

133 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Ruby Pipeline, L.L.C.

Docket No. CP09-54-002

ORDER DENYING REHEARING

(Issued October 6, 2010)

1. On April 5, 2010, in Docket No. CP09-54-000, the Commission issued a certificate of public convenience and necessity to Ruby Pipeline, L.L.C. (Ruby), under section 7(c) of the Natural Gas Act (NGA),¹ to construct and operate a 677-mile-long, 42-inch-diameter pipeline, with a firm transportation capacity of 1,500,000 dekatherms (Dth) per day, to transport natural gas from Rocky Mountain production areas to west coast markets.² The pipeline will extend from the Opal Hub in southwest Wyoming to the Malin Hub near the Oregon-California border, crossing through Wyoming, Utah, Nevada, and Oregon.

2. The Summit Lake Paiute Tribe (Summit Lake), Defenders of Wildlife (Defenders), and the Toiyabe Chapter of the Sierra Club (Sierra Club) timely requested rehearing of the April 2010 Order. The parties challenge the adequacy of the April 2010 Order's environmental analysis and compliance with the National Environmental Policy Act (NEPA).³ The Center for Biological Diversity (Biological Diversity) filed a late request for rehearing. As discussed below, we deny rehearing and reject Biological Diversity's late rehearing request.

I. Background

3. On January 27, 2009, Ruby filed an application requesting, *inter alia*, certificate authorization pursuant to NGA section 7(c) to construct and operate a new interstate

¹ 15 U.S.C. § 717f (2006).

² *Ruby Pipeline, L.L.C.*, 131 FERC ¶ 61,007 (2010) (April 2010 Order).

³ 42 U.S.C. §§ 4321-4347 (2006).

pipeline from the Opal Hub in Wyoming to interconnections near Malin, Oregon, and four compressor stations. On September 4, 2009, the Commission issued a preliminary determination addressing the non-environmental issues raised by Ruby's application for certificate authorization.⁴ The September 2009 Order determined that, contingent on the Commission's pending environmental review, the proposed Ruby pipeline would be required by the public convenience and necessity.⁵

4. Commission staff evaluated the potential environmental impacts of the proposed Ruby project in draft and final environmental impacts statements (EIS) that we found satisfy the requirements of NEPA. The U.S. Department of Interior's Bureau of Land Management (BLM), Bureau of Reclamation (Reclamation), and Fish and Wildlife Service (FWS); the U.S. Department of Agriculture's Forest Service (Forest Service) and Natural Resources Conservation Service (Conservation Service); the U.S. Army Corps of Engineers (Army Corps); the State of Utah Public Lands Policy Coordination Office; and the Board of County Commissioners in Lincoln County, Wyoming, served as cooperating agencies in the preparation of the draft and final EIS.

5. On June 26, 2009, Commission staff issued a draft EIS. The Notice of Availability of the draft EIS established a 45-day comment period. A copy of the draft EIS was mailed to agencies, tribes, organizations, and individuals that attended meetings or submitted written comments on the project, as well as other interested parties. Commission staff held seven public comment meetings during the draft EIS comment period, which provided interested parties with an opportunity to present oral comments on our analysis of the environmental impacts of the proposed project as described in the draft EIS.

6. On January 8, 2010, Commission staff issued a final EIS.⁶ The final EIS was filed with the U.S. Environmental Protection Agency (EPA), which also noticed its receipt of the final EIS in the *Federal Register*.⁷ Copies of the final EIS were mailed to over 3,000

⁴ *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 (2009) (September 2009 Order).

⁵ *Id.* P 42.

⁶ 75 Fed. Reg. 3221 (Jan. 20, 2010).

⁷ 75 Fed. Reg. 2540 (Jan. 15, 2010). On rehearing, Summit Lake argues that because the EPA notice was not placed in the Commission's eLibrary record, the public was not lawfully apprised of the final EIS. We find no error in the notice procedures for this proceeding. The EPA notice is a ministerial list of the EISs that the EPA receives each week, as required by NEPA. The Commission is responsible for making its environmental impact statements publicly available, and we have done so here through

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interested parties.⁸ The final EIS considered the relevant environmental and safety issues associated with the project, including (1) route alternatives; (2) analysis of the geology, soils, water resources, wildlife, fisheries and aquatic resources, special status species, land use and visual resources, socioeconomics, cultural resources, air quality and noise, and reliability and safety; and (3) the cumulative effects on each of these resources.

7. The April 2010 Order adopted the final EIS and its conclusions, and authorized construction of the proposed project subject to modifications and 46 environmental conditions recommended by staff.⁹ The final EIS found that most of the adverse environmental impacts identified in the final EIS would be reduced to less-than-significant levels with the implementation of Ruby's proposed conservation or mitigation measures and Commission staff's recommended conditions.¹⁰ However, the final EIS found that, even with mitigation measures, impacts on groundwater resources and sagebrush steppe habitat would be significant.¹¹ Therefore, the April 2010 Order further discussed concerns regarding groundwater resources and sagebrush steppe habitat, as well as, *inter alia*, cultural resources, migratory birds, federally-listed species, and route alternatives in northwestern Nevada.

8. Summit Lake, Defenders, Sierra Club, the Western Watersheds Foundation (Western Watersheds), and the Oregon Natural Desert Association (Oregon Desert) timely requested rehearing of the April 2010 Order. On July 27, 2010, Biological Diversity requested rehearing of the April 2010 Order.

II. Procedural Issues

A. Withdrawal of Requests for Rehearing

9. On July 14, 2010, Western Watersheds filed a notice of withdrawal of its intervention, comments, and request for rehearing in this proceeding. On July 16, 2010, Oregon Desert filed a notice of withdrawal of its intervention and request for rehearing.

direct mailing to interested parties, placement of the final EIS in eLibrary, and publication of notice of the final EIS in the *Federal Register*.

⁸ The distribution list is provided in Appendix A of the final EIS.

⁹ The environmental conditions are listed in Appendix A of the April 2010 Order.

¹⁰ Section 5.1 of the final EIS.

