

155 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rockies Express Pipeline LLC

Docket No. CP14-498-001

ORDER DENYING REHEARING

(Issued April 7, 2016)

1. On February 27, 2015, the Commission issued Rockies Express Pipeline LLC (Rockies Express) a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act (NGA)¹ to construct and operate the Zone 3 East-to-West Project (East-to-West Project or project).² On March 27, 2015, Allegheny Defense Project and Freshwater Accountability Project (collectively Allegheny) filed a timely joint request for rehearing. Allegheny's petition for rehearing asserts the Commission's environmental review for Rockies Express's East-to-West Project failed to comply with the National Environmental Policy Act (NEPA).³ Allegheny contends that the Commission's Environmental Assessment (EA) was inadequate because it: (1) improperly relied on mitigation measures; (2) segmented from its analysis Natural Gas Pipeline Company's (Natural) Chicago Market Expansion Project; (3) failed to consider the effects of natural gas development as indirect impacts of the project; (4) failed to consider gas development in the cumulative impacts analysis; and (5) failed to prepare a Programmatic Environmental Impact Statement (PEIS). In its request for rehearing, Allegheny asserted

¹ 15 U.S.C. § 717f(c) (2012).

² A full description of the East-to-West Project can be found in the underlying certificate order, *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 (2015) (Certificate Order).

³ 42 U.S.C. § 4321 *et seq.* (2012).

that the Commission should not allow Rockies Express's East-to-West Project to go forward until the Commission had remedied Allegheny's alleged NEPA violations.⁴

2. As discussed below, we reject Allegheny's arguments that our environmental review for the East-to-West Project was inadequate or failed to satisfy NEPA requirements. Accordingly, we deny Allegheny's request for rehearing.

I. Mitigation Measures

3. An agency may use mitigation measures to minimize a proposed action's possible adverse impacts below the level of significance when the adequacy of the proposed mitigation measures is supported by substantial evidence.⁵ In practice, mitigation measures have been found to be sufficiently supported when they are based on agency studies or when they "are likely to be adequately policed."⁶ If mitigation measures are mandatory, and a program exists to monitor and enforce those measures, then the efficacy of the mitigation measures has been found to be assured.⁷

⁴ On March 11, 2015, after confirming that Rockies Express had received all necessary federal authorizations and that its Implementation Plan included the information necessary to meet pre-construction conditions, the Commission's Office of Energy Projects (OEP) granted clearance in Docket No. CP14-498-000 for Rockies Express to begin construction of the East-to-West Project. On July 8, 2015, July 30, 2015, and September 1, 2015, OEP approved Rockies Express's requests to place various project facilities in service.

⁵ Certificate Order, 150 FERC ¶ 61,161 at P 30 (citing *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (*Audubon Society*). See also "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026, 18,038 (1981)); *Cabinet Mountain Wilderness v. R. Max Peterson*, 685 F.2d 678 (D.C. Cir. 1982). As the court explained in *Audubon Society*, the requirement that the mitigation measures imposed by an agency be supported by substantial evidence that they will be adequate to mitigate a potential impact to be below significant levels provides assurance that the agency is not relying on the mitigation measures as a way to avoid preparation of an environmental impact statement (EIS). *Audubon Society*, 132 F.3d at 17.

⁶ *Audubon Society*, 132 F.3d at 17.

⁷ *Id.*

4. On rehearing, Allegheny renews its argument that the mitigation measures required by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (Erosion Control Plan or Plan) and *Wetland and Waterbody Construction and Mitigation Procedures* (Wetland and Waterbody Mitigation Procedures or Procedures) were insufficient to ensure adequate mitigation of the impacts of Rockies Express's East-to-West Project on waterbodies.⁸ Allegheny alleges that nothing in the Certificate Order shows that the Plan and Procedures are supported by monitoring or agency studies.⁹ Allegheny again cites to violations by Tennessee Gas Pipeline Corporation (Tennessee Gas) of Pennsylvania's Clean Streams Law¹⁰ during construction of the 300 Line Project as evidence that the Plan and Procedures generally are not sufficient to insure that pipeline projects' impacts on waterbodies will be adequately mitigated.¹¹

