

138 FERC ¶ 61,104  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Central New York Oil and Gas Company, LLC

Docket No. CP10-480-001

ORDER ON REHEARING, CLARIFICATION AND STAY

(Issued February 13, 2012)

1. On November 14, 2011, in Docket No. CP10-480-000, the Commission issued a certificate of public convenience and necessity to Central New York Oil and Gas Company, LLC (CNYOG), under section 7(c) of the Natural Gas Act (NGA),<sup>1</sup> to construct and operate certain facilities in Bradford, Sullivan, and Lycoming Counties, Pennsylvania, to provide open-access firm and interruptible transportation service (November 14 Order), conditioned upon the satisfaction of numerous conditions and environmental mitigation measures.<sup>2</sup> The project facilities are referred to as the MARC I Hub Line Project (MARC I Project). The project includes an approximately 39-mile long, 30-inch diameter pipeline connecting the South Lateral of CNYOG existing Stagecoach facility in Bradford County, Pennsylvania, and the interstate pipeline facilities of Transcontinental Gas Pipe Line Company (Transco) in Lycoming County, Pennsylvania.

2. On November 18, 2011, Earthjustice filed a request for rehearing of the November 14 Order.<sup>3</sup> Earthjustice asserts the Commission erred in concluding that certification of

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<sup>1</sup> 15 U.S.C. § 717f (2006).

<sup>2</sup> *Central New York Oil and Gas Company, LLC*, 137 FERC ¶ 61,121 (2011) (November 14 Order).

<sup>3</sup> Earthjustice filed the rehearing request on behalf of its clients, the Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and the Sierra Club.

the MARC I Project is required by the public convenience and necessity, and challenges the adequacy of the environmental analysis and the Commission's compliance with the National Environmental Policy Act (NEPA).<sup>4</sup> On November 30, 2011, Lisa Ann Richlin filed a late motion to intervene and request for rehearing. On December 2, 2011, Earthjustice filed a motion for a stay of the November 14 Order. On December 13, 2011, CNYOG filed a request for clarification or, in the alternative, rehearing, of an accounting and reporting requirement set forth in the November 14 Order.<sup>5</sup>

3. As discussed below, the Commission: denies Earthjustice's rehearing request; denies the motion for late intervention and dismisses the rehearing request filed by Ms. Richlin; dismisses Earthjustice's stay request; and grants CNYOG's request for clarification.

### **I. Background**

4. As detailed in the November 14 Order, on April 9, 2010, CNYOG filed an application requesting, *inter alia*, certificate authorization pursuant to NGA section 7(c) to construct and operate the MARC I Project. CNYOG operates the existing Stagecoach facility, a multi-cycle natural gas storage facility at the Stagecoach Gas Field in Tioga County, New York and Bradford County, Pennsylvania, located about 150 miles west of New York City. CNYOG proposed to construct an approximately 39-mile long, 30-inch diameter pipeline connecting the South Lateral of its Stagecoach Gas Field (Stagecoach) in Bradford County, Pennsylvania, and the interstate pipeline facilities of Transco in Lycoming County, Pennsylvania, as well as a new compression facility with 16,360 horsepower (hp) of gas-fired compression in Sullivan County, Pennsylvania (M1-S); an additional 15,300 hp electric compressor unit at its existing NS2 compressor site in Bradford County, Pennsylvania (M1-N); and related metering, flow control and appurtenant facilities.

5. The MARC I Project would provide access to interstate markets for natural gas produced from the Marcellus Shale in northeast Pennsylvania, and expanded transportation and storage options to shippers utilizing Tennessee Pipeline Company's (Tennessee) Line 300 in Bradford County, Transco, Stagecoach, and Millennium Pipeline Company, LLC's (Millennium) pipeline in Tioga County, New York.

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<sup>4</sup> 42 U.S.C. §§ 4321-4347 (2006).

<sup>5</sup> On December 18, 2011, the Pennsylvania Game Commission (PGC) filed a complaint objecting to various actions related to the Migratory Bird Impact Assessment and Habitat Restoration Plan required by the November 14 Order. On January 13, 2012, PGC withdrew its complaint, citing acceptable resolutions it had reached with CNYOG.

6. On May 27, 2011, Commission staff issued an environmental assessment (EA). The EA was placed in the public record and a 30-day comment period was provided. The EA addressed geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, and cumulative impacts. The EA considered a number of alternatives to the proposed action, including the no-action alternative, system alternatives, and pipeline route alternatives. The EA found that approval of the MARC I Project, with appropriate mitigation measures, would not constitute a major federal action significantly affecting the quality of the human environment, and therefore, that no environmental impact statement (EIS) was required.

7. As is relevant here, the EA observed that Marcellus Shale development is occurring in Bradford, Sullivan and Lycoming Counties.<sup>6</sup> It explained that the widespread nature and uncertain timing of gas well drilling relative to construction of the MARC I Project made it difficult to identify and quantify cumulative impacts. More specifically, the EA explained that since the development of natural gas reserves in the Marcellus formation is expected to take 20 to 40 years due to economics and other factors, the exact location, scale, and timing of future Marcellus Shale upstream facilities that could potentially contribute to cumulative impacts in the project area is unknown at this time.<sup>7</sup> Therefore, the EA did not include a quantitative analysis of the cumulative impacts of Marcellus Shale in northeastern Pennsylvania and beyond.

8. The November 14 Order authorized CNYOG to construct and operate the MARC I Project, subject to modifications and 21 environmental conditions recommended by staff.<sup>8</sup> In response to numerous comments on the EA, the Commission determined it need not consider the cumulative impacts of Marcellus Shale development in determining whether approval of the MARC I Project would be a major federal action significantly affecting the quality of the human environment. The Commission concluded that development of the Marcellus Shale and the potential associated environmental impacts

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<sup>6</sup> As explained in the November 14 Order, the unconventional development and production of natural gas resources in shale formations has increased in the United States in recent years. In Pennsylvania, this development is occurring in the Marcellus Shale, which extends primarily from New York through Pennsylvania and West Virginia and Ohio. *See* November 14 Order, 137 FERC ¶ 61,121 at P 48, n.48.

<sup>7</sup> EA at 102.

