

154 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company, L.L.C.
National Fuel Gas Supply Corporation

Docket Nos. CP14-88-001
CP14-100-001

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

(Issued March 9, 2016)

1. On February 27, 2015, the Commission issued an order authorizing Tennessee Gas Pipeline Company, L.L.C. (Tennessee) and National Fuel Gas Supply Corporation (National Fuel) under section 7 of the Natural Gas Act (NGA) to construct and operate facilities in New York and Pennsylvania.¹ On March 17, 2015, March 27, 2015, and March 30, 2015, Allegheny Defense Project (Allegheny), Consolidated Edison Company of New York, Inc. (Con Edison), and National Fuel, respectively, filed timely requests for rehearing² or clarification³ of the February 27 Order. Allegheny separately filed a motion

¹ *Tennessee Gas Pipeline Co., L.L.C.*, 150 FERC ¶ 61,160 (2015) (February 27 Order).

² In addition to its request for rehearing in this proceeding, Allegheny's March 17, 2015 pleading also requests rehearing in *National Fuel Gas Supply Corp.*, 150 FERC ¶ 61,162 (Mar. 2, 2015) (West Side Expansion and Modernization Project) and *Empire Pipeline, Inc.*, 150 FERC ¶ 61,181 (2015) (Tuscarora Lateral Project). However, these proceedings have not been consolidated. Therefore, the Commission will treat Allegheny's requests for rehearing as if filed separately in each proceeding. The Commission has issued an order on rehearing in *Empire Pipeline, Inc.*, 153 FERC ¶ 61,379 (2015).

³ National Fuel seeks rehearing or, in the alternative, clarification.

for stay. As discussed below, this order grants and denies, in part, the requests for rehearing, grants National Fuel's request for clarification, and denies the request for stay.

I. Background

2. The February 27 Order authorized Tennessee to construct and operate approximately 3.1 miles of 30-inch-diameter looping pipeline and to install a pig launcher in Chautauqua County, New York; to modify piping at an existing compressor station in Mercer County, Pennsylvania; to modify a meter station in Erie County, New York; and to abandon and replace certain appurtenant facilities at three existing compressor and meter stations in these same three counties (the Niagara Expansion Project). The Niagara Expansion Project will enable Tennessee to provide up to 158,000 dekatherms per day (Dth/d) of incremental firm transportation service for Seneca Resources Corporation (Seneca), a production subsidiary of National Fuel.

3. The February 27 Order also authorized National Fuel to construct and operate a new compressor station in Cattaraugus County, New York (the Hinsdale Compressor Station); to install a new compressor unit at its existing Concord Compressor Station in Concord, New York; and to modify a measurement and regulator station in Eden, New York (collectively the Northern Access 2015 Project). The proposals were designed to add 23,100 horsepower of compression to National Fuel's existing Line X. In addition, the February 27 Order authorized National Fuel to lease capacity to Tennessee sufficient to provide 140,000 Dth/d of firm transportation service from an interconnection with Tennessee's 300 Line at National Fuel's Rose Lake Meter Station in Potter County, Pennsylvania, across National Fuel's Line X to an interconnection with Tennessee's 200 Line at National Fuel's Hamburg Meter Station in Erie County, New York.

4. The Commission found that the benefits of Tennessee's Niagara Expansion Project and National Fuel's Northern Access 2015 Project to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities.⁴ After review of the Environmental Assessment (EA) prepared by Commission staff for the Niagara Expansion Project and Northern Access 2015 Project to satisfy the requirements of the National Environmental Policy Act (NEPA),⁵ the Commission concluded that the approval of Tennessee's and National Fuel's proposals, with the adoption of 18 environmental conditions, would not

⁴ February 27 Order, 150 FERC ¶ 61,160 at PP 27 and 33.

⁵ 42 U.S.C. §§ 4321-4370h (2012). Commission staff placed the EA into the public record on July 16, 2014, and mailed it to all stakeholders on the environmental mailing list.

constitute a major federal action significantly affecting the quality of the human environment.⁶

5. Allegheny and Con Edison filed timely requests for rehearing of the February 27 Order. National Fuel filed a timely request for rehearing or, in the alternative, clarification. Allegheny raised issues related to the Commission's environmental analysis in the EA and February 27 Order. Allegheny also requested a stay of the February 27 Order and all later-authorized construction activities. Con Edison objects to the Commission's acceptance of National Fuel's proposed rolled-in fuel retention percentages. National Fuel raises issues about spare compression at the Concord Compressor Station.

II. Discussion

A. Procedural Issues

1. Answers to Requests for Rehearing

6. On April 14, 2015, Tennessee filed a request for leave to answer Allegheny's request for rehearing. Answers to requests for rehearing are prohibited by Rule 713(d)(1) of the Commission's Rules of Practice and Procedure⁷ and Tennessee has not justified an exception. Accordingly, we reject Tennessee's answer.

2. Motion for Stay

7. On March 6, 2015, Tennessee and National Fuel filed Implementation Plans and requested notices to proceed with construction. On March 13, 2015, Commission staff issued a Notice to Proceed with Construction for the Niagara Expansion Project and a Partial Notice to Proceed with Site Preparation for the Northern Access 2015 Project. In both notices, Commission staff concluded that the Implementation Plans included the information necessary to meet the pre-construction conditions in the February 27 Order.

8. On March 20, 2015, Allegheny filed a motion to stay the February 27 Order pending rehearing and also to stay "all construction activities that the Commission has

⁶ February 27 Order, 150 FERC ¶ 61,160 at P 98.

⁷ 18 C.F.R. § 385.713(d)(1) (2015).

authorized” since that time.⁸ On March 27, 2015, Tennessee filed an answer in opposition to the stay.

9. Allegheny contends that a stay is appropriate because without a stay Allegheny 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 argues that the March 13, 2015 Notices to Proceed with construction activities for both projects demonstrate that injury to its interests is “both certain and great” and actually occurring, rather than “theoretical or merely feared as liable to occur at some indefinite time.”⁹ Allegheny claims that procedural injury – arising from the Commission’s inadequate environmental analysis violating both NEPA and the Endangered Species Act – further supports a stay.¹⁰ Allegheny also argues that a stay will not significantly injure Tennessee and 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.

Commission Determination

10. The Commission’s standard for granting a stay is whether justice so requires.¹¹ The most important element of the standard is a showing that the movant will be irreparably injured without a stay.

11. Allegheny makes no showing that it will be irreparably injured. Allegheny has provided only unsupported allegations in the form of generalized environmental assertions about the project. For the Niagara Expansion Project’s 3.1 miles of pipeline

⁸ Allegheny also requests a stay in West Side Expansion and Modernization Project, 150 FERC ¶ 61,162 and Tuscarora Lateral Project, 150 FERC ¶ 61,181 (2015). We denied the request for stay in *Empire Pipeline, Inc.*, 153 FERC ¶ 61,379. This order addresses the request for stay only with regard to the Niagara Expansion and Northern Access 2015 Projects.

⁹ Allegheny March 20 Motion for Stay at 8-9.

¹⁰ *Id.* at 10-12.

¹¹ 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 Cty.*, 113 FERC ¶ 61,166, at P 6 (2005).

loop, which will be located on Tennessee's right-of-way for the existing 200 Line, 8.43 acres of forest would be cleared during construction with 2.90 acres kept clear during operation.¹² All other construction for the Niagara Expansion and Northern Access 2015 Projects will be confined to property already owned or leased by the applicants and covered with low-growing grasses, herbaceous vegetation, or shrubs.¹³ The Commission fully considered and addressed Allegheny's protests and comments both in the EA and in the February 27 Order's environmental discussion.¹⁴ We determined that, on balance, the proposed projects, if constructed and operated in accordance with the applications and supplements, and in compliance with the 18 environmental conditions to the February 27 Order, would not significantly affect the quality of the human environment.¹⁵ Allegheny's claims of procedural injury are without merit, as discussed in this order. Under these circumstances, we will deny Allegheny's motion for stay. In any event, this order addresses Allegheny's request for rehearing and affirms our finding in the February 27 Order.

