

156 FERC ¶ 61,007  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company, L.L.C.

Docket No. CP11-161-003

ORDER DENYING REHEARING

(Issued July 1, 2016)

1. On November 19, 2015, the Commission issued an order (Remand Order)<sup>1</sup> in response to the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Delaware Riverkeeper Network v. FERC* that found that the Commission violated the National Environmental Policy Act (NEPA) by: (1) segmenting its environmental review of Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee) Northeast Upgrade Project from that of three other Tennessee pipeline projects on the eastern leg of the 300 Line; and (2) failing to provide a meaningful analysis of the cumulative impacts of the four projects to show that the impacts would be insignificant.<sup>2</sup> The Remand Order concluded that there were no significant additive or cumulative impacts of the Northeast Upgrade and the three other projects. The Delaware Riverkeeper Network (Delaware Riverkeeper) then filed a timely request for rehearing. For the reasons discussed below, the Commission denies rehearing.

**I. Background**

2. A more detailed procedural history appears in our Remand Order.<sup>3</sup> Briefly, in the underlying orders, the Commission authorized Tennessee to construct and operate the Northeast Upgrade Project, which consists of five pipeline loop segments totaling 40.3 miles of 30-inch-diameter pipeline, modifications and upgrades at four compressor

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<sup>1</sup> *Tennessee Gas Pipeline Co., L.L.C.*, 153 FERC ¶ 61,215 (2015).

<sup>2</sup> 753 F.3d 1304 (D.C. Cir. 2014) (*Delaware Riverkeeper*).

<sup>3</sup> Remand Order at PP 2-20.

stations, and one meter station.<sup>4</sup> The Northeast Upgrade Project was one of four projects proposed by Tennessee in separate applications between July 2009 and December 2011 involving construction on its 300 Line. The projects are, in chronological order of the date the applications were filed: (1) the 300 Line Project; (2) the Northeast Supply Diversification Project; (3) the Northeast Upgrade Project; and (4) the MPP Project.

3. To satisfy the requirements of NEPA, the Commission issued an Environmental Assessment (EA) for the Northeast Upgrade Project that included an analysis of the direct, indirect, and cumulative impacts of the project. The Commission found that if constructed and operated in accordance with Tennessee's application, as supplemented, and the 19 Environmental Conditions required in the order,<sup>5</sup> approval of the proposal would not constitute a major federal action significantly affecting the quality of the human environment. The Northeast Upgrade Project was constructed and placed in service between October and December 2013.

4. In *Delaware Riverkeeper*, the court held that the Commission's environmental review of the Northeast Upgrade Project under NEPA was deficient. The court found that the Commission had improperly segmented its environmental review of the Northeast Upgrade Project from its review of three other Tennessee pipeline projects on the eastern leg of the 300 Line, namely, the 300 Line Project, the Northeast Supply Diversification Project, and the MPP Project (collectively, Upgrade Projects).<sup>6</sup> The court also found that the Commission failed to provide a meaningful analysis of the cumulative impacts of the four Upgrade Projects to show that the impacts would be insignificant.<sup>7</sup> The court remanded the case to the Commission for further consideration of these two issues.

## **II. Summary of Remand Order**

5. In the Remand Order, the Commission explained that it had directed its staff to prepare a supplemental analysis (attached as an appendix to the order) that examined the additive environmental impacts of the four Upgrade Projects (i.e., the combined direct

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<sup>4</sup> *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (2012) (Certificate Order), *order on reh'g*, 142 FERC ¶ 61,025 (2013) (Rehearing Order).

<sup>5</sup> The Environmental Conditions are included in Appendix B of the Certificate Order.

<sup>6</sup> *Delaware Riverkeeper*, 753 F.3d at 1313-1319.

<sup>7</sup> *Id.* at 1319-1320.

and combined indirect impacts), as well as incorporating the other three Upgrade Projects into the cumulative impacts analysis performed in the EA for the Northeast Upgrade Project.<sup>8</sup> Based on the supplemental analysis, the Commission found that, when considered additively, impacts from the Northeast Upgrade Project and Tennessee's three other Upgrade Projects are not significant.<sup>9</sup> The Remand Order also concluded that when the other projects are considered cumulatively with the Northeast Upgrade Project, there are no significant cumulative impacts.<sup>10</sup> As explained in the Remand Order,<sup>11</sup> these conclusions are based on:

- the fact that the projects primarily consisted of installation of looping segments (where a pipeline is installed immediately adjacent to an existing pipeline);
- the fact that minimal construction occurred that required a new pipeline right-of-way corridor that was not adjacent to an existing pipeline;
- the fact that Tennessee overlapped the construction right-of-way for each of its four projects with its existing maintained easement where feasible;
- the limited geographic range of the impacts;
- the timeframe that the impacts occurred; and
- the mitigation measures committed to and implemented by both Tennessee and Dominion Transmission, Inc. (as part of the Northeast Supply Diversification Project).

