

138 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Kern River Gas Transmission Company

Docket No. CP11-46-000

ORDER ISSUING CERTIFICATE

(Issued January 19, 2012)

1. On December 9, 2010, Kern River Gas Transmission Company (Kern River) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations for a certificate of public convenience and necessity authorizing it to construct and operate pipeline and appurtenant facilities in San Bernardino County, California (Mountain Pass Lateral). As discussed below, the Commission will grant the requested authorization.

**I. Background and Proposal**

2. Kern River is a natural gas company, as defined by section 2(6) of the NGA,<sup>1</sup> engaged in the interstate transportation of natural gas. Kern River's system originates at an interconnection with Williams Gas Processing Company in Lincoln County, Wyoming and extends nearly 900 miles through Utah and Nevada to the San Joaquin Valley near Bakersfield, California.

3. Molycorp Minerals, LLC (Molycorp) operates the Mountain Pass rare earth mine and production facility in eastern San Bernardino County. Currently, the Mountain Pass facility uses electricity from the local grid, as well as propane and diesel fuels for steam production and products drying. Kern River states that Molycorp's facility must be continuously operated in order to be energy efficient, and that local electric service is subject to frequent power interruptions.

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<sup>1</sup> 15 U.S.C. § 717(a)(6) (2006).

4. Kern River proposes to construct and operate facilities in eastern San Bernardino County in order to provide natural gas service to Molycorp. Specifically, Kern River proposes to construct approximately 8.6 miles of 8-inch diameter pipeline lateral, extending from milepost (MP) 585.77 on Kern River's mainline along the western edge of Ivanpah Valley over the Clark Mountains to Molycorp's property. Kern River also proposes to construct a tap assembly on its mainline right-of-way at MP 585.77 and a meter station on Molycorp's property.<sup>2</sup> The Mountain Pass Lateral will have a design capacity of 24,270 dekatherms (Dth) per day. Kern River contends that the proposed pipeline is the only feasible means to bring natural gas to Molycorp's facility, allowing Molycorp to generate electricity for its own use,<sup>3</sup> as well as to discontinue the use of diesel fuel and propane.

5. Kern River's open season announcement stated that it had entered into a precedent agreement for firm transportation service for all of the project's capacity and that it was posting the transaction for competitive bids. Following the posting, no bids were received, and Kern River awarded the project's transportation capacity to Molycorp under the terms of Kern River's tariff. On September 30, 2010, Kern River and Molycorp executed a ten-year firm transportation service agreement for the capacity of the Mountain Pass Lateral.

6. Kern River estimates that the total cost of the proposed Mountain Pass Lateral will be \$15.7 million and that the project will be financed with internally generated funds. Kern River proposes to establish the existing rates under its Rate Schedule KRF-1 as initial recourse rates for firm transportation service using the Mountain Pass Lateral. However, Kern River states that it will charge Molycorp a negotiated rate for service pursuant to the firm transportation service agreement.

## **II. Notice and Interventions**

7. Notice of Kern River's application was published in the *Federal Register* on December 28, 2010 (75 Fed. Reg. 81,593). The parties listed in Appendix A filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.<sup>4</sup>

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<sup>2</sup> Kern River will construct a pig launcher at MP 585.77 and a pig receiver at the proposed meter station on Molycorp's property pursuant to section 2.55(a) of the Commission's regulations.

<sup>3</sup> Molycorp intends to construct a non-jurisdictional, natural gas-fired 49 megawatt combined heat and power plant at the terminus of Kern River's proposed pipeline.

<sup>4</sup> 18 C.F.R. § 385.214(c) (2011).

8. Alexander Mizan, an individual interested in California environmental issues (but not a landowner affected by the proposed project), and Molycorp filed untimely motions to intervene. Allowing their intervention will not delay, disrupt, or unfairly prejudice any parties to the proceeding. Thus, the Commission will grant the untimely motions to intervene.<sup>5</sup>

### **III. Discussion**

9. Since the proposed facilities will be used to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

#### **A. Certificate Policy Statement**

10. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.<sup>6</sup> The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explained that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

11. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by

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<sup>5</sup> 18 C.F.R. § 385.214(d) (2011).

<sup>6</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

12. As discussed above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. Kern River proposes to provide firm transportation service to Molycorp under its existing Rate Schedule KRF-1 Firm Incremental Rate. At that rate schedule's maximum recourse rate of \$0.5817 per Dth, service to Molycorp would generate annual revenues of \$5,153,018, compared to Kern River's estimated \$3,556,901 annual cost of service for the first year of the project.<sup>7</sup> Since project revenues would exceed incremental project costs, the proposed project would not be subsidized by existing customers.