¹¹ *Id.*

10. Rule 216 of the Commission's Rules of Practice and Procedure allows any party to withdraw a pleading by filing a notice of withdrawal.¹² The withdrawal is effective at the end of 15 days from the date of filing of a notice of withdrawal if no motion in opposition to the withdrawal is filed.¹³ Because no motions in opposition to Western Watershed's or Oregon Desert's notices of withdrawal were timely filed,¹⁴ the withdrawal of their pleadings was effective at the close of business on July 29, 2010, and August 2, 2010, respectively.

B. Late Request for Rehearing

11. On July 27, 2010, Biological Diversity filed a request for rehearing of the April 2010 Order. Section 19 of the NGA allows a party to a proceeding to request rehearing of a Commission order within 30 days after issuance of an order.¹⁵ Biological Diversity filed its rehearing request almost two months after the statutory rehearing deadline. Because the 30-day rehearing period is statutorily-prescribed, we have no authority to waive this deadline. Therefore, Biological Diversity's request for rehearing is rejected.¹⁶

¹² 18 C.F.R. § 385.216(a) (2010).

¹³ 18 C.F.R. § 385.216(b) (2010).

¹⁴ A motion in opposition to Western Watersheds' withdrawal of its comments in the proceeding was filed by Summit Lake on August 5, 2010. Because Summit Lake's motion in opposition was not filed in a timely manner and the Commission did not issue an order to disallow the withdrawal as provided for in Rule 216, 18 C.F.R. § 385.216, Western Watersheds' withdrawal had already become effective on July 29, 2010. The Commission notes that while Summit Lake's motion to oppose the withdrawal states that it has relied on information in Western Watersheds' pleadings, Summit Lake makes no references to any specific information in any of Western Watersheds' pleadings.

¹⁵ 15 U.S.C. § 717r(a) (2006).

¹⁶ Biological Diversity's arguments on rehearing are more appropriately addressed in a different venue, or were raised in other parties' timely rehearing requests and are addressed herein, or were thoroughly reviewed in the final EIS. The Commission is not the appropriate venue to address Biological Diversity's assertions that: (1) the FWS' Biological Opinion violates the Endangered Species Act; (2) the BLM's Record of Decision approving rights-of-way and temporary use permits failed to analyze the project's adverse environmental impacts; and (3) the FWS' Sheldon National Wildlife Refuge compatibility determination is not in accordance with the National Wildlife Refuge Administration Act. The April 2010 Order requires Ruby to obtain all

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III. Discussion

12. On rehearing, the parties assert that the Commission's environmental analysis is deficient for a number of reasons, including: (1) required reports, plans, and agreements have not been submitted; (2) approval was granted prior to the issuance of required federal authorizations; and (3) the final EIS inadequately analyzes the impacts of mitigation on greater sage-grouse habitat and mating sites, cumulative impacts, and route alternatives.

A. Environmental Conditions

13. The April 2010 Order authorized Ruby to construct and operate the proposed project subject to compliance with 46 environmental conditions. The parties assert that the Commission's practice of authorizing natural gas infrastructure subject to conditions does not meet the requirements of NEPA, NGA, Administrative Procedures Act (APA), National Historic Preservation Act (NHPA), Federal Lands Policy and Management Act (FLPMA), Clean Water Act (CWA), or is otherwise unlawful.

14. The parties assert the issuance of an order subject to conditions that require the future submission of plans and reports defers and delays analysis of relevant environmental impacts to administrative post-authorization processes without adequate public review. The parties contend that the Commission could not have made an informed decision in authorizing the project because it had not received information relevant to potential resource impacts, and thus acted on the basis of inadequate information, in violation of NEPA, APA, and NGA. The parties also assert that the conditions in the April 2010 Order improperly delegate the Commission's responsibilities

appropriate federal authorizations, including the Biological Opinion, the necessary BLM rights-of-way and permits, and the compatibility determination before a notice to proceed with construction would be issued by the Commission. Because these documents are authored by the FWS and BLM, any challenge to these documents and the agencies' decisions should be addressed to those agencies. Further, Biological Diversity's claim that the final EIS fails to adequately analyze the project's adverse environmental impacts is similar to arguments made in the other parties' timely requests for rehearing, which are addressed in this order. Additionally, we note that in response to Biological Diversity's claim to the contrary, analysis of the project's compliance with the Bald and Golden Eagle Protection Act and the FWS' September 2009 implementing regulations can be found at pages 4-106 through 4-112 of the final EIS and in Appendix M to the final EIS (*Voluntary Conservation Measures in Furtherance of the Migratory Bird Treat Act and Bald and Golden Eagle Protection Act and Executive Order No. 13186*).

to make decisions and to weigh costs and impacts, even to modify other conditions, to the Director of the Office of Energy Projects (OEP).

15. The parties reject the Commission's previously-stated position that its practice – of issuing a final order authorizing a natural gas project contingent upon studies and analyses being completed and subsequent receipt of required federal authorizations – is routine, longstanding, and a practical response to the reality that it can be impossible to obtain all necessary federal authorizations in advance of a Commission order without unduly delaying a project.¹⁷

Commission Response

16. Section 7(c) of the NGA provides that “no natural-gas company . . . shall engage in the transportation or sale of natural gas . . . or undertake the construction or extension of any facilities . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.”¹⁸ Section 7(e) of the NGA empowers the Commission to attach to a certificate “such reasonable terms and conditions as the public convenience and necessity may require.”¹⁹ Courts have agreed that it is a well-established principle that “the Commission has extremely broad authority to condition certificates of public convenience and necessity.”²⁰

17. In responding to challenges to our authority to condition our orders, we have relied on several cases to support our assertion that we may issue conditioned orders under the NGA so long as the applicants would be precluded from initiating construction and operation until they receive all necessary federal authorizations and meet all

¹⁷ See, e.g., *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 59-60 (2009) (*AES*); *Bradwood Landing LLC*, 126 FERC ¶ 61,035, P 28-30 (2009) (*Bradwood*).

¹⁸ 15 U.S.C. § 717f(c) (2006).

¹⁹ 15 U.S.C. § 717f(e) (2006).