Based on these findings, the Commission concluded that no additional mitigation is required above and beyond those measures that were required by the Commission's Certificate Order authorizing the construction and operation of the Northeast Upgrade Project.<sup>12</sup>

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<sup>8</sup> Remand Order at P 21.

<sup>9</sup> *Id.* PP 1, 32.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* P 23.

<sup>12</sup> *Id.* P 32.

### III. Request for Rehearing and Answer

6. On December 15, 2015, Delaware Riverkeeper filed a request for rehearing of the Remand Order. Delaware Riverkeeper's rehearing petition consists of four pages with only a statement of three alleged errors and no supporting argument. Without further elaboration, Delaware Riverkeeper incorporated by reference "the arguments, evidence, and exhibits" contained in its motion to enforce the court's judgement, which is appended to its rehearing request and was concurrently filed with the Court of Appeals, which motion the court denied.<sup>13</sup>

7. The rehearing petition, on its face, fails to satisfy the statutory requirement that an application for rehearing set forth with specificity the grounds on which the rehearing application is based.<sup>14</sup> To that end, the Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent.<sup>15</sup> Bootstrapping of arguments is not permitted.<sup>16</sup> Therefore, we dismiss the rehearing request for failure to set forth with specificity the alleged grounds on which the rehearing is based. In any event, if we determined not to dismiss the rehearing request on procedural grounds, we would dismiss it on substantive grounds, for the reasons set forth below.

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<sup>13</sup> Delaware Riverkeeper Request for Rehearing at 3. *See also Delaware Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 12, 2016) (order denying motion to enforce).

<sup>14</sup> 15 U.S.C. § 717r(a).

<sup>15</sup> 18 C.F.R. § 385.713(c)(2) (2015); *see also Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 10 (2013) ("The Commission, however, expects all grounds to be set forth in the rehearing request and will dismiss any ground only incorporated by reference").

<sup>16</sup> *See Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (rejecting argument made on rehearing to FERC by incorporating by reference objections made in other pleadings) (citing *Office of the Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990); *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)).

#### IV. Discussion

##### A. The Commission Was Not Required to Consider the Impacts of Three New 2015 Tennessee Projects in its Supplemental Environmental Analysis.

8. Delaware Riverkeeper asserts that the Order on Remand undermines the intent of the court's decision by ignoring the cumulative impacts of three new proposed Tennessee pipeline projects, namely, the Susquehanna West Project in Docket No. CP15-148-000, the Triad Expansion Project in Docket No. CP15-520-000, and the Orion Project in Docket No. CP16-4-000 (collectively, 2015 Projects).<sup>17</sup> Delaware Riverkeeper claims that the three 2015 Projects are designed to complete a third new continuous pipeline called the "300-3" line from central Pennsylvania to New Jersey.<sup>18</sup> According to Delaware Riverkeeper, these new Tennessee projects all physically overlap with the existing projects, involve the disturbance of the same waterbodies, wetlands and resources that were previously disturbed, and are functionally dependent on the operation of the previous projects. Delaware Riverkeeper claims that the fact that the construction of the three 2015 Projects will begin before the mitigation efforts for the previous Upgrade Projects will be complete is of particular importance.

9. Contrary to Delaware Riverkeeper's claims, consideration of these three new pending 2015 Projects is beyond the scope of the court's mandate.<sup>19</sup> Each of these certificate applications was filed in 2015 and postdates the court's 2014 decision. In *Delaware Riverkeeper*, the court directed the Commission on remand to consider the environmental effects of the three identified Upgrade Projects together with the Northeast Upgrade Project, based on the court's findings of fact regarding the relationship between

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<sup>17</sup> Delaware Riverkeeper Request for Rehearing, Exhibit A at 8-10. (Although the arguments we discuss for the remainder of this order were not made in Delaware Riverkeeper's request for rehearing proper, but rather in the attached Motion to Enforce, we will for ease of reference treat them as current assertions.) All three applications were filed in 2015; the Susquehanna West Project on April 2, the Triad Expansion Project on June 19, and the Orion Project on October 9.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> See *Delaware Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 12, 2016) (order denying motion to enforce the court's judgment).

those four projects.<sup>20</sup> The court did not require the Commission to consider these new 2015 Projects – projects that were unknown at the time of the Commission proceedings that were the subject of the review by the court. Significantly, Delaware Riverkeeper does not cite to any language from the court’s opinion that suggests otherwise.