13. The proposed project will have no adverse impact on Kern River's existing customers. In addition, the project will not replace firm transportation service on any other pipeline. Further, no pipeline company in the market area has protested the application. Thus, the Commission finds that there will be no adverse impact on other pipelines or their captive customers.

14. Only three landowners – the U.S. Bureau of Land Management, the Los Angeles Department of Water and Power,<sup>8</sup> and Molycorp – are directly affected by the proposed construction. The landowners did not protest the proposal. Thus, the Commission finds that Kern River has designed the project to minimize impacts on landowners and surrounding communities.

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<sup>7</sup> Kern River proposes a \$3,556,901 cost of service in year one which includes a \$24,938 operating expense, a \$469,725 depreciation expense (at an annual rate of 3 percent), an \$18,789 Negative Salvage expense, a \$948,155 Federal Income Tax expense, a \$136,392 State Income Tax expense, a \$172,000 Other tax expense, a \$46,353 General Items expense, and a \$1,740,550 return allowance (at a total rate of return of 11.55 percent). The rate of return is based on the approved 11.55 percent rate of return in *Kern River Gas Transmission Company*, 126 FERC ¶ 61,034, at P 153 (2009). Kern River asserts in Exhibit N, page 3 of 7, that the book depreciation rate of 3 percent is “the same as those for the 2003 Expansion facilities in Docket No. RP04-274.” See *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,240, at P 148 (2009).

<sup>8</sup> The only impact on Los Angeles Department of Water and Power property will be an access road that Kern River will build under a temporary easement to facilitate construction.

15. The proposed project will enable Kern River to provide 24,270 Dth per day of transportation service to Molycorp. Based on the benefits the project will provide and the minimal adverse effect on existing shippers, other pipelines and their captive customers, and landowners and surrounding customers, the Commission finds, consistent with the Certificate Policy Statement and section 7 of the NGA, that the public convenience and necessity requires approval of Kern River's proposal, subject to the conditions discussed below.

**B. Initial Recourse Rates**

16. Kern River proposes to use its currently effective Rate Schedule KRF-1 Firm Incremental Rate recourse rate of \$0.5817 as its initial recourse rate for service on the Mountain Pass Lateral. Kern River has indicated that it will provide service to Molycorp at the same rate, though pursuant to a negotiated rate agreement. Given this, we will note that to the extent Kern River provides service under negotiated rate agreements, Kern River bears the risk of any revenue shortfall in a future rate case. Therefore, when Kern River files a future NGA section 4 rate proceeding to recover the costs associated with the expansion, the project costs will be compared to the revenues that would have been generated if Kern River were charging the maximum recourse rate for all expansion services under contract, regardless of whether the contracted rate is less than or greater than the recourse rate. At the maximum recourse rate of \$0.5817, incremental project revenue would exceed the incremental cost of service by \$1,596,117 for the first year of service and by \$5,248,954 over the first three years of project service. Accordingly, we will approve Kern River's proposal to charge its KRF-1 recourse rate as the initial rate for service on the Mountain Pass Lateral. In addition, we find that absent a significant change in circumstances, it will be appropriate for Kern River to roll the costs of the Mountain Pass Lateral project into its Rate Schedule KRF-1 rates in its next section 4 rate proceeding.

**C. Negotiated Rate Authority**

17. As indicated above, Kern River has entered into an agreement with Molycorp to provide firm transportation service at negotiated rates. In certificate proceedings, the Commission establishes initial recourse rates, but does not make determinations regarding specific negotiated rates for proposed services.<sup>9</sup> In accordance with the

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<sup>9</sup> *Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100, at P 97 (2008); *ANR Pipeline Co.*, 108 FERC ¶ 61,028, at P 21 (2004); *Gulfstream Natural Gas System, LLC*, 105 FERC ¶ 61,052, at P 37 (2003); *Tennessee Gas Pipeline Co.*, 101 FERC ¶ 61,360, at n.19 (2002).

Alternative Rate Policy Statement<sup>10</sup> and the Commission's negotiated rate policies,<sup>11</sup> Kern River must file any negotiated rate agreements or a tariff record describing the essential elements of the negotiated rate agreement associated with this project. Kern River shall file its negotiated rate agreement or a tariff record no less than 30 days, and not more than 60 days, prior to the commencement of service. In addition, Kern River must maintain separate and identifiable accounts for volumes transported, billing determinants, rate components, surcharges, and revenues associated with its negotiated rates in sufficient detail so that they can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate proceedings.