²⁰ See *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979) (citing *Atlantic Richfield Co. v. Public Service Comm'n of N.Y.*, 360 U.S. 378 (1959)), *cert. denied*, 445 U.S. 915 (1980); see also *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (the Commission is the guardian of the public interest and has a wide range of discretionary authority in determining whether authorizations should be granted).

environmental conditions. In *P.U.C. of Cal. v. FERC (CPUC)*,²¹ the court explained that “[w]hile it is generally true that ‘NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken*,’²² . . . we held in *Illinois Commerce Comm’n.* that this did not prevent an agency from making even a final decision so long as it assessed the environmental data before the decision’s effective date.”²³ The *CPUC* decision further found that the “Commission’s deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA.”²⁴

18. As in the *CPUC* case, we granted a certificate for the Ruby pipeline project with authorization to commence construction contingent on the applicant’s demonstrating the project’s compliance with our environmental conditions and the receipt of other necessary federal environmental authorizations. We view the nature of such Commission orders granting NGA authorization subject to conditions as “incipient authorization[s] without current force and effect,” since absent action by the applicant and other state and federal agencies, and following that further action on the part of the Commission, construction cannot begin.²⁵

19. Therefore, we see no impropriety in our routine practice of issuing a final order granting authorization for a project contingent on findings of future studies and favorable decisions on requests pending before other agencies. Such orders set forth the conditions under which a project may proceed, but until outstanding federal authorizations are obtained and the conditions of these authorizations and our final order are met, the applicant remains unable to exercise its construction authority under its NGA certificate. In other words, unless and until the necessary federal authorizations are granted, and the specified conditions of those authorizations and the Commission’s final order are

²¹ 900 F.2d 269, 282 (D.C. Cir. 1990).

²² *Id.* (citing 40 C.F.R. § 1500.1(b) (emphasis added by court)).

²³ *Id.* (citing *Illinois Commerce Comm’n v. ICC*, 848 F.2d 1246, 1259 (1988)).

²⁴ 900 F.2d 269, 282-83 (citing 40 C.F.R. §§ 1505.2(c), 1505.3).

²⁵ *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 21 (2006). We observed that “[c]onditional Commission orders have been described in the context of constitutional standing analysis as ‘without binding effect.’” *Id.* P 21, n.27 (citing *New Mexico Attorney General v. FERC*, 466 F.3d 120, 275 (D.C. Cir. 2006), quoting *DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005)).

fulfilled, no action can be undertaken that would have any adverse impact on the environment.

20. Further, our April 2010 Order does not impinge on the decision-making process or the validity or force of decisions of the other federal agencies, and state agencies acting under federally-delegated authority, that review requests for permits, authorizations, certifications, opinions, or other approvals. Our practice of issuing orders granting contingent project approval²⁶ is a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission issuing its authorization without unduly delaying the project.²⁷ We take this approach in order to make timely decisions on matters related to our NGA jurisdiction that will inform project sponsors, and other licensing agencies, as well as the public.²⁸

1. Clean Water Act

21. Sierra Club and Summit Lake argue that the April 2010 Order violates section 401 of the CWA because state water quality certifications had not been issued by the impacted states. Section 401 of the CWA requires “any applicant for a Federal license or

²⁶ See, e.g., *AES*, 129 FERC ¶ 61,245; *Bradwood*, 126 FERC ¶ 61,035; *Golden Pass LNG Terminal LP*, 112 FERC ¶ 61,141 (2005); *Freeport LNG Development, L.P.*, 107 FERC ¶ 61,278 (2004); *Transcontinental Gas Pipeline Corp.*, 102 FERC ¶ 61,305 (2003); *Islander East Pipeline Co.*, 102 FERC ¶ 61,054 (2003); *Transcontinental Gas Pipeline Corp.*, 98 FERC ¶ 61,027 (2002); *Gulfstream Natural Gas System, L.L.C.*, 94 FERC ¶ 61,185 (2001); *Florida Gas Transmission Co.*, 90 FERC ¶ 61,212 (2000); *Mojave Pipeline Co.*, 72 FERC ¶ 61,167 (1995); *Tuscarora Gas Transmission Co.*, 71 FERC ¶ 61,255 (1995).

²⁷ See, e.g., *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 59 (2008); *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 26 (2006); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 225-31 (2002).

²⁸ This practice avoids having the Commission: (1) place its administrative process on hold indefinitely until other federal agencies or states with delegated federal authority reach final decision or (2) deny applications because all federal permits have not been issued by the time the Commission completes its NGA review. Either of these approaches could preclude needed infrastructure projects from being placed in service in a timely manner, to the detriment of consumers and the public in general.

permit to conduct any activity . . . which may result in any discharge” to obtain state certification.²⁹

22. The certificates granted in the April 2010 Order do not authorize activities that will result in a discharge under the CWA, and therefore section 401 state certifications were not required prior to the Commission acting on Ruby’s application. This does not mean that the Clean Water Act is inapplicable to the Ruby project, however. To the extent any activity associated with the Ruby project may result in a discharge for which a permit is required, Ruby must obtain a permit from the appropriate federal agency before it may engage in such activities. Sections 4.3.2.4 and 4.3.3 of the final EIS recognize that Ruby must obtain a permit from the Army Corps under section 404 of the CWA for the discharge of dredge and fill material used during construction.³⁰ While this is an independent obligation on Ruby and the Army Corps, the April 2010 Order, nevertheless, made our authorization to begin construction contingent on Ruby first obtaining its section 404 permit from the Army Corps.³¹ Ruby has subsequently submitted verification that the Army Corps has issued a section 404 nationwide permit for its proposed dredge and fill activities, including copies of section 401 certifications from Wyoming, Utah, Nevada, and Oregon.³² To the extent the parties challenge the Army Corps’ authority to issue a section 404 dredge and fill permit or the process of obtaining the permit, the parties must seek redress with the Army Corps.

²⁹ 33 U.S.C. § 1341(a)(1) (2006).

³⁰ The Army Corps, in turn, must obtain section 401 state water quality certifications before issuing its section 404 permit, and include any state-required conditions in the section 404 permit. 33 U.S.C. § 1341(d) (2006). *See Marathon Dev. Corp.*, 876 F.2d 96, 100 (1st Cir. 1989) (state certification requirement of section 401 applies to section 404 permits).