5. The Commission disagrees. The Erosion Control Plan and Wetland and Waterbody Mitigation Procedures are based on the Commission's expertise developed from its experience as an agency with regulatory authority over the construction of interstate pipeline facilities. Based on that experience, the Plan and Procedures include industry best management practices designed to minimize the extent and duration of disturbance on wetlands and waterbodies during project construction, and have been

⁸ Allegheny March 27, 2015 Rehearing Request at 8. The Erosion Control Plan and Wetland and Waterbody Mitigation Procedures identify mitigation measures that are required, as applicable, to minimize erosion, enhance revegetation, and minimize the extent and duration of disturbance on wetlands and waterbodies during and following project construction. *Notice of Availability of Final Revisions to the Plan and Procedures*, 78 Fed. Reg. 34,374 (June 7, 2013). The current versions of the Plan and Procedures are available on the Commission's website at <http://www.ferc.gov/industries/gas/enviro/guidelines.asp>.

⁹ Allegheny March 27, 2015 Rehearing Request at 9.

¹⁰ Pennsylvania's Clean Streams Law was enacted on June 22, 1937, and subsequently amended to align its requirements with the Clean Water Act. 35 PA. Cons. Stat. § 691.1, *et seq.*

¹¹ Allegheny March 27, 2015 Rehearing Request at 10. Tennessee Gas's 300 Line Project included, inter alia, the construction of 127.4 miles of pipeline loop. *Tennessee Gas Pipeline Company, L.L.C.*, 131 FERC ¶ 61,140 (2010).

revised three different times over the past 20 years to reflect observations in the field.¹² This history of refining the Plan and Procedures based on construction reporting lends further support to their effectiveness. Further, the Certificate Order included the Plan and Procedures as mandatory conditions¹³ and required future monitoring to ensure their efficacy. This monitoring took the form of project-specific environmental inspectors and, as described below, pipeline reporting before, during, and after facility construction.

6. Prior to construction, Rockies Express was required to have in place a construction Implementation Plan approved by the Director of the Office of Energy Projects (OEP) to ensure that construction activities would fully comply with all required mitigation measures, which included the Erosion Control Plan and Wetland and Waterbody Mitigation Procedures.¹⁴ Rockies Express also had to file certified statements that company and contractor personnel had or would receive any necessary training to ensure

¹² Certificate Order, 150 FERC ¶ 61,161 at P 32. Commission staff most recently revised the Plan and Procedures in 2013, following two rounds of stakeholder comments, including those from the natural gas industry, federal, state and local agencies, environmental consultants, inspectors, construction contractors, nongovernmental organizations and other interested parties with special expertise with respect to environmental issues commonly associated with pipeline projects and other natural gas facility construction projects. *Notice of Availability of Final Revisions to the Plan and Procedures*, 78 Fed. Reg. 34,374.

¹³ The Certificate Order's Environmental Condition No. 1 required that Rockies Express fully comply with all of the construction procedures and mitigation measures to which it had committed in its application. Certificate Order, 150 FERC ¶ 61,161 at Appendix B. Rockies Express committed in its June 10, 2014 application to adopting the Commission's Erosion Control Plan and Wetland and Waterbody Mitigation Procedures to minimize the impacts of construction disturbance on water quality and other resources. Application at Resource Report 1 at 1-9 and Resource Report 3 at 3-4. When Rockies Express submitted its Implementation Plan on March 2, 2015 in accordance with Environmental Conditions Nos. 3 and 6 of Appendix B to the Certificate Order, it affirmed its commitment to ensure that its construction of the East-to-West Project facilities "complies with procedures and mitigation measures described in the Project application and supplements (including responses to staff data requests), identified in the EA, the environmental conditions appended to the Order, and the applicable measures identified by resource management and permitting agencies." Implementation Plan at 11.