10. Even if we agreed that the court directed the Commission to engage in a “de novo review” of the Northeast Upgrade Project, as opposed to supplementing our prior determination to address the courts concerns, consideration of the three 2015 Projects is not required by NEPA. NEPA does not require agencies to reopen their environmental review to include every new project that comes to light while a proposed action is pending before the Commission.<sup>21</sup> Were supplementation to be required every time new information comes to light, agency decisionmaking would be rendered “intractable, always awaiting updated information only to find the new information [is] outdated by the time a decision is made.”<sup>22</sup>

11. We emphasize that the Commission is currently developing an administrative record for each of the 2015 Projects that will include an EA and has invited comment on environmental issues.<sup>23</sup> In these EAs, the Commission will consider past, present, and

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<sup>20</sup> *Delaware Riverkeeper*, 753 F.3d at 1313-1319 (court’s discussion limited to whether the MPP, Northeast Supply Diversification, 300 Line and Northeast Upgrade Projects are “connected actions”). *See also id.* at 1320 (Brown, J., concurring) (joining portion of majority opinion “granting the petition for FERC’s failure to adequately address the cumulative impacts of the four upgrade projects”).

<sup>21</sup> *See Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (“An agency need not revise an almost complete environmental impact statement to accommodate new proposals submitted to the agency, regardless of the uncertainty of maturation.”).

<sup>22</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989); *cf. Village of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C. Cir. 2006) (recognizing “that an unyielding avalanche of information might overwhelm an agency’s ability to reach a final decision”).

<sup>23</sup> *See Tennessee Gas Pipeline Co., L.L.C.*, Notice, Docket No. CP15-148-000 (June 10, 2015) (Susquehanna West Project); *Tennessee Gas Pipeline Co., L.L.C.*, Notice, Docket No. CP15-520-000 (Aug. 5, 2015) (Triad Expansion Project); and *Tennessee Gas Pipeline Co., L.L.C.*, Notice, Docket No. CP16-4-000 (Nov. 23, 2015) (Orion Project).

reasonably foreseeable actions in the cumulative impact analysis,<sup>24</sup> as required by the Council on Environmental Quality's (CEQ) regulations.<sup>25</sup> Thus, the impacts of past projects within the region of influence, including, as appropriate, impacts of the Upgrade Projects, will be considered and evaluated in those proceedings, to determine whether cumulative impacts are significant and whether additional mitigation is required. For example, the cumulative analysis conducted for one of the 2015 Projects – the Susquehanna West Project – included an analysis of the 300 Line, Northeast Supply Diversification, and Northeast Upgrade Projects.<sup>26</sup> Delaware Riverkeeper has intervened in and raised its concerns about these three 2015 Projects in those proceedings,<sup>27</sup> which are the appropriate venues to challenge any alleged deficiencies in the respective environmental analyses of the 2015 Projects.

12. Finally, Delaware Riverkeeper's rehearing petition also claims that the new 2015 Projects "all physically overlap with the existing projects," and "are functionally dependent on the operation of the previous projects."<sup>28</sup> To the extent that Delaware Riverkeeper is asserting that we impermissibly segmented our environmental review of the Upgrade Projects in the Remand Order from the environmental review of the new 2015 Projects, the argument improperly seeks to expand the scope of the remand proceeding to include matters that were not the subject of the Court's *Delaware Riverkeeper* decision. Moreover, it is without merit.

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<sup>24</sup> The Commission issued an EA for the Susquehanna West Project on March 17, 2016. *See Tennessee Gas Pipeline Co., L.L.C.*, Notice of Availability of the Environmental Assessment for the Proposed Susquehanna West Project, Docket No. CP15-148-000 (March 17, 2016). The Commission issued an EA for the Triad Expansion Project on June 15, 2016. *See Tennessee Gas Pipeline Co., L.L.C.*, Notice of Availability of the Environmental Assessment for the Proposed Triad Expansion Project, Docket No. CP15-520-000 (June 15, 2016).

<sup>25</sup> 40 C.F.R. § 1508.7 (2015).

<sup>26</sup> *Tennessee Gas Pipeline Co., L.L.C.*, Susquehanna West Project, Environmental Assessment at 63-70, Docket No. CP15-148-000 (March 2016).