#### **D. Environmental Review**

18. On February 16, 2011, the Commission issued a Notice of Intent to Prepare an Environmental Assessment (NOI). The NOI was mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; and local libraries and newspapers.

19. In response to the NOI, the Commission received scoping comments from Basin and Range Watch, the California Department of Fish and Game (CDFG), Center for Biological Diversity (Center), County of San Bernardino Department of Public Works, Desert Tortoise Council, Sierra Club, Western Watersheds Project (Western Watersheds), and three individuals. The primary issues raised concerned impacts on desert tortoise habitat and on other sensitive animal and plant species potentially occurring in the project area, and general cumulative impacts within Ivanpah Valley.

20. Staff conducted a site visit, which was open to the public, of the proposed pipeline route on March 8, 2011. In addition to the Commission's staff, site visit attendees included Molycorp, Kern River, and the CDFG.

21. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), the Commission's staff prepared an environmental assessment (EA) for Kern River's proposal. The EA was prepared with the cooperation of the U.S. Department of the Interior Bureau of Land Management (BLM) and Fish and Wildlife Service (FWS). The EA evaluates the project's impact on the desert tortoise and other sensitive species and addresses geologic resources, soils, water resources, fisheries and wetlands,

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<sup>10</sup> *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, order granting clarification, 74 FERC ¶ 61,194 (1996).

<sup>11</sup> See, e.g., *Texas Eastern Transmission, LP*, 133 FERC ¶ 61,220 (2010).

vegetation and wildlife, land use, recreation and visual resources, cultural resources, air quality and noise, reliability and safety, environmental justice, cumulative impacts, and alternatives. The EA addresses all substantive scoping comments received in response to the NOI.

22. The EA was issued for a 30-day comment period and placed into the public record on September 30, 2011. The Commission received comments on the EA from the U.S. Department of the Interior Geological Survey (USGS), California Regional Water Quality Control Board – Lahontan Region (LRWQCB), Western Watersheds, the Center, Desert Tortoise Council, Kern River, and Molycorp.

### **Clarifications**

23. In their comments on the EA, Kern River, Molycorp, and the USGS provided clarification on the following aspects of the project, none of which alter the findings and conclusions in the EA. Kern River clarifies that it will not: (1) replant salvaged vegetation or place vertical mulch or boulders within the two-track maintenance access road; (2) conduct any regularly scheduled vegetation clearing on the right-of-way beyond that necessary for safety and inspection purposes; and (3) impact any active mill sites. Molycorp clarifies that the evaporation ponds identified in section 2.3.2 of the EA refer to facilities that are 9 and 14 miles away from the project, and that these facilities are owned by Chevron, not Molycorp. Molycorp seeks clarification to the listing of 52 acres as “permanent” impacts associated with the project’s operation, as it believes that restoration subsequent to project construction would return most of the permanent right-of-way to pre-construction conditions. Molycorp claims that these construction impacts are not equivalent to the permanent land disturbance impacts generated by other projects in the Ivanpah Valley, including the Ivanpah Solar Electric Generating System (ISEGS) Project, which involve permanent habitat disturbance and fencing. The USGS provided clarification on references cited in the EA which the Commission accepts.

24. To clarify, the reference to the 52 acres of permanent impact in sections 1.8 and 2.10 of the EA refers to the permanent easement for the right-of-way and aboveground facilities. Only the aboveground portions of the project, consisting of approximately 0.41 acre of disturbance, are considered equivalent to the permanent disturbance anticipated for the ISEGS. Many elements of the project that were conservatively described as “permanent” impacts, including the proposed maintenance road, will actually be allowed to revegetate naturally.

25. In addition to these clarifications, the Commission received comments on a number of other portions of the EA. The Commission will respond to them below.

### **Purpose and Need**

26. The Western Watersheds claims that the Purpose and Need section of the EA violates NEPA, because the section explains the “applicant’s desires,” rather than the agency’s purpose and need.