<sup>8</sup> The environmental conditions are listed in the Appendix of the November 14 Order.

are not sufficiently causally-related to the MARC I Project to warrant a comprehensive analysis.<sup>9</sup> We noted that the Commonwealth of Pennsylvania regulates the siting, permitting, construction and operation of Marcellus Shale wells in Pennsylvania, and that the Commission has no jurisdiction or regulatory authority over the wells. The order further found that, even if the Commission had found sufficient causal connection between the MARC I Project and Marcellus Shale development, any potential impacts from such development are not reasonably foreseeable as required by the Council on Environmental Quality (CEQ) regulations implementing NEPA.

9. Based on the analysis in the EA, and after consideration of all comments, the Commission found that with the adoption of the proposed mitigation measures recommended in the EA, construction of the project would result in no significant impacts on the quality of the human environment; therefore, preparation of an EIS was not required. The Commission also concluded, based on the entire record, that the MARC I Project is required by the public convenience and necessity. The Commission thus issued a certificate of public convenience and necessity, conditioning the start of construction upon completion of relevant conditions precedent.

## **II. Procedural Issues**

### **A. Late Request for Rehearing**

10. On November 30, 2011, Lisa Ann Richlin filed a motion for late intervention. Ms. Richlin expresses concern over safety and financial impacts from CNYOG's use of an existing private road as a temporary access road (AR-M1-11) to the project site. A portion of the private road crosses her property.

11. In considering whether to grant an untimely motion to intervene, we may apply the criteria set forth in Rule 214(d)<sup>10</sup> and consider whether: (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) the movant's interest is adequately represented by other parties in the proceeding; (4) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and (5) the motion describes in adequate detail the movant's interest in and right to participate in the proceeding. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and the burden upon the Commission of granting the late intervention may be substantial. Therefore, a movant bears a higher

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<sup>9</sup> November 14 Order, 137 FERC ¶ 61,121 at PP 81-94.

<sup>10</sup> 18 C.F.R. § 385.214(d)(2011).

burden to show good cause for granting such late intervention after issuance of an order addressing the merits of an application.<sup>11</sup>

12. Ms. Richlin asserts that she did not realize she needed to file a motion to intervene in order to become a party to the proceeding. However, as an affected landowner, Ms. Richlin would have received in the mail a copy of the September 22, 2010 Notice of Intent (NOI) to Prepare an Environmental Assessment for the MARC I Project, which includes a section on “Becoming an Intervenor.” Ms. Richlin would have also received a copy of the EA (on which, as explained below, she provided comments) which also provides an explanation of the intervention process.<sup>12</sup> Accordingly, we find that Ms. Richlin has not shown good cause to be granted intervention at this late stage of the proceeding. Allowing late intervention at this point potentially would create prejudice and additional burdens to the Commission, other parties, and the applicant. Therefore, we will deny Ms. Richlin’s untimely motion to intervene.

13. However, we note that although she declined to submit a written pleading until now, Ms. Richlin has taken advantage of the ample opportunities available to interested individuals to provide comments throughout this proceeding. The September 22, 2010 NOI included notice of the public scoping meeting, which Ms. Richlin attended and at which she spoke. Ms. Richlin also made several phone calls to Commission staff in which she orally provided comments on the EA after it was issued. Summaries of her comments, which included the same comments regarding the access road that she raises in her rehearing request, were filed by staff and placed in the public record for the Commission’s consideration prior to issuing the November 14 Order.<sup>13</sup>

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<sup>11</sup> See, e.g., *Entrega Gas Pipeline Inc.*, 113 FERC ¶ 61,327 (2005); *Rendevous Gas Services, LLC*, 113 FERC ¶ 61,169 (2005); and *Columbia Gas Transmission Corp.*, 113 FERC ¶ 61,066 (2005).

<sup>12</sup> EA at 2-3.

<sup>13</sup> See, e.g., July 8, 2011, Memo to the File summarizing July 8, 2011 phone call between Ms. Richlin and Jennifer Kerrigan, FERC Environmental Project Manager; July 14, 2011 Memo to the File summarizing July 11, 2011 phone call between Ms. Richlin and Ms. Kerrigan; July 14, 2011 Memo to the File summarizing July 14, 2011 phone call between Ms. Richlin and Ms. Kerrigan.

14. Under section 19(a) of the NGA and Rule 713(b) of our regulations,<sup>14</sup> only a party to a proceeding has standing to request rehearing of a Commission decision. Since she is not a party to this proceeding, we will dismiss Ms. Richlin's request for rehearing.

15. Even if we had allowed Ms. Richlin's late intervention, we would have denied her rehearing request on substantive grounds. Ms. Richlin states that use of AR-M1-11 would be unsafe because it intersects State Route 220 on a curve, mentioning that there have been many accidents along State Route 220 near her business and home. To avoid safety issues, she proposes use of an alternative access road that is about 0.1 mile south of her property, which runs along an abandoned railroad bed in part and also intersects State Route 220. She states that the intersection of the alternative access road with State Route 220 is not on a curve.

16. As noted by CNYOG during the proceeding, use of Ms. Richlin's proposed alternative access road would also require construction of a new access road on her neighbor's property.<sup>15</sup> We observe that, in general, constructing new access roads, even if they are temporary, causes more impact than using and modifying an existing road. CNYOG adds that the sight distances north and south of AR-M1-11 are within the Pennsylvania Department of Transportation guidelines for access to 55 mile per hour roads with less than an 8 percent grade. Therefore, we will not require the change to AR-M1-11 as suggested by Ms. Richlin.

17. Ms. Richlin also comments that AR-M1-11 passes by a pond that floods and that State Route 220 often has standing water due to storms. She expressed concern that use of AR-M1-11 will result in more flooding which will damage her properties and structures on her properties.<sup>16</sup>

18. As appropriate, erosion control measures will be installed and maintained pursuant to CNYOG's Erosion and Sedimentation Control Plan (ESCP) on all its access roads that pass by water resources such as ponds and streams. Moreover, Pennsylvania Department of Environmental Protection (PADEP) may require additional protective measures pursuant to its delegated Clean Water Act section 401 authority. Because of the length of

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<sup>14</sup> 18 C.F.R. § 713(b)(2011).

<sup>15</sup> See July 11, 2011 CNYOG Comments addressing the July 8, 2011 Kerrigan Memo to the File summarizing conversation with Ms. Richlin.

<sup>16</sup> On January 12, 13, and 23, Ms. Richlin filed a number of photographs. Although no comments were provided along with the photographs, we will presume they were provided to reflect her concerns over flooding of the access road.

time it takes to construct projects, work areas may experience many types of weather, including storms, which impact working conditions. The need to address flooded work areas, including flooded access roads, is not uncommon. We note that CNYOG's Environmental Inspectors are responsible for monitoring conditions and advising construction contractors not to work in such areas until conditions improve.