<sup>27</sup> *See, e.g.*, *Tennessee Gas Pipeline Co., L.L.C.*, Comments of Delaware Riverkeeper, et al., Docket No. CP15-148-000 (April 16, 2016); *Tennessee Gas Pipeline Co., L.L.C.*, Delaware Riverkeeper Network Motion for Leave to Intervene at 3, Docket No. CP16-4-000 (Oct. 20, 2015).

<sup>28</sup> Delaware Riverkeeper Request for Rehearing, Exhibit A at 9.

13. In *Delaware Riverkeeper*, the court held 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.<sup>29</sup> 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.<sup>30</sup> Subsequently, the 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 the construction of which is not underway.<sup>31</sup>

14. There is no temporal overlap between the Upgrade Projects and the 2015 Projects. None of the 2015 Projects were pending as proposals before the Commission at time it was considering Northeast Upgrade Project or the other three Upgrade Projects that were the subject of the court remand. As noted above, the courts have found that 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.<sup>32</sup> Section 102(c) of NEPA requires agencies to prepare an environmental document for “proposals” for major federal actions affecting the human environment.<sup>33</sup> The CEQ regulations state that a “proposal” exists only when the action is at the stage when “an agency subject to [NEPA] has a goal and is actively preparing to make a decision ... and the effects [of that action] can be meaningfully evaluated.”<sup>34</sup> Because the 2015 Projects were not fully defined “proposals” before the Commission during the time frame of the underlying proceeding for the Northeast Upgrade Project or the other three Upgrade Projects, these projects were

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<sup>29</sup> *Delaware Riverkeeper*, 753 F.3d at 1308.

<sup>30</sup> *Id.* at 1314.

<sup>31</sup> See *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014) (*Minisink*). See also *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (1981) (“... an EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*”) (emphasis in original); *Delaware Riverkeeper*, 753 F.3d at 1318 (“NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed.”).

<sup>32</sup> *Id.*

<sup>33</sup> 42 U.S.C. § 4332(2)(C) (2012).

<sup>34</sup> 40 C.F.R. § 1508.23 (2015).

not improperly segmented from the Commission's supplemental environmental review in the Remand Order.<sup>35</sup> Moreover, Delaware Riverkeeper does not allege, much less demonstrate, that the four Upgrade Projects are financially dependent on the 2015 Projects, and they are not. Each of the four Upgrade Projects has been providing transportation service for a number of years, even though the 2015 Projects are not yet authorized or built.<sup>36</sup>

15. For these reasons, the 2015 Projects are not "connected actions" that required consideration in our supplemental environmental analysis of the Upgrade Projects. Whether or not the three 2015 Projects are themselves "connected actions" under 40 C.F.R. § 1508.25(a)(1) and should be evaluated in a single environmental document are matters appropriately addressed in the environmental review of those proceedings, not here.

**B. There was an Adequate Opportunity to Comment on the Supplemental Environmental Analysis.**

16. Delaware Riverkeeper asserts that the Commission violated NEPA and the court's mandate by failing to provide an opportunity for comment or participation prior to issuing the Order on Remand.<sup>37</sup> In addition, Delaware Riverkeeper asserts that the Commission impermissibly blocked its attempts to actively participate in the process by failing to respond to letters it submitted requesting the status of the remand proceeding and by denying its Freedom of Information Act (FOIA) request.<sup>38</sup>

17. We disagree. First, not providing parties a separate opportunity to comment on the supplemental environmental analysis prior to the issuance of the Remand Order does

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<sup>35</sup> See *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015) (*Myersville*) (explaining that the Court in *Delaware Riverkeeper* "premised [its] decision requiring joint NEPA consideration on the unquestionable connectedness of the projects, the fact that the projects all were under consideration by the Commission at the same time, and the fact that the projects were financially interdependent.") (citing *Delaware Riverkeeper*, 753 F.3d at 1318).

<sup>36</sup> See Remand Order, Appendix at 4, Table 1.

<sup>37</sup> Delaware Riverkeeper Request for Rehearing, Exhibit A at 10-14 (citing 40 C.F.R. §§ 1500.1(b), 1501.4(b), 1506.6, and 1500.2).

<sup>38</sup> *Id.* at 14-15.

not violate the court's mandate. The opinion remanding this case did not address whether parties must be given an opportunity to review and comment on the supplemental environmental analysis before the Commission issued its Remand Order.