¹⁴ Certificate Order, 150 FERC ¶ 61,161 at Appendix B, Environmental Condition No. 6.

proper implementation of all required environmental mitigation measures¹⁵ and that it would have an onsite Environmental Inspector.¹⁶ During construction, the Certificate Order required Rockies Express to file monthly status reports, which would notify staff of any problem areas, noncompliance events, and any corrective actions taken.¹⁷ After construction, the Certificate Order conditioned receipt of authorization to begin service on a showing that Rockies Express was satisfactorily restoring areas affected by the project.¹⁸ The Certificate Order required an additional affirmation statement confirming compliance with all conditions within thirty days of placing the authorized facilities into service,¹⁹ and, pursuant to the Commission's Erosion Control Plan, required that Rockies Express file quarterly activity reports for at least two years following construction.²⁰

7. Moreover, the Certificate Order did not rely solely on the Plan and Procedures to ensure adequate mitigation. As explained in the Certificate Order, the requirements of the Plan and Procedures imposed baseline mitigation measures for Rockies Express's East-to-West Project. The EA's finding that the project would have no significant environmental impacts relied on all of Rockies Express's commitments²¹ in "its application and supplements, and the staff's recommended mitigation measures," which in addition to the erosion control measures detailed in the Plan and Procedures, included

¹⁵ *Id.*, Environmental Condition No. 3.

¹⁶ *Id.* The environmental inspector has the authority to stop activities that "violate the environmental conditions of the [Commission's] Orders, stipulations of other environmental permits or approvals, or landowner easement agreements; and to order appropriate corrective action." Plan at 2.

¹⁷ Certificate Order, 150 FERC ¶ 61,161 at Appendix B, Environmental Condition No. 7.

¹⁸ *Id.* at Appendix B, Environmental Condition No. 9.

¹⁹ *Id.* at Appendix B, Environmental Condition No. 10.

²⁰ Plan at 18.

²¹ Absent evidence to the contrary, the Commission may assume that a certificate holder will exercise good faith in adhering to the commitments made in its application and complying with the requirements of our authorization. See *Murray Energy Corp. v. FERC*, 629 F.3d 231, 239-40 (D.C. Cir. 2011) (ruling that FERC reasonably assumed that Rockies Express would exercise good faith in developing required mitigation). If a company fails to do so, the Commission has the authority to enforce the requirements of its orders, as well as to require additional mitigation as necessary.

those in the U.S. Army Corps of Engineers' Nationwide Permit 12.²² The EA properly relied on these mitigation measures to reduce any minor adverse impacts on water quality to well below a level of significance. The East-to-West Project's compliance reports verify this finding. None of the project's construction and restoration reports show any indication of problem areas, non-compliance, or any other environmental concerns,²³ underscoring the Plan and Procedures' efficacy.

8. Finally, we find that the fact that Tennessee Gas was found to have violated Pennsylvania's Clean Streams Law during construction of a different pipeline project provides no support for Allegheny's allegation that the requirements of the Plan and Procedures are inadequate to prevent or sufficiently minimize the environmental impact of Rockies Express's Project. The issue raised is one of compliance, rather than adequacy of the required mitigation. One instance of non-compliance does not support a conclusion that there are pervasive flaws in the required mitigation measures, let alone in the Plan and Procedures. To that point, in the course of this proceeding Allegheny has not identified any parts of the Plan and Procedures for Rockies Express's East-to-West Project that it believes to have been deficient. Neither has Allegheny identified any project impacts that were not adequately mitigated by Rockies Express' compliance with the Plan and Procedures.

II. Segmentation

9. The Council on Environmental Quality's (CEQ) regulations require that the Commission include "connected actions," "cumulative actions," and "similar actions" in its NEPA analyses.²⁴ An agency impermissibly "segments" its NEPA review "when it divides connected, cumulative, or similar federal actions into separately reviewed projects and thereby fails to address the true scope and impact of the activities that should be under consideration."²⁵ In *Delaware Riverkeeper Network v. FERC*, the D.C. Circuit

²² Certificate Order, 150 FERC ¶ 61,161 at Appendix B, Environmental Condition 1; Environmental Assessment (EA) at 12.

²³ During the construction period, Rockies Express filed the required monthly reports on April 2, 2015, May 1, 2015, June 1, 2015, July 1, 2015, August 3, 2015, and September 2, 2015. Rockies Express filed an additional post-construction affirmation statement on September 4, 2015. As required by the Plan, Rockies Express filed its first quarterly post-construction report on December 2, 2015.

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

²⁵ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (*Delaware Riverkeeper*).

emphasized that an “agency’s determination of the proper scope of its environmental review must train on the governing regulations, which here means 40 C.F.R. § 1508.25(a).”²⁶ Our environmental review here followed CEQ regulations against segmentation.