12. 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.¹⁶ Similarly, in *Ruby Pipeline, L.L.C.*, the Commission found that allegations of environmental and cultural harm did not support grant of a stay.¹⁷ The courts denied requests for judicial stay in these and other pipeline construction cases.¹⁸

¹² EA at 19.

¹³ *Id.*

¹⁴ February 27 Order, 150 FERC ¶ 61,160 at PP 50-70.

¹⁵ *Id.* P 98.

¹⁶ *Millennium Pipeline Co., LLC*, Order Den. Stay, 141 FERC ¶ 61,022 (2012).

¹⁷ *Ruby Pipeline, LLC*, Order Den. Stay, 134 FERC ¶ 61,020 (2011); *Ruby Pipeline, LLC*, Order Den. Stay, 134 FERC ¶ 61,103 (2011).

¹⁸ *See Minisink Residents for Env'tl. Pres. and Safety v. FERC*, No. 12-1481, Order Den. Mot. for Stay (D.C. Cir. Mar. 5, 2013); *In re Minisink Residents for Env'tl. Pres. and Safety*, No. 12-1390, Order Den. Pet. for Stay (D.C. Cir. Oct. 11, 2012); *Defenders of Wildlife v. FERC*, No. 10-1407, Order Den. Mot. for Stay (D.C. Cir. Feb. 22, 2011); *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389, Order Den. Mot. for

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B. Fuel and Lost and Unaccounted For Fuel

13. The February 27 Order found that National Fuel's proposal satisfied the threshold requirement of our Certificate Policy Statement that the pipeline must financially support the project without relying on subsidization from its existing customers.¹⁹ However, the order did not specifically address National Fuel's proposal to charge existing system fuel retention percentages to Tennessee for lost and unaccounted for (LAUF) gas.²⁰ Con Edison argues that the Commission should have rejected National Fuel's proposal to charge system retention percentages. Con Edison asserts that the Commission should have required a demonstration that the fuel use associated with the proposed project would not be higher than the existing system fuel use without the proposed project. Though National Fuel did file a fuel study, Con Edison argues that the study was inconclusive.²¹ For example, the study's illustrative examples included incremental fuel use for the proposed projects significantly exceeding system fuel use.

14. Con Edison requests that the Commission require National Fuel to assess an incremental fuel retention percentage to Tennessee for fuel retention associated with the proposed lease of capacity.

15. Con Edison correctly notes that National Fuel acknowledged in its fuel study that it "cannot predict or determine what the retainage rate of the system will be with or without the Compression Additions on a future day."²² Therefore, we conclude that National Fuel has not demonstrated that its existing customers will not subsidize or be adversely affected by the fuel charges resulting from the Northern Access 2015 Project.

Stay (D.C. Cir. Jan. 28, 2011). *See also Feighner v. FERC*, No. 13-1016, Order Den. Mot. for Stay (D.C. Cir. Feb. 8, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015, Order Den. Mot. for Stay (D.C. Cir. Feb. 6, 2013); *Coal. for Responsible Growth and Res. Conservation v. FERC*, No. 12-566, Order Den. Mot. for Stay (2d. Cir. Feb. 28, 2012).

¹⁹ February 27 Order, 150 FERC ¶ 61,160 at P 29; *Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy*, 88 FERC ¶ 61,227, at 61,746-47 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶61,094 (2000) (Certificate Policy Statement).

²⁰ *Id.* P 16.

²¹ National Fuel June 30, 2014 Filing, Addendum at P 3.

²² *Id.*

When it is not clear that allowing recovery of fuel costs through the system fuel retention rate will not result in the subsidization of the project by existing shippers, the Commission requires the establishment of an incremental fuel rate.²³ Therefore, the Commission will require National Fuel to separately identify the incremental fuel associated with the Northern Access 2015 Project and to charge incremental fuel rates as initial rates for service using the project. This determination is without prejudice to National Fuel's proposing in the future to roll LAUF costs associated with the project into its system gas retention rates in a general or limited NGA section 4 filing.

C. Spare Compression

16. In its application, National Fuel stated that it planned to designate 2,500 horsepower at the Concord Compressor Station as spare compression.²⁴ The February 27 Order directed that National Fuel could not, without further explanation, use the compression for intermittent demands for interruptible or secondary firm service or requests for short-term firm service during scheduled maintenance intervals.²⁵ The February 27 Order also found that National Fuel could not reflect in its system rates any of the costs associated with the leased capacity – i.e., any of the fully-allocated cost of service including costs associated with spare compression or actual fuel costs.²⁶

17. National Fuel requests clarification, contending that the spare compression is not associated with the Tennessee lease and that National Fuel may continue to recover the costs associated with the spare compression in its system rates. National Fuel states that the Commission mischaracterized National Fuel's statement about designating 2,500 horsepower of compression as spare compression. National Fuel explains that the existing Concord Compressor Station was first authorized and placed into service in 1990 to facilitate north-to-south deliveries.²⁷ Since that time, National Fuel has upgraded the

²³ See *ANR Pipeline Co.*, 152 FERC ¶ 61,021, at P 10 (2015); see also *Southeast Supply Header, LLC*, 151 FERC ¶ 61,032 (2015).

²⁴ National Fuel March 7, 2014 Certificate Application at 6.

²⁵ February 27 Order, 150 FERC ¶ 61,160 at P 30.

²⁶ *Id.* P 38 (citing *Gulf South Pipeline Co., LP*, 120 FERC ¶ 61,291, at P 42 (2007)).

²⁷ March 30, 2015 Request for Clarification at 3-5 (citing *Tennessee Gas Pipeline Co.*, 52 FERC ¶ 61,257 (1990) (authorizing the construction of the Concord Compressor Station with four units and a total horsepower of 8,600); *Nat'l Fuel Gas Supply Corp.*, 61 FERC ¶ 61,192 (1992) (authorizing the addition of a 1,350 horsepower unit at the

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Concord Compressor Station to serve a winter peaking market in the greater Buffalo, New York area. The design of the *existing* Concord Compressor Station, National Fuel explains, includes spare compression equal to approximately one reciprocating engine, which allows it to serve load in extreme cases and to meet system needs when one of the units requires service. National Fuel states that its Northern Access 2015 Project does not include new spare compression. Rather, National Fuel wishes to retain the pre-existing spare compression to meet pre-existing contingencies. National Fuel also explains that payments under the lease will not include any costs associated with the pre-existing spare compression, as those costs are already being recovered through its other rates.

18. We will grant National Fuel's request for clarification that the 2,500 horsepower of spare compression at the Concord Compressor Station is not associated with the Tennessee lease and that National Fuel may continue to recover the costs associated with the spare compression in its system rates.

D. Environmental Analysis

1. Ecologically Critical Areas and Endangered Species

19. Allegheny raises arguments regarding biological diversity and endangered species under NEPA and the Endangered Species Act (ESA).²⁸ To determine under NEPA whether a proposed action's impact would significantly affect the human environment, an agency must consider the impact's context and intensity. One factor of intensity is the "unique character[] of the geographic area such as proximity to . . . ecologically critical areas."²⁹

20. The ESA requires each federal agency to ensure that any actions authorized, funded, or carried out by the agency do not jeopardize the continued existence of a federally listed endangered or threatened species or result in the destruction or adverse modification of a listed species' designated critical habitat. As the lead federal agency, the Commission is required to consult with the U.S. Fish and Wildlife Service (FWS) to determine whether federally listed endangered or threatened species or designated critical

Concord Compressor Station); *Nat'l Fuel Gas Supply Corp.* 80 FERC ¶ 61,040 (1997) (authorizing the uprating of the five compressor units for a total horsepower of 11,250)).

