

155 FERC ¶ 61,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Trans-Pecos Pipeline, LLC

Docket No. CP15-500-000

ORDER ISSUING PRESIDENTIAL PERMIT AND GRANTING AUTHORIZATION
UNDER SECTION 3 OF THE NATURAL GAS ACT

(Issued May 5, 2016)

1. On May 28, 2015, Trans-Pecos Pipeline, LLC (Trans-Pecos) filed an application seeking a Presidential Permit and authorization under section 3 of the Natural Gas Act (NGA)¹ to site, construct, and operate a border-crossing facility (the Presidio Border Crossing Project) for the import and export of natural gas at the international boundary between the United States and the Republic of Mexico in Presidio County, Texas.²

¹ 15 U.S.C. § 717b; 18 C.F.R. Part 153 (2015) (implementing regulations).

² Authorization under section 3 of the NGA is necessary for the siting, construction, or operation of facilities to import or export natural gas. In addition, pursuant to Executive Order No. 10485, dated September 3, 1953 (18 Fed. Reg. 5397), as amended by Executive Order No. 12038, dated February 3, 1978 (43 Fed. Reg. 4957), a Presidential Permit also must be obtained for the portion of an import or export facility crossing one of the United States international borders. In Delegation Order No. 00-004.00A, effective May 16, 2006, the Secretary of the U.S. Department of Energy (DOE) renewed the delegation of authority to the Commission to grant or deny authorization under section 3 of the NGA and, if applicable, a Presidential Permit for the construction, operation, maintenance, or connection of import and export facilities. The Commission has no authority to approve or disapprove applications to import or export natural gas. The Secretary of Energy has delegated such authority to DOE's Assistant Secretary for Fossil Energy.

2. For the reasons discussed below, the Commission will grant the requested authorizations, subject to certain conditions.

I. Background and Proposal

3. Trans-Pecos is a limited liability company organized under the laws of Texas. Trans-Pecos is owned by Energy Transfer Mexicana, LLC, a subsidiary of Energy Transfer Partners, L.P.³

4. Trans-Pecos proposes to construct and operate a border-crossing facility consisting of approximately 1,093 feet of 42-inch-diameter pipeline extending from a point approximately 12.5 miles northwest of the City of Presidio in Presidio County, Texas, to the middle of the Rio Grande River at the international boundary with the State of Chihuahua, Mexico. The pipeline will be installed using a horizontal directional drill (HDD) under the Rio Grande River. It will have a design capacity of 1.3 billion cubic feet (Bcf) per day and a maximum allowable operating pressure of 1,440 pounds per square inch gauge. The pipeline will cost approximately \$3.6 million.⁴ Trans-Pecos states that a Mexican affiliate will complete the HDD on the Mexican side of the border and construct a stub pipeline to an interconnection with the Mexican pipeline grid.

5. Trans-Pecos contemplates owning, constructing, and operating an intrastate pipeline in Texas, the Trans-Pecos Pipeline, that would be subject to the jurisdiction of the Railroad Commission of Texas. The Trans-Pecos intrastate pipeline will transport gas southwest from a hub in Pecos County, Texas, to the proposed border-crossing facility. The intrastate pipeline will consist of approximately 148 miles of 42-inch-diameter pipeline with a total capacity of 1.3 Bcf per day. Trans-Pecos anticipates that the intrastate pipeline will interconnect with other Texas intrastate pipelines, as well as processing plants, and that it may later interconnect with interstate pipelines. Trans-Pecos also states that while it will initially provide only intrastate service on its contemplated upstream pipeline, it may at a later time provide transportation services under section 311 of the Natural Gas Policy Act (NGPA).⁵

³ Energy Transfer Partners, L.P. owns and operates approximately 35,000 miles of natural gas and natural gas liquids pipelines.

⁴ Energy Transfer Partners, L.P., or an affiliate, will operate the cross-border facilities.

⁵ 15 U.S.C. § 3371 (2012).

6. Trans-Pecos states that the proposed border-crossing facility will deliver gas to an interconnecting Mexican pipeline to help meet the demands of Mexico's expanding electric generation and industrial markets.⁶ Trans-Pecos has obtained blanket authorization from DOE to import and export up to 500 Bcf of natural gas per day from any point on the United States/Mexican border for a two-year period.⁷

II. Public Notice, Interventions, and Comments

7. Notice of Trans-Pecos's application was published in the *Federal Register* on June 16, 2015 (80 Fed. Reg. 34,402). Timely, unopposed motions to intervene were filed by Big Bend Conservation Alliance (Big Bend), Presidio County Commissioners Court (Presidio County), Coyne A. Gibson, and Sierra Club. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁸

8. The parties listed in Appendix A to this order filed late motions to intervene. We will grant the late-filed motions to intervene, since to do so at this stage of the proceeding will not delay, disrupt, or unfairly prejudice the proceeding or other parties.⁹

9. Big Bend's and Mr. Gibson's motions to intervene included protests. On July 15, 2015, Trans-Pecos filed an answer to the protests. Although the Commission's Rules of Practice and Procedure do not permit answers to protests, the Commission finds good cause to waive its rules and accept the answer because it provides information that has assisted us in our decision making.¹⁰ The issues raised in the protests and comments are addressed in the Environmental Assessment (EA) and, as appropriate, in the environmental section of this order.

⁶ Trans-Pecos states that it will enter into an interconnection and operating agreement with the Mexican pipeline.

⁷ See DOE Docket No. 15-75-NG, issued June 11, 2015.

⁸ 18 C.F.R. § 385.214(c)(1) (2015).

⁹ See 18 C.F.R. § 385.214(c)(2) (2015).

¹⁰ 18 C.F.R. § 385.213(a)(2) (2015).

III. Consultation with Secretaries of State and Defense

10. On June 26, 2015, the Commission sent copies of the application and a draft Presidential Permit to the Secretaries of State and Defense for their recommendations. Replies on behalf of the Secretary of State dated October 7, 2015, and the Secretary of Defense dated September 28, 2015, indicate no objection to the issuance of the requested Presidential Permit.¹¹

IV. Discussion

A. Public Interest

11. Because the proposed facilities will be used to import and export natural gas across the international border between the United States and Mexico, the siting, construction, and operation of the facilities are subject to the Commission's jurisdiction under section 3 of the NGA.

12. Section 3 provides for the Commission's approval of an application under that section "unless . . . it finds that the proposed exportation and importation will not be consistent with the public interest."¹² Consistent with its jurisdiction under section 3, the Commission may also apply terms and conditions as necessary and appropriate to ensure that the proposed siting, construction, and operation are not inconsistent with the public interest.¹³

13. NGA section 3 provides that the exportation and importation of natural gas between the United States and "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation and exportation shall be granted without modification or delay."¹⁴ This applies to the proposed project, as the United States and Mexico are signatories to the North American Free Trade

¹¹ Executive Order No. 10485, 18 Fed. Reg. 5397 (September 3, 1953), requires that the Commission obtain favorable recommendations of the Secretaries of State and Defense prior to issuing a Presidential Permit authorizing the construction of facilities at the borders of the United States for the exportation or importation of natural gas.

¹² 15 U.S.C. § 717b(a).

¹³ *Id.*

¹⁴ 15 U.S.C. § 717b(b).