10. Allegheny renews its argument that before approving Rockies Express’s East-to-West Project, the Commission should have examined it and Natural’s Chicago Market Expansion Project²⁷ together as connected, cumulative, or similar actions. In support of its position, Allegheny emphasizes that Rockies Express proposed as part of the East-to-West Project to increase capacity at its Moultrie interconnection with Natural’s system and that, while this application was pending, Natural conducted an open season from October 16, 2014, to November 17, 2014, to assess shipper interest in transporting additional gas quantities from the Moultrie interconnection to Chicago markets.

A. Connected Actions

11. 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.²⁸ Courts have applied a “substantial independent utility” test in evaluating whether actions are improperly segmented. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”²⁹ 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.

²⁶ *Id.* at 1315.

²⁷ Proposed by application filed June 1, 2015, in Docket No. CP15-505-000, Natural’s Chicago Market Expansion project involves the construction of a compressor station and related facilities in Livingston County, Illinois, enabling Natural to provide an additional 238,000 Dth per day of transportation service. *See Natural Gas Pipeline Company of America LLC*, 154 FERC ¶ 61,220 (2016).

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

²⁹ *Coalition 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.”).

12. In *Delaware Riverkeeper*, the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and where those projects were financially interdependent.³⁰ 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.³¹ Subsequently, the same court has indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.³²

13. Staff completed its environmental review for Rockies Express’s East-to-West Project on November 24, 2014, and the Commission issued its order approving the project on February 27, 2015. Although Natural conducted an open season for its Chicago Market Expansion Project from October 16, 2014, to November 17, 2014, Natural did not file its application for the project until June 1, 2015.³³ Thus, it is clear that the two projects were not pending before the Commission at the same time. Contrary to Allegheny’s assertion, the conduct of an open season does not render a project “proposed” for purposes of compelling a joint NEPA review. Projects at that early stage of development have uncertain futures and can, if they indeed go forward, change in scope, facilities, and/or location prior to being proposed in an application. The effects of projects at that stage cannot be meaningfully evaluated.

14. Moreover, beyond the fact that Natural’s Chicago Market Expansion Project was not pending before the Commission during our consideration of Rockies Express’s East-to-West Project, the projects do not meet CEQ’s criteria for connected action, having substantial independent utility. Rockies Express’s bi-directional mainline system is capable of transporting up to 1,800,000 Dth of natural gas per day between Meeker, Colorado and Clarington, Ohio. Natural’s larger Gulf Coast Line, which extends from South Louisiana and the Texas Gulf Coast to Chicago, Illinois, is capable of transporting up to 2,350,000 Dth of natural gas per day. Rockies Express’s mainline and Natural’s

³⁰ *Del. Riverkeeper Network*, 753 F.3d at 1314-16.

³¹ *Id.* at 1314.

³² *See Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014).

³³ *See Natural Gas Pipeline Co. of America LLC*, 154 FERC ¶ 61,220 (2016). Natural did not engage in the Commission’s pre-filing process for its Chicago Market Expansion Project.

Gulf Coast Line connect to several other pipelines along their routes and the two lines meet at the Moultrie meter station in Moultrie County, Illinois.

15. One component of Rockies Express's East-to-West Project will result in the interconnection facilities with Natural at Moultrie becoming bi-directional, and its capacity for delivery and processing increased from 615,000 Dth per day to 1,750,000 Dth per day. Rockies Express's activities at Moultrie include installation of larger diameter pipe, eight process line heaters, filtration, and other station piping and valves.³⁴ While the Chicago Market Expansion Project will enable Natural to provide an additional 238,000 Dth per day of firm transportation service, Commission staff's engineering review confirms that Natural does not need to make any modifications to its system in order to receive the additional volumes Rockies Express will be able to deliver at Moultrie as a result of its East-to-West Project. Rather, the compression added by the Market Expansion Project will enable Natural to meet the need on the part of one of Natural's largest shippers, Nicor Gas, for delivery of gas at a higher pressure.³⁵

16. The fact that the East-to-West Project and Chicago Market Expansion Project may operate to facilitate incremental service between the two pipelines, should not be equated with NEPA's more stringent connected action requirement. The capacity of the two projects is subscribed by different shippers. Ultimately, each project would have occurred in the other's absence and the two projects are not functionally interdependent. Further, as the *Delaware Riverkeeper* court recognized in its decision in *Myersville Citizens for a Rural Community, Inc. v. FERC*,³⁶ when projects are neither functionally nor financially interdependent, they do not become connected actions as contemplated by NEPA simply because shippers that will use capacity to be created by one project may also use capacity that will be created by the other project.³⁷

³⁴ The line heaters and filtration equipment is necessary to ensure gas delivered from Rockies Express will meet Natural's gas quality standards.