27. As described in the EA, Kern River developed the project in response to the needs of Molycorp and filed an application with the Commission for authorization to construct and operate those facilities. It is not intended that the EA reach a conclusion on whether there is a need for a proposed project. The Council on Environmental Quality (CEQ) regulations implementing NEPA requires only that an EA include a brief discussion of the need for the proposal.<sup>12</sup> The function of a statement of purpose and need in the EA is to define the objectives of the proposed action such that the agency can identify and consider legitimate alternatives.<sup>13</sup> The determination of whether there is a “need” for the proposed facilities for the purpose of issuing an authorization under section 7 of the NGA was made by the Commission in this order based on a balancing of the benefits of the project against any adverse impacts.

### **Permanent Right-of-Way Width**

28. In its comments on the EA, the Western Watersheds contends that the EA does not adequately explain why a 50-foot-wide permanent right-of-way is needed for the pipeline. The 50-foot permanent right-of-way is needed in order to protect the pipeline from future encroachment by additional development (facilities, structures, etc.) and to allow for an adequate travel lane for activities necessary for pipeline operations and maintenance. In addition, a 50-foot right-of-way is consistent with other certificated natural gas pipeline projects. BLM’s grant of a right-of-way to Kern River will include a maximum width of easement that may be less than 50 feet on federal land. Thus, the Commission finds that Kern River’s project design for a permanent right-of-way width of 50 feet is reasonable.

### **Washes and Water Quality**

29. The Center asserts that the EA fails to assess the significance of the pipeline on water movement, such as disrupting the flows of springs, seeps, or other water sources, or the potential for soil erosion triggered by construction to cause sedimentation in

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<sup>12</sup> 40 C.F.R. § 1508.9 (2011).

<sup>13</sup> *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10<sup>th</sup> Cir. 1999).

waterbodies. The Center states that the EA should consider alternatives, such as the Interstate Highway 15 (I-15) alternatives, to avoid or minimize these impacts.

30. As stated in the EA,<sup>14</sup> the proposed route does not cross any perennial waterbodies (only intermittent washes that flow water after significant rain events), and no springs are within 100 feet of the proposed pipeline alignment. Construction through intermittent-flowing washes would be temporary; typically only lasting a few days until the ground surface and drainage are restored. The washes crossed by the pipeline would not be permanently altered. All bank and bed contours would be restored to preconstruction topography with areas outside the intermittent washes reseeded with native species in accordance with the *Reclamation Plan* (Appendix C of the EA). If water is flowing in the washes due to a rain event, Kern River will stop construction in washes during periods of high flow.

31. The EA also describes Kern River's intention to minimize the potential for soil erosion by implementing the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*. In addition, the EA evaluates alternative routes that might have less impact on water sources, including the I-15 alternatives, and concludes that the proposed route crosses fewer washes than would any of the I-15 route alternatives.

32. The LRWQCB comments that the EA inaccurately states that the washes are not California state waters or designated as having California Beneficial Uses or fisheries because none of the waterbodies that the pipeline will cross are perennial. The LRWQCB also asserts that mitigation from project-related impacts on the intermittent washes must include compliance with all applicable provisions in its Water Quality Control Plan for the Lahontan Region (Basin Plan).

33. The Commission acknowledges that all surface waters the project crosses, perennial and intermittent, are considered California state waters protected under California law and that the LRWQCB has authority over those waters in the Ivanpah Valley Hydrological Unit, as outlined in their Basin Plan. As discussed in the EA,<sup>15</sup> Kern River must file for certain permits from other agencies, including the LRWQCB, and those permitting agencies may require additional mitigation.

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<sup>14</sup> EA at 2-17.

<sup>15</sup> EA at section 1-10.

### Soils

34. The USGS comments that the proposed construction and mitigation measures to reduce the impact on soils disturbed by the project should take into account restabilization measures for the cryptobiotic crusts in order to reduce the potential of wind erosion. The EA discusses the project's impact on soils, including cryptobiotic crusts, and the project's construction and restoration measures designed to lessen impact on these soils. However, to ensure proper implementation of the specialized restoration techniques, Environmental Condition 10 requires Kern River to file a revised *Reclamation Plan* that includes measures to minimize the impact of the project on cryptobiotic soil crust communities.

### Desert Tortoise

35. The Western Watersheds, Center, and Desert Tortoise Council provided a number of comments regarding the desert tortoise. The commentors question highly technical details of the EA's analysis including the survey protocols, the defined range of this specific genetic population of the species, and the effectiveness of translocation of individual tortoises, a standard mitigation measure for this species.