19. Finally, as explained in the EA, temporary access roads, like all other project-related workspaces, will be restored following their use for project construction.<sup>17</sup>

**B. Request for Stay**

20. On December 2, 2011, Earthjustice filed a motion seeking a stay of the November 14 Order, and a stay of construction and any other land disturbance conducted under the order pending rehearing. Earthjustice asserts that if the Commission does not grant a stay pending rehearing, the environment will be irreparably harmed:

CNYOG has proposed to build a 39-mile pipeline that will slice through a pristine natural landscape, traversing the highly erodible steep slopes, intact forests, and cold water fisheries of the Endless Mountains in Sullivan County. Construction activities will involve the cutting down of over 200,000 mature trees and the disturbance of nearly 600 acres of land and more than 100 waterways. There is no dispute that, once construction begins, damage to the natural environment will occur and will last for decades, if not forever.<sup>18</sup>

21. Since we are now acting on rehearing, we will dismiss as moot Earthjustice's request for a stay.<sup>19</sup>

22. In any event, the EA and November 14 Order thoroughly addressed the potential impacts from project construction and operation and found that, with the 21 Environmental Conditions and mitigation measures, the project will not have a significant impact on the environment. As discussed in more detail below, in the November 14 Order we concluded that the required mitigation measures collectively act to minimize

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<sup>17</sup> See EA at 14 (public property impacted during construction would be restored to original or better condition consistent with individual landowner agreements).

<sup>18</sup> Stay Request at 5.

<sup>19</sup> For the same reason, we also dismiss as moot the request for stay of the November 14 Order filed on February 7, 2012 by Ms. Richlin.

any impact of construction activities in a way that, when balanced with the important project benefits, allowed us to find that authorizing the MARC I Project is required by the public convenience and necessity. We affirm these findings here.

### **III. Requests for Rehearing, Clarification, and Reconsideration**

#### **A. CNYOG Request for Clarification**

23. The November 14 Order stated that waiver of Part 201 and section 260.2 of the Commission's regulations (pertaining to accounting and reporting requirements, which presume that cost-of-service rates are charged) and the requirement in section 260.2 to file an annual report (Forms Nos. 2 and 2A), except for the information necessary for the Commission's assessment of annual charges, "[are] not applicable to cost-based rate services provided by the MARC I Project, or the firm and interruptible wheeling services." CNYOG requests that the Commission clarify this ruling, in light of the fact that the Commission had previously granted these waivers with respect to CNYOG's market-based rate interruptible wheeling service.<sup>20</sup>

24. We grant CNYOG's request for clarification. The November 14 Order inadvertently included interruptible market-based rate wheeling service as one of the services with respect to which CNYOG is required to comply with Part 201 and section 260.2 of the Commission regulations. The Commission finds that since CNYOG is authorized to charge market-based rates for interruptible wheeling service and was granted waiver of Part 201 and section 260.2 of the Commission's regulations, CNYOG is not now required to comply with the cost-based reporting requirements for interruptible wheeling service, including the requirement to file an annual report.<sup>21</sup> The previously-granted waivers with respect to CNYOG's interruptible wheeling service remain in effect.

25. We note, however, that CNYOG is still required to maintain separate books and records for each of its three distinct services to ensure that customers for one type of service do not subsidize another service. Further, CNYOG is also required to maintain records of cost and revenue data consistent with the Uniform System of Accounts should the Commission require CNYOG to produce those reports in the future.<sup>22</sup>

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<sup>20</sup> Citing, *Central New York Gas & Oil Co., LLC*, 116 FERC ¶ 61,277, at P 39 and ordering para. (D) (2006).

<sup>21</sup> Except for CNYOG's requirement to file pages 520 and 520a of Form No. 2A.

<sup>22</sup> *Central New York Gas & Oil Co., LLC*, 116 FERC ¶ 61,277 at P 39.

## **B. Earthjustice Rehearing Request**

26. On rehearing, Earthjustice asserts that: (1) the Commission violated its Certificate Policy Statement in concluding that the MARC I Project is needed for the public convenience and necessity; (2) the EA is deficient; and (3) the MARC I Project will have a significant impact on the environment, thus requiring an EIS.

### **1. Certificate Policy Statement**

27. Earthjustice contends that the Commission violated the Certificate Policy Statement, which requires that a project only be approved where the “public benefits to be achieved from the project can be found to outweigh the adverse impacts.”<sup>23</sup> Earthjustice asserts that the Commission failed to consider concerns raised by landowners and communities surrounding the project, who “in fact have substantial concerns about its impacts on property values and local businesses.”<sup>24</sup> Moreover, Earthjustice dismisses the Commission’s “unquestioning trust” that CYNOG would minimize the need for the exercise of eminent domain as the basis for finding a limited impact on landowners.<sup>25</sup>

28. As described in the November 14 Order, under the Certificate Policy Statement, we balance the public benefits of a proposed project against potential adverse impacts. The threshold requirement is that the project must be able to proceed without subsidies from existing shippers. The next step, as relevant here, is for the Commission to determine whether the applicant has made efforts to eliminate or minimize any potential adverse impacts on landowners and communities affected by the proposed project. The Certificate Policy Statement explains that the “[t]he more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from [need for] the project required to balance the adverse impact.”<sup>26</sup> This balancing analysis is essentially an economic test and precedes an environmental analysis.<sup>27</sup>

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<sup>23</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

<sup>24</sup> Rehearing Request at 6.

<sup>25</sup> *Id.*

<sup>26</sup> Certificate Policy Statement, 88 FERC at 61,749.

<sup>27</sup> *Id.* at 61,475.

29. CNYOG made a strong showing of the need for this project—precedent agreements have been executed for 100 percent of design capacity of the facilities for 10-year terms.<sup>28</sup> Against this showing of need, the November 14 Order found that there will be limited impact to landowners and communities along the route of the project, in part because the proposed pipeline and compression facilities will be located in sparsely populated, rural areas and impact primarily forest and agricultural land; few residential properties will be impacted by the project.<sup>29</sup> The Commission also noted that during the course of the proceeding CNYOG had filed supplements to its original application proposing several route modifications in response to landowner concerns.<sup>30</sup>

30. Earthjustice asserts that we failed to consider: (1) two landowner affidavits attached to its 2011 motion to intervene (expressing concern over impacts to tourism-based small business in Lycoming County, and concern over impacts to an individual's property values); (2) a third-party economic review that concluded the EA failed to adequately consider the socioeconomic impacts of the project;<sup>31</sup> and (3) a July 11, 2011 letter filed by 35 members of the Pennsylvania House of Representatives “asking that the Commission not grant CNYOG eminent domain without first preparing an EIS.”<sup>32</sup>

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<sup>28</sup> November 14 Order, 137 FERC ¶ 61,121 at P 8.