²⁸ 16 U.S.C. §§ 1531-1599 (2012).

²⁹ 40 C.F.R. § 1508.27(b)(3) (2015) (defining the term "significantly" to require a consideration of both the context and intensity of the proposed action's impact).

habitat are found in the vicinity of a proposed project, and to determine the proposed action's potential effects on those species or critical habitats. The ESA requires that the federal agency complete consultation before construction begins³⁰ and that while consultation is pending "the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures"³¹

21. Tennessee and National Fuel, acting as the Commission's non-federal representatives for the purpose of complying with section 7(a)(2) of the ESA, initiated informal consultation with FWS on November 11 and December 4, 2013, respectively.

22. Regarding French Creek, the EA discussed potential impacts to the federally-listed rayed bean mussel and clubshell mussels, which FWS had identified as potentially occurring in the project area. Based on Tennessee's proposal to bore under French Creek and staff's recommendation that Tennessee file documentation of FWS's approval of any hydrostatic test water withdrawal from French Creek before Tennessee begins construction, the EA concluded that the Niagara Expansion Project is not likely to adversely affect the rayed bean or clubshell mussels.³² The Commission requested that FWS consider the EA as the Commission's Biological Assessment and concur within 30 days of issuance of the EA.

23. The February 27 Order went a step further and forbade any withdrawal of hydrostatic test water from French Creek.³³ In addition, Environmental Conditions 9 and 18 to the February 27 Order prohibit construction until Tennessee and National Fuel have obtained all applicable federal authorizations and have completed consultation with FWS, among other requirements.³⁴

³⁰ ESA § 7(c)(1), 16 U.S.C. § 1536(c)(1) (2012).

³¹ *Id.* § 7(d), 16 U.S.C. § 1536(d).

³² EA at 22.

³³ February 27 Order, 150 FERC ¶ 61,160 at P 73; *id.* app. C, Environmental Condition 13.

³⁴ *Id.* PP 88-91; *id.* app. C, Environmental Conditions 9 (federal authorizations) and 18 (ESA consultation and documentation).

24. On March 6, 2015, Tennessee and National Fuel submitted Implementation Plans to the Commission and requested notices to proceed with construction. On March 13, 2015, Commission staff issued a notice to proceed with construction of the Niagara Expansion Project and a partial notice to proceed with site preparation for the Northern Access 2015 Project. In both notices, staff concluded that the Implementation Plans, as supplemented, included the information necessary to meet the pre-construction conditions in the February 27 Order. The notice to Tennessee specifically found the required approval from FWS, in accordance with the ESA.

25. Repeating arguments that we addressed in the February 27 Order,³⁵ Allegheny argues that the Commission's EA ignored the fact that FWS had proposed French Creek as critical habitat for the now-listed threatened rabbitsfoot mussel and failed to consider two other endangered mussels found in French Creek, the snuffbox and northern riffleshell mussels.³⁶ Allegheny also argues that the Commission failed to consider the potential impacts to French Creek if the proposed pipeline were to rupture beneath it in the future. Allegheny adds that the EA was inadequate as a Biological Assessment because it did not contain information about "the life history and habitat requirements" for each mussel species, as the Commission's regulations require of a Biological Assessment.³⁷ Allegheny also argues that Commission staff issued the March 13, 2015 Notices to Proceed with construction in violation of the February 27 Order's Environmental Condition 18 because there was no evidence in the record that FWS had concurred with the EA's determination regarding the listed clubshell and rayed bean mussels. Allegheny asserts that the Commission's February 27 Order and our March 13, 2015 Notice to Proceed with the Niagara Expansion Project triggered an irretrievable and irreversible commitment of resources in violation of section 7(d) of the ESA.³⁸

Commission Determination

26. As noted several times in the EA and in the February 27 Order, because Tennessee will bore under French Creek and will not withdraw hydrostatic test water from it, there will be no direct impacts to the environmental resources of this ecosystem, making the Commission's alleged failure to recognize French Creek as an ecologically critical area,

³⁵ February 27 Order, 150 FERC ¶ 61,160 at PP 88-91.

³⁶ Allegheny Request for Rehearing at 12.

³⁷ *Id.* at 88 (citing 18 C.F.R. § 380.13(b)(5)(ii)(A)).

³⁸ *Id.* at 82-90.

and to sufficiently analyze the mussels in it, immaterial.³⁹ In any event, the EA and the February 27 Order did sufficiently acknowledge the ecological importance of French Creek. The EA explained that the New York State Department of Environmental Conservation had identified French Creek as a significant natural community. The February 27 Order stated that French Creek was the only waterbody specifically identified by federal and state resource agencies as a concern.⁴⁰

27. The EA also sufficiently analyzed potential impacts to the federally-listed mussels in the project area, the rayed bean and clubshell mussels. Despite Allegheny's arguments about the other three federally-listed mussels in French Creek – the rabbitsfoot, snuffbox, and northern riffleshell mussels – we explained in the February 27 Order that Commission staff's independent research concluded that these three species were not listed as potentially occurring in the area affected by the projects in Chatauqua County, New York. In addition, FWS did not identify these three species as occurring in the project area.⁴¹ Further, because FWS concurred with the Commission's determination that the proposed project was not likely to adversely affect the clubshell and rayed bean mussels or their habitat, the Commission was under no obligation to create a Biological Assessment.⁴² Allegheny offers no basis for us to revisit our previous analysis. We affirm the February 27 Order's conclusions.

28. Regarding the risk of a pipeline accident affecting French Creek, the EA reviewed the number of significant incidents nationally on natural gas transmission pipelines and

³⁹ *E.g.*, EA at 21 (finding no impact to fisheries), 22 (finding no impact to rayed bean and clubshell mussels), and 23 (finding no impact to state-listed, threatened spotted darter); February 27 Order app. C, Environmental Condition 13 (prohibiting Tennessee from withdrawing hydrostatic test water from French Creek).

⁴⁰ EA at 17, 21; February 27 Order, 150 FERC ¶ 61,160 at P 72.

⁴¹ February 27 Order, 150 FERC ¶ 61,160 at P 89. *See Designation of Critical Habitat for Neosho Mucket and Rabbitsfoot*, 80 Fed. Reg. 24,692, 24,693 (Apr. 30, 2015) (designating no critical habitat in New York); *Determination of Endangered Status for the Rayed Bean and Snuffbox Mussels Throughout Their Ranges*, 77 Fed. Reg. 8632, 8634, 8637 (Feb. 14, 2012) (“the [rayed bean] is not known from the New York portion of [French Creek]”); *id.* at 8639, 8643-44 (identifying known snuffbox populations only in the Pennsylvania portion of French Creek in Erie, Crawford, Mercer, and Venango Counties.).

⁴² 18 C.F.R. § 380.13(b)(5)(ii) (2015).

found that the risk is low for an incident at any given location.⁴³ The Commission concluded that the probability of an accident is so low that approval of the project was acceptable.⁴⁴ Allegheny points to a January 2015 rupture of a 20-inch-diameter pipeline in West Virginia that scorched nearby woodland and impacted a structure 2000 feet away.⁴⁵ The EA acknowledged that the greatest hazard from a pipeline is a fire or explosion following a major pipeline rupture. The event of January 2015, however, does not disturb the EA's consideration of 20 years of data reported on more than 300,000 miles of natural gas transmission pipelines nor disprove that the risk of an accident at French Creek is too speculative to merit analysis under NEPA.