Agreement.¹⁵ The border-crossing facilities are needed to export gas that is being produced in the United States for sale to expanding energy and industrial markets in Mexico. Authorization for construction of the facilities herein will promote national economic policy by reducing barriers to foreign trade and stimulating the flow of goods and services between the United States and Mexico, implementing a gas import/export arrangement that has been authorized by DOE's Office of Fossil Energy.¹⁶

14. Several commenters state that the project will benefit the pipeline owners and residents of Mexico, not residents of the United States. They contend that the underlying principles of the Commission's Certificate Policy Statement¹⁷ are applicable in determining public interest under NGA section 3 and argue that Trans-Pecos fails to show a need for the project because the combined capacity of Trans-Pecos's proposed facility and two other proposals currently pending before the Commission would exceed the Mexican customer's needs.¹⁸ They also argue that the proposed project is not in the public interest because it would harm the environment, as well as domestic energy needs and markets. Commenters claim that the record is inadequate regarding need for the pipeline because Trans-Pecos did not file a copy of the construction and operating agreement or a copy of a precedent agreement or other evidence of project subscribers.

15. Section 3(a) of the NGA provides, in part, that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do

¹⁵ Pub. L. No. 103-182, 107 Stat. 2057 (1993); Implementation of the North American Free Trade Agreement Act, Executive Order No. 12889, 58 Fed. Reg. 69,681 (Dec. 27, 1993).

¹⁶ See 10 C.F.R. § 590.202 (2015).

¹⁷ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000).

¹⁸ The two section 3 authorization proposals identified by the commenters are: (i) Comanche Trail Pipeline, LLC's (Comanche Trail) application filed on May 29, 2015, in Docket No. CP15-503-000; and (ii) Roadrunner Gas Transmission, LLC's (Roadrunner) application filed on April 9, 2015, in Docket No. CP15-161-000. On October 15, 2015, the Commission granted section 3 authorization and a presidential permit to Roadrunner to site, construct, operate, and maintain border-crossing facilities to import and export natural gas across the international boundary with Mexico. *Roadrunner Gas Transmission, LLC*, 153 FERC ¶ 61,041 (2015).

so.”¹⁹ In 1977, the DOE Organization Act transferred the regulatory functions of section 3 of the NGA to the Secretary of Energy.²⁰ Subsequently, the Secretary of Energy delegated to the Commission authority to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports.”²¹ The Secretary of Energy, however, has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity of natural gas, as part of the Commission’s public interest determination under NGA section 3(a).²² Thus, the claims that the capacity of this project, along with the capacity of the Roadrunner and Comanche Trail Projects, exceeds the demands of the indicated customer (Comision Federal de Electricidad) of the three projects are beyond the Commission’s purview and are not appropriately addressed here.²³

16. The construction and operation of the border-crossing facility will have a minimal impact on landowners because while the construction activities in the United States will temporarily disturb approximately 7.1 acres of land, only 1.3 acres will be permanently maintained for operation and maintenance. Two landowners own all the property that will be directly affected by construction activities and access.²⁴ After construction, Trans-Pecos will restore the disturbed areas to their preconstruction condition in accordance with the Commission’s guidelines. As discussed below and in the EA, the project will not have significant direct or indirect impacts on the environment if it is constructed and operated in compliance with the conditions in Appendix B to this order.

17. With respect to the concerns raised regarding adequacy of the record, we note that, on December 7, 2015, Trans-Pecos filed its construction and operation agreement in compliance with section 153.8(4) of the Commission’s regulations. Trans-Pecos is not

¹⁹ 15 U.S.C. § 717(a) (2012).

²⁰ *See* 42 U.S.C. § 7151(b) (2012).

²¹ DOE Delegation Order No. 00-004.00A (effective May 16, 2006).

²² *See, e.g., National Steel Corp.*, 45 FERC ¶ 61,100, at 61,332-33 (1988).

²³ *See* June 30, 2015 motion to intervene and protest of Big Bend at 14-15.

²⁴ We note that authorization under section 3 of the NGA does not convey the right of eminent domain.

required to file precedent agreements or other evidence of project subscribers in order for the Commission to grant an NGA section 3 authorization.²⁵

18. In view of the above considerations, the Commission finds that approval of the cross-border facility is not inconsistent with the public interest. Therefore, the Commission will issue a Presidential Permit, as set forth in Appendix C to this order, and an NGA section 3 authorization to site, construct, and operate the cross-border facility. However, the Commission will exercise its discretion under section 3 of the NGA to make its grant of authorization “upon such terms and conditions as the Commission may find necessary or appropriate.”

B. Environmental Analysis

19. On July 23, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI) and mailed it to interested parties, including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and potentially affected property owners.

20. Approximately 653 comments were filed by concerned individuals prior and in response to the issuance of the NOI, including Congressman Will Hurd of the 23rd District of Texas; State Senator Jose Rodriguez of the Texas’s 29th District (extending from El Paso to Big Bend); Maya L. Sanchez, Mayor of San Elizario, Texas; Brewster County Commissioner Mr. Luc Novovitch; the City of Alpine, Texas; and Coyne A. Gibson, a member of the Big Bend Conservation Alliance. In addition, several environmental groups, including the Big Bend Conservation Alliance, Sierra Club, and the Rio Grande International Study Center, as well as federal and state agencies, including the U.S. Environmental Protection Agency (EPA), the U.S. National Park Service (NPS), Big Bend National Park, and the Texas Parks and Wildlife Department (Texas PWD), also filed comments.

21. Most of the scoping comments, including those of Congressman Hurd and State Senator Rodriguez, as well as the Cities of Alpine and San Elizario, Brewster County, the Sierra Club, the Big Bend Conservation Alliance, the NPS Big Bend National Park, and the Rio Grande International Study Center, pertained to Trans-Pecos’s planned 148 miles of intrastate pipeline through Pecos, Brewster, and Presidio Counties, Texas. Specifically, the scoping comments addressed the ecological uniqueness of the Big Bend

²⁵ As noted above, by statute an import or export to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas shall be deemed to be consistent with the public interest.

area including: the Big Bend National Park; Fort Davis National Historic Center; Davis Mountain State Park; and the Chianti Mountains; and potential impacts on wildlife, including federal and state listed species. Commenters also asked the Commission to consider environmental impacts of the proposed Comanche Trail Pipeline, LLC facilities in Docket No. CP15-503-000. Many of these commenters asserted that the Commission should prepare an environmental impact statement (EIS).

22. In addition, the scoping comments addressed potential impacts on palustrine forested wetlands; migratory birds; wildlife habitat; federal and state-protected species; vegetation and invasive plant species; geologic resources; regional seismicity; cultural and archeological resources, including tribal coordination and the potential for burials and human remains in the project area; pipeline safety; air quality; light pollution; environmental justice; local and regional economies; as well as cumulative impacts; project alternatives; and project need.

23. We also received scoping comments regarding adherence to the federal requirements of the Wild & Scenic Rivers Act and specific concerns for the Rio Grande River, including impacts on the recreational and biological value; concerns for water used during project construction; potential impacts to shallow aquifers along the river; spills of hazardous materials; sedimentation during the HDD and geotechnical drilling investigations; and siting of HDD entrance and exit points at the Rio Grande River.

24. Several commenters also expressed concern in their scoping comments regarding the inconsistency of the border-crossing project with the May 19, 2010 United States-Mexico Binational Agreement²⁶ for the protection of cultural and natural resources of the Big Bend Region, as well as the Center for Environmental Cooperation's (CEC) conservation assessment (CEC 2014) for the region, which identified 29 priority conservation areas due to their ecological significance and opportunities for conservation, protection, and restoration actions.

25. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), our staff prepared an EA for Trans-Pecos's proposal to construct and operate the Presidio Border Crossing Project. The EA addresses geology; soils; groundwater; surface waters; wetlands; vegetation; wildlife and aquatic resources; special status species; land use, recreation, special interest areas, and visual resources; cultural resources; air quality and noise; safety and reliability; alternatives; and cumulative impacts from other potential projects within a one-mile radius of Trans-Pecos's border crossing, as well as cumulative impacts related to the 148 miles of intrastate pipeline that would be constructed under the

²⁶ <https://www.whitehouse.gov/the-press-office/joint-statement-president-barack-obama-and-president-felipe-calder-n>

jurisdiction of the Railroad Commission of Texas. All substantive comments received prior to and in response to the NOI were addressed in the EA.