<sup>29</sup> *Id.* P 17.

<sup>30</sup> *Id.* P 17. We note that in a January 20, 2012 filing, CNYOG stated that to date it has obtained negotiated right-of-way easement agreements with approximately 80 percent of the right-of-way landowners, covering approximately 78 percent of the 39-mile length of the pipeline alignment. The Certificate Policy Statement states that “[l]andowners should not be subject to eminent domain for projects that are not financially viable,” (Certificate Policy Statement, 88 FERC at 61,746) but also recognizes that where it is not “possible to acquire all the necessary right-of-way by negotiation...the company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible.” (Certificate Policy Statement, 88 FERC at 61,749).

<sup>31</sup> *See* Declaration of Andrea Young, Ex. B to Motion to Intervene; Declaration of John Trallo, Ex. E to Motion to Intervene; and Ex. M to Earthjustice's Comments on EA, ECONorthwest, An Economic Review of the Environmental Assessment of the MARC I Hub Line Project (July 2011).

<sup>32</sup> Rehearing at 7 (citing July 11, 2011 letter from Representative Mirabito *et al.*).

31. This is not the case. We took into consideration all comments filed regarding the potential impacts of the MARC I Project, including those regarding tourism and property values.<sup>33</sup> Further, we believe the EA's analysis of socioeconomic impacts, including impacts on property values and tourism, was adequate and we took those findings into account in balancing the overall public benefits against the potential adverse consequences.<sup>34</sup> Moreover, the Commission considered the Pennsylvania House of Representatives' letter seeking an EIS, but as discussed at length in the November 14 Order as well as in the EA, we concluded that an EA, rather than an EIS, was appropriate.<sup>35</sup>

32. Accordingly, we affirm our finding in the November 14 Order that the benefits of the MARC I Project will outweigh any adverse effects.

## 2. Deficiencies in the EA

### Cumulative Impact Analysis

33. Earthjustice argues that the November 2011 Order wrongly concluded that the cumulative impacts of Marcellus Shale development need not be considered in the EA because they are not sufficiently causally-related to the MARC I Project to warrant an analysis of such impacts. Earthjustice asserts the Commission misstated the law in suggesting that there is a causality requirement in a cumulative impact analysis, and that

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<sup>33</sup> Moreover, we did not “unquestionably trust” CNYOG’s assertions: as with all NGA section 7 applications and related filings, CNYOG was required to provide certification of the truthfulness of its filings, including those pertaining to negotiations with landowners. *See* 18 C.F.R. § 157.6(a)(4)(i) (2011), which states in relevant part that the signature on a filing “constitutes a certification that...the contents as stated in the copies and in the electronic filings are true to the best knowledge and belief of the signer....”

<sup>34</sup> *See* EA at 65-69.

<sup>35</sup> November 14 Order, 137 FERC ¶ 61,121 at P 55-56 and 108-117; *see also* EA at 7. We also note that it is not the Commission, but section 7(h) of the NGA, that grants a certificate holder the ability to exercise the right of eminent domain to obtain necessary property rights. If the Commission finds that a project is required by the public convenience and necessity, we cannot issue a certificate that prohibits the exercise of eminent domain.

the cases we cited are “inapposite” because they address the scope of a “major Federal action,” rather than “the scope of cumulative impacts.”<sup>36</sup>

34. We are unclear as to the distinction Earthjustice draws between the facts of this case and the case law cited. In two of the three cases Earthjustice challenges, the courts found that, in determining whether a proposed action was a major federal action—that is, if an EIS was required-- the agency properly limited the cumulative impacts analysis to actions which were sufficiently causally related. As we explained in the November 14 Order<sup>37</sup>, in *Wetlands Action Network v. U.S. Army Corps of Engineers*<sup>38</sup> (*Wetlands Action Network*), the U.S. Army Corps of Engineers (USACE) issued a permit to a developer to fill 16.1 acres of wetlands for the first phase of a development project. The proposed private development had been the subject of much dispute, as the property to be developed was the largest remnant parcel of undeveloped land in a heavily urbanized area of Los Angeles County. The USACE’s EA evaluated the cumulative impact that the project would have on the surrounding area. The EA did not consider potential impacts of the larger development because the USACE concluded that development could occur in those areas regardless of whether it issued the instant permit.

35. The court upheld the USACE’s decision to limit the cumulative impact analysis, agreeing that the development project could proceed—and indeed was proceeding—without the permit. The court was also persuaded by the fact that the development was not financed by federal money, and that state and local (rather than federal) regulation controlled the overall development design.<sup>39</sup>

36. The *Wetlands Action Network* court also noted that in *Sylvester v. Army Corps of Engineers*<sup>40</sup> (*Sylvester*), it upheld the USACE’s decision to limit its NEPA review to impacts of the construction of a golf course for which the USACE issued a permit, rather than the impacts of the larger resort complex. The *Sylvester* court observed that, although the golf course and the entire resort complex “would benefit from each other’s presence,”

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<sup>36</sup> Rehearing at 8-9, and fn 9.

<sup>37</sup> November 14 Order, 137 FERC ¶ 61,121 at P 85-89.

<sup>38</sup> 222 F.3d 1105 (9<sup>th</sup> Cir. 2000).