18. Additionally, the CEQ's regulations do not require that an EA or supplemental EA be issued for comment. In *Taxpayers of Mich. Against Casinos v. Norton*, the court held that "nothing in the CEQ regulations suggests that another comment round is necessary following an agency's issuance of a supplemental EA."<sup>39</sup> Similarly, the Commission's regulations implementing NEPA do not require that an EA or supplemental EA be issued for comment.<sup>40</sup> Rather, an "agency has significant discretion in determining when public comment is required with respect to EAs."<sup>41</sup>

19. Given the extensive environmental records that had been developed in the Northeast Upgrade Project proceeding, as well as in the other three Upgrade Projects proceedings, it was reasonable for the Commission not to issue the supplemental environmental analysis for comment. In each of these proceedings, the public had previously been provided multiple opportunities to participate and comment on the proposed projects and all substantive comments had been addressed in the EA or the order for the project.<sup>42</sup>

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<sup>39</sup> *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (*TOMAC*). See also *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 952 (9th Cir. 2008) (holding that circulation of a draft EA is not required in every case; to do so "would apply a level of particularity to the EA process that is foreign to the regulations"); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*, 398 F.3d 105, 114–115 (1st Cir. 2005) (concluding that "[n]othing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain 'limited circumstances'").

<sup>40</sup> See 18 C.F.R. § 380.9 (regulation governing public availability of NEPA documents). CEQ guidance provides that "[i]n the case of an agency preparing an EA, the CEQ regulations require the agency to involve the public to the extent practicable, but each agency has its own guidelines about how to involve the public for EAs." CEQ, *A Citizen's Guide to the NEPA, Having Your Voice Heard* at 26 (December 2007).

<sup>41</sup> *TOMAC*, 433 F.3d at 861.

<sup>42</sup> See, e.g., Remand Order at P 22.

20. Moreover, due process requires “only a ‘meaningful opportunity’ to challenge new evidence.”<sup>43</sup> Here the ability to comment on or challenge the findings in the Remand Order and supplemental environmental analysis by filing for rehearing within the 30-day-statutory period provided parties that meaningful opportunity.<sup>44</sup> It is worth noting that this 30-day period is equivalent to the comment period the Commission typically establishes when it deems that issuance of an EA for comment is warranted.<sup>45</sup> The absence of a discrete opportunity to comment on the supplemental NEPA document prior to the issuance of the Remand Order in no way adversely affected Delaware Riverkeeper’s rights: Delaware Riverkeeper was able to raise on rehearing any concerns it had about the Commission’s environmental review. The absence of a comment period had no procedural or substantive effect on Delaware Riverkeeper’s ability to argue its case.

21. With respect to Delaware Riverkeeper’s other procedural arguments, in acting on Delaware Riverkeeper’s rehearing petition, we fully complied with our Rules of Practice and Procedure in Part 385,<sup>46</sup> and nothing in Delaware Riverkeeper’s petition indicates otherwise. Moreover, this proceeding is not the proper forum for raising issues related to the Commission’s processing of Delaware Riverkeeper’s FOIA request. Procedures for making requests for non-public documents and for appealing the denial of a request for Commission records are set forth in Rules 388.108-110.<sup>47</sup>

**C. The Remand Order Did Not Impermissibly Ignore Impacts Associated with Non-Compliance Matters.**

22. Delaware Riverkeeper claims that if it had been provided the opportunity to comment on the supplemental environmental analysis, it would have shown that the Commission’s cumulative impacts analysis failed to evaluate significant on-the-ground

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<sup>43</sup> *Myersville*, 783 F.3d at 1327 (quoting *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006), and *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

<sup>44</sup> *See, e.g., Minisink*, 762 F.3d at 115; *Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010).

<sup>45</sup> *See, e.g., Tennessee Gas Pipeline Co., L.L.C.*, Notice of Availability of the Environmental Assessment for the Proposed Susquehanna West Project, Docket No. CP15-148-000 (March 17, 2016) (establishing 32-day comment period).

<sup>46</sup> *See* 18 C.F.R. pt. 385 (2015).

<sup>47</sup> *See* 18 C.F.R. §§ 388.108-110 (2015).

impacts resulting from the company's failure to comply with the required construction procedures. Delaware Riverkeeper asserts that the states of Pennsylvania and New Jersey documented numerous "pollution events" that impacted resources including wetlands and waterways that were not analyzed in the supplemental environmental analysis or Remand Order.<sup>48</sup> It also asserts that the Pennsylvania Department of Environmental Protection (Pennsylvania DEP) found these violations serious enough to secure an \$800,000 settlement from Tennessee for the damage and environmental harm that Tennessee's construction and operational activities caused.<sup>49</sup> In addition, Delaware Riverkeeper claims that the Commission failed to analyze or cite its own inspection and monitoring reports, which it claims detail numerous harms to the environment as a result of improper construction activities and ineffective post-construction monitoring methods.<sup>50</sup>

23. We disagree. First, as explained above, Delaware Riverkeeper's suggestion that it was not provided a meaningful opportunity to challenge the Commission's finding in the Remand Order is unsupported.

