

153 FERC ¶ 61,379
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Empire Pipeline, Inc.
National Fuel Gas Supply Corporation

Docket No. CP14-112-001

ORDER GRANTING AND DENYING IN PART REQUESTS FOR
REHEARING AND CLARIFICATION AND
DENYING REQUEST FOR STAY

(Issued December 30, 2015)

1. On March 10, 2015, the Commission issued an order authorizing Empire Pipeline, Inc. (Empire) and National Fuel Gas Supply Corporation (National Fuel) under section 7 of the Natural Gas Act (NGA) to construct and operate the Tuscarora Lateral Project.¹ Allegheny Defense Project (Allegheny) filed a timely request for rehearing and, in a separate filing, a request for stay of the March 10 Order. Empire and National Fuel jointly filed a timely request for rehearing and clarification. For the reasons discussed below, this order grants and denies, in part, the requests for rehearing and clarification and denies the request for stay.

I. Background

2. Empire currently offers only firm and interruptible transportation services under Rate Schedules FT and IT, respectively. It has no storage facilities. The Tuscarora Lateral Project authorized in the March 10 Order is designed to connect Empire's pipeline system to National Fuel's pipeline system, which will enable Empire to lease transportation and storage capacity on National Fuel and allow Empire to offer no-notice transportation and storage service to its customers. The capacity of the project is fully subscribed under long-term contracts with two of Empire's existing shippers. These

¹ *Empire Pipeline, Inc.*, 150 FERC ¶ 61,181 (2015) (March 10 Order).

shipper's existing maximum daily transportation quantities will not change under the contracts.

3. Specifically, to transport gas to and from National Fuel, the March 10 Order authorized Empire to construct and operate 0.77 miles of 16-inch-diameter pipeline and 16.23 miles of 12-inch-diameter pipeline between a tie-in at the southern end of Empire's system in the Town of Jackson, Tioga County, Pennsylvania, and a tie-in at National Fuel's Tuscarora Compressor Station in Steuben County, New York. The tie-ins will include measurement and pressure control equipment and a pig launcher and receiver. Empire will also construct and operate auxiliary facilities, such as mainline valves, a drip, and cathodic protection equipment under section 2.55(a) of the Commission's regulations. In addition, the March 10 Order authorized Empire to replace one or both compressor wheels at its existing Oakfield Compressor Station in Genesee County, New York, if necessary, to accommodate potential exports to Canada.

4. To enable Empire to use the storage and transportation capacity on National Fuel's system, the March 10 Order authorized National Fuel to add a 1,380-horsepower reciprocating natural gas-fired compressor unit to its existing Tuscarora Compressor Station and to lease to Empire capacity sufficient to provide 55,000 dekatherms (Dth) per day of firm transportation service and 3,300,000 Dth of firm storage service. The capacity lease provides for injection rights up to 27,500 Dth per day and withdrawal rights up to 55,000 Dth per day. The capacity of the project is fully subscribed under long-term contracts with two of Empire's existing shippers.

5. The March 10 Order also authorized Empire (1) to offer firm no-notice transportation service (FTNN), firm no-notice storage service (FSNN), and interruptible storage service (ISS); (2) to charge initial rates for Rate Schedules FTNN, FSNN, and ISS; and (3) to revise its tariff to reflect the new services and related rates and to modify or remove several existing tariff provisions.

6. In the March 10 Order, the Commission found that the benefits the Tuscarora Lateral Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities.² After review of the Environmental Assessment (EA) prepared by Commission staff for the Tuscarora Lateral Project to satisfy the requirements of the National Environmental Policy Act (NEPA),³ the Commission concluded that with the

² March 10 Order, 150 FERC ¶ 61,181 at P 33.

³ 42 U.S.C. §§ 4321-4370h (2012). Commission staff placed the EA into the public record on October 31, 2014, and mailed it to all stakeholders on the environmental mailing list.

adoption of 15 environmental conditions, the project would not constitute a major federal action significantly affecting the quality of the human environment.⁴

7. Empire and National Fuel jointly filed a request for rehearing and clarification, raising issues related to Empire's and National Fuel's existing tariffs and Empire's proposed services. Allegheny filed a request for rehearing, raising issues related to the Commission's environmental analysis in the EA and the March 10 Order. Allegheny also requested a stay of the March 10 Order.

II. Discussion

A. Request for Stay

8. On March 20, 2015, Allegheny filed a request for stay of the March 10 Order, as well as of two other projects authorized by the Commission, and also to stay "all construction activities that the Commission has authorized" since it issued the March 10 Order.⁵ On March 24, 2015, Empire and National Fuel filed an answer opposing the motion for stay.

9. Allegheny contends that a stay is appropriate because without a stay it will be left without an adequate remedy at law to address its injuries and the public will lose significant environmental resources, together amounting to irreparable injury. Allegheny asserts that on March 19, 2015, Commission staff issued a Pre-Construction Authorization for Tree Felling Activities for the Tuscarora Lateral Project, which demonstrates that injury to its interests from Empire or National Fuel's construction activities is "both certain and great" and actually occurring, rather than "theoretical or merely feared as liable to occur at some indefinite time." Allegheny also contends that a stay will not significantly injure Empire or National Fuel, that a stay is in the public interest, and that Allegheny is likely to succeed on the merits of its pending request for rehearing.

⁴ March 10 Order, 150 FERC ¶ 61,181 at P 134.

⁵ Allegheny also requests a stay in *Tennessee Gas Pipeline Co., L.L.C.*, 150 FERC ¶ 61,160 (2015) (Niagara Expansion and Northern Access 2015 Projects) and *National Fuel Gas Supply Corp.*, 150 FERC ¶ 61,162 (2015) (West Side Expansion and Modernization Project). This order addresses only the request for a stay regarding the Tuscarora Lateral Project.

Commission Determination

10. The Commission's standard for granting a stay is whether justice so requires.⁶ The most important element is a showing that the movant will be irreparably injured without a stay. To ensure definiteness and finality in our proceedings, our general policy is to refrain from granting a stay.⁷ For the reasons discussed below, we will deny Allegheny's request.

11. Allegheny has not shown that a stay is necessary to avoid irreparable harm. Allegheny has provided only unsupported, generalized allegations about environmental harm resulting from the project. The Commission fully considered and addressed the protest and comments of Allegheny, as well as the comments of other individuals and entities, both in the EA and in the March 10 Order's environmental discussion⁸ and determined that, on balance, the Tuscarora Lateral Project, if constructed and operated in accordance with the application and supplements, and in compliance with the 15 environmental conditions appended to that order, would not significantly affect the quality of the human environment.⁹

12. Although Allegheny cites to Commission staff's March 19, 2015 letter order authorizing non-mechanized tree felling activities, the impacts from this limited authorization were carefully minimized. The EA explained that National Fuel's proposed construction methods, including conducting tree clearing outside of the migratory bird nesting season, April 15 to August 1, would not result in population-level impacts or significant measurable negative impacts on birds of conservation concern or migratory birds.¹⁰ Regarding tree felling activities' impacts to northern long-eared bats, the EA

⁶ Administrative Procedure Act, 5 U.S.C. § 705 (2012); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

⁷ See, e.g., *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

⁸ March 10 Order, 150 FERC ¶ 61,181 at PP 92-122 (addressing many of the same arguments that Allegheny raises here on rehearing).

⁹ March 10 Order, 150 FERC ¶ 61,181 at P 134.

¹⁰ EA at 32-33.

noted that National Fuel would only clear trees between October and March within 1.5 miles of identified roost trees and also recommended that the Commission make construction conditional on receipt of comments from the U.S. Fish and Wildlife Service (FWS),¹¹ which we did in Environmental Condition 13 of the March 10 Order. In National Fuel's Implementation Plan filed on March 12, 2015, it reported that FWS had identified conservation measures for the bat including a tree-felling window from October 31 to March 31. The Implementation Plan indicated that National Fuel would complete limited tree felling activities by March 31, 2015.¹²

13. Both the Commission and the courts have denied stays in circumstances similar to those presented here. For example, in *Millennium Pipeline Company, L.L.C.*, the Commission denied a request for stay that was based on claims that tree cutting would cause irreparable harm to local residents, including injury to endangered species and reduced property values.¹³ Similarly, in *Ruby Pipeline, L.L.C.*, the Commission found that allegations of environmental and cultural harm did not support grant of a stay.¹⁴ The courts denied requests for judicial stay in these and other pipeline construction cases.¹⁵

14. For these reasons, the Commission finds that Allegheny has not demonstrated that it will suffer irreparable harm, and Allegheny's request for stay is denied.

¹¹ *Id.* at 34.

¹² National Fuel March 12, 2015 Implementation Plan at 29.

¹³ *Millennium Pipeline Co., LLC, order denying stay*, 141 FERC ¶ 61,022 (2012).

¹⁴ *Ruby Pipeline, LLC, order denying stay*, 134 FERC ¶ 61,020 (2011); *Ruby Pipeline, LLC, order denying stay*, 134 FERC ¶ 61,103 (2011).

¹⁵ *See, e.g., Minisink Residents for Env'tl. Pres. and Safety v. FERC*, No. 12-1481, Order Denying Motion for Stay (D.C. Cir. Mar. 5, 2013); *In re Minisink Residents for Env'tl. Pres. and Safety*, No. 12-1390, Order Denying Petition for Stay (D.C. Cir. Oct. 11, 2012); *Defenders of Wildlife v. FERC*, No. 10-1407, Order Denying Motion for Stay (D.C. Cir. Feb. 22, 2011); and *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389 Order Denying Motion for Stay (D.C. Cir. Jan. 28, 2011). *See also Feighner v. FERC*, No. 13-1016, Order Denying Motion for Stay (D.C. Cir. Feb. 8, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015, Order Denying Motion for Stay (D.C. Cir. Feb. 6, 2013); and *Coal. for Responsible Growth and Res. Conservation v. FERC*, No. 12-566, Order Denying Motion for Stay (2d. Cir. Feb. 28, 2012).