<sup>39</sup> *Id.*

<sup>40</sup> 884 F.2d 394 (9<sup>th</sup> Cir. 1989).

they were not “sufficiently interrelated” to require the more comprehensive impact analysis.<sup>41</sup>

37. Here, as in *Wetlands Action Network and Sylvester*, an EA was prepared to determine if the proposed project was indeed a major federal action requiring an EIS. We did not find the requisite causal connection between the MARC I Project and Marcellus Shale development and its associated potential environmental impacts, as articulated by the 9<sup>th</sup> Circuit in *Sylvester* and *Wetlands*. Accordingly, the Commission was not required, in the EA, to consider such potential impacts in its cumulative impact analysis.<sup>42</sup> Nonetheless, the EA included a limited discussion of cumulative impacts related to the ongoing development of the Marcellus Shale gas reserves, in order to inform the public’s understanding of the potential impacts of such development, and the related local, state and federal regulatory requirements.<sup>43</sup> That discussion, however, is not part of the cumulative impact *analysis* which informed both Commission staff’s finding that only small cumulative impacts are anticipated<sup>44</sup> and staff’s recommendation that the November 14 Order include a finding of no significant impact.<sup>45</sup>

38. Earthjustice also challenges our reliance on *U.S. Department of Transportation. v. Public Citizen*,<sup>46</sup> which we cited for the notion that, because the Commonwealth of Pennsylvania regulates the siting, permitting, construction, and operation of Marcellus Shale wells in Pennsylvania, the Commission need not consider in its EA the impacts from Marcellus Shale wells. As we noted in the November 14 Order,<sup>47</sup> the Supreme Court stated that

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<sup>41</sup> *Id.* at 398.

<sup>42</sup> *See* EA at 102 (such impacts are “outside the scope of our analysis”); *id.* at 107.

<sup>43</sup> *See, e.g.*, EA at 105 (development activities could impact wetlands, and the USACE oversees the permitting of wetland impacts), 108 (noise impacts associated with development activities, including drilling, would be subject to any local noise abatement requirements).

<sup>44</sup> EA at 109.

<sup>45</sup> EA at 119.

<sup>46</sup> 541 U.S. 752 (2004).

<sup>47</sup> November 14 Order, 137 FERC ¶ 61,121 at P 93.

[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a ‘major Federal action.’<sup>48</sup>

39. In this case, we similarly concluded that, because the Commission plays no role in, nor retains any control over, Marcellus Shale well development, we were not required to consider in the cumulative impact analysis potential impacts from shale development when determining whether the MARC I Project was a major federal action. As with *Wetlands Action Network* and *Sylvester*, we fail to see how the *U.S. Department of Transportation* decision is “inapposite” to the case at hand. Accordingly, we will deny rehearing on this matter.<sup>49</sup>

40. We also find unpersuasive the three cases Earthjustice cites in its rehearing request to support its contention that there is no causality requirement in a cumulative impact analysis.<sup>50</sup> In our view, two of the cases involve cumulative impacts from ongoing and future activities that, unlike here, were similar to the agency’s proposed action. In *Grand Canyon Trust v. Federal Aviation Administration*,<sup>51</sup> the FAA issued an EA for a proposed airport, but, as part of its noise analysis, declined to consider the cumulative impact of noise from other area flight traffic, future aircraft activity, and other foreseeable airport expansions. The court found the FAA should have analyzed these other activities, noting that the EA must give a “realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.”<sup>52</sup> Notably, the scope of the cumulative impact analysis required by the court was limited to noise related to aircraft and airports, which were activities similar to the proposed action.

41. In *Natural Resources Defense Council v. Hodel*<sup>53</sup> (*NRDC*), the court found that simultaneous oil and gas leasing activity in regions on the Outer Continental Shelf (OCS)

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<sup>48</sup> See *U.S. Department of Transportation*, 541 U.S. at 770.

<sup>50</sup> See Rehearing at 9-10.

<sup>51</sup> 290 F.3d 339 (D.C. Cir. 2002).

<sup>52</sup> *Id.* at 342.

<sup>53</sup> 865 F.2d 288 (D.C. Cir. 1988).

should have been considered in the cumulative impact assessment for proposed oil and gas leasing activity on other areas on the OCS. Earthjustice interprets this case to mean that the

cumulative impact assessment of Outer Continental Shelf (“OCS”) oil and gas leasing activity must consider the cumulative impacts of “simultaneous OCS development in different areas” without requiring that such other OCS development be *caused* by the proposed leasing activity.<sup>54</sup>

42. We disagree with this interpretation. The *NRDC* court was persuaded by an earlier Supreme Court finding that, under NEPA,

...proposals for...*related actions* that will have cumulative or synergistic environmental impact upon a region *concurrently pending before an agency* must be considered together.<sup>55</sup> (emphasis added)

43. Production and gathering activities in the Marcellus Shale are not related activities concurrently pending before the Commission. First, there is no way to relate any specific production and gathering activities to the MARC I Project. Second, as noted earlier, Pennsylvania has jurisdiction over the siting, permitting, construction and operation of well development in Pennsylvania. Accordingly, we find this case unavailing to Earthjustice.<sup>56</sup>

44. We find Earthjustice’s reliance on *U.S. v. 27.09 Acres of Land*<sup>57</sup> equally unavailing. In this case, New York City challenged an EA prepared for the U.S. Postal Service’s proposed new postal facility. The District Court held that the cumulative impact assessment should have considered the impacts of other area construction on

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<sup>54</sup> Rehearing at 10.

<sup>55</sup> *NRDC v. Hodel*, 858 F.2d at 297 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)).

<sup>56</sup> Earthjustice erroneously claims that the Commission avers that only other actions that are “*caused by the proposed action*” need be considered in a cumulative impact analysis. (emphasis added). *See* Rehearing at 9. That is not the case. Rather, we have asserted that the actions must be sufficiently causally related.

<sup>57</sup> 760 F.Supp. 345 (S.D.N.Y. 1991).

drinking water quality.<sup>58</sup> Notably, the court found that the other planned construction projects were “near-certain.”<sup>59</sup>

45. The EA for the MARC I Project did consider the cumulative impacts of similar activities, including known interstate pipeline projects in the area. However, as noted earlier, the extent and location of future Marcellus Shale wells and the associated development are speculative; even if a well has been permitted, it is not known if, or when, it will ultimately be drilled.

46. Earthjustice takes issue with the cumulative impact analysis for a number of other reasons. It challenges the Commission’s conclusion that the EA need not consider impacts from shale gas development because “the factors necessary for a meaningful analysis of when, where and how Marcellus Shale development will ultimately occur are unknowable at this time.”<sup>60</sup> Earthjustice responds that it, and others, provided “extensive information and avenues that would enable to Commission to conduct a meaningful cumulative impact analysis of reasonably foreseeable shale gas development.”<sup>61</sup> Earthjustice also asserts that the Commission “tries to have it both ways” by asserting that the cumulative impact analysis need not consider Marcellus Shale drilling, while simultaneously claiming “that it did consider the cumulative impacts of such development.”<sup>62</sup>

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<sup>58</sup> *Id.* at 348.