29. Additionally, Commission staff's issuance of the notice to proceed did not violate Environmental Condition 18 as Allegheny suggests. In an attachment to Tennessee's Implementation Plan, Tennessee provided a letter from FWS to the Commission dated August 24, 2014, which stated that due to concerns about water withdrawals at French Creek and potentially at Ischua and Olean Creeks, they could not concur with the Commission's determination that the Niagara Expansion Project and the Northern Access 2015 Project are not likely to adversely affect mussels.⁴⁶ However, these concerns were abated as shown by Tennessee's additional attachment of a September 4, 2014 email in which FWS agrees that the proposed water withdrawal from French Creek "should not significantly impact aquatic life," and a September 12, 2014 email in which the FWS indicated that it had no further concerns with the projects.⁴⁷ Thus, the record shows that FWS had concurred with the EA's determination regarding the listed clubshell and rayed

⁴³ EA at 40-47; *see id.* at 45 tbl.16 (Incidents by Cause), 46 tbl.17 (Outside Forces Incidents by Cause). The EA discusses the common causes of pipeline accidents and explains that Tennessee's proposed facilities would be designed, constructed, tested, operated, and maintained in accordance with the U.S. Department of Transportation's Minimum Federal Safety Standards. 49 C.F.R. pt. 192 (2014). These standards are intended to ensure adequate protection for the public and to prevent natural gas facility accidents and failures. The standards specify material selection and qualification; minimum design requirements; and protection from internal, external, and atmospheric corrosion.

⁴⁴ February 27 Order, 150 FERC ¶ 61,160 at P 81.

⁴⁵ Allegheny Request for Rehearing at 14.

⁴⁶ Tennessee March 6, 2015 Implementation Plan, Attach. B

⁴⁷ *Id.*

bean mussels. The NGA authorization granted by our February 27 Order, and the notices to proceed issued on March 13, 2015, are consistent with the ESA's requirements.

2. Programmatic Environmental Impact Statement

30. The Council on Environmental Quality's (CEQ) regulations do not require broad or "programmatic" NEPA reviews. CEQ has stated, however, that such a review may be appropriate where an agency: (1) is adopting official policy; (2) is adopting a formal plan; (3) is adopting an agency program; or (4) is proceeding with multiple projects that are temporally and spatially connected.⁴⁸ 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,⁴⁹ and the United States Court of Appeals for the Fourth Circuit has 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.⁵⁰

31. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.⁵¹ 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."⁵² What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of

⁴⁸ See Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* 13-15 (Dec. 18, 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 the 2014 Programmatic Guidance.

⁴⁹ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

⁵⁰ See *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009).

⁵¹ 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).

⁵² 15 U.S.C. § 717f(e) (2012).

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,"⁵³ which would not present "a credible forward look and would therefore not be a useful tool for basic program planning."⁵⁴ As to projects that are closely related in time or geography, the Commission may, however, prepare a multi-project environmental document, where that is the most efficient way to review project proposals.⁵⁵

32. 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.⁵⁶ Allegheny further contends that the Commission should withdraw recently issued orders and stay all current proceedings in these regions until this EIS is completed.⁵⁷ 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.⁵⁸

⁵³ *Kleppe*, 427 U.S. at 402.

⁵⁴ *Piedmont Env'tl. Council*, 558 F.3d at 316.

⁵⁵ *See, e.g.*, Environmental Assessment for the Monroe to Cornwell Project and the Utica Access Project, Docket Nos. CP15-7-000 and 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).

⁵⁶ Allegheny Request for Rehearing at 66-82.

⁵⁷ *Id.* at 82.

⁵⁸ 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); Nat'l 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); a recent document created by Commission staff identifying 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

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33. 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”⁵⁹ 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.⁶⁰

34. 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.”⁶¹ 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 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.”⁶²

EU-US Presentation); 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), *Order Initiating Investigation into ISO and RTO Scheduling Practices* (146 FERC ¶ 61,202 (2014)), and *Posting of Offers to Purchase Capacity* (146 FERC ¶ 61,203 (2014)); and the PJM Interconnection’s 2013 Annual Report. The 2010 Commission EU-US Presentation and the 2013 PJM Interconnection Annual Report are reproduced in Allegheny’s attachments 5 and 24, respectively.

⁵⁹ Allegheny Request for Rehearing at 67-68 (citing 2014 Programmatic Guidance at 11).

⁶⁰ *Id.* at 82.

⁶¹ *Id.* at 68 (citing 2014 Programmatic Guidance at 21).

⁶² *Id.* at 71 (citing *Churchill Cty v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001)).

Commission Determination

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

36. 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.⁶³

37. 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."⁶⁴ Thus, here, the Commission's environmental review of Tennessee and National Fuel's actual proposed pipeline project in a discrete EA is appropriate under NEPA.

38. In sum, CEQ states 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."⁶⁵ The Commission does not believe these benefits can be realized by a

⁶³ See *Kleppe*, 427 U.S. at 401-02.

⁶⁴ *Id.*

⁶⁵ 2014 Programmatic Guidance at 13.

programmatic review of natural gas infrastructure projects 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.

3. Segmentation

39. CEQ regulations require the Commission to include “connected actions,” “cumulative actions,” and, potentially, “similar actions” in its NEPA analyses.⁶⁶ “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.”⁶⁷

40. “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.⁶⁸ 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.”⁶⁹ 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.”⁷⁰

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

⁶⁷ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Unlike for connected and cumulative actions, for similar actions an agency has some discretion about combining environmental review. *E.g.*, *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-1306 (9th Cir. 2003).

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

⁶⁹ *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.”).

⁷⁰ *Coal. on Sensible Transp., Inc.*, 826 F.2d at 69.

41. In *Delaware Riverkeeper Network v. FERC*, 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 where those projects were financially interdependent.⁷¹ 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.⁷² In a later case, the same court indicated that in considering a pipeline application the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.⁷³

42. Allegheny contends that the Commission is allowing National Fuel to segment its planned infrastructure build-out into separate proceedings.⁷⁴ Allegheny cites a 2013 presentation by National Fuel to investors which depicted three distinct areas of pipeline expansions to carry Appalachian production.⁷⁵ Allegheny asserts that the Commission violated NEPA by improperly segmenting our environmental review of the Northern Access 2015 Project from our review of National Fuel’s and Empire Pipeline Inc.’s (Empire) jointly proposed Northern Access 2016 Project (2016 Project).⁷⁶ These projects are “connected actions,” Allegheny argues, because they are interdependent and share a close temporal nexus.⁷⁷ Allegheny cites statements by National Fuel that both projects are intended to transport Marcellus Shale gas from Seneca’s “Clermont Area” of

⁷¹ 753 F.3d 1304, 1308 (D.C. Cir. 2014).

⁷² *Id.*

⁷³ See *Myersville Citizens for a Rural Cmty. Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015).

⁷⁴ Allegheny Request for Rehearing at 55-56. Allegheny cites a 2013 presentation by National Fuel to investors which depicted three distinct areas of pipeline expansions to carry Appalachian production.

⁷⁵ *Id.* attach. 17 at 35 (slide with map).

⁷⁶ Allegheny Request for Rehearing at 56-60. The Commission authorized pre-filing review for National Fuel and Empire’s 2016 Project on July 24, 2014, in Docket No. PF14-18-000. The companies filed their joint application on March 17, 2015, in Docket No. CP15-115-000.

⁷⁷ *Id.* at 56-58.

McKean, Elk, and Cameron Counties, Pennsylvania, to Canada.⁷⁸ Allegheny asserts that the Northern Access 2015 Project's construction of the Hinsdale Compressor Station is a necessary prerequisite for the 2016 Project because both projects' facilities will connect at that site.⁷⁹ Allegheny notes that the ongoing construction of the Northern Access 2015 Project overlaps the Commission's pending review of the 2016 Project.