³⁵ See Natural's Application in Docket No. CP15-505-000 at 3.

³⁶ 783 F.3d 1301 (D.C. Cir. 2015) (*Myersville*).

³⁷ *Id.* at 1326-27. While Natural's Chicago Market Expansion Project may well transport gas that Rockies Express is able to deliver as a result of its East-to-West Project, since Natural is already able to receive the additional volumes of gas that Rockies Express is able to deliver as a result of its East-to-West Project, Rockies Express's project was not necessary to support Natural's proposed Chicago Market Expansion Project.

B. Cumulative Actions

17. Allegheny again argues that Rockies Express's East-to-West Project and Natural's Chicago Market Expansion Project are cumulative actions "because they will have cumulatively significant impacts related to gas drilling in the Marcellus and Utica shale formations."³⁸

18. 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.³⁹ As stated by the Fifth Circuit Court of Appeals, actions that are merely contemplated, as opposed to proposed, are not cumulative actions: "Proposed actions with potential cumulative impacts may mandate the preparation of a regional or comprehensive impact statement, contemplated actions with potential cumulative impacts cannot"⁴⁰ Because Natural's application for its Chicago Market Expansion Project was filed three months after the Commission had issued its order certifying Rockies Express's East-to-West Project, they did not constitute cumulative actions.

19. In any event, for purposes of the respective cumulative impacts analyses for Rockies Express's East-to-West Project and Natural's Chicago Market Expansion Project, the Commission's staff identified each project's region of influence, i.e., the areas that might be impacted by the project's construction activities and operation of the proposed facilities.⁴¹ The impacts of both the East-to-West Project and the Chicago Market Expansion Project will be minor, temporary, and highly localized. None of the identified areas for either project overlapped with any identified area for the other project. Further, Allegheny does not identify areas where Rockies Express's and Natural's projects could have cumulative impacts.

³⁸ Rehearing Request at 28-29.

³⁹ 40 C.F.R. § 1508.25(a)(2) (2015).

⁴⁰ *Fritiofson v. Alexander*, 772 F.2d 1225, 1242 (5th Cir. 1985), *overruled on other grounds by Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669 (5th Cir. 1992). *See also Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 441-42 (5th Cir. 1981) (holding that comprehensive review is not required for contemplated but not yet proposed actions under 40 C.F.R. § 1508.25(a)(2)); *Del. Riverkeeper*, 753 F.3d 1304 (D.C. Cir. 2014) (noting that NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed").

⁴¹ EA for Rockies Express's East-to-West Project, issued November 24, 2014, Docket No. CP14-498-000, at 28; EA for Natural's Chicago Market Expansion Project, issued January 11, 2016, Docket No. CP15-505-000, at 27-28.

20. Rockies Express's construction activities during its East-to West Project were limited to the sites of its existing mainline compressor stations. Natural's Chicago Market Expansion Project consists of a new compressor station in Livingston County, Illinois, which would not be close enough to any of the facilities at which Rockies Express made modifications during its East-to-West Project for any impacts of the projects, such as emissions or noise, to impact the same areas.

C. Similar Actions

21. Allegheny summarily states that the Commission violated NEPA by failing to consider the Chicago Market Expansion Project and East-to-West Project as similar actions, but does not explain in its pleading why the two projects are similar actions.⁴²

22. 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."⁴³ Unlike connected and cumulative actions, analyzing similar actions is not always mandatory.⁴⁴ The CEQ regulations state that "[a]n agency *may* wish to analyze [similar] actions in the same impact statement," but it "*should* do so when the *best* way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement."⁴⁵ Given the fact that an application for the Chicago Market Expansion Project had not been filed and Commission staff thus lacked the necessary information to assess its potential impacts at the time it was conducting its environmental review of the East-to-West Project, we find that an single EA was neither required nor the best way to assess either proposal.