<sup>59</sup> *Id.* at 351.

<sup>60</sup> Rehearing at 10 (citing November 14 Order, 137 FERC ¶ 61,121 at P 96).

<sup>61</sup> *Id.* at 11. Earthjustice also asserts that the EA fails to assess “even the impacts of past and present shale development activities of which the Commission is plainly aware.” Rehearing at 10. But, Earthjustice disregards the Commission’s finding that Marcellus Shale development, including the impacts of past and present activity, is not sufficiently causally related to the MARC I Project to be considered in a cumulative impact analysis. And, moreover, we note that agencies can conduct an adequate cumulative impact analysis by focusing on the current aggregate effects of past actions without delving into the historic details of individual past actions. *See Council on Environmental Quality Guidance on Consideration of Past Actions in Cumulative Effects Analysis at 2, June 24, 2005.*

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

47. These challenges to the EA were previously raised and considered in the EA and in the November 14 Order. Earthjustice raises no new arguments here. Accordingly, we find no cause to respond in detail, and will deny rehearing.

48. As discussed in the November 14 Order<sup>63</sup>, as of October 2010, PADEP issued thousands of well permits, and continues to do so today. However, it is unknown if, or when, the vast majority of these wells will be drilled, much less what the associated infrastructure and related facilities may be for those wells ultimately drilled. Accordingly, we concluded that the factors necessary for a meaningful analysis of when, where and how Marcellus Shale development will ultimately occur are unknowable at this time.<sup>64</sup> While the Commission acknowledged that it was provided information, such as maps and independent expert opinion, on potential development of future gas wells, we noted that such development was merely speculative.<sup>65</sup>

49. We also reject Earthjustice's claim that the Commission tried to "have it both ways" in claiming we were not required to consider the cumulative impacts of Marcellus Shale development, yet we considered them anyway. The EA and November 14 Order simply noted the possibility of cumulative impacts from future drilling, suggested what general resources could be impacted, and added, without more, that any future drilling would be subject to state and other federal agency regulatory requirements.<sup>66</sup> This

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<sup>63</sup> November 14 Order, 137 FERC ¶ 61,121 at P 47.

<sup>64</sup> Indeed, the Environmental Protection Agency (EPA) acknowledged that "prediction of where specific new Marcellus wells may be located could be problematic...." See July 18, 2011 EPA Comments on EA at 6.

<sup>65</sup> November 14 Order, 137 FERC ¶ 61,121 at P 96-100. The order at P 96, n.88, also noted that, while such information provided a fuller picture of future potential development, it demonstrated that Marcellus Shale development is ongoing and will continue regardless of whether we certificated the MARC I Project. This reinforced our finding that, as discussed above, there is insufficient causal connection between the project and Marcellus Shale drilling and its potential associated impacts.

<sup>66</sup> *Id.* P 133. On rehearing, Earthjustice challenges, with no explanation, what it deems the Commission's "categorical deferral to standards administered by other agencies as evidence of no significant cumulative impacts." See Rehearing at 13. It would appear that Earthjustice is suggesting—erroneously—that the statement "future drilling would be subject to state and other federal regulatory requirements" indicates a conclusion by the Commission that such regulatory requirements would mitigate any significant cumulative impacts from such drilling. To the extent Earthjustice is

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general information did not purport to be a cumulative impact analysis under NEPA and the CEQ regulations, nor was it the basis for the EA's finding of no significant impacts.<sup>67</sup>

### Need for an EIS

50. Earthjustice argues that the "context and intensity" of the MARC I Project weigh in favor of a finding that the project will significantly affect the quality of the human environment. Earthjustice cites the "exploding development of Marcellus Shale gas play," the "unique circumstances of the affected region," the "scientifically controversial nature of the project," the "uncertainty" of the impacts of the project, and the "highly controversial" nature of the project.<sup>68</sup>

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challenging the EA's reliance on other regulatory requirements for mitigating potential project impacts, Earthjustice provides no evidence that other regulatory authorities will not ensure compliance with applicable requirements, or that CNYOG will not comply with them.

<sup>67</sup> The EA's finding of no significant cumulative impacts was based on, among other things, a consideration of proposed gas-related projects. For example, as discussed in the November 14 Order, 137 FERC ¶ 61,121 at P 103, the EA at 103-104 considers the cumulative effects on groundwater resources by noting that other projects, like the MARC I Project, involve shallow excavation to install the facilities, the use of appropriate erosion and sedimentation controls, the identification of public and private water supply sources, and the use of appropriate or required procedures near water wells or when crossing well-head protection areas to minimize or avoid impacts to these resources during project construction and operation.

<sup>68</sup> The CEQ regulations state that determinations of whether a project will have significant impacts on the environment depend on consideration of both "context" and "intensity." Context means the "significance of an action must be analyzed in several contexts," including "the affected region, the affected interest, and the locality." With respect to "intensity," the CEQ regulations set forth 10 factors agencies should consider, including: the unique characteristics of the geographic area; the degree to which the effects are highly controversial or highly uncertain or unknown; the degree to which the action may establish a precedent for future actions; whether the action is related to other actions with insignificant but cumulatively significant impacts; and the degree to which the action may adversely affect threatened and endangered species. *See* November 14 Order, 137 FERC ¶ 61,121 at P 109 (citing the CEQ regulations at 40 C.F.R. § 1508.27(a) and (b) (2011)).

51. This issue was fully addressed in the November 14 Order, and we find no cause to revisit the matter in great detail.

52. On rehearing, Earthjustice argues that the Commission “inappropriately dismissed the unique nature of the affected region,” citing the July 11, 2011 Pennsylvania House of Representative comment letter, which notes the natural beauty and recreational opportunities of the region, including the “Endless Mountains” and “Pennsylvania Wilds.”<sup>69</sup> We disagree. As explained in the November 14 Order, the EA considered the impacts to both the Endless Mountain Heritage Region and the Pennsylvania Wilds, and concluded that any impacts would be limited.<sup>70</sup>

53. Earthjustice also argues that the November 14 Order failed to address the uncertainty of the project’s effects as a factor in determining the intensity, and hence significance, of the project. Earthjustice cites the Commission’s acknowledgement that there are “too many uncertainties about specific future development and its environmental consequences to provide meaningful consideration in a cumulative impacts analysis.”<sup>71</sup>

54. Earthjustice takes this statement out of context. The “uncertainty” we cited refers to future Marcellus drilling and associated development that, at this time, is not yet known; accordingly, we cannot know the potential environmental consequences of that development. We fail to see how preparing an EIS will assist in resolving these uncertainties.