B. Rates and Tariff Issues**1. System Fuel and Lost and Unaccounted For Gas Retainages**

15. National Fuel expresses concern that the Commission did not explicitly approve the proposed revision to its *pro forma* tariff regarding how National Fuel would reflect the capacity lease in its calculation of system fuel and lost and unaccounted for (LAUF) gas retainages. In the application, National Fuel proposed to deduct the quantities of system fuel and LAUF gas attributable to the capacity lease from its experienced fuel and losses, before calculating the adjusted retainage factors for its existing system. National Fuel proposed to reflect this mechanism in revisions to the general terms and conditions (GT&C) section 41 of its *pro forma* tariff. Here, National Fuel requests that the Commission clarify that the proposed revision to GT&C section 41 is approved and that it should file this language in anticipation of the in-service date of the Tuscarora Lateral Project.

16. The Commission grants clarification and approves National Fuel's *pro forma* tariff language in GT&C section 41, since the March 10 Order did not specifically approve the proposed revision. National Fuel's proposed revision to GT&C section 41, providing for the treatment of the leased capacity in the calculation of system fuel and LAUF retainages, is consistent with previous Commission-approved tariff language.¹⁶

2. Tracker Filings

17. Empire states that under the capacity lease, changes to National Fuel's rates and fuel retainages for National Fuel's Rate Schedules FSS (firm storage service) and FST (firm storage transportation service) will result in corresponding changes to Empire's payments under the lease. In its application, Empire proposed a flow-through mechanism under which it would submit a tracker filing to modify its FSNN and ISS storage rates to reflect changes to National Fuel's rates and fuel retainages retroactive to the date of such change. The Commission denied Empire's proposed flow-through mechanism for monetary rates by directing Empire to remove language in Rate Schedules FSNN section 3.4(c) and ISS section 3.5(c) regarding the tracker filing process, yet the Commission left intact the proposed tariff language describing the adjustment mechanism.¹⁷

¹⁶ *Niagara Expansion and Northern Access 2015 Projects*, 150 FERC ¶ 61,160 at P 16.

¹⁷ March 10 Order. 150 FERC ¶ 61,181 at P 54.

18. Empire contends that although the capacity lease will provide it with the ability to provide no-notice service, the Commission erred in finding that some lease costs may eventually be allocated to FTNN transportation service.¹⁸ Empire states that the load balancing feature of FTNN transportation service depends on the existence of an associated FSNN storage agreement with sufficient gas and/or capacity under that contract. Empire notes that Rate Schedule FTNN includes the administrative provision under which receipts and deliveries will be balanced using storage service but, because Empire makes no other use of the leased capacity for FTNN transportation service, Empire argues that FSNN storage service is the appropriate place to allocate the costs associated with the capacity lease.

19. Empire also contends that the Commission erroneously concluded that the flow-through mechanism for monetary rates could become a problematic fixed cost or plant tracker, or both. In reaching this conclusion, the Commission stated that Empire's proposal "presumes that future cost allocation and rate design on National Fuel's system for its customers will have equal applicability to service provided on assets National Fuel has abandoned [by lease]."¹⁹ Empire counters that the proposed flow-through mechanism in the lease agreement would reflect future Commission-authorized changes in National Fuel's FSS and FST rate schedules, which would change Empire's payments under the lease. Empire cites *Millennium Pipeline Company, L.L.C. (Millennium)*, which Empire claims allowed Columbia Gas Transmission Corporation (Columbia) to recover lease costs through a tariff tracking mechanism.²⁰

20. We reject these arguments. Though Empire diminishes its importance, the Commission is concerned about the fact that Rate Schedule FTNN service includes the administrative provision under which receipts and deliveries will be balanced using storage service. This administrative provision may in the future be a basis for allocating some lease costs to Empire's FTNN transportation service. For example, administrative costs of managing the leased capacity may be incurred by Empire in administering FTNN service.

21. Contrary to Empire's characterization, in *Millennium* the Commission permitted Columbia to record the costs of a lease with Millennium in Account 858 (Transmission

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Empire and National Fuel Request for Rehearing and Clarification at 8 (citing *Millennium Pipeline Co., L.L.C.*, 117 FERC ¶ 61,319 (2006)(*Millennium*)).

and Compression of Gas by Others)²¹ and to recover those costs through a filing under section 36 of Columbia's tariff, the Transportation Cost Rate Adjustment.²² Section 36.1 provided for recovery of costs incurred for the transmission and compression of gas by others, applicable to Account 858. By contrast, Empire proposes to include tariff provisions in Rate Schedules FSNN and ISS to allow Empire to submit a tracker filing to change the rates for service provided under these rate schedules if National Fuel changes the rates and fuel retainages for its Rate Schedules FSS and FST services. This proposed mechanism is not consistent with the Commission's regulations for changing a rate.²³

22. We reject Empire's proposed flow-through mechanism and tracker filing. Nevertheless, we do not preclude Empire from revising its Rate Schedules FSNN and ISS in the event that National Fuel's Rate Schedules FSS and FST change. Rather, we will require that such revision be proposed in an NGA section 4 proceeding.

23. Empire states that the March 10 Order rejected sections 3.4(c) and 3.5(c) of Rate Schedules FSNN and ISS – which describe the filings Empire would submit to change the stated tariff rates – but left intact other language in sections 3.4 and 3.5 regarding the tracking of monetary rates.²⁴ Sections 3.4 and 3.5 of Rate Schedules FSNN and ISS show the entire process Empire would follow when changing stated tariff rates, including tracking National Fuel's FSS and FST rates, notification to shippers of a change in National Fuel's rates, and refunds. Consistent with the findings of the March 10 Order and this Order, sections 3.4 and 3.5 of Rate Schedules FSNN and ISS are moot and should be deleted from the tariff.

3. Rate Schedule ISS Storage Capacity Charge

24. Empire contends that the Commission erroneously rejected its proposed Rate Schedule ISS capacity charge, which used a load factor of 50 percent based on the assumption that storage capacity used by an ISS customer will be, on average, half full. The March 10 Order required Empire to recalculate the rate using a load factor of 100 percent.²⁵ Empire complains that the Commission relied on precedent addressing

²¹ See 18 C.F.R. pt 201, Operation and Maintenance Expense Accounts, Account No. 858 (2015).

²² *Millennium*, 117 FERC ¶ 61,319 at P 118.

²³ See 18 C.F.R. §§ 154.301-15 (2015) (Material To Be Filed With Changes).

²⁴ Empire and National Fuel Request for Rehearing and Clarification at 8 n. 7.

²⁵ March 10 Order, 150 FERC ¶ 61,181 at P 58.

how a company derives interruptible transportation rates from firm transportation rates, not how a company derives interruptible storage rates.²⁶ Empire asserts that because storage capacity must be empty, then filled, then emptied over time, it is unrealistic to assume 100 percent use of the storage service. Empire requests that the Commission permit it to design its ISS capacity charge based on a load factor of 50 percent.

25. Empire's claimed distinction between precedent addressing interruptible transportation rates versus interruptible storage rates is not relevant. As stated in the March 10 Order, the Commission's policy requires the use of a 100 percent load factor rate for interruptible service unless there are extenuating circumstances that would require an exception.²⁷ We find that Empire has not shown that using a 50 percent load factor is consistent with Commission policy or is justified as an exception. Even if Empire's assumption were true that an ISS customer's storage balance will be on average half full, this does not justify Empire's proposal to use a 50 percent load factor (which would result in a higher Rate Schedule ISS capacity charge than if Empire used a 100 percent load factor) for a service, which we note, is of lower quality than firm service. We reaffirm the March 10 Order's requirement that Empire use a 100 percent load factor when calculating its Rate Schedule ISS capacity charge.

4. Rate Schedule ISS Injection Charge

26. Empire argues that the Commission erroneously required it to remove section 3.4 of its *pro forma* ISS Rate Schedule, which applies the ISS injection charge to quantities transferred from an FSNN shipper's storage balance to an ISS shipper's storage balance. Under proposed section 3.4, Empire would also credit an amount to the ISS shipper equal to the maximum FSNN injection charge for each transferred dekatherm.²⁸ All other storage balance transfers are subject to an identical storage balance transfer charge of \$3.86 per Dth.²⁹ The March 10 Order found that Empire had not identified any additional costs that would be incurred by a storage balance transfer from an FSNN shipper to an

²⁶ *Id.* (citing *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150, at PP 50-51 (2005); *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043, at P 200 (2005); *Southern Natural Gas Co.*, 99 FERC ¶ 61,345, at PP 85-87 (2002)).

²⁷ *Discovery Gas Transmission, LLC*, 107 FERC ¶ 61,124, at P 57 (2004).

²⁸ Empire and National Fuel Request for Rehearing and Clarification at 11-14.

²⁹ Empire, Pro forma Tariff Records, Part 4 – Applicable Rates.

ISS shipper, and thus had not justified why a different charge for this type of storage balance transfer is reasonable.³⁰

27. Empire contends that because FSNN shippers pay capacity and demand charges based on contract quantities, not actual usage, they also pay a low maximum FSNN injection rate of \$0.0526 per Dth, reflecting only variable costs. ISS shippers, by contrast, pay a higher maximum ISS injection rate of \$0.9601 per Dth because the ISS injection rate reflects the allocation of fixed costs. Empire notes the disparity between FSNN and ISS injection charges is the intended result of the Commission's straight fixed variable rate design. Empire contends that the ISS injection charge must apply to quantities transferred from an FSNN shipper's storage balance to prevent gaming by ISS shippers to avoid responsibility for fixed costs allocated to the ISS injection charge and that its proposal to credit an amount to the ISS shipper equal to the maximum FSNN injection charge for each transferred dekatherm prevents any double-collection of fixed costs. Empire adds that proposed section 3.4 of its *pro forma* ISS Rate Schedule was modeled on a similar provision in National Fuel's tariff that was previously accepted by the Commission.³¹

28. Upon review, the Commission agrees that proposed section 3.4 of Rate Schedule ISS is necessary to prevent ISS shippers from avoiding the responsibility for the fixed costs allocated to the ISS injection charge. As Empire notes, a shipper that has a combination of both an FSSN and ISS storage service agreement could inject gas under its FSSN agreement at the lower FSSN injection rate of \$0.0526 per Dth and then transfer that gas into its ISS service storage account, avoiding the higher ISS injection charge of \$0.9601 per Dth and any further charges for withdrawal of gas from storage. The Commission will allow Empire to retain proposed section 3.4 of its *pro forma* ISS Rate Schedule.