43. Allegheny states that the Northern Access 2015 and 2016 Projects are "cumulative actions" under NEPA because they will produce cumulatively significant impacts.⁸⁰ Allegheny further states that the projects share common timing and geography, making them similar actions, because National Fuel and Empire propose to locate a section of the 2016 Project pipeline along existing Line X's right-of-way where the Northern Access 2015 Project added the new Hinsdale Compressor Station.⁸¹

Commission Determination

44. 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.⁸² These sources of information do not provide an appropriate basis for selecting projects to be analyzed together in comprehensive NEPA documents.

45. The Northern Access 2015 Project and the 2016 Project are not "connected actions." The projects do not automatically trigger each other, each project can proceed without the other, and they do not depend on each other.

46. The projects involve different receipt and delivery points along different paths. For the Northern Access 2015 Project, National Fuel proposed to add 23,100 horsepower of compression to its existing Line X (at the Concord and Hinsdale Compressor Stations)

⁷⁸ *Id.* at 56-57 (quoting 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 51 (Nov. 2014) (2014 National Fuel Form 10-K)); *id.* attach. 9 (reproducing report).

⁷⁹ *Id.* at 57.

⁸⁰ *Id.* at 59.

⁸¹ *Id.*

⁸² *Infra* note 128.

to enable Tennessee to transport up to 140,000 Dth/d of Seneca's gas north across Line X from an interconnection with Tennessee's 300 Line at the Rose Lake Meter Station in Potter County, Pennsylvania, to an interconnection with Tennessee's 200 Line at the Hamburg Meter Station in Erie County, New York, for potential delivery along Tennessee's system into Canada.⁸³

47. For the 2016 Project, National Fuel and Empire propose to add 5,350 horsepower of compression to the Porterville Compressor Station on Line X north of the Northern Access 2015 path, and to construct 97 miles of new pipeline. The facilities would enable National Fuel to transport 497,000 Dth/d of gas along a separate path from a new interconnection with NFG Midstream Clermont, LLC, a production subsidiary of National Fuel, in McKean County, Pennsylvania, north along the new pipeline to a tie-in with National Fuel's Line X near the Town of Elma, Erie County, New York. The tie-in with Line X sits north of the Hamburg Meter Station where the Northern Access 2015 path along Line X ends. Of the 497,000 Dth/d of capacity, 140,000 Dth/d would be delivered to Tennessee's 200 Line and 357,000 Dth/d would be delivered to Empire's system and into Canada.⁸⁴ National Fuel and Tennessee placed the Northern Access 2015 Project into service on December 1, 2015. National Fuel and Empire contemplate a November 2017 in-service date.⁸⁵ Thus, as proposed, the in-service dates of the two projects would be a full two years apart.

48. The facilities at the Northern Access 2015 Project's Hinsdale Compressor Station are not a prerequisite to the 2016 Project. As part of the 2016 Project, National Fuel and Empire propose to co-locate 19 miles of the proposed 97-mile-long pipeline in the same right-of-way as Line X, as well as to construct a tie-in, a metering and regulation station, and a jumper connection on the co-located portion at the Hinsdale Compressor Station site.⁸⁶ Though these facilities will allow National Fuel to deliver gas to Line X in the future; the applicants do not propose to do so at this time nor are such deliveries necessary to justify either project. The proposed 2016 Project pipeline will receive only electric power and telecommunication services from the Hinsdale Compressor Station,

⁸³ February 27 Order, 150 FERC ¶ 61,160 at PP 6-13.

⁸⁴ National Fuel and Empire March 17, 2015 Joint Application for the 2016 Project at 4-9, 13-16.

⁸⁵ National Fuel and Empire February 5, 2016 Filing at 1.

⁸⁶ National Fuel and Empire March 17, 2015 Joint Application for the 2016 Project, Ex. F, Res. Rep. 1 at 1-6,

not compression.⁸⁷ There is no indication that without these services National Fuel would not proceed with the 2016 Project. Using figures from the 2016 Project application, the estimated increase in cost to National Fuel to construct a separate tie-in along Line X rather than co-locating the tie-in with the Hinsdale Compressor Station would be \$4.3 million, a small fraction of the 2016 Project's estimated cost of \$376.7 million.⁸⁸ Nothing in the record indicates that this expense would influence National Fuel's and Empire's decision to proceed.

49. The Northern Access 2015 Project and the 2016 Project were not pending before the Commission at the same time. The application for the 2016 Project was not filed with the Commission until almost a year after Commission staff issued the EA for the Northern Access 2015 Project. Moreover, the 2016 Project had not even entered pre-filing review when we issued the EA.

50. The scarcity of common timing and geography similarly show that the projects are not cumulative actions or similar actions.⁸⁹ They are not cumulative actions because they lack the potential to produce cumulatively significant impacts. The only common geography of the two projects is the overlapping environmental footprint in the vicinity of the new Hinsdale Compressor Station. As noted in the Northern Access 2015 Project EA, constructing and operating the Hinsdale Compressor Station will disturb 13.24 acres, 9.18 permanently, on land owned by National Fuel adjacent to the Line X right-of-way, a major highway, and a railroad. Commission staff concluded that the Northern Access 2015 Project's only possible cumulative impacts were to air quality and noise but that these impacts were expected to be minimal, localized, and further reduced by best-management practices, engineering controls, resource protection, and other proposed

⁸⁷ *Id.* Ex. F, Res. Rep. 1 at 6-7.

⁸⁸ *Id.* Ex. K at 1, 3-4. The estimated cost to construct the 2016 Project's proposed "Hinsdale Tie-In and M&R Station" is \$2.37 million. By contrast, the estimated cost to construct the 2016 Project's proposed "TGP 200 Line Interconnect – Measurement & Regulation Station," a separate tie-in with electric power and telecommunications facilities, is \$6.71 million, indicating a difference of \$4.3 million.

⁸⁹ 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 provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id.* § 1508.25(3).

mitigation.⁹⁰ National Fuel has completed construction of the Hinsdale Compressor Station and placed it into service before receiving authorization from the Commission to construct the 2016 Project facilities. Pursuant to Environmental Condition 10 of the February 27 Order, Commission staff determined that rehabilitation and restoration of the right-of-way and other areas affected by the Northern Access 2015 Project were proceeding satisfactorily before service commenced.⁹¹

51. For comparison, constructing and operating the 2016 Project's proposed tie-in, meter and regulation station, and jumper connection will disturb 5.7 acres, 0.92 permanently, all within the Hinsdale Compressor Station parcel.⁹² Constructing and operating a portion of the 2016 Project's proposed 97-mile long pipeline in the same right-of-way with Line X will temporarily disturb a 50-foot-wide right-of-way and permanently disturb a 17-foot-wide right-of-way, respectively, beyond Line X's existing permanent right-of-way.⁹³

52. Because the Northern Access 2015 Project's potential cumulative impacts are minor, temporary, and reduced through mitigation, and because the 2016 Project's potentially overlapping impacts are minor and temporary, we conclude that the two projects' cumulative impacts, if any, are unlikely to be cumulatively significant. To the extent that the 2016 Project could cumulatively affect the same environmental resources affected by the Northern Access 2015 Project, the cumulative impact will be discussed in the cumulative analysis section of the NEPA document for the 2016 Project. We will separately consider the 2016 Project on its own merits, based on the facts and circumstances specific to that proposal.

53. Similarly, the scarcity of common timing and geography provide no basis for evaluating the environmental consequences of the projects together as similar actions.