³¹ Environmental condition no. 9 explicitly states that “prior to receiving written authorization from the Director of OEP to commence construction of project facilities in each state, Ruby shall file documentation that it has received all authorizations required under federal law (or evidence of waiver thereof) in each respective state.”

³² *See* Ruby filing, August 3, 2010, Supplement to Implementation Plan – Condition No. 9 Information.

23. The parties further cite *City of Tacoma, Wash. v. FERC (City of Tacoma)*³³ and *State of N.C. v. FERC (North Carolina)*³⁴ for the proposition that the Commission lacks authority to issue a license without section 401 state certifications, and, by analogy, lacks authority to issue a natural gas certificate without section 401 state certifications. We dispute the relevance of the cases cited by the parties, which concerned aspects of section 401 state certifications for operation of hydroelectric projects. By nature of the operation of a hydroelectric project, such projects result in the discharge of water into navigable waters, and therefore require section 401 state water quality certifications before the Commission may issue a license.³⁵ In contrast to a hydroelectric project, the April 2010 Order does not authorize a discharge under the CWA, and therefore section 401 certifications are not required.³⁶ Further, as explained above, our issuance of

³³ 460 F.3d 53, 68 (D.C. Cir. 2006). In *City of Tacoma*, the court found that where a state's notice procedures under section 401 of the CWA have been called into question, the Commission has a responsibility to verify compliance with state notice procedures. *Id.* In dicta discerning the distinction between *application* for a section 401 state water quality certification for the term of a hydroelectric license versus *compliance* with that certification, the court stated that the Commission "may not act based on any certification the state might submit; rather it has an obligation to determine that the specific certification 'required by [section 401] has been obtained,' and without that certification FERC lacks authority to issue a license." *Id.* at 69 (citing 33 U.S.C. § 1341(a)(1)).

³⁴ 112 F.3d 1175, 1183 (D.C. Cir. 1997). At issue in *North Carolina* was whether a licensee must obtain a section 401 state certification for an amendment to an operating hydroelectric license where the amendment (a withdrawal of water) would cause no "discharge" in the state. In dicta, however, the *North Carolina* decision articulated a distinction that the parties conflate: the *Commission* is proscribed from issuing a hydroelectric license until a section 401 state certification has been received or waived, whereas the *Army Corps* is proscribed from issuing a section 404 dredge and fill permit until section 401 state certifications have been received. A section 401 certification is required for a hydroelectric project if the activity authorized by the license or amendment will result in a discharge that is separate from, and in addition to, the discharge of dredged and fill material that requires a section 404 permit from the Army Corps.

³⁵ See *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109, 1111 (4th Cir. 1989) (Federal Power Act section 4(e) license applicant must obtain state certification under Clean Water Act section 401 before the Commission may issue a license).

³⁶ Hydroelectric licensees sometimes must seek section 404 dredge and fill permits from the Army Corps before engaging in construction activities. As in the case of Ruby's certificate, the obligation for a licensee to seek Army Corps authorization for these

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Ruby's certificate in the April 2010 Order does not impact any substantive determinations that need to be made by other federal agencies or states under federal statutes, including the CWA. The agencies retain full authority to grant or deny specific requests.

2. National Historic Preservation Act

24. The parties argue that the Commission and Ruby failed to adequately consult with State Historic Preservation Officers (SHPO) before issuance of the final EIS. Sierra Club and Summit Lake also argue that the April 2010 Order violates 18 C.F.R.

§ 380.12(f)(2)(i) of the Commission's regulations because land management agencies did not submit comments on survey reports of potential historic properties before the order was issued. The parties further assert that the April 2010 Order violates section 380.12(f)(3) of the Commission's regulations because evaluation reports and treatment plans for cultural resources had not been submitted before the order was issued.

25. Section 106 of the NHPA requires federal agencies to take into account the effects of federal undertakings on historic properties, and to afford the Advisory Council on Historic Preservation (Advisory Council) an opportunity to comment on such undertakings.³⁷ The section 106 regulations, promulgated by the Advisory Council, also require federal agencies with responsibility for an undertaking to consult with the relevant SHPOs, federal land management agencies, federally-recognized Native American tribes, representatives of local government, and other potentially interested parties.³⁸

26. The record in this proceeding evidences a long and thorough consultation process for cultural resources along the pipeline route. Section 4.10 of the final EIS thoroughly recounts this history. The record does not support the parties' assertion that land management agencies did not submit comments on survey reports before the April 2010 Order was issued. Comments on the potential eligibility of cultural resources were submitted by each of the relevant BLM field offices, the Forest Service, FWS, Reclamation, and state land management agencies for Utah, Nevada, Wyoming, and

activities is separate and independent from the Commission's issuance of a license. *See Cogeneration, Inc.*, 71 FERC ¶ 61,382 (1995); *see, e.g., Public Utility District No. 2 of Grant County, Wash.*, 123 FERC ¶ 61,049, at 61,357 (Appendix A, section 6.8) (2008).

³⁷ 16 U.S.C. § 470 (2006).

³⁸ 36 C.F.R. Part 800 (2010).

Oregon before the April 2010 Order.³⁹ Because not all evaluations and final treatment plans had been submitted by the issuance of the April 2010 Order, environmental condition no. 44 required Ruby to file any additional treatment plans before project construction would be authorized to address any historic properties that would be adversely affected by the project once all studies and the appropriate consultations are completed.

27. As previously discussed, the April 2010 Order is an “incipient authorization without force or effect,” and construction in areas with historic properties cannot occur until treatment plans have been agreed to by the SHPOs. Although it would be the Commission’s preference to have received all final treatment plans before issuance of the order, draft treatment plans for Oregon, Utah, and Wyoming had been filed prior to issuance of the order.⁴⁰ By July 30, 2010, Commission staff had executed memorandums of agreement with the state SHPOs and the Advisory Council for Wyoming, Utah, Nevada, and Oregon, thereby completing the section 106 consultation process. Nevertheless, Ruby will have to continue to comply with environmental condition no. 44 in the April 2010 Order.