24. Second, Delaware Riverkeeper's claim that we impermissibly ignored impacts from construction that resulted in significant impacts to the environment has no merit. Our supplemental environmental analysis provided the examination of the additive and cumulative impacts of the four Tennessee Upgrade Projects which the court found lacking in our original decision for the Northeast Upgrade Project. The supplemental environmental analysis concluded that none of the resource impacts escalated to a significant level based on the mitigation measures required by the Commission in the

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<sup>48</sup> Delaware Riverkeeper Request for Rehearing, Exhibit A at 16-18 (citing Notices of Violations issued for the Pike County Conservation District for the Northeast Upgrade Project (attached as Exhibit G) and for the 300 Line Upgrade Project in Pennsylvania (attached as Exhibit H), and Notices of Violations issued by New Jersey for the projects (attached as Exhibit J).

<sup>49</sup> *Id.* at 18 (citing an article describing settlement between the Pennsylvania DEP and Tennessee regarding compliance with Pennsylvania's Clean Stream Laws (attached as Exhibit I)).

<sup>50</sup> *Id.* at 18-20 (citing a Year 1 Post-Construction Monitoring Report for the Northeast Upgrade Project (attached as Exhibit K) and Tennessee's Quarterly Status Report for the Northeast Upgrade Project dated October 15, 2015, for the period of July 1, 2015 through September 30, 2015 (attached as Exhibit L)).

orders authorizing Tennessee's expansion projects.<sup>51</sup> We adopted the findings in the supplemental environmental analysis and found that no additional mitigation is required for our authorization of Tennessee's Northeast Upgrade Project.<sup>52</sup> As explained below, the mitigation measures adopted for the Northeast Upgrade Project, as well as the other Upgrade Projects, were mandatory and enforceable, and were sufficient to ensure Tennessee's construction and operation of the project would not result in significant impacts to the environment.<sup>53</sup> Whether the company ultimately complied with required mitigation measures, however, has no bearing on the sufficiency of our environmental analysis. Rather, the Commission has in place practices and procedures for monitoring and ensuring compliance with certificate conditions and for appropriately addressing any instances of non-compliance.

25. Regarding the Commission's finding that its action would not result in significant impacts to the environment, we note that Federal agencies may incorporate mitigation measures as part of a proposed action as a means to ensure that such action will not result in significant impacts to the environment.<sup>54</sup> In developing mitigation, agencies necessarily rely on their staff's expertise to assess mitigation needs, develop mitigation plans, and oversee mitigation implementation.<sup>55</sup> Courts have found that a federal agency

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<sup>51</sup> See, e.g., Remand Order, Appendix at 3 (summary of analysis) and 9 (each FERC-jurisdictional project is required to comply with the measures in our *Upland Erosion Control, Revegetation, and Maintenance Plan and Wetland and Waterbody Construction and Mitigation Procedures*).

<sup>52</sup> Remand Order at P 32; Ordering paragraph.

<sup>53</sup> It is worth noting that in the underlying proceeding, we rejected Delaware Riverkeeper's contention that the mitigation measures for the Northeast Upgrade Project were not sufficient and required greater scrutiny because of Tennessee's past compliance record on the 300 Line Project. Rehearing Order at PP 90, 92-94. Riverkeeper did not pursue this issue on appeal. Thus, the court's opinion did not expressly or impliedly impose any obligation on the Commission to consider in our environmental review notices of the pipeline's non-compliance with any federal, state, or local permit or condition that may occur during construction or post-construction.

<sup>54</sup> See, e.g., *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1015 (9th Cir. 2006).

<sup>55</sup> CEQ, *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 Fed. Reg. 3843, 3847 (2011).

may use mitigation measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS when the adequacy of proposed mitigation measures is supported by substantial evidence.<sup>56</sup> Mitigation measures have been found to be sufficiently supported when based on agency assessments or studies,<sup>57</sup> or when they are likely to be “adequately policed,” such as when they are included as mandatory conditions imposed on licenses.<sup>58</sup> It is also appropriate for the Commission to look to the requirements of other expert agencies to determine whether an applicant’s compliance with those agencies’ permitting and other requirements will adequately safeguard and protect resources.<sup>59</sup>