⁹⁰ EA at 56; *see id.* at 52-55 (concluding for each resource – geological resources and soils, water resources, vegetation and wildlife, land use, air quality and noise – that potential cumulative impacts would be temporary and minor or otherwise insignificant).

⁹¹ *Nat'l Fuel Gas Supply Corp.*, Docket No. CP14-100-000, at 1 (Oct. 20, 2015) (delegated letter order).

⁹² National Fuel and Empire March 17, 2015 Joint Application for the Northern Access 2016 Project, Ex. F-I, Res. Rep. 1 at 1-18.

⁹³ *Id.* Ex. F-I, Res. Rep. 1 at 1-15. In total, the construction and operation rights-of-way span 75 feet and 50 feet, respectively, but they overlap the existing permanent Line X right-of-way by 25 feet and 33 feet, respectively.

We see no reason that combined analysis would be the best way to adequately assess these projects' combined impacts, if any exist.⁹⁴ Thus, we affirm our ruling in the February 27 Order.

4. Indirect Effects of Natural Gas Production

54. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.⁹⁵ 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."⁹⁶ Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

55. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause" in order "to make an agency responsible for a particular effect under NEPA."⁹⁷ As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."⁹⁸ 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.⁹⁹ Further, the Court has stated that "where an agency has no ability to prevent

⁹⁴ See, e.g., *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004) (emphasizing that agencies are only required to assess similar actions programmatically when such review is necessarily the best way to do so).

⁹⁵ See 40 C.F.R. § 1508.25(c) (2015).

⁹⁶ *Id.* § 1508.8(b).

⁹⁷ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 at 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

⁹⁸ *Id.*

⁹⁹ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

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.”¹⁰⁰

56. 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.”¹⁰¹ 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.”¹⁰²

57. Allegheny asserts that the Commission’s environmental analysis of the Niagara Expansion and Northern Access 2015 Projects violated NEPA by failing to consider the indirect effects of gas drilling in the Marcellus or Utica Shale formations.¹⁰³

58. 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, deep underground injection and disposal of wastewaters and liquids are subject to regulation by the Environmental Protection Agency under the Safe Drinking Water Act. The Environmental Protection Agency also regulates air emissions under the Clean Air Act. On public lands, federal agencies are responsible for the enforcement of regulations that apply to natural gas wells.

59. 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

¹⁰⁰ *Pub. Citizen*, 541 U.S. at 770.

¹⁰¹ *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).

¹⁰² *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (*Northern Plains*).

¹⁰³ Allegheny Request for Rehearing at 14-36.

contemplated by the CEQ regulations.¹⁰⁴ 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 such production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).¹⁰⁵ 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.

60. 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 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

¹⁰⁴ 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), *pet. for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. App'x 472, 474-75 (2012) (unpublished opinion).

¹⁰⁵ See *c.f. 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). See also *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 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).

vary per producer and per 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.¹⁰⁶

61. 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.¹⁰⁷ The Environmental Protection Agency has reached a similar conclusion.¹⁰⁸ With respect to air quality, the Department of Energy found that natural gas development leads to both short- and long-term increases in local and regional air emissions.¹⁰⁹ It also found that such emissions may contribute to climate change. But to the extent that natural gas production replaces

¹⁰⁶ *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).

¹⁰⁷ 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>.

¹⁰⁸ 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 (Mar. 26, 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”).

¹⁰⁹ DOE Addendum at 32.

the use of other carbon-based energy sources, the Department of Energy found that there may be a net positive impact in terms of climate change.¹¹⁰

62. 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.¹¹¹ Allegheny argues that Seneca and another producer have stated that firm transportation contracts “de-risk production growth” by ensuring takeaway capacity, that portions of Seneca’s drilling locations have been de-risked, and that the development of other portions of Seneca’s drilling locations will be “limited” until firm transportation capacity becomes available.¹¹² Allegheny also cites statements in Tennessee’s and National Fuel’s applications that the Niagara Expansion Project will “provid[e] access to” Marcellus Shale supplies for delivery to the northeast United States and eastern Canada and that the Northern Access 2015 Project is “designed to bring” Marcellus Shale supplies to the interstate grid. Allegheny cites a recent article which suggests that shale wells sharply decline in volume after the first few years, which it claims makes new production more likely.¹¹³ Allegheny also contends that additional natural gas production in the Marcellus and Utica Shale formations is not uncertain, as demonstrated in statements and reports from industry and government entities.¹¹⁴

63. Allegheny contends that like the rejected indirect impact analysis in *Colorado River Indian Tribes v. Marsh*,¹¹⁵ the Commission assessed the project with “tunnel

¹¹⁰ *Id.* at 44.

¹¹¹ Allegheny Request for Rehearing at 15-17 (quoting *Sylvester*, 884 F.2d at 400), 19-24. Allegheny cites the 2011 National Petroleum Council report at 51-52 (*supra* note 58); 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 58). These sources are reproduced in Allegheny’s attachments 1, 3, 4, and 5, respectively.

¹¹² *Id.* at 19-20.

¹¹³ *Id.* at 25, attach. 6 (James Ladlee, Marcellus Center for Outreach & Research, Pennsylvania State University, *Appalachian Basin Decline Curve and Royalty Estimation* (July 17, 2014), <http://extension.psu.edu/natural-resources/natural-gas/news/2014/07/appalachian-basin-decline-curve-and-royalty-estimation-part-1>).

¹¹⁴ *Id.* at 29-34.

¹¹⁵ 605 F.Supp. 1425 (C.D. Cal. 1985) (*Colorado River*).

vision” that was “tantamount to limiting its assessment to primary impacts.”¹¹⁶ Allegheny challenges the Commission’s argument that gas drilling and the project are not causally related because natural gas development will continue with or without the project; Allegheny states that such argument is similar to the one rejected by the 8th Circuit in *Mid States Coalition for Progress v. Surface Transportation Board*.¹¹⁷

64. In the February 27 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.¹¹⁸ Allegheny argues 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 decision-making.¹¹⁹

Commission Determination

65. The record in this proceeding, including the reports and statements cited by Allegheny, does not demonstrate the requisite reasonably close causal relationship between the Niagara Expansion and Northern Access 2015 Projects and the impacts of future natural gas production to 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 these particular pipeline projects 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.¹²⁰ If the Niagara Expansion and Northern

¹¹⁶ *Id.* at 1433.

¹¹⁷ Allegheny Request for Rehearing at 24-25 (citing 345 F.3d 520, 549 (8th Cir. 2003) (*Mid-States*)).

¹¹⁸ February 27 Order, 150 FERC ¶ 61,160 at P 62.

¹¹⁹ Allegheny Request for Rehearing at 27.

¹²⁰ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015) (*Rockies Express*). *See also Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production);

(continued...)

Access 2015 Projects 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.¹²¹ Again, any such production would take place pursuant to the regulatory authority of state and local governments.

66. Moreover, future gas development is not an essential predicate for Tennessee's and National Fuel's projects. The purpose of both projects together is to allow Tennessee to provide up to 158,000 Dth/d of incremental firm transportation service for Seneca. But whether or how much *induced* gas will travel through the projects cannot be known. In 2014, unconventional natural gas production in Pennsylvania exceeded 11.49 million Dth/d.¹²² Therefore, existing production could support the project for many years, if not its entire useful life. Seneca has multiple outlets for its Marcellus Shale gas.¹²³ Allegheny fails to identify any new production specifically associated with the Niagara Expansion and Northern Access 2015 Projects.

67. Even if the pipeline were to transport new gas supplies in the future and we were to accept the cited figures about declining wellhead productivity, the widely ranging first-year rates of decline between 60 percent and 80 percent¹²⁴ only add to the uncertainty

Fla. 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).