3. Federal Land Policy and Management Act

28. Summit Lake and Sierra Club argue that the April 2010 Order violates FLPMA because existing land-use plans are inconsistent with the order. The parties assert that several land management plans would need to be changed before BLM could execute a Record of Decision authorizing federal rights-of-way.

³⁹ See the attachments to the staff-issued letters of “Determination of Eligibility and Effect for the Ruby Pipeline Project and Request for Review” sent to the Utah State Historical Society on March 18, 2010, the Nevada State Historic Preservation Office on March 19, 2010, the Wyoming State Historic Preservation Office on March 19, 2010, and the Oregon State Historic Preservation Office on April 16, 2010, which include the comments applicable to each state.

⁴⁰ Section 380.12(f)(3) of the Commission’s regulations does state that evaluation reports and treatment plans must be filed before a final certificate is issued. 18 C.F.R. § 380.12(f)(3) (2010). Section 380 of our regulations describes the basic filing requirements for natural gas infrastructure proponents to comply with NEPA. However, where we have specifically included a site-specific condition in our order, the site-specific conditioning, as in the case of environmental condition no. 44, complies with NEPA.

29. FLPMA requires BLM to develop land use plans that govern the use of BLM lands.⁴¹ Section 1.5.2 of the final EIS identifies ten BLM land use plans affected by the pipeline project, and indicates that BLM determined the pipeline project would be in conformance with the management goals, objective, and/or direction of each of the land use plans. BLM's process to determine whether to grant rights-of-way on federal land, and whether such a grant is consistent with land use plans and FLPMA, is exclusively within BLM's responsibility and expertise. As noted above, environmental condition no. 9 requires that Ruby obtain all authorizations under federal law, including receipt of a Record of Decision granting rights-of-way on federal lands, before construction will be authorized by the Commission. We note that on July 12, 2010, BLM issued its Record of Decision granting rights-of-way and temporary use permits for use of federal lands.

4. Improper Delegation

30. The parties assert that the April 2010 Order improperly delegates authority to the Director of OEP because it authorizes the director to consider impacts and make modifications to the environmental conditions.⁴²

31. The Commission's regulations explicitly authorize the Director of OEP to "[t]ake whatever steps are necessary to ensure the protection of all environmental resources during the construction or operation of natural gas facilities."⁴³ This includes the ability to modify construction procedures and mitigation measures as necessary. The matters delegated to the Director of OEP are matters within the particular technical expertise of the Director and his staff. To the extent the Director adds or modifies a requirement in response to information filed in the proceeding, such information will be available in eLibrary for review and comment by interested parties. Moreover, as provided for in Rule 1902 of the Commission's regulations, any delegated order issued by the Director

⁴¹ 43 U.S.C. §§ 1701-82 (2006).

⁴² Environmental condition no. 1 grants authority to the Director of OEP to approve modifications to the construction procedures and mitigation measures set forth in Ruby's applications, filings, the final EIS, and the April 2010 Order. Environmental condition no. 2 grants authority to the Director of OEP to "take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project."

⁴³ 18 C.F.R. § 375.308(x)(7) (2010).

that significantly modifies the Commission's order would be subject to rehearing by the Commission.⁴⁴ Thus, the due process rights of all parties would be protected.

B. Sufficiency of Environmental Analysis

32. The parties argue that the final EIS violates NEPA because it fails to take the requisite "hard look" at the environmental consequences of the project. Sierra Club and Summit Lake also contend that the Commission has allowed "piecemeal" submissions with no indexing, which has made it difficult for the parties to understand the content of the filings.

33. We have found that the review that takes place in the context of our pre-filing process and during the development of our draft and final EIS enables us to identify and take a hard look at the potentially adverse environmental impacts of a proposed project. This allows us to make an informed comparison among possible alternatives to the proposed project and, as necessary, to impose environmental mitigation conditions so we can be confident the project does not result in unacceptable adverse impacts. We believe this approach meets the NEPA expectation that an EIS contain "a reasonably complete discussion of possible mitigation measures,"⁴⁵ and that these measures "be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated."⁴⁶

34. We also disagree with the parties' assertion that our record-keeping system makes review of the record in this proceeding onerous. Documents in our eLibrary system are labeled to identify the type of document, who submitted and/or issued the document, and the filing date of the document, and can be searched based on many attributes of the document. Documents relied on by staff in this proceeding are accessible to the public almost immediately after submittal through our eLibrary system.⁴⁷ It is the nature of an

⁴⁴ 18 C.F.R. § 385.1902 (2010).

⁴⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (*Robertson*).

⁴⁶ *City of Carmel-By-The-Sea v. U.S. Dep't of Transportation*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson*, 490 U.S. at 353).

⁴⁷ Critical energy infrastructure information is available if the requester follows the procedures established in the Commission's regulations. See 18 C.F.R. § 388.113 (2010). Privileged information, which includes information that contains location, character, and ownership information about cultural resources, may be sought through a Freedom of Information Act request. See 18 C.F.R. § 388.108 (2010).

administrative proceeding to expect ongoing updates and revised information as a project proposal is developed. As discussed above, it would be virtually impossible to site new infrastructure if the record of every federal authorization and all possible potential updates to an application were required to be submitted at once. Rather, our regulations require specific information and resource reports from applicants at the beginning of a proceeding to allow the Commission and cooperating agencies to begin the NEPA process, which includes scoping, issuing data requests for additional information, draft documents subject to comments, and final documents. As more detailed information becomes available, we expect the applicant, cooperating agencies, and interested members of the public to submit additional information or identify concerns, as has been done throughout this proceeding.

