resort in

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<sup>77</sup> *Thomas v. Peterson*, 753 F.2d at 760.

<sup>78</sup> Environmental Assessment Report (EAR) dated 7/11/11 in Docket No. CP11-303; and EAR dated 7/8/12 in Docket No. CP11-333. Both reports can be found in eLibrary.

<sup>79</sup> 884 F.2d 394 (9th Cir. 1989).

<sup>80</sup> *Id.* at 398.

<sup>81</sup> *Id.* at 401.

<sup>82</sup> *Id.* at 400.

<sup>83</sup> *Id.*

*Sylvester*: separate segments of chain each of which can exist without the other. Each project development will continue with or without the others and there is no “reasonably close causal relationship” between the alleged impacts and the project. Therefore, we do not believe that they need be evaluated together with the Greenspring Expansion Project in a single NEPA document.

106. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application(s), as supplemented, and exhibits thereto, submitted in support of the authorizations sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Eastern Shore authorizing it to construct and operate the Greenspring Expansion Project facilities, as described and conditioned herein, and as more fully described in the application.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on Eastern Shore’s:

- (1) completion of construction of the proposed facilities and making them available for service within one year of the date of this order pursuant to section 157.20(b) of the Commission’s regulations;
- (2) compliance with all applicable Commission regulations including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission’s regulations;
- (3) compliance with the environmental conditions in Appendix C to this order; and
- (4) executing, prior to the commencement of construction, firm contracts for the volumes and service terms equivalent to those in its precedent agreements and binding nominations.

(C) Eastern Shore shall file actual tariff records with the incremental rates and changes to its tariff no earlier than 60 days, and no later than 30 days, prior to the date the expansion capacity is placed in service.

(D) Eastern Shore shall notify the Commission’s environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other federal, state or local agencies on the same day that such agency notifies Eastern

Shore. Eastern Shore shall file written confirmation of such notification with the Secretary of the Commission with 24 hours.

(E) The untimely motion to intervene is granted.

(F) Easton's protest and request for Hearing are denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## Appendix

### Environmental Conditions

As recommended in the Environmental Assessment (EA), this authorization includes the following conditions:

1. Eastern Shore shall follow the construction procedures and mitigation measures described in its application, supplements (Including responses to staff data requests) and as identified in the EA, unless modified by the Order. Eastern Shore must:
  - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary;
  - b. justify each modification relative to site-specific conditions;
  - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
  - d. receive approval in writing from the Director OEP before using that modification.
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
  - a. the modification of conditions of the Order; and
  - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Eastern Shore shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, EIs, and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA. **As soon as they are available, and before the start of construction**, Eastern Shore shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order.

All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Eastern Shore's exercise of eminent domain authority granted under NGA section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Eastern Shore's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Eastern Shore shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by Eastern Shore's Plan and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
  - b. implementation of endangered, threatened, or special concern species mitigation measures;
  - c. recommendations by state regulatory authorities; and
  - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the Certificate and before construction** begins, Eastern Shore shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Eastern Shore must file revisions to the plan as schedules change. The plan shall identify:

- a. how Eastern Shore will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
  - b. how Eastern Shore will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
  - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
  - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
  - e. the location and dates of the environmental compliance training and instructions Eastern Shore will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change).
  - f. the company personnel (if known) and specific portion of Eastern Shore's organization having responsibility for compliance;
  - g. the procedures (including use of contract penalties) Eastern Shore will follow if noncompliance occurs; and
  - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
    - (1) the completion of all required surveys and reports;
    - (2) the environmental compliance training of onsite personnel;
    - (3) the start of construction; and
    - (4) the start and completion of restoration.
7. Eastern Shore shall employ at least one EI per construction spread. The EI shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
  - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
  - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
  - d. a full-time position, separate from all other activity inspectors;

- e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
  - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Eastern Shore shall file updated status reports with the Secretary on a biweekly basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Eastern Shore's efforts to obtain the necessary federal authorizations;
  - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
  - c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
  - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
  - e. the effectiveness of all corrective actions implemented;
  - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
  - g. copies of any correspondence received by Eastern Shore from other federal, state, or local permitting agencies concerning instances of noncompliance, and Eastern Shore's response.
9. Eastern Shore shall develop and implement an environmental complaint resolution procedure. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the right-of-way. **Prior to construction**, Eastern Shore shall mail the complaint procedures to each landowner whose property would be crossed by the project.
- a. In its letter to affected landowners, Eastern Shore shall:
    - (1) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;

- (2) instruct the landowners that if they are not satisfied with the response, they should call Eastern Shore's Hotline; the letter should indicate how soon to expect a response; and
    - (3) instruct the landowners that if they are still not satisfied with the response from Eastern Shore's Hotline, they should contact the Commission's Dispute Resolution Service Helpline at 877-337-2237 or at [ferc.adr@ferc.gov](mailto:ferc.adr@ferc.gov).
  - b. In addition, Eastern Shore shall include in its biweekly status report a copy of a table that contains the following information for each problem/concern:
    - (1) the identity of the caller and date of the call;
    - (2) the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;
    - (3) a description of the problem/concern; and
    - (4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.
10. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, Eastern Shore shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
11. Eastern Shore must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
12. **Within 30 days of placing the authorized facilities in service**, Eastern Shore shall file an affirmative statement with the Secretary, certified by a senior company official:
  - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
  - b. identifying which of the Certificate conditions Eastern Shore has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
13. Eastern Shore **shall not begin construction activities until**:

- a. the staff receives comments from the USFWS regarding the proposed action;
  - b. the staff completes any necessary consultation with the USFWS; and
  - c. Eastern Shore has received written notification from the Director of OEP that construction or use of mitigation may begin.
14. **Eastern Shore shall not begin construction of facilities and/or use of all staging, storage, or temporary work areas and improved access roads until:**
- a. Eastern Shore files with the Secretary:
    - (1) remaining cultural resources survey report(s) and addendum(s);
    - (2) site evaluation report(s) and avoidance/treatment plan(s), as required;
    - (3) comments on the cultural resources reports, addendums and plans from the Delaware State Historic Preservation Office; and
    - (4) correspondence demonstrating the report(s) and addendum(s) were sent to the Delaware Nation and the Delaware Tribe of Indians of Oklahoma.
  - b. the ACHP is afforded an opportunity to comment if historic properties would be adversely affected; and
  - c. the FERC staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Eastern Shore in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing location, character, and ownership information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: **“CONTAINS PRIVILEGED INFORMATION - DO NOT RELEASE.”**