26. In the subject proceedings, the mitigation measures imposed to reduce any adverse environmental impacts associated with the Upgrade Projects were based on the detailed record, including public comments, developed regarding the project’s impacts on specific resources, and reflected, as well, our staff’s expertise. Moreover, the mitigation measures adopted are mandatory and enforceable; for example, for the Northeast Upgrade Project, Tennessee was required to employ environmental inspectors to monitor and ensure compliance with all mitigation measures required by the order (Environmental Condition No. 3). The Commission’s approval of the project was explicitly conditioned on the pipeline submitting an implementation plan detailing the “procedures (including use of contract penalties) [Pipeline] will follow if noncompliance occurs,” along with weekly status reports throughout project construction and restoration activities (Environmental Condition Nos. 6(g) and 7). The status reports must list “all problems encountered and each instance of noncompliance” for both the environmental conditions imposed by the Commission and any mitigation measures/permit requirements imposed by other federal, state, or local agencies, along with a description of corrective actions taken and their

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<sup>56</sup> See, e.g., *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (citing *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556-57 (2d Cir. 1992) (*Ompompanoosuc*); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 245 (D. Vt. 1992) (*Abenaki*), *aff’d* 990 F.2d 729 (2d Cir. 1993).

<sup>57</sup> See *Ompompanoosuc*, 968 F.2d at 1555.

<sup>58</sup> See *Abenaki*, 805 F. Supp. at 239 n.9.

<sup>59</sup> See *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 131-132 (2011), *order on reh’g*, 138 FERC ¶ 61,104 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth and Res. Conservation v. FERC*, 485 F. App’x. 472 (2d Cir. 2012) (unpublished opinion). See also *Transcon. Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091, at PP 140-141 (2012) (citing *Sierra Club v. Hassell*, 636 F.2d 1095, 1098 (5th Cir. 1981)).

effectiveness (Environmental Condition No. 7(c)-(e)). We also ensured that Tennessee was fulfilling its duties by conducting our own compliance monitoring during construction, including regular field inspections. In addition, the Director of the Office of Energy Projects has delegated broad authority to “take whatever steps are necessary to ensure the protection of all environmental resources during the construction and operation of the project”(Environmental Condition No. 2). This includes the authority to modify the existing project conditions and to impose additional mitigation measures (including stop work authority) to assure continued compliance with the intent of the environmental conditions and the avoidance or mitigation of adverse environmental impacts (Environmental Condition No. 2). Similar mitigation measures were adopted in the orders authorizing the other three Upgrade Projects.

27. Moreover, NEPA does not require that an agency, when making a finding of no significant impact, conclude that the proposed action will cause no impacts or that the mitigation measures “completely compensate” for project impacts.<sup>60</sup> While there were impacts that resulted from some non-compliance matters as documented in the Notices of Violations issued by state and local agencies and status reports cited by Delaware Riverkeeper, the mitigation measures imposed in the Commission’s order authorizing the Northeast Upgrade Project and the orders authorizing the three other Upgrade Projects, as well as the requirements of other federal, state, or local laws not administered by the Commission, were sufficient to ensure that any impacts during construction were adequately mitigated.

28. The supplemental environmental analysis was not silent on the issue of activities occurring during construction and operation of the authorized facilities, as Delaware Riverkeeper contends, but found:

We conducted inspections of the projects during both construction and restoration to ensure environmental compliance with the Commission’s orders. This included daily inspections for both the 300 Line and [Northeast Upgrade] Projects and monthly inspections for the [Northeast Supply Diversification] and MPP Projects. The [Northeast Supply Diversification Project] was considered restored in May 2014, for the Tennessee facilities and in September 2014, for the [Dominion Transmission, Inc.] facilities. Based on the most recent compliance inspections of the other three projects, restoration and revegetation of all areas disturbed

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<sup>60</sup> *Tillamook County v. U.S. Army Corps of Eng’rs*, 288 F.3d 1140, 1144 (9th Cir. 2002).

during construction are proceeding satisfactorily and the right-of-way segments are generally revegetated or restored.<sup>61</sup>

Regarding groundwater impacts, the supplemental environmental analysis concluded:

We continue to find that implementation of the construction procedures detailed in each EA, [Tennessee's] mitigation measures, and the recommendations we made in the EAs (which were included as mandatory conditions as a part of the respective Commission Orders) adequately protected groundwater resources, including water wells. This conclusion is based on our confirmation that disturbances were temporary, erosion controls were implemented, and natural ground contours were restored. Further, the Commission's requirement discussed above ensured that any impacts on water supply systems were repaired. Thus, we find that the projects, additively, did not result in any significant long-term or permanent impacts on groundwater resources or users of groundwater.<sup>62</sup>

Therefore, at the time we issued the Remand Order, environmental restoration of the construction areas of the projects was virtually complete, and the applicable environmental conditions were adequately protecting resources. Thus, any discussion of specific non-compliance issues would be necessarily duplicative, as our post-certificate program for monitoring and enforcing compliance with certificate conditions, as well as other federal state and local agencies, had ensured that non-compliance matters had been, and would be, effectively addressed.