5. Adjusting Scheduled Quantities

29. Empire argues that the Commission erroneously required it to remove the limitation that an FTNN shipper must have an associated FSNN service agreement to use the no-notice adjustment described in section 2.17 of Rate Schedule FTNN.³² Empire

³⁰ March 10 Order, 150 FERC ¶ 61,181 at P 59.

³¹ *National Fuel Gas Supply Corp.*, 85 FERC ¶ 61,467 (1998).

³² Empire and National Fuel Request for Rehearing and Clarification at 14-15. Section 2.17 of Rate Schedule FTNN states "if Shippers FTNN Service Agreement is associated with a service agreement under Rate Schedule FSNN, Transporter will adjust scheduled quantities pursuant to such FSNN Service Agreement."

suggests that we misinterpreted section 2.19 of Rate Schedule FTNN and section 14.11 of the GT&C. The former section allows Empire to permit conversions from FT service to FTNN service without an associated FSNN contract, or vice versa. The latter section provides that when Empire has available firm capacity unassociated with an FSNN storage agreement, Empire may make that capacity available under Rate Schedules FT or FTNN. Empire asserts that neither of these provisions alter the fact that absent an FSNN service agreement, Empire has no ability to adjust an FTNN shipper's storage balance under a contract with a third-party, if weather or some other cause results in a mismatched schedule. Empire acknowledges that an FTNN shipper would be free to use contracts with third parties to resolve imbalances, though this would necessarily involve submitting nominations to Empire. Empire requests that the Commission clarify that the automatic adjustment mechanism in Rate Schedule FTNN section 2.17 relates only to FTNN shippers with associated FSNN agreements.

30. We grant clarification that the automatic adjustment mechanism in section 2.17 of Rate Schedule FTNN relates only to FTNN shippers with associated FSNN agreements. As stated by Empire, a shipper with an FTNN service agreement is permitted to use contracts with third parties to resolve imbalances, but their use would require nominations submitted to Empire.

6. Rate Schedule ISS Mandatory Withdrawal

31. Section 2.5 of Rate Schedule ISS allows Empire to require ISS customers to withdraw gas on 30 days' notice, if the storage capacity is needed to perform firm service obligations. The Commission required Empire to revise this provision to explicitly allow an ISS shipper to transfer quantities of gas consistent with section 28.1 of the GT&C.³³ Empire requests that the Commission clarify that an ISS shipper may accomplish a section 2.5 mandatory withdrawal by arranging a transfer of storage inventory only to a firm storage customer that has not exceeded its maximum storage quantity. Empire explains that a transfer to another shipper with only interruptible service – i.e., an ISS shipper or FSNN shipper in excess of its maximum storage quantity – would not achieve the intended purpose of mandatory withdrawal, which is to make the storage quantity available to firm customers when necessary to meet Empire's service obligations.³⁴

32. We grant clarification that an ISS customer shall be permitted to accomplish a mandatory withdrawal by arranging a transfer from an ISS customer only to a firm

³³ March 10 Order, 150 FERC ¶ 61,181 at P 68. Section 28.1 of the GT&C addresses storage balance transfers.

³⁴ Empire and National Fuel Request for Rehearing and Clarification at 15-16.

storage customer with suitable capacity available under its firm storage contract. The Commission agrees that allowing an ISS customer to transfer storage inventory to another ISS customer or an FSNN shipper whose maximum storage quantity would be exceeded as a result of the transfer would impact Empire's ability to make capacity available to firm customers.

7. Permissible Discounts

33. Empire contends that the Commission erroneously rejected its proposal to add a new section 29 to the GT&C of its tariff to identify the types of discount provisions that can be included in conforming service agreements under all existing and new rate schedules.³⁵ Empire also proposed to correspondingly remove discount provisions in its existing Rate Schedules FT and IT. The Commission concluded that the proposed tariff revisions may affect not only project customers but other Empire customers as well.³⁶

34. Empire argues that it proposed the section 29 language to identify permissible discounts in one general provision, rather than to include a discounting section in each new Rate Schedule (FTNN, FSNN, and ISS). Empire argues that the Commission should permit the new language in the context of this proceeding, or that the Commission should clarify that when Empire makes its compliance filing, it may include language in Rate Schedules FTNN, FSNN, and ISS regarding permissible discounts.

35. We grant clarification that if at the time that Empire makes its compliance filing to place the project into effect, Empire has not yet proposed to revise its tariff to include a new section addressing permissible discounts in its GT&C, Empire may submit a discounting section in each new Rate Schedule (FTNN, FSNN, and ISS) in the compliance filing.

8. Acquiring Capacity

36. Empire argues that the Commission erroneously rejected its proposal to revise section 13(c) of the GT&C, which permits it to acquire capacity on other pipelines for operational or other purposes.³⁷ Empire states that the proposed language specified that if Empire acquires capacity on other pipelines, the contract term that Empire can offer to a new or renewing shipper for service using the acquired capacity may be limited by the

³⁵ *Id.* at 16-17.

³⁶ March 10 Order, 150 FERC ¶ 61,181 at P 72.

³⁷ Empire and National Fuel Request for Rehearing and Clarification at 17-19.

remaining term of the capacity lease approved in this docket. The proposed language also addressed a hypothetical situation in which Empire might enter a joint ownership agreement for capacity. The Commission rejected the proposed revision to section 13 of the GT&C after finding that the language regarding jointly-owned facilities did not apply to the facilities authorized in the March 10 Order.³⁸

37. Empire asserts that the proposed revision to section 13(c) is broad enough to enable it to appropriately limit contract terms for acquired capacity, whether it acquires such capacity as a shipper, lessee, or joint owner. Empire requests that the Commission allow the proposed revision or, at a minimum, clarify that the Commission will accept the proposed revision to section 13(c), if Empire removes the language concerning joint ownership.

38. We will clarify that only the portion of proposed tariff section 13(c) addressing jointly-owned facilities is rejected, without prejudice to Empire proposing such tariff language in an NGA section 4 tariff proceeding. As part of Empire's compliance filing placing the project into service, it shall file the portion of section 13(c) recognizing that the contract term that Empire can offer for service on acquired capacity may be limited by the remaining term of the capacity lease.

9. Annual Charge Adjustment

39. The March 10 Order found that Empire's proposed Annual Charge Adjustment (ACA) language in Part 4 of its Pro Forma Tariff – Applicable Rates – may allow it to assess the ACA multiple times for the same transaction.³⁹ Further, we found that section 19 of the GT&C, "Annual Charges Adjustment Clause," does not exclude multiple assessments. Empire requests that the Commission clarify that Empire include language in section 19 of its GT&C "that prohibits Empire from assessing the ACA multiple times to a shipper for the same transaction."⁴⁰

40. In Order 472-C, we addressed the potential for double assessment of contract storage volumes, explaining that the Commission includes storage volumes in its annual charges computation only if those volumes were delivered into contract storage and were

³⁸ March 10 Order, 150 FERC ¶ 61,181 at P 73.

³⁹ *Id.* P 74.

⁴⁰ Empire and National Fuel Request for Rehearing and Clarification at 19-20 (quoting March 10 Order, 150 FERC ¶ 61,181 at P 74).

not already included in the reporting company's sales and transportation figures.⁴¹ Empire shall file language in section 19 of its GT&C that clarifies that no storage volumes that are also sold or transported by Empire would be counted twice in computing the ACA.

10. Reservation Charge Credits & Right of First Refusal

41. Empire requests clarification that the revised tariff records set forth in its request for rehearing regarding limitations on reservation charge credits⁴² and on existing shippers' right of first refusal⁴³ are permissible under the findings and the section 5 directives of the March 10 Order.⁴⁴ On April 9, 2015, Empire filed the same revised tariff records in response to the section 5 directives of the March 10 Order. By letter order issued May 7, 2015, the Director of the Division of Pipeline Regulation, Office of Energy Market Regulation, accepted the revised tariff records.⁴⁵ Thus, Empire's requests for clarification regarding the revised tariff records are dismissed as moot.

C. Environmental Analysis

1. Programmatic Environmental Impact Statement

42. The Council on Environmental Quality's (CEQ) regulations do not require broad or "programmatic" NEPA reviews. CEQ has stated that a programmatic NEPA review may be appropriate where an agency is: (1) adopting official policy; (2) adopting a formal plan; (3) adopting an agency program; or (4) proceeding with multiple projects

⁴¹ *Annual Charges Under the Omnibus Budget Reconciliation Act of 1986*, Order No. 472, FERC Stats & Regs. ¶ 30,746, *clarified by*, Order No. 472-A, FERC Stats. & Regs. ¶ 30,750, *order on reh'g*, Order No. 472-B, FERC Stats. & Regs. ¶ 30,767 (1987), *order on reh'g*, Order No. 472-C, 42 FERC ¶ 61,013, at 61,033 (1988). The Commission's regulations address ACA expenditures at section 154.402. 18 C.F.R. § 154.402 (2015).

⁴² Empire and National Fuel Request for Rehearing and Clarification at 20-21.

⁴³ *Id.* at 22-24.

⁴⁴ March 10 Order, 150 FERC ¶ 61,181 at PP 77-80 (reservation charge crediting) and 81-83 (right of first refusal).