1. Greater Sage-Grouse Habitat Mitigation

35. The parties argue that NEPA does not permit the Commission to postpone describing mitigation measures and their effect on the projected impacts of the project until some point in the future.⁴⁸ The parties also assert that the final EIS fails to provide site-specific mitigation measures for the disturbance of sage-grouse habitat and mating sites, as required by section 380.12(e)(7) of the Commission's regulations.⁴⁹

36. The Supreme Court stated in *Robertson v. Methow Valley Citizens Council* that "NEPA does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have

⁴⁸ The parties also make the broad claim that the final EIS "fails to explain how any of the undefined mitigation measures are going to be of any benefit to any of the impacted species." Many species and many mitigation measures were discussed throughout the final EIS. Without a more specific description of the error alleged by the parties, it is impossible to know to which species and mitigation measures they are referring.

⁴⁹ This assertion is not supported by the record. Ruby satisfied the requirement in section 380.12(e)(7) of the regulations that applicants "describe site-specific mitigation measures to minimize impacts on fisheries, wildlife, and vegetation." 18 C.F.R. § 380.12(e)(7) (2010). Specifically, section 3.4.7 of Resource Report 3 in Ruby's application outlines the construction and operation impacts of the project to vegetative communities, wildlife, and fisheries resources, and outlines the conservation and mitigation measures that Ruby would implement to minimize such impacts. See Ruby January 27, 2009 Application at Volume 2, Resource Report 3.

been fairly evaluated.”⁵⁰ Here the Commission made every effort to ensure that impacts to greater sage-grouse, their habitat, and their mating sites were considered. The final EIS thoroughly discusses sage-grouse (section 4.7.3.1 of the final EIS), sage-grouse habitat (sagebrush steppe habitat) (section 4.4.1 of the final EIS) and mating sites (leks) (section 4.7.3.1 of the final EIS), and related mitigation measures (sections 4.7.4.1, 4.7.3.1, and 4.4.1 of the final EIS). The final EIS recognizes that construction impacts on sagebrush steppe habitat will be significant due to the amount of habitat affected and because restoration of habitat could take 50 years or longer.

37. To mitigate impacts, Ruby committed to numerous site-specific measures to minimize these impacts on greater sage-grouse, including realignment of the pipeline, pre-construction surveys, construction buffers, construction-timing restrictions, and specific revegetation activities. In addition, Ruby, BLM, Wyoming Game and Fish Commission, Utah Division of Wildlife Resources, and Nevada Department of Wildlife prepared a *Cooperative Conservation Agreement for the Greater Sage-Grouse and Pygmy Rabbit* to further mitigate impacts to greater sage-grouse.⁵¹ This agreement provides for funding by Ruby for state conservation efforts and incorporates by reference Ruby’s separate *Greater Sage-Grouse and Pygmy Rabbit Conservation Measures Plan* to minimize and mitigate adverse impacts associated with the project.⁵² Ruby has agreed to implement the agreement, and has also committed to not remove sagebrush during routine vegetation maintenance activities after construction in order to further preserve sage-grouse habitat.⁵³

2. Cumulative Impacts

38. NEPA requires that federal agencies consider the cumulative impacts of proposals under their review. Cumulative impacts are defined as “the impact on the environment

⁵⁰ *Robertson*, 490 U.S. at 352.

⁵¹ A draft of the plan is included in Appendix M of the final EIS.

⁵² *See* Appendix M of the final EIS.

⁵³ Sierra Club emphasizes that, contrary to a statement in the April 2010 Order (131 FERC ¶ 61,007 at P 56), the greater sage-grouse is a candidate species that was found to be warranted, but precluded for listing, as an endangered species by findings of the FWS on March 5, 2010. We agree. However, the misstatement in the April 2010 Order does not change our underlying analysis because our staff took a precautionary approach to the analysis of greater sage-grouse, and throughout the process analyzed species and habitat impacts as if the greater sage-grouse were a candidate species.

that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions regardless of what agency . . . or person undertakes such actions.”⁵⁴

39. Sierra Club and Summit Lake argue that the final EIS does not adequately analyze the cumulative impacts of the project because various plans and federal authorizations have not been submitted. Specifically, the parties allege that the following documents or information either were not submitted or simply were not considered in the cumulative impacts analysis: (1) Nevada’s Greater Sage-Grouse Conservation Plan for Nevada and Eastern California; (2) a 2008 Memorandum of Understanding among Western Association of Fish and Wildlife Agencies and the Departments of Interior and Agriculture regarding sage-grouse; (3) the most recent science in the sage-grouse population assessment released by the FWS on November 4, 2009, to inform the ongoing FWS status review to determine whether or not the sage-grouse requires protection under the ESA; and (4) FWS’ Biological Opinion. These parties also assert that the EIS could not adequately analyze cumulative impacts because (1) a Memorandum of Understanding has not been agreed upon for compliance with the Migratory Bird Treaty Act (MBTA); (2) an agreement has not been executed for mitigation of impacts to greater sage-grouse and pygmy rabbit; and (3) a Wetland Restoration Plan had not been filed, as required by environmental condition no. 29.

40. The parties misunderstand the nature of the cumulative impacts analysis. Section 4.13 of the final EIS thoroughly discusses all known and reasonably foreseeable Commission, other federal agency, state and local agency, or private projects. Ten anticipated projects are identified, which include natural gas pipelines, an LNG terminal, electric power lines, residential developments, meteorological towers, and a habitat restoration project on retired ranch land. The cumulative impacts of each of these potential projects were analyzed in section 4.13 of the final EIS.

41. The various plans and information cited by the parties are themselves mitigation plans and/or agreements intended to mitigate past, present, or future impacts on resources; thus, if anything, they will serve to reduce the potential level of cumulative strain on the covered resources. We note that the first three plans identified by the parties are not plans to which the Commission or Ruby are parties. However, to the extent that BLM or FWS must comply with these plans, it will be their responsibility to do so before issuing their respective federal authorizations. Likewise, the Biological Opinion is a required federal authorization that must be issued by the FWS before Ruby will be

⁵⁴ 40 C.F.R. § 1508.7 (2010).

authorized to construct.⁵⁵ Appendix M of the final EIS includes an agreement that sets forth the conservation measures that Ruby will implement in order to comply with the MBTA⁵⁶ and greater sage-grouse conservation agreements that Ruby has committed to implement.⁵⁷ As discussed in section 4.3.3.3 of the final EIS, the Wetland Restoration Plan must be developed in consultation with the Army Corps, must include measures for seeding and replanting wetland vegetation affected by project activities, and must be filed with the Commission before construction will be authorized.⁵⁸ As previously discussed, to the extent required authorizations are still outstanding, the Commission's April 2010 Order in no way interferes with other agencies' ability to render decisions, and the project cannot proceed until all federal authorizations have been obtained.