III. Indirect Impacts

23. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.⁴⁶ Indirect impacts are defined as those "which

⁴² Rehearing Request at 2, 5, 27.

⁴³ 40 C.F.R. § 1508.25(a)(3).

⁴⁴ *San Juan Citizens' Alliance v. Salazar*, 2009 WL 824410, at *13.

⁴⁵ 40 C.F.R. § 1508.25(a)(3) (emphasis added). *See also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004) (stating that agencies are only required to assess similar actions programmatically when such review is necessarily the best way to do so).

⁴⁶ *See* 40 C.F.R. § 1508.25(c) (2015).

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.”⁴⁷ 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.

24. With respect to causation, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause”⁴⁸ in order “to make an agency responsible for a particular effect under NEPA.”⁴⁹ As the Supreme Court explained, “a ‘but for’ causal relationship is insufficient [to establish cause for purposes of NEPA].”⁵⁰ 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.⁵¹ Further, the Court has stated that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁵²

25. An impact is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”⁵³ 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.”⁵⁴

⁴⁷ *Id.* § 1508.8(b) (2015).

⁴⁸ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

⁵² *Pub. Citizen*, 541 U.S. at 770.

⁵³ *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).

⁵⁴ *Northern Plains Resources Council, Inc. v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011).

26. Allegheny repeats its argument that the EA should have analyzed as an indirect effect the environmental impacts associated with induced natural gas production in the Marcellus and Utica shales. However, 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 localized. 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.

27. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by the CEQ regulations.⁵⁵ 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).⁵⁶ Though we recognize that Allegheny disagrees with our reliance on these cases, we are not persuaded to change our position. 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

⁵⁵ 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).

⁵⁶ 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).

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.

28. 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 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.⁵⁷

29. 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.⁵⁸ The Environmental

⁵⁷ *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).

⁵⁸ 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>.

Protection Agency has reached a similar conclusion.⁵⁹ 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.⁶⁰ It also found that such emissions may contribute to climate change. But to the extent that natural gas production replaces the use of other carbon-based energy sources, the Department of Energy found that there may be a net positive impact in terms of climate change.⁶¹

30. Below, we discuss Allegheny's challenges to our causation and reasonable foreseeability findings and affirm our determination in the Certificate Order that impacts from future natural gas production is neither a project "effect" nor reasonably foreseeable.

A. Lack of Causality

31. Allegheny contends that the East-to-West Project will increase the options for transporting gas produced in the Marcellus and Utica shale regions to markets and make the project likely to induce future production activities in those areas. As evidence to support its argument, Allegheny again points to the statement by one of the project's producer-shippers that having contracts with multiple pipelines will "de-risk [its natural gas] production growth."⁶²

32. Allegheny alleges that the Commission's failure to consider the potential for induced additional shale gas production activities was similar to the U.S. Army Corps of Engineers (Corps) "tunnel vision" that caused the court to find in *Colorado River Indian Tribes v. Marsh (Colorado River)* that the Corps had failed to satisfy NEPA requirements

⁵⁹ 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").

⁶⁰ DOE Addendum at 32.

⁶¹ *Id.* at 44.

⁶² Rehearing Request at 14 (citing Certificate Order, 150 FERC ¶ 61,161 at P 38).

by limiting its consideration to “only those impacts physically dependent upon activities within its redefined jurisdiction [which] was tantamount to limiting its assessment to primary impacts.”⁶³

33. Allegheny asserts that without Rockies Express’s East-to-West Project, the project’s producer-shippers would drill fewer wells. It also alleges that the reservation of east-to-west capacity by producer-shippers is evidence that Rockies Express’s project would induce more production in the Marcellus and Utica shale regions.⁶⁴ The record, however, does not show that future gas wells in the Marcellus and Utica shale basins is a reasonably certain “effect” of the project’s construction.

34. As Allegheny pointed out in its comments, the four producer-shippers with precedent agreements for the new east-to-west capacity to be created by Rockies Express’s project already had acquired the drilling and production rights to more than four million acres in the Marcellus and Utica shale regions.⁶⁵ Even if a causal relationship between approval of Rockies Express’s project and additional production were presumed, the areas where those impacts might be felt, the nature of the impacts in those areas, and the scope of the impacts are not reasonably foreseeable. Although we know the identities of these producer-shippers, the amount of pipeline capacity they have reserved, and that they have acquired drilling and production rights in two very large regions spanning tens of thousands of square miles, we can only speculate on the number and location of new wells that the producers may drill to produce the gas that they will have transported using the reserved capacity on Rockies Express’s pipeline. As we have

⁶³ *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985) (*Colorado River*).