⁴⁵ *Empire Pipeline, Inc.*, Docket No. RP15-873-000 (May 7, 2015) (delegated letter order).

that are temporally and spatially connected.⁴⁶ The Supreme Court has held that a NEPA review covering an entire region (that is, a programmatic review) is required only “if there has been a report or recommendation on a proposal for major federal action” with respect to the region,⁴⁷ and the courts have concluded that there is no requirement for a programmatic environmental impact statement (EIS) where the agency cannot identify the projects that may be sited within a region because individual permit applications will be filed at a later time.⁴⁸

43. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.⁴⁹ Rather, the Commission acts on individual applications filed by entities proposing to construct interstate natural gas pipelines. Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities “is or will be required by the present or future public convenience and necessity.”⁵⁰ What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. In the circumstances of the Commission’s actions, a broad, regional analysis would “be little more than a study . . . concerning estimates of potential development and attendant environmental consequences,”⁵¹ which would not present “a credible forward look and would therefore not be a useful tool for basic program planning.”⁵² As to projects that are closely related in time or geography, the Commission

⁴⁶ See Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews*, at 13-15 (Dec. 24, 2014) (citing 40 C.F.R. §1508.18(b)), https://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf. We refer to the memorandum as 2014 Programmatic Guidance.

⁴⁷ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (*Kleppe*) (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

⁴⁸ See *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009).

⁴⁹ See, e.g. *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014) (*Texas Eastern*); *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 (2014).

⁵⁰ 15 U.S.C. § 717f(e) (2012).

⁵¹ *Kleppe*, 427 U.S. at 402.

⁵² *Piedmont Env'tl. Council*, 558 F.3d at 316.

may, however, prepare a multi-project environmental document, where that is the most efficient way to review project proposals.⁵³

44. As they have in other proceedings, Allegheny contends that the Commission violated NEPA by failing to prepare a programmatic EIS for natural gas infrastructure projects in the Marcellus and Utica Shale formations.⁵⁴ Allegheny further contends that the Commission should withdraw recently issued orders and stay all current proceedings in these regions until this EIS is completed.⁵⁵ Allegheny claims that the Commission is engaged in regional development and planning with the gas industry as demonstrated in statements from government and industry entities.⁵⁶

⁵³ See, e.g., Environmental Assessment for the Monroe to Cornwell Project and the Utica Access Project, Docket Nos. CP15-7-000 & CP15-87-000 (filed Aug. 19, 2015); Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, Project Nos. 1888-030, 2355-018, and 405-106 (filed Mar. 11, 2015).

⁵⁴ Allegheny Request for Rehearing at 66-82.

⁵⁵ *Id.* at 82.

⁵⁶ Allegheny Request for Rehearing at 71-75. Allegheny cites recent Commission orders rejecting Allegheny's argument for the preparation of a programmatic EIS, e.g., *Texas Eastern*, 149 FERC ¶ 61,259 at PP 38-47; *AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019, at 61,097 (2009) (Wellinghoff, Comm'r, dissenting) (disfavoring LNG imports in part because "effective delivery of Marcellus shale gas could be accomplished with expansion of pipeline and storage infrastructure in the region."); National Petroleum Council, *Prudent Development: Realizing the Potential of North America's Abundant Natural Gas and Oil Resources* (2011); the Commission's *Strategic Plan FY2014-2018* (2014) (identifying the approval of natural gas pipeline infrastructure as a specific goal); a recent document created by Commission staff identifying at least 45 jurisdictional projects "on the horizon;" Michael J. McGehee, Director, Division of Pipeline Certificates, Office of Energy Projects, Federal Energy Regulatory Commission, Presentation to the 8th EU-US Energy Regulators Roundtable, *Natural Gas in the U.S.: Supply and Infrastructure = Security* (Berlin, Ger., Oct. 26-27, 2010) (2010 Commission EU-US Presentation) (identifying 25 projects in the Marcellus Shale region); the Commission's proceedings related to the *Coordination Between Natural Gas and Electricity Markets* (Docket No. AD12-12-000), *Coordination of Scheduling Process of Natural Gas Pipelines and Public Utilities* (Docket No. RM14-2-000), *California Indep. Sys. Operator Corp., order initiating investigation into ISO and RTO scheduling practices* 146 FERC ¶ 61,202 (2014); and *Posting of Offers to Purchase Capacity*

(continued...)

45. Further, Allegheny claims that even if future pipeline projects may be theoretical, this does not mean that the Commission “would not be able to establish parameters for subsequent analysis”⁵⁷ Allegheny claims that a programmatic EIS may aid the Commission’s and the public’s understandings of broadly foreseeable consequences of NGA-jurisdictional projects and non-jurisdictional shale gas production. Allegheny argues that the Commission has “a unique vantage point” to be aware of, and to avoid, redundant pipeline construction in the same region of Pennsylvania.⁵⁸

46. Allegheny also argues that CEQ’s 2014 Programmatic Guidance explicitly recommends a programmatic EIS when “several energy development programs proposed in the same region of the country. . . [have] similar proposed methods of implementation and similar best practice and mitigation measures that can be analyzed in the same document.”⁵⁹ In support, Allegheny points to, among other things, a table from the Energy Information Administration listing a number of projects planned, proposed, or placed in service and another publication from that agency discussing new pipeline projects to move Marcellus and/or Utica Shale production. Allegheny asserts that an agency cannot escape the existence of a comprehensive program with cumulative environmental effects by “disingenuously describing it as only an amalgamation of unrelated smaller projects.”⁶⁰

Commission Determination

47. Documents cited by Allegheny do not show that the Commission is engaged in regional planning. For example, the Strategic Plan sets forth goals for the efficient

146 FERC ¶ 61,203 (2014); and the PJM Interconnection’s 2013 Annual Report, which discusses a Department of Energy-funded initiative to analyze natural gas infrastructure. The 2010 Commission EU-US Presentation and the PJM Interconnection’s 2013 Annual Report are reproduced in Allegheny’s Attachments 5 and 24, respectively. We have previously rejected the National Petroleum Council’s 2011 report as immaterial. *See, e.g., Columbia Gas Transmission, LLC*, 153 FERC ¶ 61,064, at PP 23, 26 (2015).

⁵⁷ Allegheny Request for Rehearing at 67-68 (citing 2014 Programmatic Guidance at 11).

⁵⁸ *Id.* at 82 (quoting comments of Pennsylvania Governor Tom Corbett on the Atlantic Sunrise Project, Docket No. PF14-8-000 (filed Aug. 18, 2014)).

⁵⁹ *Id.* at 68 (citing 2014 Programmatic Guidance at 21).

⁶⁰ *Id.* at 71 (citing *Churchill Cty v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001)).

processing of individual pipeline applications in order to carry out the Commission's responsibilities under the NGA. Similarly, the other proceedings cited by Allegheny focus on various initiatives proposed by the Commission to carry out its statutory responsibilities under the NGA or the Federal Power Act.

48. In addition, the mere fact that there are a number of approved, proposed, or planned infrastructure projects to increase infrastructure capacity to transport natural gas from the Marcellus and Utica Shale does not establish that the Commission is engaged in regional development or planning. Rather, this information confirms that pipeline projects to transport Marcellus and Utica Shale gas are initiated solely by a number of different companies in private industry. As we have noted previously, a programmatic EIS is not required to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, a federal plan or program in that region.⁶¹

49. The Commission's siting decisions regarding pending and future natural gas pipeline facilities will be in response to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the type of facilities that will be proposed. In these circumstances, the Commission's longstanding practice to conduct an environmental review for each proposed project, or a number of proposed projects that are interdependent or otherwise interrelated or connected, "should facilitate, not impede, adequate environmental assessment."⁶² Thus, here, the Commission's environmental review of Empire and National Fuel's actual proposed pipeline project in a discrete EA is appropriate under NEPA.

50. In sum, CEQ states that a programmatic EIS can "add value and efficiency to the decision-making process when they inform the scope of decisions," "facilitate decisions on agency actions that precede site- or project-specific decisions and actions," or "provide information and analyses that can be incorporated by reference in future NEPA reviews." The Commission does not believe these benefits can be realized by a programmatic review of natural gas infrastructure projects in the Marcellus and Utica Shale formations because the projects subject to our jurisdiction do not share sufficient elements in common to narrow future alternatives or expedite the current detailed assessment of each particular project.

⁶¹ See *Kleppe*, 427 U.S. at 401-02.

⁶² *Id.*

2. Segmentation

51. CEQ regulations require the Commission to include “connected actions,” “cumulative actions,” and potentially “similar actions” in its NEPA analyses.⁶³ “An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.”⁶⁴ “Connected actions” include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; or (c) are interdependent parts of a larger action and depend on the larger action for their justification.⁶⁵

52. In evaluating whether connected actions are improperly segmented, courts apply a “substantial independent utility” test. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”⁶⁶ For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. Similar to a highway network, “it is inherent in the very concept of” the interstate pipeline grid “that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”⁶⁷

53. In *Delaware Riverkeeper*, the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and

⁶³ 40 C.F.R. § 1508.25(a)(1)-(3) (2015).

⁶⁴ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Unlike connected and cumulative actions, analyzing similar actions is not always mandatory. See, e.g., *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-06 (9th Cir. 2003).

⁶⁵ 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2015).

⁶⁶ *Coal. on Sensible Transp., Inc. v Dole*, 826 F.2d 60, 69 (D.C. Cir., 1987); see also *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project “can stand alone without requiring construction of the other [projects] either in terms of the facilities required or profitability”).

⁶⁷ *Coal. on Sensible Transp.*, 826 F.2d at 69.

where those projects were financially interdependent.⁶⁸ The court put a particular emphasis on the four projects' timing, noting that, when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.⁶⁹ Courts have subsequently indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.⁷⁰ Further, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.⁷¹

54. In its comments on the EA,⁷² Allegheny contends that the Commission improperly segmented its review of the Tuscarora Lateral Project from Empire's 2011 Tioga County Extension Project⁷³ and also from Empire's potential Central Tioga County Extension Project, which is not currently before the Commission in any form. In the March 10 Order, we rejected Allegheny's contention because the three projects have separate timing, substantial independent utility and, though they each extend like spokes from a shared hub at Empire's Jackson interconnection in Tioga County, Pennsylvania, they each have separate logical termini related to their distinct purposes.⁷⁴

55. On rehearing, Allegheny argues generally that the Commission is allowing National Fuel to segment a planned regional infrastructure build-out into separate proceedings, citing a 2013 presentation by National Fuel to investors which included a map depicting three distinct areas of pipeline expansions to carry Appalachian-sourced

⁶⁸ 753 F.3d at 1308 (D.C. Cir. 2014).