36. The analysis in the EA was prepared by a combination of experts from the Commission, FWS, and BLM. The FWS, the federal agency charged with enforcing the Endangered Species Act (ESA), and the BLM, the federal land manager for the majority of the land on which the project occurs, fully participated in the NEPA process for this proceeding as cooperating agencies. The EA discusses the project-related actions that may impact the desert tortoise and proposes measures to mitigate impacts. The EA concludes that the project may effect, and is likely to adversely affect, this federally threatened species.

37. As explained in the EA (section 2.4.8), in compliance with section 7 of the ESA, the Commission, as the lead federal agency, prepared a biological assessment (BA)<sup>16</sup> identifying the nature and extent of adverse impacts the project may have on the desert tortoise and recommending measures that could avoid or reduce impacts. By letter dated September 30, 2011, Commission staff submitted the BA to the FWS and requested that the FWS initiate formal consultation on the desert tortoise. This formal consultation process will result in the FWS's issuance of a biological opinion (BO), finding whether the project is likely to jeopardize the continued existence of this listed species. Before reaching this finding, the BO will, among other things, identify the nature and extent of the project's effects on the species and include a statement of anticipated incidental take

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<sup>16</sup> A copy of the BA is attached as Appendix D to the EA.

with mandatory reasonable and prudent measures, as appropriate, to minimize such take. In Environmental Condition 11 herein, the Commission ensures that Kern River cannot begin project construction until the Commission has completed formal consultation with the FWS.

38. Survey protocols are determined by the FWS through the ESA consultation process. For example, desert tortoise surveys were conducted within the FWS designated desert tortoise survey season in accordance with the FWS's *Pre-Project Field Survey Protocol for Potential Desert Tortoise Habitats*. Further, as stated in section 8 of the BA, Kern River has committed to follow the FWS's protocols regarding translocation of the desert tortoise from the project's footprint. The FWS, through their rendering of a BO, may include any additional measures necessary to protect the desert tortoise, including modifications to the monitoring protocols if the FWS believes it is necessary. As such, the Commission does not believe that this order is the proper place to discuss the standard procedures recommended by the FWS.

39. With regards to comments from the Western Watersheds and the Desert Tortoise Council that the Ivanpah Valley population is a distinct genetic cluster, the Commission clarifies that the Mojave population of the desert tortoise includes all tortoises north and west of the Colorado River in Arizona, Utah, Nevada, and California, as defined in the final listing rule for this taxon.<sup>17</sup> The comment that the Ivanpah Valley population is a distinct genetic cluster has no bearing on the discussion of potential impacts on the species from the proposed project.

40. The Western Watersheds states that the EA is inadequate because it fails to provide any data on the numbers of desert tortoises that would be affected by the alternative routes. The Commission disagrees. According to the FWS, surveys conducted for proposed linear projects do not provide a useful estimate as to how many tortoises would be affected. Since a surveyor's findings will most likely be different than what is present when the project begins, the FWS did not recommend surveys for each alternative route because useful numbers would not be obtained to reasonably compare each route.

41. The Western Watersheds asserts that the EA's discussion of the Ivanpah Valley as a Category 3 desert tortoise habitat should be expanded to include the area's previous designation as a Category 1 habitat prior to the passage of the BLM Northern and Eastern Mojave Desert (NEMO) Plan Amendment, which was proposed to be part of the Desert

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<sup>17</sup> 55 Fed. Reg. 12,178 (April 2, 1990). Taxon is defined as a group of one or more organisms which are usually inferred to be phylogenetically related and which have characteristics in common that differentiate the unit from other units.

Wildlife Management Area in the 1994 Desert Tortoise (Mojave Population) Recovery Plan. In response, the BLM states that the NEMO amendment of the California Desert Conservation Area Plan directs the BLM's management of the area as Category 3. The FWS agrees, stating that the former identification of the area as Category 1 habitat for the desert tortoise is no longer relevant and need not be discussed in the EA. In addition, the original recovery plan for the desert tortoise, published by the FWS in 1994, provided broad recommendations for areas in which desert wildlife management areas should be established but left the actual designation of these areas (and their discrete boundaries) to the land management agencies.

42. The Western Watersheds contends that the FWS's policy on the significance of critical habitat is not bound by the determination of a habitat's designation at a particular time, but that areas important to the conservation of the species, both inside and outside the critical habitat designation, are subject to FWS's regulations which include conservation actions, regulatory actions, and prohibitions on actions for areas that FWS must enforce. As stated, the FWS is in formal consultation with the Commission on the project and will issue a BO that may include additional protective measures the FWS may deem necessary. Commentors should direct comments concerning the FWS's policies directly to that agency.