26. The EA was placed into the public record on January 4, 2016, and issued for a 30-day comment period. The Commission received over 500 comments on the EA²⁷ and many late motions to intervene. The Commission received comments on the EA from the NPS and the Texas PWD, and concerned individuals. The majority of comments received were from individuals opposing the project.

27. The commenters raised concerns about the need for an EIS; segmentation; soil impacts; water resource and wetland impacts; climate change; fuel spills drilling under the Rio Grande River; wildfire risks; impacts on wildlife, fisheries, and vegetation; cultural resources; cumulative impacts; and alternatives. These comments are addressed below.

1. Need for an Environmental Impact Statement

28. Several commenters assert that the project would result in significant impacts on environmental resources and that the Commission must prepare an EIS to assess the impacts of both the jurisdictional border-crossing facilities and the non-jurisdictional Trans-Pecos intrastate project, as well as the non-jurisdictional Comanche Trail Pipeline, LLC intrastate pipeline project and the associated jurisdictional San Elizario Crossing Project.²⁸

29. As explained in the EA, “one of the purposes of an EA is to assist agencies in determining whether to prepare an EIS or a finding of no significant impact.”²⁹ As discussed below, Commission staff appropriately determined that the scope of the

²⁷ On January 4, 2016, Mr. Gibson filed comments on the EA clarifying that, although he lives at the McDonald Observatory of Texas, he does not represent the observatory, the University of Texas, or its affiliates. On January 26, 2016, The University of Texas at Austin also filed a comment noting that Mr. Gibson’s comments were made solely in his individual and personal capacity, not as an employee of The University of Texas at Austin, of which the McDonald Observatory is a part. We acknowledge this error in the EA and clarify that Mr. Gibson’s comments are not representative of the University of Texas at Austin and/or the McDonald Observatory.

²⁸ FERC staff is conducting a separate NEPA analysis for the San Elizario Crossing Project in Docket No. CP15-503-000.

²⁹ EA at 9 (citing 40 C.F.R. § 1508.9 (2015)).

proposed action is the Presidio Border Crossing Project, which consists of approximately 1,093 feet of 42-inch-diameter pipeline. The Commission's years of experience with NEPA implementation for pipeline projects indicates that such a project normally would not fall under the "major" category for which an EIS is automatically prepared.³⁰

30. Here, Commission staff prepared an EA to determine whether the Presidio Border Crossing Project would have a significant impact, necessitating the preparation of an EIS. The EA addresses the impacts that could occur on a wide range of resources should the project be approved and constructed. As explained below, based on the EA's analysis and staff's recommended mitigation measures, the EA concludes, and we agree, that approval of the Presidio Border Crossing Project would not constitute a major federal action significantly affecting the quality of the human environment.³¹ Thus, an EIS is not required.³²

2. Scope of Review – Upstream Transportation

31. When companies construct a pipeline to transport import or export volumes, only a small segment of the pipeline close to the border is deemed to be the import or export facility for which NGA section 3 authorization is necessary; the rest of the pipeline may be jurisdictional under NGA section 7 because it will be used to transport gas in interstate commerce or it may be NGA-exempt because it will be used to gather gas or for non-interstate transportation service.³³ Trans-Pecos's 148-mile upstream pipeline initially will only transport Texas gas production received from other Texas intrastate pipelines or

³⁰ See, e.g., *Impulsora Pipeline, LLC*, 153 FERC ¶ 61,204 (2015) (EA issued for border-crossing facilities consisting of 4,000 feet of 36-inch-diameter pipeline and parallel 2,500-foot-long, 12-inch-diameter pipeline in Texas); *NET Mexico Pipeline Partners, LLC*, 145 FERC ¶ 61,112 (2013) (EA issued for border-crossing facilities consisting of 1,400 feet of 48-inch-diameter pipeline in Texas).

³¹ EA at 9. Under 40 C.F.R. § 1508.18 (2015) of CEQ's regulations, "a 'major federal action' includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." "Significantly" requires consideration of both the context and intensity of the project. See 40 C.F.R. § 1508.27 (2015).

³² CEQ regulations state that, where an EA concludes in a finding of no significant impact, an agency may proceed without preparing an EIS. See 40 C.F.R. § 1501.4(e), 1508.13 (2015).

³³ See *Southern LNG, Inc.*, 131 FERC ¶ 61,155 (2010).

processing plants and none of the gas will enter jurisdictional interstate commerce. Thus, when Trans-Pecos commences service, it will qualify as a non-jurisdictional intrastate pipeline. If Trans Pecos subsequently provides qualifying service for interstate gas supplies under section 311 of the NGPA, the Commission's jurisdiction under that Act will only apply to the service; such service will not subject Trans-Pecos's pipeline facilities to the Commission's jurisdiction under either section 311 of the NGPA or section 7 of the NGA.³⁴ The Commission has no authority to exercise jurisdiction over the construction and operation of Trans-Pecos's pipeline facilities, except for the limited facilities that constitute export facilities at the point of export.³⁵ Thus, while the applicant's overall project will include approximately 148 miles of pipeline, the only portion subject to the Commission's jurisdiction is the 1,093 feet that would constitute the import/export border-crossing facilities for which authorization under section 3 of the NGA and a Presidential Permit are necessary. The remaining 148 miles of upstream pipeline facilities sited in Texas are under the jurisdiction of the Railroad Commission of Texas.³⁶

32. Many commenters argue that, under the four-factor test set out in *Algonquin Gas Transmission Company*,³⁷ the Commission must prepare an environmental analysis of

³⁴ See e.g., *Egan Hub Partners, L.P.*, 73 FERC ¶ 61,334 at 61,930 (1995):

NGPA sections 601(a)(1)(C) and (a)(2)(A) provide that intrastate pipelines do not become subject to the NGA by virtue of section 311 transactions. Moreover, in Order No. 46, the Commission explained that "if a corporate entity qualifies as an intrastate pipeline under [NGPA] section 2(16), it will retain that identity for its entire system even if it constructs a new portion of its system to be used exclusively for section 311(a)(2) transportation." Order No. 46 is codified in part in section 284.3(c) of the Commission's regulations which states, "the Natural Gas Act shall not apply to facilities utilized solely for transportation authorized by section 311(a) of the NGPA." . . . The ability to utilize existing intrastate facilities to move intrastate gas into interstate markets and the construction of additional facilities for section 311 services, when necessary, by intrastate pipelines without prior NGA authorization made it possible for interstate pipelines to avoid constructing duplicative facilities. [footnotes omitted]

³⁵ See *Valero Transmission, L.P.*, 57 FERC ¶ 61,299 (1991).

³⁶ See *Oasis Pipeline, LP*, 127 FERC ¶ 61,263 (2009).

³⁷ 59 FERC ¶ 61,255 (1992) (*Algonquin*).

Trans-Pecos's non-jurisdictional upstream pipeline. Under that test, in order to determine whether there is sufficient federal control over a project to warrant environmental analysis, the Commission considers: (i) whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project); (ii) whether there are aspects of the non-jurisdictional facility in the immediate vicinity of the regulated activity that uniquely determine the location and configuration of the regulated activity; (iii) the extent to which the entire project will be within the Commission's jurisdiction; and (iv) the extent of cumulative federal control and responsibility.³⁸ As explained below, our review under the four-factor test indicates that the Commission's control and responsibility over Trans-Pecos's border-crossing facilities is not sufficient to cause Trans-Pecos's construction and operation of the 148-mile upstream pipeline to become a federal action.