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<sup>69</sup> As discussed at November 14 Order, 137 FERC ¶ 61,121 at P 71-73, the mission of the Endless Mountains Heritage Region (EMHR) is to maintain and enhance the unique rural character of the Endless Mountains. Bradford and Sullivan Counties are part of the EMHR. The Pennsylvania Wilds is a community revitalization and nature tourism initiative; approximately 2.8 miles of the 39-mile-long pipeline for the MARC I Project would be located within the Pennsylvania Wilds.

<sup>70</sup> As discussed in November 14 Order, 137 FERC ¶ 61,121, P 72-74, the project would impact both the Pennsylvania Wilds and the EMHR by creating a new utility corridor. Where forest land is cleared for construction, there will be a permanent conversion of forest land to open land along the 50-foot-wide pipeline right-of-way because it will be maintained as open space. The temporary workspaces will be restored and vegetation will be allowed to grow back. Where larger trees are cut for construction workspaces, the impact is considered long-term because it may take 20 to 40 years for the trees to grow back to pre-construction size, depending on the size of the cut trees.

<sup>71</sup> Rehearing at 16 (citing November 14 Order, 137 FERC ¶ 61,121 at P 98).

55. Finally, Earthjustice asserts that the Commission erred in concluding that the MARC I Project is not “highly controversial” for the purposes of determining significance. Earthjustice reiterates its arguments that the controversy is documented by the conflicting “expert evidence” introduced during the EA comment period.

56. As we explained in the November 14 Order, the vast majority of the environmental concerns raised by experts were primarily, and directly, related to their desire for a comprehensive review of the impacts of Marcellus Shale development. We explained at great length why such a review was neither required nor appropriate here. Further, the MARC I Project is not “highly controversial.” As we noted, others may disagree with this determination, but this does not amount to a “controversy” requiring the preparation of an EIS.<sup>72</sup>

### Alternatives Analysis

57. Earthjustice challenges the adequacy of the alternatives analysis for failure to “identify any alternative that would not involve the construction of a new corridor through areas untouched by gas development or pipeline construction in Sullivan County.”<sup>73</sup> Earthjustice suggests that locating the MARC I Project along the same rights-of-way as pipelines such as the Williams Springville or the PVR Midstream gathering lines would substantially reduce the project’s impacts. Earthjustice argues that the Commission was required to conduct an “independent analysis” of this and other similar alternatives, rather than accepting “wholesale CNYOG’s claims that any route other than one that cuts through Sullivan County’s Endless Mountains is unfeasible.”<sup>74</sup>

58. The EA and November 14 Order fully addressed this issue. Earthjustice raises no new issues, therefore, we will deny rehearing on this matter.

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<sup>72</sup> As discussed in the November 14 Order at footnote 106, Earthjustice asserted that “independent experts” disputed the EA’s approach on several matters, such as the analysis of forest fragmentation. We explained why we disagreed with the experts, and supported staff’s recommendations, and noted that when specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

<sup>73</sup> Rehearing at 18.

<sup>74</sup> *Id.*

59. The Commission is required by NEPA to take a “hard look” at the potential environmental consequences of its proposed actions.<sup>75</sup> However, in carrying out their NEPA responsibilities, agencies are governed by the rule of reason.<sup>76</sup> The range of alternatives that must be considered is a matter within an agency’s discretion, but must be sufficient to permit a reasoned choice of alternatives, i.e., “reasonable alternatives.”<sup>77</sup>

60. As explained in the November 14 Order, the EA considered, but rejected as not reasonable, north-south “industrial corridors” east of the project such as the Williams Energy Springville or PVR gathering lines.<sup>78</sup> We noted that the PVR gathering line is located about 38 miles west of CNYOG’s proposed route; the Williams Springville gathering line (which will connect to the Tennessee pipeline) is located 15 miles east of CNYOG’s proposed interconnection to Tennessee. We found that these alternatives were unrealistic given the distances involved and the inability of either alternative to fulfill the commercial purpose of the proposed MARC I Project.<sup>79</sup> Rather than accepting “wholesale” CNYOG’s claims, we explained that a review of topographic and aerial photos of the project area show that there are no existing, generally north-south trending corridors that might be followed to meet the purpose of the project.<sup>80</sup>

61. Earthjustice states that even if it were true that the suggested alternatives would entail a longer pipeline and result in additional costs, “the Commission’s charge under NEPA is to evaluate the environmental impacts of alternatives, not to guarantee the applicant the lowest possible construction costs.” We disagree. Our charge under NEPA is not to evaluate the environmental impacts of all alternatives, but rather to evaluate the environmental impacts of *reasonable* alternatives. For the reasons stated in the

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<sup>75</sup> *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979), *cert denied*, 445 U.S. 915 (1980).

<sup>76</sup> *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

<sup>77</sup> *See* 42 U.S.C. § 4332(2)(C)(iii); *see also North Carolina v. FPC*, 53 F.2d 702, 707 (D.C. Cir. 1976) (citing *NRDC v. Morton*, 458 F.2d 827).

<sup>78</sup> November 14 Order, 137 FERC ¶61,121 at P 125-128.

<sup>79</sup> *See id.* P 126 and July 19, 2011 CNYOG Comments.

<sup>80</sup> November 14 Order, 137 FERC ¶ 61,121 at P 125-128; *see also* EA, Section A. 1.

November 14 Order and the EA, we considered, and rejected as unreasonable, “industrial corridor” alternatives. We find that this fulfills NEPA’s requirements.<sup>81</sup>

### Mitigation Measures

62. On rehearing, Earthjustice argues that the EA’s discussion of mitigation measures is conclusory and perfunctory, and does not adequately demonstrate that such measures will mitigate significant adverse environmental impacts. Earthjustice cites to its comments on the EA, in which it challenged the EA’s reliance on CNYOG’s ESCP and other agency standards, for mitigation, including measures required from the PADEP and USACE.<sup>82</sup>

63. We will deny rehearing. The November 14 Order addressed these same matters, and Earthjustice raises no new issues on rehearing.