¹²¹ *Id.* National Fuel's recent presentation to investors, cited by Allegheny, suggests that Seneca, a producing subsidiary of National Fuel with assets in the project area, may have plans to use a number of pipelines to transport its production. *E.g.*, Allegheny Request for Rehearing Attach. 4 at 26-27 (table showing that Seneca's natural gas marketing portfolio relies in part on long-term firm transportation on Transcontinental Pipe Line Company's pending Atlantic Sunrise Project); *id.* Attach. 4 at 45 (map depicting "multiple outlets to high-value markets" from Seneca's acreage along several existing interstate pipelines in addition to National Fuel's or Tennessee's systems).

¹²² Penn. Dep't of Env'tl. Prot., *2014 Oil and Gas Annual Report* at 7 fig. (July 2015), http://www.portal.state.pa.us/portal/server.pt/community/annual_report/21786 (aggregate 2014 unconventional production divided by 365 days yields 11.15 billion cubic feet per day or, converted, 11.49 million Dth/d).

¹²³ *Supra* note 121.

¹²⁴ Allegheny Request for Rehearing Attach. 6.

about the project's relative inducement of new development. Moreover, as we explained in the February 27 Order and below, the exact location, scale, and timing of any future production facilities are unknown. Any analysis would not assist our decision-making.

68. We find *Colorado River* distinguishable. In *Colorado River*, a district court held that the Corps violated NEPA by not preparing a final environmental impact statement (EIS) for a permit authorizing a developer to place riprap along a riverbank. The court stated that without the permit, the developer could not have received local government approval for its proposed residential and commercial development project along the riverbank.¹²⁵ The Corps originally prepared a draft EIS because the proposed development along the banks would cause significant environmental impacts.¹²⁶ Before completing a final EIS, however, the Corps retracted its draft EIS because the Corps determined that the appropriate scope of its environmental analysis should be limited to the activities within its jurisdiction, i.e., the river and the bank.¹²⁷

69. The court disagreed, finding that the Corps violated NEPA because it narrowed the scope of its analysis to primary or direct impacts of its authorization, ignoring the indirect and cumulative effects analysis required by NEPA. Here, by contrast, Commission staff analyzed the indirect and cumulative effects of the Niagara Expansion and Northern Access 2015 Projects. Commission staff did not analyze the effects of induced natural gas production because, unlike in *Colorado River*, there is no sufficient causal link between our authorization of the projects and any additional activity. Natural gas development will likely continue with or without the Niagara Expansion and Northern Access 2015 Projects.

70. 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 projects. 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 project is approved.¹²⁸ As we have previously explained, a

¹²⁵ 605 F. Supp. 1425, 1428.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *E.g.*, 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 12 n.1 (Feb. 14, 2014) (“[w]ith so much inherent uncertainty, projections

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 us.¹²⁹

71. 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 projects' impacts on environmental resources and to reasonably and responsibly take action on the proposals. Commission staff began its environmental review on April 11, 2014, about three months before the EA issued and ten months before the February 27 Order issued. Staff 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. In response to Allegheny's protest during scoping, the EA explained that arguments about cumulative impacts, impacts on waterbodies, and impacts on protected species were addressed in the applicable sections

for Marcellus production beyond the next few years are essentially meaningless, in our opinion."); 2015 National Fuel Investor Presentation at 2 (Jan. 2015) (listing twenty 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; the need to obtain governmental approvals and permits; and compliance with environmental laws and regulations); 2014 National Fuel Form 10-K at 21-22 (*supra* note 78) (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 are reproduced in Allegheny's attachments 8, 4, and 9, respectively. The cited 2013 US Geological Survey report provides only a retrospective analysis of land use and land cover changes, based on aerial images, due to natural gas production between 2004 and 2010. 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 6-7 (2013), <http://pubs.usgs.gov/of/2013/1263>. The cited 2011 Nature Conservancy report relied on assumptions to calculate a wide range of development and land impacts – e.g., finding 360,000 to 900,000 acres of forest edge affected by 2030.

¹²⁹ *E.g.*, *Rockies Express*, 150 FERC ¶ 61,161 at P 40.

of the EA.¹³⁰ The February 27 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.¹³¹

72. Allegheny asserts that the court's ruling in *Mid States* supports the contention that the Commission must analyze the effects of upstream gas drilling in the Marcellus and Utica Shale formations. But *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.¹³² The court found – and the project proponent did not dispute – that the proposed project would increase the use of coal for power generation.¹³³ The court held that where such downstream effects are reasonably foreseeable they must be analyzed even if the extent of those effects is uncertain.¹³⁴

73. Here, Allegheny asserts that construction of the Niagara Expansion and Northern Access 2015 Projects would increase *production*, rather than end-use as was conceded in *Mid States*. And unlike *Mid States*, there is an insufficient causal link between our authorization of the projects and any additional production. As we have explained, natural gas development will likely continue with or without the Niagara Expansion and Northern Access 2015 Projects. Thus, we find speculative not merely the extent of production-related impacts, as at issue in *Mid States*, but also whether the project at issue will have any such impacts.

5. Cumulative Impacts Analysis

74. 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

¹³⁰ EA at 5.

¹³¹ February 27 Order, 150 FERC ¶ 61,160 at PP 57-70.

¹³² *Mid States*, 345 F.3d at 550.

¹³³ For example, the Surface Transportation Board made a finding of public demand for the rail line because it would offer a shorter and less expensive method by which to transport low-sulfur coal from the mines to power plants, *id.* at 533, which the court concluded would “at the very least make coal a more attractive option to future entrants into the utilities market” *Id.* at 549.

¹³⁴ *Id.* at 549.

past, present, and reasonably foreseeable future actions”¹³⁵ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

75. 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.”¹³⁶ CEQ has explained 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.”¹³⁷ 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.”¹³⁸ 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.¹³⁹

76. 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.¹⁴⁰ 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

¹³⁵ 40 C.F.R. § 1508.7 (2015).

¹³⁶ *Kleppe*, 427 U.S. at 413.

¹³⁷ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (Jan. 1997) (1997 Cumulative Effects Guidance).

¹³⁸ *Id.*

¹³⁹ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005).

¹⁴⁰ See, e.g., *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

region of influence, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.¹⁴¹

77. 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.¹⁴² Allegheny asserts that the Commission arbitrarily narrowed the geographic scope of the project's region of influence to just Chautauqua County, New York, and Mercer County, Pennsylvania.¹⁴³

78. Allegheny also 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."¹⁴⁴ 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.¹⁴⁵ Allegheny likens the restrictive geographic scope to the one found insufficient by the Ninth Circuit in *LaFlamme v. FERC*.¹⁴⁶

79. Allegheny cites *Natural Resources Defense Council v. Hodel* to bolster its claim that the Commission is required to consider the "inter-regional" impacts of Marcellus and Utica Shale development activities.¹⁴⁷ Allegheny also asserts that recent research identifies the "substantial impact" that shale gas drilling will have throughout the

¹⁴¹ *Id.* P 120.

¹⁴² Allegheny Request for Rehearing at 36-53.

¹⁴³ *Id.* at 36-37.

¹⁴⁴ *Id.* at 40 (citing 1997 Cumulative Effects Guidance at 12).

¹⁴⁵ Allegheny Request for Rehearing at 41-42. Allegheny cites the environmental assessments for seven unrelated projects, which varied in geographic scope from the vague "area affected" to a 5-mile radius. The Commission considers projects on a case-by-case basis, and these seven proceedings have no bearing in the instant case.

¹⁴⁶ 852 F.2d 389 (9th Cir. 1988) (*LaFlamme*).

¹⁴⁷ 865 F.2d 288 (D.C. Cir. 1988) (*Hodel*).