⁵⁵ The FWS issued its Biological Opinion on June 8, 2010, and it was filed with the Commission on June 14, 2010.

⁵⁶ Appendix M of the final EIS includes a draft agreement between Ruby and the FWS titled *Voluntary Conservation Measures in Furtherance of the Migratory Bird Treaty Act and Bald And Golden Protection Act and Executive Order No. 13186*. The purpose of this agreement is to set forth the conservation measures that Ruby voluntarily agreed to implement in coordination with the FWS to comply with the MBTA and Executive Order 13186. In this agreement, Ruby and the FWS have agreed that Ruby will take all reasonable measures to comply with the MBTA, and to provide for the reasonable restoration and preservation of habitats for migratory birds in the four states where the project will be constructed.

⁵⁷ Appendix M of the final EIS includes the *Greater Sage-Grouse and Pygmy Rabbit Conservation Measures Plan*, which describes measures Ruby will undertake for minimizing potential impacts on the greater sage-grouse and the pygmy rabbit, arising from construction and operation of the project. Appendix M also includes a draft *Cooperative Conservation Agreement for the Greater Sage-Grouse and Pygmy Rabbit* between Ruby, the BLM, Wyoming Game and Fish Commission, Utah Division of Wildlife Resources, and Nevada Department of Wildlife.

⁵⁸ In its July 30, 2010 filing, Supplement to Implementation Plan, at 10, referencing environmental condition no. 29, Ruby stated that it provided its Wetland Restoration Plan to the Army Corps for review and comments, and the Army Corps had no specific comments. The Wetland Restoration Plan was incorporated as special condition (c) of the Army Corps' section 404 authorization, submitted by Ruby in its August 2, 2010 Supplement to Implementation Plan.

3. Route Alternatives

42. Section 102(2)(E) of NEPA requires agencies to study appropriate alternatives to a proposed pipeline route.⁵⁹ NEPA requires the Commission to obtain sufficient information to permit a reasoned choice of alternatives; NEPA, however, does not require an exhaustive discussion of those alternatives. NEPA does not require an agency to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective.”⁶⁰

43. The parties argue that the Commission did not give adequate consideration to possible alternative routes that would reduce the impact of the project on sagebrush steppe habitat and the greater sage-grouse. The parties further state, without explanation, that “routes of probably lesser impact were summarily dismissed” and suggest that there is sufficient information in Appendix M of the final EIS to show that major wildlife impacts could be avoided by alternative routes that were not fully studied in the EIS. Sierra Club and Summit Lake also state that the April 2010 Order has created a situation whereby Ruby can claim that it has made an irretrievable commitment of resources to the route approved, without full consideration of impacts by the Commission, in violation of section 7(d) of the Endangered Species Act (ESA).⁶¹

44. We disagree with the parties’ broad assertions that reasonable route alternatives were not fully studied. Section 3.0 of the final EIS thoroughly considered, compared, and explained each of the route alternatives suggested by the parties on rehearing, including the West-Wide Energy Corridor (WWEC) route alternative (section 3.4.9), the Sheldon route alternative (section 3.4.12), and the Jungo-Tuscarora (section 3.4.14) and Black Rock route alternatives (section 3.4.13). Route alternatives have been considered throughout Ruby’s pre-filing and certificate process. Several route alterations were made by Ruby to its originally planned route during the pre-filing process in response to landowner and land management agency concerns regarding cultural issues and threatened and endangered species.

⁵⁹ 42 U.S.C. § 4332(2)(E) (2006).

⁶⁰ *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004).

⁶¹ 16 U.S.C. § 1536(d) (2006). This section states that after initiation of consultation under the ESA, “the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures”

45. In addition, Commission staff recommended three additional route alternatives to avoid sensitive resources and in response to agency concerns. As specifically discussed in the final EIS, the Terrace Basin route alternative (section 3.4.8) was included to avoid salt-scrub habitat, the Willow Creek route alternative (section 3.4.11) was included to address BLM concerns, and the Southern Langell Valley route alternative (section 3.4.15) was included to avoid sensitive cultural resources. These route alternatives recommended by staff for portions of the pipeline route, as well as 15 other minor route variations identified in the draft EIS, were subsequently adopted by Ruby and became part of Ruby's proposed route for analysis in the final EIS.

46. Thus, despite the parties' assertions to the contrary, the EIS process successfully fostered the adoption of many alterations to Ruby's originally proposed route in response to landowner, agency, and stakeholder concerns for particular resources, and we affirm staff's recommendations. Moreover, the parties' suggestion that the EIS process merely served to justify actions already decided is at odds with the record. As previously noted, in response to agency concerns (including the FWS) with the route proposed in the draft EIS, the final EIS incorporated agency-suggested route changes, and considered further possible alterations. The final EIS weighed the benefits to certain resource areas with the costs to other resource areas for each route proposal. Furthermore, to complete our staff's formal consultation with the FWS and to comply with section 7(a)(2) of the ESA,⁶² the FWS issued a Biological Opinion finding that the project route, as recommended in the final EIS, would not jeopardize threatened or endangered species.⁶³ As discussed above, the Biological Opinion was a required federal authorization, without which Ruby would not be authorized to construct. The specifics of the route alternatives preferred by the parties on rehearing are discussed below.

a. West-Wide Energy Corridor Route Alternative

47. The parties argue that the WWEC route is environmentally preferable to Ruby's proposed route, and the Commission inappropriately rejected this route as an alternative simply because it is 151 miles longer than the proposed route and would require additional compliance with the California Environmental Quality Act (CEQA).

⁶² 16 U.S.C. § 1536(a)(2) (2006).