⁶⁴ Certificate Order, 150 FERC ¶ 61,161 at P 39.

⁶⁵ Rockies Express had precedent agreements with four producer-shippers for the east-to-west capacity to be created by its project: American Energy – Utica (AEU), 550,000 Dth per day; EQT Energy, 300,000 Dth per day; Gulfport Energy, 175,000 Dth per day; and Rice Drilling B, 175,000 Dth per day. Certificate Order, 150 FERC ¶ 61,161, at P 4. Public well and lease data submitted by Allegheny indicated that (1) AEU had mineral rights to 280,000 net acres and plans to drill 2,600 gross wells in the Utica Shale and had acquired 48,000 net acres and plans to drill 410 gross wells; (2) EQT Energy had secured drilling rights to almost 3.6 million acres in the Appalachian basin and plans to drill 186 Marcellus wells; (3) Gulfport Energy had leased 179,000 net acres and planned to drill 85-95 gross wells; and (4) Rice Drilling B had leased 127,000 net acres in Appalachia with 787 net risked locations in the Marcellus and Upper Devonian. *Id.* at n. 53.

explained in other proceedings and in the Certificate Order, a number of factors, such as domestic natural gas prices and production costs drive new drilling.⁶⁶

35. *Colorado River* does not support Allegheny's argument that Rockies Express's project is inducing more production activities in the Marcellus and Utica shale regions. In *Colorado River*, a district court held that the Corps violated NEPA by not preparing an environmental impact statement (EIS) for a permit authorizing a developer to place riprap along a riverbank, i.e., place large boulders along the riverbank to stabilize it from erosion. In an earlier draft EIS, the Corps had determined that a proposed residential and commercial development adjacent to the river was dependent upon the Corps' permit. Before completing a final EIS, however, the Corps retracted its draft EIS because it 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.⁶⁷ 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 East-to-West Project. 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. It is not new, but preexisting, shale gas development that provided motivation for the project. Natural gas development will likely continue with or without the East-to-West Project.

B. Lack of Reasonable Foreseeability

36. Allegheny argues that future natural gas production is reasonably foreseeable, claiming that there is no need to know the exact location of production activities. Allegheny argues that the Commission must assess possible impacts "to the fullest extent

⁶⁶ *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); *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).

⁶⁷ *Colorado River*, 605 F. Supp. at 1428.

possible,” and therefore it is the Commission’s responsibility, not the public’s, to ascertain these potential indirect impacts.⁶⁸

37. As the Commission stated in the Certificate Order, even if the project’s facilities transport natural gas from future wells, the number, location, and therefore the environmental impacts of these additional wells are matters of speculation. A broad analysis, based on generalized assumptions, does not provide the Commission with meaningful information on which to base its decision.⁶⁹

38. Allegheny points to *Northern Plains Resource Council v. Surface Transportation Board*⁷⁰ as an example where precise information was not available, but we find that case is not applicable. *Northern Plains* addressed the issue of whether the Surface Transportation Board should have considered the cumulative impacts of coal bed methane well development as part of its NEP analysis of a proposed 89-mile-long rail line intended to serve specific new coal mines in three Montana counties. *Northern Plains* is distinguishable because, as part of an earlier programmatic EIS, the Bureau of Land Management had already analyzed reasonably foreseeable coal bed methane well development, which provided the Surface Transportation Board with information about the timing, scope, and location of future coal bed methane well development. Here, the Commission has no similar information in the present case about the timing, location, and scope of future shale (or conventional) well development that might be associated with the East-to-West Project. As indicated in the Certificate Order, *Northern Plains* establishes that while agencies must engage in reasonable forecasting in considering cumulative impacts, NEPA does not require an agency to “engage in speculative analysis.”⁷¹

39. Further, *Northern Plains* concerned the foreseeability of impacts from coal bed methane extracted from specific new coal mines in three Montana counties, which the proposed rail line was intended to service. Here, Allegheny asks us to consider the impacts from all potential gas production activities in a multistate region, which may or may not produce gas which will be transported on the East-to-West Project. Such analysis will not provide meaningful assistance to the Commission in its decision making.