⁶⁹ *Id.*

⁷⁰ *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 113 n.11 (D.C. Cir. 2014) (*Minisink*).

⁷¹ *See Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015).

⁷² Allegheny December 1, 2014 Comments on the EA at 8.

⁷³ *See Empire Pipeline Inc.*, 135 FERC ¶ 61,163 (2011) (authorizing the Tioga County Extension Project).

⁷⁴ March 10 Order, 150 FERC ¶ 61,181 at PP 105-06.

natural gas.⁷⁵ Allegheny argues specifically that the March 10 Order applied the substantial independent utility standard and logical terminus standard – both of which relate to whether projects are connected actions⁷⁶ – while ignoring Allegheny’s claims that the three projects are cumulative actions and similar actions that must be analyzed in a combined EIS.⁷⁷

Commission Determination

56. National Fuel’s statements were made outside the context of this proceeding. The plans indicated in National Fuel’s internal documents, public relations materials, or filings with the Securities and Exchange Commission may change or may never materialize.⁷⁸ These sources of information are not an appropriate basis for selecting projects to be analyzed together in comprehensive NEPA documents.

57. Because the 2011 Tioga County Extension Project, the Tuscarora Lateral Project, and the contemplated Central Tioga County Extension Project have no common timing and only a small area of common geography, they are not cumulative or similar actions.⁷⁹

⁷⁵ Allegheny Request for Rehearing at 55-56; *id.* Attachment 17 at 35 (slide with map).

⁷⁶ Allegheny argues that Empire’s Tioga County and potential Central Tioga County Projects are connected actions because National Fuel first envisioned them as a single proposal. Allegheny offers an undated map from National Fuel’s website which appears to depict a single pipeline spanning the length of both the Tioga County and potential Central Tioga County Projects. Allegheny Request for Rehearing at 60-61, 61 fig. 5. We reject this argument. Whether National Fuel or Empire envisioned the two projects in different detail than the eventual Tioga County proposal before the Commission is immaterial. Allegheny makes no challenge to the March 10 Order’s conclusions that the 2011 Tioga County Project, Tuscarora Lateral Project, and potential Central Tioga County Project have or will have substantial independent utility and logical termini, disproving that they are connected actions.

⁷⁷ Allegheny Request for Rehearing at 60.

⁷⁸ *Infra* note 126.

⁷⁹ Actions are “cumulative” if they, when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. 40 C.F.R. § 1508.25(a)(2)(2015). Actions are “similar” if they, “when viewed with other reasonably foreseeable or proposed agency actions, have similarities that

(continued...)

In addressing the lack of common timing, the March 10 Order found that Commission staff authorized Empire to commence service on the Tioga County Extension Project in November 2011.⁸⁰ Three years and three months later, on March 10, 2015, we authorized the Tuscarora Lateral Project. Empire requested that service commence on the Tuscarora Lateral Project on November 1, 2015.⁸¹ The contemplated Central Tioga County Extension Project is not currently before the Commission in any form, and Allegheny's offered statements from National Fuel about a 2016 in-service date are not reliable evidence of when, if ever, National Fuel will file an application or the Commission will begin to review that project. We are not required to consider in our NEPA analysis other potential projects for which the project proponent has not yet filed an application or where construction of a project is not underway.⁸² A cumulative impact results from projects' simultaneous additive impact to the same environmental resource. Because the vast majority of these projects' impacts occur during the construction phase, the lack of common timing means that there is likely no simultaneous burden to any environmental resource and so likely no significant cumulative impact.

58. In addressing the small area of common geography, we acknowledged in the March 10 Order that all three projects, assuming that the Commission eventually receives and approves an application for the Central Tioga County Extension Project, will only share, as a hub, Empire's Jackson interconnection.⁸³ Each project extends away from the hub in opposite directions. Further, the Tuscarora Lateral Project EA did, in fact, consider the 2011 Tioga Country Extension Project in the cumulative impact analysis.⁸⁴ In both the earlier Tioga County Extension Project EA and in the Tuscarora Lateral

provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25(a)(3)(2015).

⁸⁰ Letter Order from Lauren H. O'Donnell, Director of the Division of Gas – Environment and Engineering, Office of Energy Projects, in Docket No. CP10-493-000 (filed Nov. 18, 2011).

⁸¹ Empire and National Fuel October 1, 2015 Letter.

⁸² *Minisink*, 762 F.3d at 113 n.11.

⁸³ March 10 Order, 150 FERC ¶ 61,181 at P 106.

⁸⁴ *Id.* P 106 (citing EA at 58).

Project EA, Commission staff concluded that cumulative impacts of each project would be minimal or insignificant and localized to the immediate area.⁸⁵

59. Allegheny offers no other similarities to provide a basis for evaluating the projects' environmental consequences together as similar actions. The fact that each of these projects may be used to transport some volume of Marcellus Shale gas does not mean that the projects are so closely related to each other that NEPA requires concurrent analysis. We see no reason that combined analysis would be the best way to adequately assess these projects' combined impacts, if any exist.⁸⁶ The Commission has appropriately considered each proposed project on its own merits based on the facts and circumstances specific to each proposal and will do so for the possible Central Tioga County Expansion Project as well, if and when it is before us. Thus, we affirm our ruling in the March 10 Order.

3. Indirect Effects of Natural Gas Production

60. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.⁸⁷ Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."⁸⁸ Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it is: (1) caused by the proposed action; and (2) reasonably foreseeable.

⁸⁵ Tioga County Extension Project EA at 60 (issued Nov. 19, 2010, Docket No. CP10-493-000) ("Due to implementation of specialized construction techniques and mitigation measures designed to minimize environmental impacts for the Project, only a small cumulative effect is anticipated . . . in the immediate area"); the Tuscarora Lateral Project EA at 57 ("most of the construction impacts would be temporary and localized and are not expected to contribute to regional cumulative impacts.").

⁸⁶ See, e.g., *Klamath-Siskiyou Wildlands Center v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004).

⁸⁷ 40 C.F.R. § 1508.25(c) (2015).

⁸⁸ *Id.* § 1508.8(b).

61. With respect to causation, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause”⁸⁹ in order “to make an agency responsible for a particular effect under NEPA.”⁹⁰ As the Supreme Court explained, “a ‘but for’ causal relationship is insufficient [to establish cause for purposes of NEPA].”⁹¹ Thus, “[s]ome effects that are ‘caused by’ a change in the physical environment in the sense of ‘but for’ causation,” will not fall within NEPA if the causal chain is too attenuated.⁹² Further, the Court has stated that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁹³

62. An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”⁹⁴ NEPA requires “reasonable forecasting,” but an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”⁹⁵

63. The Commission does not have jurisdiction over natural gas production. The potential impacts of natural gas production, with the exception of greenhouse gases and climate change, would be on a local and regional level. Each locale includes unique conditions and environmental resources. Production activities are thus regulated at a state and local level. In addition, the Environmental Protection Agency regulates deep underground injection and disposal of wastewaters and liquids under the Safe Drinking Water Act, as well as air emissions under the Clean Air Act. On public lands, federal

⁸⁹ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. at 774.

⁹³ *Pub. Citizen*, 541 U.S. at 770.

⁹⁴ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). See also *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).

⁹⁵ *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

agencies are responsible for the enforcement of regulations that apply to natural gas wells.

64. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by the CEQ regulations.⁹⁶ A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).⁹⁷ To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas. It would make little economic sense to undertake construction of a pipeline in the hope that production might later be determined to be economically feasible and that the producers will choose the previously-constructed pipeline as best suited for moving their gas to market.

65. Even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, we have found that the potential environmental impacts resulting from such production are not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. We are aware of no

⁹⁶ See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review denied sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion).

⁹⁷ Cf. *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project) (*Sylvester*). See also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport plan was not an indirect, "growth-inducing" impact); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the project's potential to induce additional development).

forecasts by such entities, making it impossible for the Commission to meaningfully predict production-related impacts, many of which are highly localized. Thus, even if the Commission knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depending on the applicable regulations in the various states. Accordingly, the impacts of natural gas production are not reasonably foreseeable because they are “so nebulous” that we “cannot forecast [their] likely effects” in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.⁹⁸

66. Nonetheless, we note that, although not required by NEPA, a number of federal agencies have examined the potential environmental issues associated with unconventional natural gas production in order to provide the public with a more complete understanding of the potential impacts. The Department of Energy has concluded that such production, when conforming to regulatory requirements, implementing best management practices, and administering pollution prevention concepts, may have temporary, minor impacts to water resources.⁹⁹ The EPA has reached a similar conclusion.¹⁰⁰ With respect to air quality, the Department of Energy found that natural gas development leads to both short- and long-term increases in local

⁹⁸ *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with specific specificity to make their consideration meaningful need not be included in the environmental analysis).

⁹⁹ U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From The United States* 19 (Aug. 2014) (DOE Addendum), <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf>.