33. With respect to factor (i), the import/export facilities are merely a link between two non-jurisdictional facilities: Trans-Pecos's 148-mile upstream pipeline and the downstream Mexican facilities. With respect to factor (ii), while the proposed import/export facilities will indeed connect to the 148-mile intrastate pipeline, the routing of the upstream pipeline had little impact on the overall location and configuration of the proposed import/export facilities. Rather, the proposed import/export facilities' design and location were determined based on the downstream Mexican interconnect location. With respect to factor (iii), the bulk of Trans-Pecos's facilities will be non-jurisdictional. The 148-mile upstream pipeline constitutes a much more significant portion of the overall facilities than the 1,093 feet of the border-crossing facilities. As stated above, the Commission has no authority over the permitting, licensing, funding, construction, or operation of the 148-mile upstream pipeline. The Commission's jurisdiction over Trans-Pecos's proposed import/export facilities is not sufficient to "federalize" the much larger non-jurisdictional facilities.

34. Finally, with respect to factor (iv), federal control is determined by the amount of federal financing, assistance, direction, regulation, or approval inherent in a project.³⁹ Here, the extent of cumulative federal control and responsibility over the 148-mile pipeline is limited. The upstream pipeline will be owned by Trans-Pecos with no federal financial involvement. No federal lands are involved in the project, Trans-Pecos is responsible for obtaining any federal permits required to construct the pipeline; Trans-Pecos must obtain any stream-crossing permits from the U.S. Army Corps of Engineers and consult with the U.S. Fish and Wildlife Service for compliance with the Endangered Species Act. This minimal federal control, however, is not enough

³⁸ *Algonquin*, 59 FERC at 61,934.

³⁹ *Id.* at 61,935.

to warrant federalizing the much larger non-jurisdictional facilities. In Texas, the permitting of gas pipeline facilities falls under the jurisdiction of the Railroad Commission of Texas and other state and local agencies. Cumulative federal control is minimal and does not warrant extending the Commission's environmental review.

35. In view of the above considerations, on balance, we are not compelled to consider the upstream intrastate pipeline as part of our action authorizing the Presidio Border Crossing Project for purposes of NEPA. Moreover, as discussed below, the cumulative, indirect, and secondary environmental impacts of the intrastate pipeline are comprehensively evaluated in the EA⁴⁰ and we find that this analysis was sufficient to satisfy our NEPA responsibility for the authorized action.

36. Commenters also assert that separate review of the border-crossing facilities and the 148-mile upstream pipeline violates NEPA's anti-segmentation policy, citing *Del. Riverkeeper Network v. FERC*.⁴¹ In that case, the court explained that 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.⁴² As discussed above, Trans-Pecos's 148-mile upstream pipeline is a non-jurisdictional project and therefore, does not constitute a federal action. Accordingly, the Commission's position regarding separate environmental review of the border crossing facilities subject to our jurisdiction does not constitute impermissible segmentation.

37. In addition, some commenters maintain that the Commission must review the environmental impacts of the 148-mile upstream pipeline as an indirect effect of the proposed border-crossing facilities, citing *Barnes v. U.S. Department of Transportation*,⁴³ where the court found that the agency must consider increased traffic caused by an airport expansion. The EA for the Presidio Border Crossing Project indeed did review and disclose potential environmental impacts of the non-jurisdictional upstream pipeline.

⁴⁰ See EA at 37-38 (discussing cumulative impacts on geology and soils), 38 (discussing cumulative impacts on water resources), 38-39 (discussing cumulative impacts on vegetation and wildlife), 40 (discussing cumulative impacts on land use and cultural resources), 41-42 (discussing cumulative impacts on air quality and noise), 43-44 (discussing cumulative impacts on safety).

⁴¹ 753 F.3d 1304 (D.C. Cir. 2014).

⁴² 753 F.3d at 1313.

⁴³ 655 F.3d 1124 (9th Cir. 2011).

This information was presented in the Cumulative Impacts section of the EA, although the vast majority of the impacts associated with the intrastate pipeline will occur outside of the region of influence of the border-crossing facilities.⁴⁴

38. 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”⁴⁵ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

39. 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.”⁴⁶ 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.”⁴⁷ 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.”⁴⁸ 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.⁴⁹

40. As we have explained, consistent with CEQ 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

⁴⁴ EA at 31-32.

⁴⁵ 40 C.F.R. § 1508.7 (2015).

⁴⁶ *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) (*Kleppe*).

⁴⁷ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (January 1997).

⁴⁸ *Id.*

⁴⁹ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005).

project and other past, present, and reasonably foreseeable future actions.⁵⁰ In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.⁵¹ The agency should then establish the geographic scope for analysis. Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts. Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.⁵² 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.⁵³

41. The cumulative effects analysis in the EA took precisely the approach CEQ guidance advises.⁵⁴ Commission staff identified an area within one mile of the proposed project as its geographic scope for purposes of the cumulative effects. The geographic scope of the cumulative impact analysis was appropriately reflective of the magnitude of the proposed project's direct and indirect environmental impacts.⁵⁵

42. Based on this region of influence, the EA identified three potential projects within one mile of the Presidio Border Crossing Project, whose impacts, when added to the impacts of the proposed actions, could result in cumulative impacts.⁵⁶ Two of these projects – installation of a non-jurisdictional custody transfer and metering station and a

⁵⁰ See, e.g., *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

⁵¹ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 11 (January 1997) (1997 Cumulative Effects Guidance).

⁵² *Id.*

⁵³ CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

⁵⁴ We note that the 1997 Cumulative Effects Guidance at 15 states that the “applicable geographic scope needs to be defined case-by-case.”

⁵⁵ *Kleppe*, 427 U.S. at 413 (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.”).

⁵⁶ EA at 31.

fiber optics cable – are associated with Trans-Pecos’s 148-mile intrastate pipeline.⁵⁷ The EA considered the potential cumulative impacts associated with the proposed project and these other projects pertaining to each potentially affected resource, including: geology and soils; water resources; vegetation and wildlife; land use; cultural resources; and air quality and noise.⁵⁸ The EA concluded that the cumulative impacts of the proposed project, when combined with other known or reasonably foreseeable projects, would be short-term, minimal, and not contribute significantly to cumulative impacts.⁵⁹

43. In addition, as noted above, the EA also discussed the environmental impacts of the non-jurisdictional intrastate pipeline occurring outside of the region of influence of the border-crossing facilities. Based on publicly available information, the EA discussed the potential impacts of construction and operation of the upstream pipeline facilities on geology and soils, water resources, vegetation and wildlife, land use, cultural resources, air quality and noise, and safety.

3. Scope of Review – Comanche Trail Facilities

44. Commenters also assert that Trans-Pecos’s facilities, in conjunction with facilities at issue in Docket No. CP15-503-000 involving Comanche Trail’s proposed border-crossing facilities near San Elizario, Texas, are part of a larger project, and that separate review of those facilities constitutes impermissible segmentation. As discussed below, the Trans-Pecos project and the Comanche Trail project are not connected, cumulative, or similar actions that would require consideration in a single NEPA analysis.

45. As defined by CEQ’s regulations, “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; (c) are interdependent parts of a larger action and depend on the larger action for their justification.⁶⁰

46. In evaluating whether connected actions are improperly segmented, courts apply a “substantial independent utility” test. The test asks “whether one project will serve a

⁵⁷ *Id.* at 30-31.

⁵⁸ *Id.* at 34-36.

⁵⁹ *Id.* at 36-37.