⁶⁸ Rehearing Request at 18.

⁶⁹ 150 FERC ¶ 61,161, at P 40.

⁷⁰ 668 F.3d 1067 (9th Cir. 2013) (*Northern Plains*) .

⁷¹ *Id.* at 1078.

IV. Cumulative Impacts

40. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions”⁷² The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

41. On rehearing, Allegheny renews its claim that FERC failed to take the requisite hard look at the cumulative impacts of Marcellus and Utica shale extraction activities. Allegheny alleges that the Commission should have considered a geographic scale beyond the “general vicinity of Rockies Express’s East-to-West Project” to capture Marcellus and Utica shale gas development’s “inter-regional” cumulative impacts.⁷³ According to Allegheny, the Commission is obligated to analyze those upstream impacts because the project will transport Marcellus and Utica shale gas.

42. The Certificate Order fully addressed and denied Allegheny’s same cumulative impacts claims.⁷⁴ As we explained, the impacts from Rockies Express’s project involved various modifications to several existing interconnections and compressor stations, and the impacts of which are minor, temporary, and localized. The magnitude of the type of analysis requested by Allegheny, i.e. of impacts of gas drilling in the Marcellus, Upper Devonian, and Utica shale formations, bears no relationship to the magnitude of the Rockies Express proposal and occur outside the project’s regions of influence. The EA appropriately limited its review to other projects directly in the vicinity of each proposed modification for each resource analyzed.

V. Programmatic Impact Statement

43. CEQ’s regulations do not specifically require broad or “programmatic” NEPA reviews. The Council has explained that the concept of such reviews is imbedded in its regulation discussing broad actions and the tiering process.⁷⁵ CEQ has stated that a programmatic NEPA review may be appropriate where an agency: (1) is adopting

⁷² 40 C.F.R. § 1508.7 (2015).

⁷³ Rehearing Request at 19-20.

⁷⁴ Certificate Order, 150 FERC ¶ 61,161 at P 44.

⁷⁵ See CEQ, *Effective Use of Programmatic NEPA Reviews* at 11-12 (citing 40 C.F.R. § 1502.4(b)-(c)). Tiering is the use of an environmental document in a subsequent proceeding.

official policy; (2) is adopting a formal plan; (3) is adopting an agency program; or (4) is proceeding with multiple projects that are temporarily and spatially connected.⁷⁶ 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,⁷⁷ and the courts have concluded that there is no requirement for a programmatic 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.⁷⁸

44. On rehearing, Allegheny renews its claim that the Commission must prepare a programmatic EIS for natural gas infrastructure projects transporting natural gas from Marcellus and Utica shale formations in Pennsylvania, Ohio, and West Virginia. Allegheny claims such analysis is necessary because the Commission has proposed a broad federal action to deploy infrastructure in order to better coordinate the natural gas and electric markets, and alternatively, that a programmatic statement is the best way to assess this infrastructure build-out.⁷⁹

45. As the Commission explained in the Certificate Order, there is no Commission plan, policy, or program for the development of natural gas infrastructure serving the Marcellus and Utica shale formations.⁸⁰ Nor is a programmatic review the best way to analyze proposed projects that create takeaway capacity from the Marcellus and Utica shale formations. What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. Although several proposed projects may transport Marcellus and Utica shale natural gas, project impacts may not occur in that or even the same region. As projects are often proposed to serve different markets across the country, they will impact different geographic areas. To the extent multiple projects’ impacts are temporarily and spatially connected, the Commission will analyze those projects’ related impacts together. However, the review

⁷⁶ *Id.* at 13-15 (citing 40 C.F.R. §1508.18(b)).

⁷⁷ *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).

⁷⁸ *See Piedmont Environmental Council v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009).

⁷⁹ Rehearing Request at 29-30.

⁸⁰ Certificate Order, 150 FERC ¶ 61,161 at P 54.

Allegheny seeks would extend beyond a single region and encompass most of the United States.

The Commission orders:

Allegheny Defense Project's and Freshwater Accountability Project's joint request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.