¹⁰⁰ See U.S. Environmental Protection Agency, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, at ES-6 (June 2015) (external review draft), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523539 (finding the number of identified instances of impacts on drinking water resources to be small compared to the number of hydraulically fractured wells). See also *Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128, 16,130 (2015) (Bureau of Land Management promulgated regulations for hydraulic fracturing on federal and Indian lands to “provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health”).

and regional air emissions.¹⁰¹ It also found that such emissions may contribute to climate change. But to the extent that natural gas production replaces the use of other carbon-based energy sources, the Department of Energy found there may be a net positive impact in terms of climate change.¹⁰²

67. Allegheny asserts that the Commission's environmental analysis of the Tuscarora Lateral Project violated NEPA by failing to consider the indirect effects of gas drilling in the Marcellus and/or Utica Shale formations.¹⁰³ Allegheny argues that the proposed project and regional shale gas extraction are "two links of a single chain" as allegedly shown by multiple industry and government sources, as well as common sense.¹⁰⁴ Allegheny argues that Seneca Resources, a subsidiary of National Fuel, and another producer have stated that firm transportation contracts "de-risk production growth" by ensuring takeaway capacity, that portions of Seneca Resources' drilling locations have been de-risked, and that the development of other portions of the Seneca Resources' drilling locations will be "limited" until firm transportation capacity becomes available.¹⁰⁵ Allegheny also cites to a statement in Empire's and National Fuel's application that the Tuscarora Lateral Project will provide one of the contracted shippers with "firm access to Marcellus Shale production."¹⁰⁶ Allegheny cites a recent article explaining that shale wells sharply decline in volume after the first few years, which Allegheny claims makes new production more likely.¹⁰⁷ Allegheny also contends that

¹⁰¹ DOE Addendum at 32.

¹⁰² *Id.* at 44.

¹⁰³ Allegheny Request for Rehearing at 14-36.

¹⁰⁴ *Id.* at 15-17 (quoting *Sylvester*, 884 F.2d at 400), 19-24. Allegheny cites the National Petroleum Council, *Prudent Development: Realizing the Potential of North America's Abundant Natural Gas and Oil Resources* 51-52 (2011), Rice Energy, Presentation to Barclays CEO Energy-Power Conference 31 (Sept. 2, 2014), National Fuel Investor Presentation 6, 18, 41-52 (Jan. 2015), and the 2010 Commission EU-US Presentation at 28-33 (*supra* note 56). These sources are reproduced in Allegheny's Attachments 1, 3, 4, and 5, respectively.

¹⁰⁵ Allegheny Request for Rehearing at 19-20.

¹⁰⁶ *Id.* at 16-17 (quoting Empire & National Fuel March 18, 2014 Joint Application at 22).

¹⁰⁷ *Id.* at 25, Attachment 6 (James Ladlee, Marcellus Center for Outreach & Research, Pennsylvania State University, *Appalachian Basin Decline Curve and Royalty*

additional natural gas production in the Marcellus and Utica Shale regions is not uncertain, as demonstrated in statements and reports from industry and government entities.¹⁰⁸

68. Allegheny contends that like the rejected indirect impact analysis in *Colorado River Indian Tribes v. Marsh*, the Commission assessed the project with “tunnel vision” that was “tantamount to limiting its assessment to primary impacts.”¹⁰⁹ Allegheny further asserts that the Commission’s claim that the causal connection between gas drilling and the project is insufficient because natural gas development will continue and

Estimation (July 17, 2014), <http://extension.psu.edu/natural-resources/natural-gas/news/2014/07/appalachian-basin-decline-curve-and-royalty-estimation-part-1>).

¹⁰⁸ *Id.* at 29-34. Allegheny cites Morningstar, Energy Observer, *Shale Shock: How the Marcellus Shale Transformed the Domestic Natural Gas Landscape and What it means for Supply in the Years Ahead*, at 15, 17 (Feb. 14, 2014) (Morningstar Report) (stating that industry has identified between 10 and 30 years of drilling locations across the Marcellus, that 30 to 75 years of Marcellus resource potential exists at current production rates, and that 1000 new wells each year are necessary to maintain the rate of gas production.); National Fuel Investor Presentation, at 23-24 (Jan. 2015) (providing map of 10 well pads with planned, drilled, or producing wells in Seneca Resources’ Clermont Area and stating that more than 1,000 locations remain to be drilled in several “Prospect” areas, including 148 in the Clermont Area); Milheim et al., U.S. Geological Survey, *Landscape Consequences of Natural Gas Extraction in Armstrong and Indiana Counties, Pennsylvania, 2004-2010*, Open-File Report 2013-1263, at 10 (2013) (USGS Report), <http://pubs.usgs.gov/of/2013/1263> (estimating affected land acreage per well pad); The Nature Conservancy, *Marcellus Gas Well & Pipeline Projections*, at 13 (Dec. 16, 2011) (Nature Conservancy Presentation), <http://extension.psu.edu/natural-resources/forests/private/training-and-workshops/2012-goddard-forum-oil-and-gas-impacts-on-forest-ecosystems/marcellus-gas-well-and-pipeline-projections> (estimating that 60,000 shale gas wells could be drilled in Pennsylvania and estimating associated impacts); the 2010 Commission EU-US Presentation at 30-33 (*supra* note 566) (describing the process of hydraulic fracturing, including composition of fracture fluids and required volume of water)). The Morningstar report, 2015 National Fuel Investor Presentation, and 2010 Commission EU-US presentation are reproduced in Allegheny’s Attachments 8, 4, and 5, respectively.

¹⁰⁹ 605 F.Supp. 1425, 1433 (C.D. Cal. 1985).

is indeed continuing with or without the project is similar to the argument rejected in *Mid States Coalition for Progress v. Surface Transportation Board*.¹¹⁰

69. In the March 10 Order, we explained that no party had presented or referenced any accepted, detailed information that quantifies the environmental impacts of producing natural gas in the various areas from which the proposed project might be supplied.¹¹¹ Allegheny contends that by “requir[ing] the public to ascertain the cumulative effects of the proposed action,” the Commission abdicated its primary duty to comply with NEPA and failed to satisfy NEPA’s aim to inform the public that the agency has considered environmental concerns in its decisionmaking.¹¹²

Commission Determination

70. The record in this proceeding, including the reports and statements cited by Allegheny, does not demonstrate the requisite reasonably close causal relationship between the impacts of future natural gas production and the Tuscarora Lateral Project which would necessitate further analysis. The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. However, this does not mean that the Commission’s action of approving this particular pipeline project will cause or induce the effect of additional or further shale gas production. Rather, as we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs drive new drilling.¹¹³ If the Tuscarora Lateral Project were not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.¹¹⁴ Again,

¹¹⁰ Allegheny Request for Rehearing at 24-25 (citing *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*)).

¹¹¹ March 10 Order, 150 FERC ¶ 61,181 at P 114.

¹¹² Allegheny Request for Rehearing at 27.

¹¹³ See, e.g., *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015) (*REX*). See also *Florida Wildlife Fed’n v. Goldschmidt*, 506 F.Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

¹¹⁴ *REX*, 150 FERC ¶ 61,161 at P 39. National Fuel’s 2015 presentation to investors cited by Allegheny suggests that Seneca Resources, a producing subsidiary of National Fuel, may have plans to use a number of pipelines to transport its production. See Allegheny Request for Rehearing, Attachment 4 at 26-27 (table showing that Seneca

(continued...)

any such production would take place pursuant to the regulatory authority of state and local governments.

71. Moreover, future gas development in any particular region is not an essential predicate for the Tuscarora Lateral Project. Rather, Empire and National Fuel operate transmission and storage facilities in multiple states,¹¹⁵ and interconnect with other pipelines. The purpose of the project is to enable Empire to offer its customers new no-notice services using available storage and transportation capacity on National Fuel's system. While it is possible that gas received by Empire at the interconnection with Millennium Pipeline Company, L.L.C. at Corning, New York, could include Marcellus Shale-sourced gas, the proposed project will operate for decades and can draw on multiple sources of gas.¹¹⁶ Whether or how much gas from any specific source will travel through the project cannot be known.¹¹⁷ Allegheny fails to identify any production specifically associated with the Tuscarora Lateral Project.

The *Colorado River Indian Tribes* case is distinguishable. In that case, a private developer proposed to stabilize a portion of the west bank of the Colorado River as part of a broader residential and commercial development.¹¹⁸ The U.S. Army Corps of Engineers (Corps) issued a permit to stabilize the riverbank based on a finding that the stabilization would have no significant environmental impact.¹¹⁹ The court held that because it may have been reasonably foreseeable that the stabilization project was a "stepping stone to major development in the area," the Corps violated NEPA by narrowing its analysis to only the jurisdictional activity.¹²⁰ The court emphasized that the

Resources' natural gas marketing portfolio relies in part on long-term firm transportation on Tennessee Gas Pipeline Company's Northeast Supply Diversification Project and Transcontinental Pipe Line Company's pending Atlantic Sunrise Project); *id.* at 45 (map depicting "multiple outlets to high-value markets" from Seneca Resources' acreage along several existing interstate pipelines in addition to National Fuel's or Empire's systems).

¹¹⁵ March 10 Order, 150 FERC ¶ 61,181 at PP 3-5.

¹¹⁶ *Id.* P 111.

¹¹⁷ *Id.* P 114.

¹¹⁸ 605 F.Supp. at 1428.

¹¹⁹ *Id.* at 1432.

¹²⁰ *Id.* at 1433.

Corps had earlier acknowledged the need to assess indirect impacts on known cultural resources nearby.¹²¹ The court found that the Corps knew that the proposed development was the primary motivation for the application to stabilize the riverbank.¹²²

72. By contrast, here, the Commission explained that it is not new, but preexisting, shale gas development that motivates applications for transportation projects.¹²³ Nor do transportation projects motivate new drilling, which is driven by a number of factors including natural gas prices, production costs, and transportation alternatives.¹²⁴ Even if the Tuscarora Lateral Project transports new shale gas supplies in the future, the Commission cannot know the exact location, scale, and timing of any future production facilities—e.g., well pads, gathering lines, processing facilities—or the location and nature of nearby environmental resources. Allegheny’s comparison to the *Colorado River Indian Tribes* case is not applicable. The cited variable figures from Pennsylvania about first-year declines in wellhead productivity—ranging from 60 to 80 percent—further show the uncertainty of predicting whether and for how long existing wells can supply a project’s transportation volumes over the project’s useful lifetime.¹²⁵

73. Moreover, even if a causal relationship between our action here and additional production were presumed, the scope of the impacts from any induced production is not reasonably foreseeable. The offered evidence does not alter the fact that the location, scale, and timing of any additional wells are matters of speculation, particularly with respect to their relationship to the proposed project. In addition, the reports and articles cited by Allegheny are broad generic reports that do not show where or when additional development will occur if the proposed project is approved.¹²⁶ As we have previously

¹²¹ In its initial environmental assessment, the Corps concluded that the entire proposed development would result in a significant environmental impact. The Corps composed a draft EIS which concluded that a thorough cultural resources survey was essential. The Corps later reverted to an EA when the Corps decided to narrow its analysis to only the jurisdictional stabilization project. *Id.* at 1428-29, 1432-33.