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

significant purpose even if a second related project is not built.”⁶¹ 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.”⁶²

47. In *Del. 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.⁶³ 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.⁶⁴ Courts have subsequently indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.⁶⁵ Further, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.⁶⁶

48. Commenters assert that the project applications are parts of a larger action by the same owners to serve the same customer in Mexico. The Trans-Pecos project, however, is not connected to the Comanche Trail project. Although both projects may transport

⁶¹ *Coal. for Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987); see also *O’Reilly v. U.S. Army Corps of Engineers*, 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 of profitability”).

⁶² *Coal. for Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

⁶³ *Del. Riverkeeper Network*, 753 F.3d at 1308.

⁶⁴ *Id.*

⁶⁵ *Minisink Residents for Environmental. Preservation and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014).

⁶⁶ See *Myersville Citizens for a Rural Community Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir, 2015).

gas to the same end user, Comision Federal de Electricidad, Mexico's dominant electric company, they are not directly related to the other nor are they contingent on the other's success or failure – they have no functional or financial interdependence. Both border crossing projects would be connected to pipelines extending from the Waha Hub in West Texas. However, the Comanche Trail border-crossing facilities connect with a Comanche Trail pipeline that extends to a meter facility near San Elizario in El Paso County, Texas, while the Trans-Pecos border-crossing facilities connect with a Trans-Pecos pipeline that extends to a point near the City of Presidio in Presidio County, Texas. Trans-Pecos's and Comanche Trail's projects are nearly 250 miles apart and would have substantial independent utility, serving different market areas in Mexico. Each will be constructed regardless of whether the other is constructed. Each originates from a separate request for proposals. The Trans-Pecos border-crossing facilities do not trigger or depend on the Comanche Trail border-crossing facilities, and would proceed on their own. They are not connected actions.

49. 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.⁶⁷ The two border-crossing facilities are not cumulative actions. As noted above, the non-contiguous projects are separated from each other by almost 250 miles. Comanche Trail's proposed border-crossing facilities are outside of the Trans-Pecos border-crossing facilities' region of influence; therefore, the projects will not have cumulative impacts.

50. 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.”⁶⁸ Unlike connected and cumulative actions, analyzing similar actions is not always mandatory.⁶⁹ An agency may wish to analyze these 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.”⁷⁰

⁶⁷ 40 C.F.R. § 1508.25(a)(2).

⁶⁸ *Id.* § 1508.25(a)(3).

⁶⁹ *San Juan Citizens' Alliance v. Salazar*, CIV.A.00CV00379REBCB, 2009 WL 824410, at *13 (D. Colo. Mar. 30, 2009) (citing 40 C.F.R. § 1508.25(a)(3) for the proposition that “nothing in the relevant regulations compels the preparation of a single EIS for ‘similar actions.’”).

⁷⁰ 40 C.F.R. § 1508.25(a)(3).

51. While both projects are designed to transport gas to the same state owned electric utility customer in Mexico and the proposals were both filed in May 2015, a single environmental review is not the best way to assess the two projects' environmental impacts. Although the projects have similar timing, the projects will not affect the same environmental resources and are not in any way dependent on each other. Moreover, analyzing both projects in one environmental document would not have improved staff's alternatives analysis since the projects are not functionally interdependent and could not be reconfigured to avoid overall impacts. That these projects may serve the same end-user in Mexico and be proposed by affiliates of the same parent company does not warrant analysis in a single document. Combining the two projects' environmental impacts would serve no purpose; therefore, separate reviews are appropriate.

4. Scope of Review - Induced Production/Fracking

52. A small number of commenters suggest, without elaborating, that this project may promote production and fracking of shale gas generally and specifically in the Marfa Basin and the Big Bend region, which will, in turn, result in adverse environmental consequences. The Commission has, in a number of cases, addressed claims that it must consider the indirect and cumulative effects of past, present, and reasonably foreseeable actions, including induced conventional and unconventional gas production in shale gas regions, and the effect that production has on wildlife habitat, water and air quality and recreation.⁷¹ While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that, where the Commission lacks meaningful information regarding potential future natural gas production in a region of influence, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.

53. Indirect impacts are "caused by the proposed action" and occur later in time or farther removed in distance than direct impacts, but are still "reasonably foreseeable."⁷² Indirect impacts may include growth inducing effects and other effects related to induced changes in the pattern or land use, population density or growth rate, and related effects

⁷¹ See, e.g., *Dominion Transmission, LLC*, 153 FERC ¶ 61,323, at PP 55-63 (2015); *National Fuel Gas Supply Corp.*, 153 FERC ¶ 61,379, at PP 60-75 (2015); *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review denied sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion).

⁷² 40 C.F.R. § 1508.8(b) (2015).

on air and water.⁷³ For an agency to consider an impact in its NEPA analysis as an indirect effect, approval of the proposed project and the related secondary effect must be causally related. As the Supreme Court explained, “a ‘but for’ causal relationship is insufficient [to establish cause for purposes of NEPA].”⁷⁴ 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.⁷⁵ 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.”⁷⁶

54. The potential environmental effects associated with additional natural gas production are not sufficiently causally related to the Presidio Border Crossing Project to warrant a detailed analysis.⁷⁷ Here, the fact that the easement for the intrastate pipeline is near the Barnett/Woodford shale play in the Marfa Basin by itself does not establish that the region will be opened to hydraulic fracturing or that development of those shale reserves will result from the border-crossing project. Trans-Pecos states in its application that the Trans-Pecos Pipeline would transport natural gas from a new header originating on the pipeline grid near the Waha Hub located in Pecos County, Texas, with eight interconnects to existing pipeline systems.⁷⁸ Trans-Pecos also states that the project will provide transportation capacity for natural gas produced in the Texas Permian Basin and “ultimately other domestic natural gas production” to markets in Northern Mexico.⁷⁹ The project purpose is not to facilitate additional natural gas production in any particular region, which may occur for reasons unrelated to the project and over which the

⁷³ *Id.*

⁷⁴ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

⁷⁵ *Metro. Edison*, 460 U.S. at 774.

⁷⁶ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 at 770.

⁷⁷ *See, e.g., Central New York Oil and Gas Co., LLC, supra* (upholding the Commission’s analysis of the development of Marcellus shale gas reserves where the Commission reasonably concluded that the impacts of that development were not sufficiently causally-related to the projects to warrant a more in-depth analysis).

⁷⁸ EA at 8.

⁷⁹ *See* July 15, 2015 Answer of Trans-Pecos Pipeline at 3-4.

Commission has no jurisdiction. In any event, unconventional production will likely continue regardless of whether the Presidio Border Crossing Project is approved, because multiple existing and proposed transportation alternatives are available for regional production.

5. Impacts of Trans-Pecos's Proposed Border Crossing Project

55. As discussed in the EA, the proposed border-crossing facility would begin at a point in Presidio County, Texas, and extend 1,093 feet to the international border with Mexico beneath the center of the Rio Grande River. To construct its proposed border-crossing facility, Trans-Pecos would employ a HDD method to cross underneath the Rio Grande River. This method would avoid direct impacts on the sensitive environmental resources associated with this waterbody. Another 907 feet of non-jurisdictional pipeline of equal diameter would extend south into Mexico. Construction of the border-crossing facility within the United States will require a total temporary disturbance of about 7.1 acres of land. Following construction, Trans-Pecos will retain about 1.3 acres for operation of the project facilities.⁸⁰

56. The EA states that Trans-Pecos's proposed HDD would occur at an alignment depth of 69 feet beneath the Rio Grande River and concludes that a successful HDD under the river would not result in significant impacts on this waterbody or on biological resources. Trans-Pecos would implement several measures, as described in its Directional Drill Contingency Plan, to minimize the potential for any drilling fluid to enter the Rio Grande River during the HDD, and would notify the U.S. Army Corps of Engineers of any inadvertent release.⁸¹

a. Installation of Dual Shut-Off Valves

57. The NPS requests that Trans-Pecos be required to install dual shut-off valves to prevent natural gas pipeline liquids from degrading the Rio Grande River, particularly the downstream section of the river's congressionally-designated component of the National Wild and Scenic River System. In response to our environmental staff's September 8, 2015 data request, Trans-Pecos states it would install an automatic mainline shut-off valve at their custody transfer meter station at the upstream terminus of the project. We find this measure adequate.

b. HDD Setback

⁸⁰ EA at 5.