29. The notices of violations and the inspection and monitoring reports cited by Delaware Riverkeeper do not support a contrary conclusion. First of all, the notices of violation cited by the Delaware Riverkeeper in Exhibits G, H, and J relate to the laws and mitigation requirements of state and local agencies in Pennsylvania and New Jersey. As we explained above, we rely on these agencies to require compliance with the respective laws the agencies administer and to take any necessary corrective actions. The Commission requirements often differ from other federal, state, and local requirements and the Commission has no jurisdiction over compliance with conditions imposed by other entities, unless non-compliance also violates the conditions of the Commission's

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<sup>61</sup> Remand Order, Appendix at 9-10.

<sup>62</sup> *Id.* at 13.

certificate. Therefore, the appropriate venue to resolve any issues Delaware Riverkeeper may have regarding compliance with these state and local requirements is with the agencies having jurisdiction over these matters.<sup>63</sup>

30. Second, contrary to Delaware Riverkeeper's assertion, the Commission's inspection and monitoring reports cited by Delaware Riverkeeper show that the environmental conditions of the Certificate Order for the Northeast Upgrade Project were being implemented, that non-compliance issues were being identified and resolved, and that restoration of the project right-of-way was progressing. For example, Exhibit K of Delaware Riverkeeper's request for rehearing is a Year 1-Post Construction Monitoring Report for the Northeast Upgrade Project that details the restoration status of the project by facilities constructed, and identifies issues with restoration that need to be addressed. Our post-certificate program for monitoring and enforcing compliance with certificate conditions ensures that any additional problem areas or areas that require supplemental efforts to enhance restoration are corrected, and Delaware Riverkeeper has not provided any evidence to the contrary. Exhibit L is a Quarterly Status Report for July 1, 2015 through September 30, 2015, for the Northeast Upgrade Project. This report details, among other things, the status of construction and restoration activities on the project for the applicable time period, and details problems encountered and instances of non-compliance observed by an Environmental Inspector. Where instances of non-compliance are reported, the report must detail corrective actions taken in response to

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<sup>63</sup> As discussed above, we are dismissing Delaware Riverkeeper's rehearing request on procedural grounds. Accordingly, we will not accept into the record Tennessee's answer to that request. However, solely in the context of our discussion in this order of the reasons we would have, in any event, dismissed Delaware Riverkeeper's request on the merits, we note that in its answer, Tennessee asserts that Delaware Riverkeeper mischaracterizes the settlement between the Pennsylvania (DEP) and Tennessee. Tennessee states that the settlement specifically states that the findings therein may not be relied on by any other party in any other proceeding and that it agreed to pay a civil penalty of \$210,000 (and costs of approximately \$50,000) in resolution of the agency's claim for civil penalties for alleged violations that Tennessee did not admit to. It also states that it agreed to perform, or cause to be performed, a Community Environmental Project, valued at \$540,000, and that the Pennsylvania DEP's policy for consideration of such projects states that such projects will generally not be considered if "the violation was intentional, willful, or the result of gross negligence; the harm to the environment or public health was unusually extreme; or, the person or regulated entity has a poor compliance history or a pattern of violations similar to the current violation." Tennessee Answer at 6-7 (citing Pennsylvania DEP's Policy for the Consideration of Community Environmental Projects in Conjunction with Assessment of Civil Penalty).

each non-compliance occurrence, and the effectiveness of corrective actions. There were no instances of non-compliances reported by Tennessee's Environmental Inspector during the quarterly reporting period. While the report also lists the cumulative number of problem areas and non-compliance issues for the project, this does not mean that these problems and/or non-compliances were not addressed or resulted in adverse harm to resources. The corrective actions taken for these occurrences are detailed in earlier status reports and we find that they have all been adequately resolved and did not warrant further discussion of impacts in the supplemental environmental analysis.

31. In sum, the Commission has supported its reliance on mitigation measures to determine that the Northeast Upgrade Project and the other three Upgrade Projects will not have a significant impact on the environment. Consistent with the conditions of the orders authorizing the Upgrade Projects, the Commission's monitoring and enforcement program ensures that non-compliance issues have or, in the case of future issues, will be appropriately remediated to ensure the avoidance or mitigation of adverse environmental impacts.

The Commission orders:

For the reasons discussed above, Delaware Riverkeeper's request for rehearing is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.