¹²² EA at 1440-41.

¹²³ March 10 Order, 150 FERC ¶ 61,181 at P 111.

¹²⁴ *See, e.g., Corpus Christi Liquefaction, LLC*, 151 FERC ¶ 61,098, at P 13 (2015); *supra* note 113.

¹²⁵ Allegheny Request for Rehearing, Attachment 6.

¹²⁶ *See, e.g., Morningstar Report* at 12 n. 1 (“[w]ith so much inherent uncertainty, projections for Marcellus production beyond the next few years are essentially

(continued...)

explained, a broad analysis based on generalized assumptions rather than reasonably specific information of this type will not yield information that would provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to the specific proposal before it.¹²⁷

74. The Commission did not abdicate its information-gathering responsibility under NEPA. NEPA's obligation to take a "hard look" at environmental consequences does not require agencies to develop every bit of information that may pertain to environmental impacts prior to acting. To the contrary, the data collected for and analyzed in the EA was adequate to inform the public and to allow us to fully consider the proposed project's impacts on environmental resources and to reasonably and responsibly take action on the pending proposal. Commission staff began its pre-filing environmental review on April 12, 2013, about 12 months before Empire submitted its application, 18 months before the EA issued, and 24 months before the March 10 Order issued. Staff participated in an open house; published a notice soliciting environmental comments, which was mailed directly to interested parties including government entities with environmental expertise, environmental and public interest groups, and others; and conducted a public scoping meeting. In response to Allegheny's protest during scoping, the EA explained that direct and indirect impacts were addressed throughout its analysis and that Commission staff looked at numerous projects in the general project area to determine the cumulative

meaningless, in our opinion"); National Fuel Presentation to Investors, at 2 (2015) (listing 20 factors that could cause the company's forward-looking statements to differ materially from actual results: e.g., geology; lease availability; title disputes; weather conditions; shortages, delays or unavailability of equipment and services required in drilling operations; insufficient gathering, processing and transportation capacity; etc.); National Fuel Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended September 30, 2014, Form 10-K, U.S. Securities and Exchange Commission, at 21-22 (filed Nov. 21, 2014) (listing similar factors and adding that shifting federal and state legislative and regulatory initiatives that affect all aspects of well construction, operation, and abandonment could lead to operational delays or restrictions). These sources appear in Allegheny's Attachments 8, 4, and 9, respectively. The USGS Report provides only a retrospective analysis of land use and land cover changes due to natural gas production between 2004 and 2010 based on aerial images. USGS Report at 6-7 (*supra* note 108). The Nature Conservancy Report relied on assumptions to calculate a wide range of development and land impacts over a 20-year period, e.g., between 360,000 and 900,000 acres of forest edge affected by 2030. Nature Conservancy Presentation at 21 (*supra* note 108).

¹²⁷ See, e.g., *REX*, 150 FERC ¶ 61,161 at P 40.

impacts on environmental resources.¹²⁸ The March 10 Order provided a thorough explanation why Allegheny's arguments about indirect and cumulative impacts failed for lack of a causal link to the proposed project and lack of reasonable foreseeability.¹²⁹

75. We find *Mid States* to be distinguishable from the circumstances here. *Mid States* involved the Surface Transportation Board's failure to analyze the downstream effects of a proposal to build and upgrade rail systems to reach coal mines in Wyoming's Powder River Basin.¹³⁰ The court found – and the project proponent did not dispute – that the proposed project would increase the use of coal for power generation. The court held that where such downstream effects are reasonably foreseeable, they must be analyzed, even if the extent of those effects is uncertain.¹³¹ Here, Allegheny asserts that construction of the Tuscarora Lateral Project would increase production, rather than end use. And unlike *Mid States*, there is an insufficient causal link between our authorization of the project and any additional production. As we have explained, natural gas development will likely continue with or without the Tuscarora Lateral Project. Thus, it is not merely the extent of production-related impacts that we find speculative, as was the case in *Mid States*, but also whether the project at issue will have any such impacts.

4. Cumulative Impacts Analysis

76. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions.”¹³² The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

77. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”¹³³ CEQ has explained

¹²⁸ EA at 3.

¹²⁹ March 10 Order, 150 FERC ¶ 61,181 at PP 108-22.

¹³⁰ *Mid States*, 345 F.3d at 550.

¹³¹ *Id.*

¹³² 40 C.F.R. § 1508.7 (2015).

¹³³ *Kleppe*, 427 U.S. at 413.

that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”¹³⁴ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”¹³⁵ An agency’s analysis should be proportional to the magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.¹³⁶

78. As we have explained, consistent with CEQ’s 1997 Cumulative Effects Guidance, in order to determine the scope of a cumulative impacts analysis for each project, Commission staff establishes a “region of influence” in which various resources may be affected by both a proposed project and other past, present, and reasonably foreseeable future actions.¹³⁷ While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that, where the Commission lacks meaningful information regarding potential future natural gas production in a region of influence, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.¹³⁸

79. Allegheny argues that the cumulative impact analysis in the EA did not adequately consider the environmental harms associated with natural gas development activities in the Marcellus Shale formation.¹³⁹ Allegheny complains that the EA only considered present gas well drilling in Tioga County, Pennsylvania, within 0.5 miles of the proposed facilities. Allegheny explains that the 86 permitted wells in this 0.5-mile region of influence represent 13 percent of the 655 or more wells drilled in Tioga County between

¹³⁴ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act*, at 8 (Jan.1997) (1997 Cumulative Effects Guidance).

¹³⁵ *Id.*

¹³⁶ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005).

¹³⁷ See, e.g., *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 at P 113.

¹³⁸ *Id.* P 120.

¹³⁹ Allegheny Request for Rehearing at 36-53.

2009 and 2014.¹⁴⁰ Allegheny argues that the Commission ignored the vast majority of the cumulative impacts of shale gas drilling in Tioga County.

80. Allegheny asserts that the Commission misreads the 1997 Cumulative Effects Guidance, citing a portion of the guidance that contrasts between a project-specific analysis, for which it often suffices to analyze effects within the immediate area of the proposed action, and an analysis of the proposed action's contribution to cumulative effects, for which "the geographic boundaries of the analysis almost always should be expanded."¹⁴¹ Allegheny argues that the Commission uses a practice of arbitrarily narrowing the geographic scope of review to ignore substantial and long-term cumulative effects from Marcellus and Utica Shale gas drilling on various environmental resources.¹⁴² Allegheny likens the restrictive geographic scope to the one found insufficient in *LaFlamme v. FERC (LaFlamme)*.¹⁴³

81. Allegheny cites *Natural Resources Defense Council v. Hodel (Hodel)*¹⁴⁴ to bolster its claim that the Commission is required to consider the "inter-regional" impacts of Marcellus and Utica Shale development activities. Allegheny also asserts that recent research identifies the "substantial impact" that shale gas drilling will have throughout the Marcellus and Utica Shale formations, obligating the Commission under NEPA to take a hard look at these impacts on a broader scale.¹⁴⁵

¹⁴⁰ *Id.* at 39, Attachment 13 (figures from Pennsylvania Department of Environmental Protection).

¹⁴¹ *Id.* at 40 (citing 1997 Cumulative Effects Guidance at 12).

¹⁴² *Id.* at 40-41. Allegheny cites the environmental assessments for seven unrelated projects, which varied in geographic scope from the vague "area affected" to a 5-mile radius. *Id.* at 41-42. The Commission considers projects on a case-by-case basis, and these seven proceedings have no bearing in the instant case.

¹⁴³ 852 F.2d 389 (9th Cir. 1988).

¹⁴⁴ 865 F.2d 288 (D.C. Cir. 1988).

¹⁴⁵ Allegheny Request for Rehearing at 13 (citing M.C. Brittingham, et al., *Ecological Risks of Shale Oil and Gas Development to Wildlife, Aquatic Resources, and their Habitats*, Environmental Science & Technology, at 11035-37 (Sept. 4, 2014)).

82. Allegheny asserts that because speculation is implicit in NEPA the Commission needs to forecast reasonably foreseeable future actions even if they are not specific proposals.¹⁴⁶

Commission Determination

83. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.¹⁴⁷ The agency should then establish the geographic scope for analysis.¹⁴⁸ Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts.¹⁴⁹ Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.¹⁵⁰ As noted above, CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.¹⁵¹

84. The cumulative effects analysis in the EA took precisely the approach the CEQ guidance advises.¹⁵² Commission staff concluded that nearly all Tuscarora Lateral Project construction impacts would be contained within the right-of-way and alternative temporary workspaces, would be temporary and localized, and would not be expected to contribute to regional cumulative impacts.¹⁵³ Staff acknowledged that stream turbidity, air emissions, and noise may migrate outside of these work areas. The EA generally considered the Tuscarora Lateral Project's potential cumulative impact with other projects within a 0.5-mile radius, the region of influence for most affected resources –

¹⁴⁶ *Id.* at 35 (citing *Northern Plains Res. Council*, 668 F.3d at 1079).

¹⁴⁷ 1997 Cumulative Effects Guidance at 11.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

¹⁵² We note that the 1997 Cumulative Effects Guidance at 15 states that the “applicable geographic scope needs to be defined case-by-case.”