⁸¹ EA at 15.

58. The Texas PWD asks the Commission to review its previous [scoping] comments and recommendations, as well as specifying certain additional recommendations. The EA addressed the Texas PWD's previous comments and in several instances referred to them directly. In its original comments the Texas PWD recommended that Trans-Pecos locate the HDD entry and exit point at least 500 feet from the streambeds [Rio Grande River]. Based on Trans-Pecos's mapping and a geographic information system crossing layer, the HDD entry (at the U.S. side of the crossing) is well outside the requested 500-foot minimum setback.

c. Vegetation

59. The Texas PWD recommends on-site replacement/restoration of native vegetation, where practicable, as well as using certain practices to prevent the establishment of invasive species. Trans-Pecos will restore vegetation with an herbaceous plant species blend developed in consultation with the Range Department of Sul Russ University and the U.S. Department of Agriculture - Agricultural Extension Service. Regarding the increased potential for the introduction of invasive species, the EA notes that Trans-Pecos will comply with the Commission's *Upland Erosion Control, Revegetation, & Maintenance Plan* (Upland Plan). We concur with the EA's conclusion that impacts on vegetation would not be significant.

d. State-listed Rare and Protected Species

60. The Texas PWD recommends that Trans-Pecos survey for the Texas horned lizard during the warm months of the year, when the species is active, install and maintain an exclusion fence, and train construction contractors to avoid the lizard and other rare and protected species. Section B.3.4 of the EA summarized Trans-Pecos's commitments to avoid and minimize impacts on the Texas horned lizard, as further described in Trans-Pecos's response to our environmental staff's September 8, 2015 data request. We conclude that Trans-Pecos's efforts to minimize impacts on this and other rare and protected species are consistent with the Texas PWD's recommendations, except for a recommendation that Trans-Pecos report to the Texas PWD when the Texas horned lizard or other rare and protected species are observed. Accordingly, environmental condition 13 in Appendix B to this order requires Trans-Pecos to report observances of rare and protected species to the Texas PWD.

61. The Texas PWD makes several recommendations regarding other rare and protected species, stating that the EA did not provide details regarding surveys for these species or efforts to avoid impacts on them. The Commission's environmental staff considered the rare and protected species identified by the Texas PWD and, as stated in the EA, concluded that installing and operating the proposed border-crossing facilities would not significantly affect these species. We have reviewed the Texas PWD's recommendations, the EA, and other documents included in the record of this proceeding, and concur with the EA's conclusion.

62. The remainder of the comments on the EA largely repeats concerns, without elaboration, regarding certain specific environmental impacts that were raised in the scoping comments. These issues were addressed in the EA, either as direct impacts of the border-crossing facilities or as cumulative impacts. Nevertheless, we address them again below, with additional explanation where appropriate.

e. **Land Disturbance and Impacts on CEC Conservation Areas**

63. Commenters assert that the proposed construction might disturb CEC conservation areas and other lands. The EA states that project construction would temporarily disturb about 7.1 acres of land currently used for livestock grazing. The nearest home is two miles east-southeast. The project would not affect nor be within or near any public use areas or special/sensitive land uses. Big Bend State Park is 13 miles east; Big Bend National Park is 54 miles southeast; and the proposed border-crossing facilities are not within a segment of the Rio Grande River currently designated or proposed as a candidate for the National Wild and Scenic River Program. The EA states that the proposed border-crossing facilities are upstream of CEC-designated Priority Conservation Area 5, which is at the confluence of the Rio Conchos and Rio Grande Rivers. We concur with the EA's conclusion that land disturbance would be minor and the project would not significantly impact CEC-designated Priority Conservation Areas.

f. **Wetlands**

64. Commenters assert that the path of the proposed HDD beneath the Rio Grande River disrupts two wetlands. The U.S. Fish and Wildlife Service's National Wetlands Inventory indicates that palustrine forested wetlands encompass all of the project workspace. As stated in section B.2.0 of the EA, however, Trans-Pecos conducted a field assessment on May 6, 2015, in accordance with the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and Arid West Supplement, and found no forested wetlands within or adjacent to the project.⁸² The project location and immediate surrounding habitats, including the Rio Grande River riparian zone, are principally vegetated by shrub and tree-size western honey mesquite. We acknowledge that the EA omitted Trans-Pecos's wetland survey information indicating that about 0.25 acre of alluvium-filled, relic oxbows of the Rio Grande River is in temporary workspaces, and that these areas support wetland hydrology and have hydrophytic vegetation and hydric soils that would be affected by the construction. Regarding concerns that construction activities might compact fragile wetlands, Trans-Pecos will comply with the May 2013 version of

⁸² Trans-Pecos October 6, 2015 Response to Staff's Environmental Information Request. CP15-500-000; Accession Number: 20151006-5152.

our *Wetland & Waterbody Construction & Mitigation Procedures* (Wetland Procedures), including installing equipment mats. We concur with section B.2.0 of the EA that, based on Trans-Pecos's proposed construction and mitigation measures and its adherence to our Upland Plan and Wetland Procedures, impacts on wetlands would not be significant and these resources would be adequately protected.

g. Water Consumption and Climate Change

65. Commenters assert that the trans-boundary ecosystems are already steadily being degraded by human activities like irrigation and by climate change. EA section B.1.0 states that Trans-Pecos would decompact soils in compliance with our Upland Plan's requirements to minimize impacts on water infiltration in work areas. Interveners and commenters specifically question whether a hydrologic study is needed to show whether withdrawal of the amount of water needed for the project's HDD, hydrostatic testing, and dust control over 40 days will cause well draw-down problems. EA section B.2.0 indicates that the City of Presidio's confirmations that it can provide the needed water are sufficient assurance that the proposed project's water use during construction will not significantly affect the area's water supply. Section B.6.1 of the EA further states that, while construction of the proposed border-crossing facilities would cause short-term emissions, operation of the facilities would not be a permanent source of criteria pollutants or greenhouse gas emissions. We concur that the project would therefore not significantly affect water consumption or air quality, or contribute to climate change.

h. Fuel Spills and Inadvertent Returns of Drilling Fluids

66. Commenters assert that the proposed construction might contaminate the environment with HDD fluids and fuel spills. Section B.1.0 of the EA states that Trans-Pecos developed its *Spill Prevention, Containment, and Countermeasure Plan* to prevent and clean up inadvertent spills or leaks of fuels, lubricants, or coolants. Section B.2.0 of the EA states that Trans-Pecos prepared a *Directional Drilling Contingency Plan* to monitor and mitigate effects of inadvertent releases of drilling fluids, and environmental condition 12 in Appendix B to this order requires Trans-Pecos to collect and dispose of inadvertent releases of drilling mud and notify the International Boundary and Water Commission. We concur with EA section B.2.0's conclusions that impacts on groundwater (quality or quantity) and surface-water resources would not be significant, and that Trans-Pecos's compliance with its *Spill Prevention, Containment, and Countermeasure Plan*, its *Directional Drilling Contingency Plan*, as revised by this order, and the Commission's Upland Plan and Wetland Procedures would adequately protect such resources.

i. Risk of Wildfires Due to Welding

67. Commenters assert that construction welding might cause wildfires. Section B.7.1 of the EA states that the pipeline facilities must be designed, constructed, operated and

maintained in accordance with the Department of Transportation (DOT) Minimum Federal Safety Standards.⁸³ Subpart E of the DOT standards pertains steel pipelines welding. We conclude that adherence to the federally-mandated safety regulations will ensure adequate protection to the public and environmental resources.