Marcellus and Utica Shale formations, thus the Commission “has an obligation under NEPA to take a hard look at these impacts on a much broader scale”¹⁴⁸

80. 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.¹⁴⁹ Allegheny points to National Fuel’s recent report to the Securities and Exchange Commission as evidence of reasonably foreseeable future production that must be considered.¹⁵⁰

Commission Determination

81. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.¹⁵¹ The agency should then establish the geographic scope for analysis.¹⁵² Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project’s direct and indirect impacts.¹⁵³ Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.¹⁵⁴ 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.¹⁵⁵

¹⁴⁸ Allegheny Request for Rehearing at 50 (citing M.C. Brittingham, et al., *Ecological Risks of Shale Oil and Gas Development to Wildlife, Aquatic Resources, and their Habitats*, 48 *Envtl. Science & Technology* 11034, 11035–37 (Oct. 7, 2014) (published online on Sept. 4, 2014)).

¹⁴⁹ Allegheny Request for Rehearing at 35 (citing *Northern Plains*, 668 F.3d at 1079.).

¹⁵⁰ *Id.* at 37-38, and 46 (citing 2014 National Fuel Form 10-K at 52 (*supra* note 78)).

¹⁵¹ 1997 Cumulative Effects Guidance at 11.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

82. The cumulative effects analysis that Commission staff undertook in the Niagara Expansion and Northern Access 2015 Projects EA took precisely the approach the CEQ guidance advises.¹⁵⁶ Based on the small scale of the Niagara Expansion and Northern Access 2015 Projects and the lack of significant direct and indirect impacts on resources, Commission staff concluded that a cumulative impacts analysis within the counties surrounding the Projects would be sufficient.¹⁵⁷ This region of influence was appropriate because project impacts to resources would be minor, temporary, and localized – for example Tennessee’s proposed 3.1-mile pipeline loop would be located within its existing 200 Line right-of-way and all other facilities, except for the Hinsdale Compressor Station, would be constructed within or immediately adjacent to Tennessee’s and National Fuel’s existing compressor and meter stations.

83. Based on the region of influence for the projects, the EA identified eight present and reasonably foreseeable future actions whose impacts when added to the impacts of the Niagara Expansion and Northern Access 2015 Projects could result in cumulative impacts.¹⁵⁸ The EA considered the potential cumulative impacts pertaining to each potentially affected resource, including soils, water resources, vegetation and wildlife, land use, and air quality and noise. The EA concluded that when considered with the eight other projects planned or ongoing within the relevant region of influence, the Niagara Expansion and Northern Access 2015 Projects would not result in significant long-term cumulative effects.

84. Further, the EA identified 15 permitted wells associated with Marcellus Shale drilling activities in the region of influence.¹⁵⁹ While state agencies provide data on when a majority of well permits are issued, the data does not convey if and when permitted wells would be drilled. Accordingly, the timing of future natural gas is uncertain and there is not enough information available to allow meaningful consideration. Further, statements from National Fuel’s recent report to the Securities and Exchange Commission about Seneca’s activities are not, in their own words, credible evidence of future operations.¹⁶⁰

¹⁵⁶ We note that the 1997 Cumulative Effects Guidance at 15 states that the “applicable geographic scope needs to be defined case-by-case.”

¹⁵⁷ EA at 48-51.

¹⁵⁸ *Id.* at 48-49.

¹⁵⁹ *Id.* at 52.

¹⁶⁰ *Supra* note 128.

85. 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. Given the large geographic scope of these formations, the magnitude of the type of analysis requested by Allegheny bears no relationship to the limited magnitude of Tennessee's and National Fuel's instant proposals.¹⁶¹ As discussed in the February 27 Order, project construction will mostly occur within previously disturbed rights-of-way co-located with existing facilities and will be of relatively short duration, followed by restoration activities.¹⁶² Moreover, for the reasons discussed above, even if the Commission were to vastly expand the geographic scope of the cumulative effects analysis, the impacts from upstream gas development are not reasonably foreseeable.¹⁶³

86. 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 and Utica Shale formations, an area that covers potentially thousands of square miles. We decline to do so. As the Commission explained in the February 27 Order¹⁶⁴ and herein, there is no Commission program or policy to promote additional natural gas development and production in shale formations.

87. Allegheny's reliance on *LaFlamme v. FERC* 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.¹⁶⁵ In *LaFlamme*, the Ninth Circuit criticized the Commission's environmental review of the the Sayles Flat Project, a hydroelectric project on the American River, because the

¹⁶¹ Tennessee's proposals would permanently disturb 17.74 out of 80.74 total acres of disturbed land, and National Fuel's proposals would permanently disturb 17.65 out of 39.02 total acres of disturbed land. EA at 11–12.

¹⁶² February 27 Order, 150 FERC ¶ 61,160 at P 65.

¹⁶³ The 2014 study published by M.C. Brittingham and other authors, *supra* note 148, offers only general conclusions about the potential qualitative impacts on terrestrial and aquatic ecosystems from shale development. It provides no specific information regarding those impacts, much less specific details with respect to the Northern Access 2015 and Niagara Expansion Projects.

¹⁶⁴ February 27 Order, 150 FERC ¶ 61,160 at P 54.

¹⁶⁵ 852 F.2d 389 (9th Cir. 1988).

Commission relied on the “narrow analysis” of another hydroelectric project’s EIS 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.¹⁶⁶ By contrast, the Northern Access 2015 and Niagara Expansion Projects’ EA looked at other projects within the immediate landscape, watershed, and airshed relevant to the projects’ 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.

88. Allegheny’s reliance on *Natural Resources Defense Council v. Hodel*¹⁶⁷ 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. 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). By contrast, the “plan” before the Commission involves construction of approximately 3.1 miles of pipeline loop, the construction of a new compressor station, 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

89. The Department of the 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

¹⁶⁶ *Id.* 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).

¹⁶⁷ 865 F.2d 288 (D.C. Cir. 1988).

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

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 formations 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.

E. Natural Gas Act

90. 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.¹⁷⁰ Allegheny argues that the Commission applies the Certificate Policy Statement unfairly by emphasizing access to new gas supplies in the Marcellus and Utica Shale regions while downplaying or ignoring the countervailing environmental impacts of that access. Thus, Allegheny contends that the Commission fails the explicit goal to “avoid[] unnecessary disruption of the environment” and also heavily favors the issuance of certificates.¹⁷¹

91. Allegheny’s argument under the Certificate Policy Statement is merely an extension of its arguments under NEPA and the ESA that we rejected in the EA, the February 27 Order, and herein. The Commission does not participate in any program to authorize or facilitate Marcellus and Utica Shale gas production. The Commission does not favor any one source of natural gas over any other; sourcing of gas is a market decision. The February 27 Order’s discussion of the Certificate Policy Statement addressed the Niagara Expansion and Northern Access 2015 Projects’ potential disruption of the environment, finding the impacts to be minimized.¹⁷² Based on the

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, Statement of Policy*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹⁷¹ Allegheny Request for Rehearing at 90-91 (quoting Certificate Policy Statement, 88 FERC at 61,736).

¹⁷² February 27 Order, 150 FERC ¶ 61,160 at PP 26, 32.

record in this proceeding, the Commission continues to find that on balance, pursuant to the criteria set forth in the Certificate Policy Statement, the Niagara Expansion and Northern Access 2015 Projects are required by the public convenience and necessity.¹⁷³ We affirm our conclusion that our approval of the projects, if constructed and operated in accordance with Tennessee and National Fuel's applications, as supplemented, and in compliance with the environmental conditions to the February 27 Order, does not constitute a major federal action significantly affecting the quality of the human environment.¹⁷⁴

The Commission orders:

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁷³ *Id.* PP 27-28.

¹⁷⁴ *Id.* P 98.