¹⁵³ EA at 57.

soils, groundwater, waterbodies, fisheries, wetlands, vegetation and wildlife, protected species, land use, visual resources, and cultural resources.¹⁵⁴ Based on the small scale of the Tuscarora Lateral Project and the lack of significant direct and indirect impacts on resources, Commission staff concluded that a 0.5-mile radius to assess cumulative impacts would provide a conservative range of analysis. The EA concluded that when considered with the other projects planned or ongoing within the relevant regions of influence, the Tuscarora Lateral Project would not result in significant long-term cumulative effects.

85. For water resources and fisheries, the region of influence for analyzing cumulative effects is generally within a watershed, either local or regional. However, because Empire's construction through waterbodies would avoid or minimize impacts by implementing measures identified in its Erosion and Sediment Control and Agricultural Management Plan, by reducing construction workspace in wetlands, and by crossing the Tioga River and Steamtown Creek via horizontal directional drill,¹⁵⁵ staff concluded that the project's impacts could not result in a significant cumulative impact on these resources.¹⁵⁶ The scope of staff's analysis was appropriately reflective of the specific characteristics of the Tuscarora Lateral Project.

86. For the air quality resource, the EA acknowledged that cumulative air quality impacts would occur as a result of construction using heavy equipment.¹⁵⁷ The EA explained that the Tuscarora Lateral Project's direct impacts would be confined primarily to the project's airshed, would be localized, and would be minimized because construction would move regularly over a large geographical area.¹⁵⁸ The EA concluded that these direct impacts would only temporarily contribute to the cumulative effect of all foreseeable local projects, which would have varying construction schedules and would themselves move regularly over a large geographical area.

87. For noise, the EA acknowledged that the proposed project could contribute to cumulative noise impacts.¹⁵⁹ The EA noted, however, that noise impacts are highly

¹⁵⁴ *Id.* at 57, 62-64.

¹⁵⁵ *Id.* at 23-28.

¹⁵⁶ *Id.* at 62.

¹⁵⁷ *Id.* at 65.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

localized and attenuate quickly as one moves away from the source. Therefore, the EA anticipated no cumulative impacts because no other projects are likely to be constructed or to operate, in the case of compressor stations or industrial facilities, within the same 0.5-mile region of influence during the short period of proposed project construction. The March 10 Order discussed noise impacts and mitigation at length.¹⁶⁰

88. Using the 0.5-mile region of influence, the EA identified 14 past, present, and reasonably foreseeable future actions (11 NGA-jurisdictional); 86 well permits issued in 2013 for Tioga County, Pennsylvania; and 14 active well permits in the Towns of Tuscarora, Lindley, and Caton, New York, whose impacts might contribute to a cumulative impact.¹⁶¹ The EA noted well permits in New York despite the statewide moratorium on shale development. The EA explained that the construction footprints at natural gas well sites are variable and that environmental resources within those footprints are unknowable.¹⁶² The EA responded to this uncertainty by discussing the wells' potential cumulative impacts in general qualitative terms.

89. For these reasons, we find that the EA identified the appropriate geographic scope for considering cumulative effects and properly excluded from its cumulative impacts analysis the impacts from shale gas drilling in the Marcellus and Utica Shale formations. Such impacts will occur far outside the 0.5-mile region of influence of the Tuscarora Lateral Project. Further, given the large geographic scope of the Marcellus Shale formations, the magnitude of the type of analysis requested by Allegheny bears no relationship to the limited magnitude of Empire and National Fuel's instant proposal, which involves temporary construction impacts on 115.31 acres and permanent impacts to 115.49 acres of land within a mixed use area of mostly agricultural, residential, and commercial land uses.¹⁶³ Moreover, for the reasons discussed above and in the March 10 Order,¹⁶⁴ even if the Commission were to vastly expand the geographic scope of the

¹⁶⁰ March 10 Order at P 128.

¹⁶¹ EA at 57-61.

¹⁶² By their own admission, statements from National Fuel's recent report to the Securities and Exchange Commission about Seneca Resources' activities are not credible evidence of future operations. *Supra* note 126.

¹⁶³ EA at 15-16.

¹⁶⁴ March 10 Order at PP 113-114.

cumulative effects analysis, the impacts from such development are not reasonably foreseeable.¹⁶⁵

90. In our view, Allegheny's arguments with respect to the geographic scope of the analysis are based on their erroneous claim that the Commission must conduct a regional programmatic NEPA review of natural gas development and production in the Marcellus Shale formation, an area that covers potentially thousands of square miles. We decline to do so. As the Commission explained in the March 10 Order¹⁶⁶ and herein, there is no Commission program or policy to promote additional natural gas development and production in shale formations.

91. Allegheny's reliance on *LaFlamme* is misplaced, as the opinion in fact supports the Commission's use of a region of influence and an analysis of cumulative impacts limited to those impacts occurring in the area of the project at issue. In *LaFlamme*, the Ninth Circuit criticized the Commission's environmental review of the Sayles Flat Project, a hydroelectric project on the American River, because the Commission relied on the "narrow analysis" of another hydroelectric project's EIS, the Upper Mountain Project, as a substitute for a cumulative impact analysis of actual area projects on area resources. The relied-upon Upper Mountain Project EIS had not examined potential cumulative impacts from other projects on the segment of the American River Basin relevant to the Sayles Flat Project.¹⁶⁷ By contrast, the Tuscarora Lateral Project EA looked at other projects within the areas of land, watershed, and airshed relevant to the project's limited direct and indirect impacts. If anything, *LaFlamme* supports the importance of identifying a "region of influence" appropriately connected to the location of the project under review.

92. Allegheny's reliance on *Hodel* is misplaced. In *Hodel* the court considered the U.S. Department of the Interior's EIS composed in conjunction with its plan to award five-year leases for hydrocarbon exploration and production on multiple offshore blocks.

¹⁶⁵ The 2014 study published by M.C. Brittingham and other authors, *supra* note 145, offers only general conclusions about the potential qualitative impacts on terrestrial and aquatic ecosystems from shale development. It provides no specifics regarding those impacts, much less specific details with respect to the Tuscarora Lateral Project.

¹⁶⁶ March 10 Order at PP 93-96.

¹⁶⁷ 852 F.2d at 401-02. The court stated, "[a]t no point did the [Upper Mountain Project] EIS analyze the effects *other projects*, pending or otherwise, might have on *this* section of the American River Basin," i.e., the Sayles Flat Project section. *Id.* at 401 (emphasis added).

The court found that the EIS focused primarily on assessing impacts associated with the region proximate to each lease block, and thereby failed to capture potential inter-regional cumulative impacts on migratory species if exploration and production were to take place simultaneously on several lease blocks within the species' migratory range. However, *Hodel* considered a plan for resource-development leasing over a vast geographic area (including the North Atlantic, North Aleutian Basin, Straits of Florida, Eastern Gulf of Mexico, and waters off California, Oregon, and Washington). In contrast, the 'plan' before us involves construction of approximately 17 miles of pipeline running from Pennsylvania into New York and the addition of a compressor unit at an existing compressor station. Because we find the proposal will have no reasonably foreseeable impacts on shale development, we find no reason to adopt a region of influence for reviewing cumulative impacts that would include, as Allegheny urges, all the "states in and surrounding the Marcellus and Utica shale formations."¹⁶⁸

93. The Department of Interior's leasing of large tracts in federal waters in *Hodel* is dissimilar from the Commission's case-by-case review of individual and independent infrastructure projects. Whereas mineral leases, especially those that cover extensive and contiguous areas, establish the location and time frame for future development, the Commission does not permit, and indeed has no jurisdiction over, activities upstream of the point of interconnection with an interstate pipeline, e.g., leasing, exploration, production, processing, and gathering. To the extent the court in *Hodel* was persuaded by an earlier Supreme Court statement that under NEPA "proposals for . . . related actions that will have cumulative or synergistic environmental impact upon a region *concurrently pending before an agency* must be considered together,"¹⁶⁹ production and gathering activities in the Marcellus and Utica shale areas are not related actions concurrently pending before the Commission. Thus, there is no way to relate any specific production and gathering activities to this project. Accordingly, we find *Hodel* unavailing.

D. Natural Gas Act

94. Allegheny argues that the Commission applies its Certificate Policy Statement¹⁷⁰ unfairly by emphasizing access to new gas supplies in the Marcellus and Utica Shales

¹⁶⁸ Allegheny Request for Rehearing at 36, 43-47, 50.

¹⁶⁹ *Hodel*, 865 F.2d at 297 (citing *Kleppe*, 427 U.S. at 410) (emphasis added).

¹⁷⁰ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

while downplaying or failing to weigh the countervailing environmental impacts of that access, thus heavily favoring the issuance of certificates.¹⁷¹

95. The Commission's Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction to determine whether there is a need for a proposed project and whether the proposed project will serve the public interest. As explained in the March 10 Order, under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of: (1) the applicant's existing customers; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the construction.

96. Contrary to Allegheny's characterization, the March 10 Order concluded that the proposed project would have no adverse economic impacts on Empire's or National Fuel's customers or on other existing pipelines or their captive customers. Further, the March 10 Order found that Empire and National Fuel had taken steps to minimize to the extent practicable adverse economic impacts on landowners and surrounding communities.¹⁷² Moreover, after finding that the project will serve the public interest under the criteria of the Certificate Policy Statement, we turned to the completion of the analysis and consideration of the environmental impacts of the project pursuant to the requirements of the NEPA. In the EA, the March 10 Order, and herein, the Commission has fully addressed the environmental issues raised by Allegheny, and we continue to find that the project would have no significant impacts.

¹⁷¹ Allegheny Request for Rehearing at 90-91.

¹⁷² March 10 Order at PP 30-32. One goal of the Certificate Policy Statement was to protect the interests of landowners whose land might be condemned for right-of-way under the eminent domain rights conferred by the Commission's certificates from unnecessary construction. *See* Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,737, 61,746, 61,748, and 61,749.

The Commission orders:

(A) The requests for rehearing and clarification are granted and denied, as discussed in the body of this order.

(B) Allegheny's request for stay is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.