j. Federally-listed Threatened and Endangered Species

68. Commenters assert that the EA suggests that there are 12 federally- listed threatened and endangered species in the path of the proposed border-crossing facilities. Section B.3.4 of the EA states that the U.S. Fish and Wildlife Service Information for Planning and Conservation System identified 10 threatened and endangered species, one candidate species, and one experimental/non-essential species that should be considered as part of an effects analysis. We concur with the EA's findings that, based on the life and habitat characteristics and requirements of these species, scope of the project, land requirements, use of an HDD, absence of suitable habitat and species observed during Trans-Pecos's surveys, and Trans-Pecos's measures to avoid and minimize environmental impacts, the proposed border-crossing facilities would not affect federally listed threatened and endangered species.

k. Cultural Resources

69. Commenters assert that the territory near the border crossing was used by at least eight Native American tribes and indigenous peoples of Mexico and contains archaeological and cultural artifacts. Section B.5.0 of the EA discusses Trans-Pecos's cultural resources survey, which identified no historic or prehistoric properties. The Commission's environmental staff and the Texas State Historic Preservation Officer concur with those findings. Moreover, the Commission and Trans-Pecos contacted eight Indian tribes who historically used the project area. Two responded, and neither identified any sites of concern or objected to the project.

70. Commenters assert that the applicant's environmental and cultural statements and associated mitigation plans are insufficiently detailed, incomplete, and prepared by consultants unfamiliar with the Big Bend region. In this regard, we note that applicable sections of the EA explicitly state that the Commission's environmental staff has independently reviewed Trans-Pecos's environmental and cultural mitigation plans and found them acceptable.

71. Commenters also object that parts of the application were filed as privileged and not available to the public for scrutiny and comment. The Commission's regulations

⁸³ 49 C.F.R. § 192 (2015).

state that “. . . any person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information contained in a particular document is exempt from mandatory public disclosure requirements”⁸⁴ The Commission requires that applicants request privileged treatment for all material filed with the Commission containing location, character, and ownership information about cultural resources.⁸⁵ We find that Trans-Pecos appropriately filed the cultural resource information as privileged and requested that the Commission treat affected landowner information (names and addresses) as privileged.

6. Alternatives Analysis

72. One commenter asserted that the alternatives analysis in the EA is inadequate to satisfy NEPA. Specifically, the commenter maintains that, although alternative routes exist, the Commission failed to identify any or provide any analysis or comparison of such routes, or to analyze or discuss in depth a “no action” alternative.

73. We disagree. NEPA requires the Commission to “identify the reasonable alternatives to the contemplated action” and “look hard” at the impacts of the final action.⁸⁶ NEPA does not define “reasonable alternatives;” however, CEQ has indicated that “a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.”⁸⁷ For a “small scale project”⁸⁸ such as this, the range of reasonable alternatives is quite limited. Further, agencies have discretion to reject alternatives that are “impractical” or otherwise unlikely to satisfy the objectives for a project.⁸⁹

⁸⁴ 18 C.F.R. § 388.112(a) (2015).

⁸⁵ 18 C.F.R. § 380.12(f)(4) (2015).

⁸⁶ *Minisink Residents for Env'tl. Pres. And Safety v. FERC*, 762 F.3d 97, 102 (D.C. Cir. 2014) (quoting *Corridor H Alts., Inc. v. Slater*, 166 F.3d 368, 374 (D.C. Cir. 1999)).

⁸⁷ *CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

⁸⁸ EA at 44.

⁸⁹ *W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1275-76 (10th Cir. 2013).

74. The purpose of Trans-Pecos's project is to provide natural gas to help meet the needs of expanding electric generation fueled by natural gas generation plants and to supply potential industrial customers in Mexico.⁹⁰ The EA appropriately considered the no action alternative and concluded that while adopting this alternative would eliminate the potential impact on the environment, Trans-Pecos's stated purpose would not be met.⁹¹ In addition, the EA stated, other natural gas companies could construct projects in substitute for the natural gas supplies offered by Trans-Pecos. Such alternative projects could require the construction of additional and/or new pipeline facilities in the same or other locations to transport the gas volumes proposed by the project. These projects would result in their own set of specific environmental impacts that could be equal to or greater than those described for the current proposal.⁹² The EA further determined that, based on the limited construction impacts and lack of sensitive environmental resources in the project area, an analysis of alternative crossing locations was not warranted. The EA concluded that the proposed project is the preferred alternative that can meet the project objectives.

75. Trans-Pecos selected the crossing point location based on the interconnect location of the planned transmission pipeline commencing in Mexico, which has been assessed, aligned and is being permitted by the Mexican customer. Trans-Pecos states that no alternative crossing points exist due to the interconnect location dictated by the preferred alignment for the pipeline inside Mexico.⁹³ Further, given the minimal level of impacts associated with the project as proposed, staff could not identify any alternatives that would "provide a significant environmental advantage" over the proposed project, while meeting the objectives of the project.⁹⁴ We conclude that the EA adequately examined alternatives to Trans-Pecos's proposal.

7. Environmental Conclusions

76. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with Trans-Pecos's application and supplements, and in compliance with the environmental conditions in Appendix B to this order, our

⁹⁰ EA at 2.

⁹¹ *Id.* at 45.

⁹² *Id.*

⁹³ Trans-Pecos May 28, 2015 Application at Resource Report 10, p. 36.

⁹⁴ EA at 45.

approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

77. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this authorization. The Commission encourages cooperation between pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.⁹⁵

V. Conclusion

78. The Commission on its own motion, received and made part of the record all evidence, including the application and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

(A) A Presidential Permit and NGA section 3 authorization are issued authorizing Trans-Pecos to site, construct, and operate natural gas import and export border-crossing facilities, as described and conditioned in this order, subject to the conditions of the Presidential Permit and compliance with the environmental conditions in Appendix B to this order.

(B) Trans-Pecos shall sign and return the testimony of acceptance of all provisions, conditions, and requirements of the Presidential Permit to the Secretary of the Commission within 30 days of the issuance of this order.

(C) The authorized import/export facility shall be completed and placed in service within three years of the date of issuance of this order.

(D) Trans-Pecos shall notify the Commission's environmental staff by telephone, email, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies

⁹⁵ See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) (holding state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission); and *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

Trans-Pecos. Trans-Pecos shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

(E) The untimely motions to intervene filed by the parties listed in Appendix A are granted.