64. As discussed in the November 14 Order, the MARC I Project will be constructed pursuant to, among other things, the measures and procedures in CNYOG’s ESCP; the ESCP incorporates the procedures and mitigation measures set forth in the Commission’s 2003 *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan) and the 2003 *Wetlands and Waterbody Construction and Mitigation Procedures* (Procedures).<sup>83</sup> We found that the ESCP was sufficient to protect waterbodies and wetlands, and the Commission has monitoring and enforcement capabilities to ensure compliance.<sup>84</sup>

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<sup>81</sup> See *Rochester Gas and Electric Corp.*, 100 FERC ¶ 61,113 (2002) (if an alternative is not reasonable, it may be eliminated from further study).

<sup>82</sup> July 11, 2011 Earthjustice EA Comments at 16-17. Earthjustice also asks that we reconsider adopting additional mitigation measures it provided in its July 11, 2011 comments on the EA as well as subsequent comments, such as: employing independent environmental inspectors for the project “who are not contractors or employees of CNYOG”, phased construction, and a prohibition on construction and tree clearing until recently flooded areas are restored. Because we concluded that the mitigation measures set forth in the November 14 Order are adequate, we found no good cause for imposing Earthjustice’s recommendations.

<sup>83</sup> November 14 Order, 137 FERC ¶ 61,121 at P 68.

<sup>84</sup> *Id.* at PP 130-131. We note that the November 14 Order requires CNYOG to take certain actions to ensure its compliance with the mitigation measures, and to demonstrate that compliance to the Commission. See *e.g.*, Condition 6, which requires, among other things, CNYOG to file a plan describing how it will implement the

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65. Moreover, we concluded that it is appropriate for the Commission to look to the requirements of those agencies with expertise in certain matters to determine whether compliance with those agencies' permitting and other requirements will adequately safeguard and protect resources. We also noted that in some instances, state and local agencies require mitigation that is over and above what the Commission requires and that those requirements are based on site-specific details and local knowledge.<sup>85</sup>

66. The November 14 Order also addressed Earthjustice's specific contention that the EA dismissed "potentially significant impacts" to wildlife in a cursory discussion of mitigation measures." We cited language in the EA which made clear that several factors lead to the conclusion that there will be no significant impacts on wildlife.<sup>86</sup>

67. Finally, we note that the Commission takes seriously its responsibility to authorize a project only after careful consideration of the project's potential environmental impacts, and measures to mitigate, minimize, or avoid any adverse impacts. As noted earlier, Earthjustice's December 2, 2011 stay request expresses concerns over the impacts of the MARC I Project from tree clearing. However, the EA, as adopted in the November 14 Order, sets forth numerous measures that CNYOG is required to follow in order to minimize the impacts associated with the necessary tree clearing. These measures include: reducing the typical construction workspace from 85-foot-wide to 75-foot-wide in all forested areas; limiting the width of the permanent pipeline right-of-way to 50 feet, and ensuring adjacent temporary workspace is allowed to revert to pre-construction condition. Additional temporary workspaces in forested areas will only be used where

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mitigation measures and incorporate them into construction contracts; the number of environmental inspectors assigned to the project; the training and instructions it will give to all personnel involved in with construction; and procedures if noncompliance occurs. For each discrete facility, CNYOG must provide a chart and dates for the completion of all required surveys and reports, the mitigation training of onsite personnel, the start of construction, and the start and completion of restoration of the site. Condition 7 requires CNYOG to employ at least one full-time environmental inspector to be responsible for ensuring and documenting compliance with all of the November 14 Order's Environmental Conditions and any such conditions imposed by other federal, state, or local agencies, and evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract.

<sup>85</sup> *Id.* P 136.

<sup>86</sup> *Id.* P 134-136.

topography or safety dictates more room for placement of rock or timber, or for providing a level working surface.<sup>87</sup>

68. Once construction is complete, all workspaces must be restored to preexisting topographic conditions, seeded, mulched and stabilized in accordance with CNYOG's ESCP, which is consistent with the measures in FERC's Plan and Procedures, or per local soil conservation authority guidelines.<sup>88</sup>

69. CNYOG has consulted with PADEP on appropriate measures to revegetate the construction right-of-way, and, as part of its PADEP application, CNYOG prepared a Riparian Forested Buffer Enhancement Plan that includes providing native vegetative species as streamside buffer plantings for certain waterbodies, and plans for a 25-foot-wide buffer area adjacent to certain waterbodies.<sup>89</sup>

70. We are also confident that other agency requirements add extra layers of protection. For example, CNYOG is required to file a Migratory Bird Impact Assessment and Habitat Restoration Plan in consultation with U.S. Fish and Wildlife Service (FWS) and PGC. CNYOG filed the final plan on November 28, 2011, and a supplement to the plan on January 26, 2012. Pursuant to this plan and supplement, CNYOG will enlarge the riparian buffer zones as recommended by PGC, to provide additional habitat protection measures.<sup>90</sup>

71. Finally, we note that CNYOG is required to follow the construction procedures and mitigation measures described in its application, supplemental filings, and as identified in the EA and November 14 Order; any modifications require Commission approval.<sup>91</sup> Moreover, with respect to the project route, the EA found that there are no unique or sensitive vegetation communities and that no long-term wildlife impacts are expected, as plentiful, suitable habitat is adjacent to the proposed right-of-way and the permanent right-of-way would receive limited vegetation maintenance (once every three

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<sup>87</sup> See Migratory Bird Impact Assessment

<sup>88</sup> See EA at 45.

<sup>89</sup> *Id.*

<sup>90</sup> See January 20, 2012 CNYOG letter regarding additional revisions to PADEP-approved ESCP, and Migratory Bird Impact and Habitat Restoration Plan).

<sup>91</sup> See Environmental Condition 1, Appendix to the EA.

years).<sup>92</sup> Based on this, as well as our findings in the November 14 Order and the May 2011 EA, we concluded that construction of the MARC I Project as authorized will not result in significant environmental impacts or any irretrievable harm to the area in which it will be located. We affirm our finding that authorizing the MARC I Project is in the public convenience and necessity.

The Commission orders:

- (A) CNYOG's request for clarification is granted.
- (B) Earthjustice's November 18, 2011 request for rehearing is denied for the reasons given in the text of this order.
- (C) Earthjustice's December 2, 2011 request for a stay is dismissed.
- (D) Lisa Ann Richlin's request for late intervention is denied and her requests for rehearing and stay are dismissed.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>92</sup> See EA at P 44 and 47.