⁶³ FWS, June 14, 2010 Filing of Biological Opinion at 107. Note that pursuant to Rule 2003(d) of the Commission's rules of practice and procedure, "citations to specific pages of documents filed via the Internet should use the page numbers appearing in the PDF . . . version of the document available on the Commission's web site." 18 C.F.R. § 385.2003(d) (2010).

48. The parties inaccurately simplify and mischaracterize Commission staff's comparison of the WWEC route alternative to the proposed route. As described in section 3.4.9 of the final EIS, the WWEC is a collection of non-contiguous energy corridors on federal lands identified by federal agencies for use by oil, gas, and hydrogen pipelines, and electrical transmission and distribution facilities. In weighing the environmental benefits of the two routes, the final EIS found that in comparison to the proposed route, the WWEC route alternative had several advantages: it is collocated with 34.9 additional miles of existing rights-of-way, crosses five fewer perennial waterbodies, and affects 6.6 fewer miles of wetland habitat. However, the WWEC is 151 miles longer than the proposed route, crosses 72 more miles of non-federal lands, and affects seven additional national or recreational trails. For linear projects, a longer route will generally result in increased environmental impacts. In addition, the WWEC route alternative's additional pipeline length would necessitate more compression, which, in turn, would increase long-term air emissions. The final EIS then explained that non-environmental considerations also weighed against the WWEC route alternative, such as the increased cost for the additional pipeline and compression, and the time required for additional review by the CPUC under CEQA. Therefore, because the WWEC route alternative would not provide a significant environmental advantage over the proposed route and there were non-environmental considerations that would significantly affect the viability of the project, Commission staff recommended against incorporating this alternative into the proposed route. We affirm this conclusion.

b. Sheldon Route Alternative

49. Summit Lake states that it prefers a route that follows the right-of-way for Highway 140 in the northeast corner of the Sheldon National Wildlife Refuge (NWR) because this route would have less impact on sage grouse and pristine wilderness.

50. Section 3.4.12 of the final EIS discusses the Sheldon route alternative which traverses the Sheldon NWR and partially collocates within the Highway 140 right-of-way. The Sheldon route alternative was specifically included in the final EIS to assess whether the project's impacts on greater sage-grouse habitat would be minimized by following an existing road across the Sheldon NWR, and to consider Summit Lake's concerns that the proposed route may impact traditional Northern Paiute foods, medicines, and other current or historic subsistence resources.

51. The final EIS concluded that the Sheldon route alternative would be technically and economically feasible and might result in less environmental impacts on some resources, especially with respect to greater sage-grouse and historic properties. However, because the FWS has consistently indicated that a pipeline was not likely compatible with the purposes of the Sheldon NWR or the national refuge system, fewer site-specific surveys have been conducted on the Sheldon route alternative. The FWS believes that additional fieldwork along the Sheldon route alternative would reveal that

the route's biological and cultural resources are at least equal in value to those found on the proposed route. Regardless, the final EIS concluded that because the FWS would not concur with a right-of-way grant for the Sheldon route alternative, staff did not recommend this route. Because FWS has continued to maintain that rights-of-way on this route would not be authorized, we affirm staff's decision not to recommend the Sheldon route alternative.

c. Black Rock and Jungo-Tuscarora Route Alternatives

52. Defenders and Summit Lake argue that the Commission did not adequately consider the Black Rock and Jungo-Tuscarora route alternatives in the final EIS. The parties believe that the Commission should reconsider its analysis because these alternatives would minimize impacts to sagebrush steppe habitat, parallel more existing rights-of-way, and reduce the cost of the project.

53. Section 3.4.13 of the final EIS discusses the Black Rock alternative and compares its impacts to the proposed route. The final EIS specifically compared impacts to greater sage-grouse habitat along the Black Rock route alternative and the proposed route. A mile-by-mile habitat analysis was conducted along the Black Rock route alternative to determine the quality of habitat that exists along this alternative and the corresponding segment of the proposed route. Based on this analysis, the Black Rock route alternative crosses more greater sage-grouse habitat, mule deer habitat, and pygmy rabbit sites than the proposed route, but the greater sage-grouse habitat and mule deer habitat is generally of lower quality. The proposed route crosses approximately eight more miles of high quality greater sage-grouse habitat than the Black Rock alternative. The Black Rock alternative would parallel existing rights-of-way for 22 more miles than the proposed route. However, because the Black Rock alternative is 42 miles longer than the proposed route, an additional compressor unit would need to be added to the Desert Valley compressor station and a fifth compressor station would be necessary to deliver the required volumes of natural gas. These additions would increase air emissions and project cost.

54. The final EIS ultimately did not recommend the Black Rock route alternative over the proposed route because its larger environmental footprint would not significantly outweigh the benefits to be gained in certain resource areas. Commission staff did not believe that the reduction in impacts on greater sage-grouse leks, high quality mule deer habitat, and perennial streams would confer an environmental advantage over the proposed route because of the added impacts on pygmy rabbit habitat, pronghorn crucial winter habitat, wetlands, national historic trails, recreation, and air quality. We affirm these conclusions.

55. Section 3.4.14 of the final EIS compares the impacts of the Jungo-Tuscarora route alternative and the proposed route. The first half of the Jungo-Tuscarora route alternative

follows the same route as the Black Rock route alternative. Compared to the proposed route, the Jungo-Tuscarora route would cross approximately 30 fewer miles of winter sage-grouse habitat, and 10 fewer miles of habitat with sage-grouse leks. However the Jungo-Tuscarora route alternative would cross 50 additional miles of mule deer habitat and 18 more miles of pronghorn habitat. The Jungo-Tuscarora alternative would be 52 miles longer than the proposed route, and, like the Black Rock alternative, would require additional pipe and compression which would increase project costs and air emissions. Like the Black Rock alternative, the final EIS did not recommend the Jungo-Tuscarora route because overall it would create a larger environmental footprint, which staff concluded, would not significantly outweigh the benefits to be gained in certain individual resource areas. We affirm staff's findings.

The Commission orders:

(A) The requests for rehearing filed by Defenders of Wildlife, Toiyabe Chapter of the Sierra Club, and Summit Lake Paiute Tribe are denied.

(B) The late request for rehearing filed by Center for Biological Diversity is rejected.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.