(F) Trans-Pecos's July 15, 2015 motion for leave to answer and answer is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

Late Motions to Intervene

Bill Addington
Adam H. Baker
Ashley Baker
Catherine Crumpton
Beth Doolittle
Mary Etherington
Adrienne Evans-Stark
Theron L. Francis
Martha Gannon
Sharon Reed Gavin
Nattalie L. Glover
David W. Keller
Roberto Lujan
Lynette Melnar
Karen Nakakihara
Kathryn Nowell
Pilar H. Pedersen
William Salmon
Margaret Shugart
Deborah E. Swart
Margaret Dodie Sweeney
John Tuck

APPENDIX B

Environmental Conditions

As recommended in the environmental assessment (EA), this authorization includes the following conditions:

1. Trans-Pecos Pipeline, LLC (Trans-Pecos) shall follow the construction procedures and mitigation measures described in its application and supplements, including responses to staff data requests, and as identified in the EA, unless modified by the Order. Trans-Pecos must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during activities associated with the construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Order; and
 - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Trans-Pecos shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA. **As soon as they are available, and before the start of construction**, Trans-Pecos shall file with the Secretary any revised construction workspace configuration drawings at a

scale not smaller than 1:6,000 with station positions for all activities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

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

This requirement does not apply to extra workspace allowed by the FERC *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

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

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the authorization and before construction begins,** Trans-Pecos shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Trans-Pecos must file revisions to the plan as schedules change. The plan shall identify:
 - a. how Trans-Pecos would implement construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
 - b. how Trans-Pecos would incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and

specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;

- c. the number of EIs assigned, and how the company would ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who would receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions Trans-Pecos would give to all personnel involved with construction activities and restoration (initial and refresher training as the project progresses and personnel change);
 - f. the company personnel (if known) and specific portion of Trans-Pecos's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Trans-Pecos will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) the completion of all required surveys and reports;
 - (2) the environmental compliance training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. Trans-Pecos shall employ at least one EI. The EI shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and

- e. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Trans-Pecos shall file updated status reports with the Secretary on a **biweekly basis until all construction and restoration activities are complete**. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
 - a. an update on Trans-Pecos's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of corrective actions implemented in response to all instances of noncompliance, and their cost;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Trans-Pecos from other federal, state or local permitting agencies concerning instances of noncompliance, and Trans-Pecos's response.
 9. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, Trans-Pecos shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
 10. Trans-Pecos must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of all areas affected by the project are proceeding satisfactorily.

11. **Within 30 days of placing the authorized facilities in service**, Trans-Pecos shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the Authorization conditions Trans-Pecos has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
12. **Prior to construction**, Trans-Pecos shall file with the Secretary a revised *Directional Drilling Contingency Plan* for review and written approval by the Director of OEP that includes:
 - a. measures to be implemented for collection and disposal of an inadvertent release of drilling mud into the Rio Grande River; and procedures to notify the International Boundary and Water Commission of any release of drilling mud into the river.
13. **During construction**, Trans-Pecos shall report in its construction status reports (see environmental condition 8) any observance of state rare or protected species and also provide these reported observances to the Texas Parks and Wildlife Department.

APPENDIX C**PERMIT AUTHORIZING TRANS-PECOS PIPELINE, LLC TO SITE,
CONSTRUCT, AND OPERATE NATURAL GAS FACILITIES
AT THE INTERNATIONAL BOUNDARY
BETWEEN THE UNITED STATES AND MEXICO****FEDERAL ENERGY REGULATORY COMMISSION
Docket No. CP15-500-000**

(May 5, 2016)

Trans-Pecos Pipeline, LLC (Trans-Pecos), a limited liability company organized under the laws of the State of Texas, filed on May 28, 2015, in Docket No. CP15-500-000, an application pursuant to Executive Order Nos. 10485 and 12038, and the Secretary of Energy's Delegation Order No. 00-004.00A, requesting that the Commission issue an order under section 3 of the Natural Gas Act and a Presidential Permit authorizing Trans-Pecos to site, construct, and operate certain natural gas pipeline facilities to import and export natural gas at a point on the international boundary between the United States and Mexico.

By letter dated October 7, 2015, the Secretary of State, and by letter dated September 28, 2015, the Secretary of Defense, favorably recommended that the Permit be granted. The Federal Energy Regulatory Commission finds that the issuance of a Permit is appropriate and consistent with the public interest.

Pursuant to the provisions of Executive Order Nos. 10485 and 12038, dated September 3, 1953, and February 3, 1978, respectively, the Secretary of Energy's Delegation Order No. 00-004.00A, effective May 16, 2006, and the Commission's Regulations, permission is granted to Trans-Pecos (Permittee) to site, construct, and operate the natural gas facilities described in Article 2 below, upon the terms and conditions of the Permit.

Article 1. It is expressly agreed by the Permittee that the facilities herein described shall be subject to all provisions and requirements of this Permit. This Permit may be modified or revoked by the President of the United States or the Federal Energy Regulatory Commission and may be amended by the Federal Energy Regulatory Commission upon proper application therefore.

Article 2. The following facilities are subject to this Permit:

Approximately 1,093 feet of 42-inch diameter pipeline that will commence in Presidio County, Texas, and extend beneath the Rio Grande River, terminating in the middle of the river bed at the international boundary with Mexico.

Article 3. The natural gas facilities subject to the Permit, or which may subsequently be included herein by modification or amendment, may be utilized for the transportation of natural gas between the United States and Mexico only in the amount, at the rate, and in the manner authorized under section 3 of the Natural Gas Act.

Article 4. The operation and maintenance of the aforesaid facilities shall be subject to the inspection and approval of representatives of the United States. The Permittee shall allow officers and employees of the United States, showing proper credentials, free and unrestricted access to the land occupied by the facilities in the performance of their official duties.

Article 5. If in the future, it should appear to the Secretary of Defense that any facilities or operations permitted hereunder cause unreasonable obstruction to the free navigation of any of the navigable waters of the United States, the Permittee may be required, upon notice from the Secretary of Defense, to remove or alter the same so as to render navigation through such waters free and unobstructed.

Article 6. The Permittee shall be liable for all damages occasioned to the property of others by the operation or maintenance of the facilities, and in no event shall the United States be liable therefore. The Permittee shall do everything reasonable within its power to prevent or suppress fires on or near land occupied under this Permit.

Article 7. The Permittee agrees to file with the Commission, under oath and in such detail as the Commission may require, such statements or reports with respect to the natural gas exported, or imported, or the facilities described herein, as the Commission may, from time to time, request. Such information may be made available to any federal, state, or local agency requesting such information.

Article 8. Neither this Permit nor the facilities, nor any part thereof, covered by this Permit shall be voluntarily transferred in any manner, but the Permit shall continue in effect temporarily for a reasonable time in the event of the involuntary transfer of the facilities by operation of law (including transfer to receivers, trustees, or purchasers under foreclosure or judicial sale) pending the making of an application for a permanent Permit and decision thereon, provided notice is promptly given in writing to the Commission accompanied by a statement that the facilities authorized by this Permit remain substantially the same as before the involuntary transfer. The Permittee shall maintain

the facilities in a condition of repair for the efficient transportation of natural gas and shall make all necessary renewals and replacements.

Article 9. Upon the termination, revocation, or surrender of this Permit, the Commission shall determine which of the authorized facilities shall be removed and which shall remain in place. The facilities authorized shall be removed within such time as the Commission may specify and at the Permittee's expense. Upon failure of the Permittee to comply with the Commission's direction to remove any authorized facilities, or any portion thereof, the Commission may direct that possession of the same be taken and the facilities be removed at the Permittee's expense, and the Permittee shall have no claim for damages by reason of such possession or removal.

Article 10. The Permittee agrees that when, in the opinion of the President of the United States, evidenced by a written order addressed to it as holder of this Permit, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any of the facilities, or parts thereof, maintained or operated under this Permit, and all contracts covering the transportation or sale of natural gas by means of said facilities, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the Permittee; and in the event that the United States shall exercise such right it shall pay the Permittee just and fair compensation for the use of said facilities upon the basis of a reasonable profit in time of peace, and the cost of restoring said facilities to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the Permittee.

Article 11. This Permit is subject to any action which the Government of the United States may in the future deem expedient or necessary to take in case any part of the aforesaid facilities comes into the control of any foreign government.

Article 12. The Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, agreement, or otherwise, be granted by the Permittee to any foreign government.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

IN TESTIMONY OF ACCEPTANCE of all the provisions, conditions and requirements of this Permit, the Permittee this day of _____, 2016, has caused its name to be signed by _____, pursuant to a resolution of its Board of Directors duly adopted on the ___ day of _____, 2016, a certified copy of the record of which is attached hereto.

Trans-Pecos Pipeline, LLC

By _____

(Attest)

Executed in triplicate