43. The Western Watersheds and Desert Tortoise Council contend that the Commission should prepare an environmental impact statement (EIS) because the project will impose significant cumulative impacts threatening the survival of the desert tortoise, and because the EA concludes the project "is likely to adversely affect the desert tortoise." The Commission disagrees. The EA considers cumulative impacts (section 2.10) and concludes that the project will not result in any significant cumulative impacts. Specific to the desert tortoise, the BA concludes that the project's contribution to cumulative impacts in the area will not be significant. In addition, the Commission does not agree that an EIS is necessary based on the expected impacts on the desert tortoise. Contrary to the commentors' contention that the EA's conclusion of impact on the desert tortoise requires an EIS, the finding of "likely to adversely affect" requires the lead agency to enter formal consultation under the ESA. This has occurred here.

### **Bighorn Sheep**

44. The Western Watersheds claims that the EA and the BLM, as a cooperating agency, did not adhere to the BLM's California Desert Conservation Area (CDCA) Plan to "avoid, mitigate, or compensate for impacts of conflicting use" to the suitable bighorn sheep habitat that would be adversely affected by the project during construction. The Western Watersheds also claims that the placement and use of a maintenance road within the permanent right-of-way during operation will result in the permanent loss of foraging habitat. The Western Watersheds contends that because the project is likely to impact

bighorn sheep, the EA should consider alternatives, such as a route along I-15, in order to avoid impacts on this species.

45. To the contrary, the EA clearly states that surveyors did not identify any bighorn sheep or their sign within two miles of the pipeline route. The EA explains that the lack of rocky terrain for escaping predators and the absence of perennial surface water features decrease the likelihood that bighorn sheep would use the project area. The EA concludes that the project will not have long lasting effects on the bighorn sheep and, therefore, the BLM does not recommend any mitigation for this species.

46. The EA evaluates alternatives to Kern River's proposal, including routes along I-15. The EA did not find any alternatives to be environmentally preferable to Kern River's proposal.

### **Rusby's Desert-Mallow**

47. The Western Watersheds asserts that the EA did not adequately consider the project's impacts on Rusby's desert-mallow, a BLM listed sensitive species, and that alternatives such as the I-15 route should be considered so that impacts are avoided entirely.

48. The EA discusses the special status species that could occur in the project area, including the Rusby's desert-mallow and others listed as sensitive by the BLM and the State of California. Kern River conducted surveys for each of these species in 2010 and 2011. The EA describes the identification of a single population of Rusby's desert-mallow near MP 7.2. The EA also describes the special treatment plan that Kern River and the BLM developed for this species. Specifically, under the treatment plan, a qualified biologist will transplant the individuals of this population to an appropriate location adjacent to the right-of-way and will water and monitor the plants for up to six months following the transplanting (or longer if deemed necessary by a qualified botanist). Appendix C to the EA includes Kern River's Biological Resources Mitigation Plan, which fully describes the survey results and mitigation plans for the special status species in the project area.

49. Because impacts on the Rusby's desert-mallow would be mitigated through transplanting and through best management practices such as avoidance and salvage as employed on other BLM lands in the north Ivanpah Valley, no alternative route, including any of the I-15 route alternatives, provides an environmental advantage with respect to Rusby's desert-mallow.

### **Golden Eagles and Gila Monsters**

50. The Western Watersheds and Center commented that the EA should consider the project's impact on occupied habitat for the golden eagle and Gila monster, both sensitive species. The Western Watersheds noted that golden eagles have been documented foraging in the Ivanpah Valley during surveys for the ISEGS Project and that a Gila monster was detected near a service road during a May 2010 desert tortoise survey for the nearby Silver State North Project.

51. The EA discusses each of these species and states that the 2011 surveys did not identify any golden eagles or Gila monsters within two miles of the project area. The EA also notes the BLM field reports that identify two potentially active golden eagle nests within 10 miles of the project area, and that indicate that within limited-water environments such as the project area, golden eagles have been documented to forage up to 10 miles from their nest sites. Assuming that the BLM-documented golden eagle nests, located approximately 10 miles from the project, are active, foraging habitat from that location would encompass 200,960 acres. Thus, the Commission concludes that the 159 acres disturbed by the project would account for significantly less than one percent of potential foraging habitat for golden eagles, which does not warrant additional consideration.

52. The location where the Gila monster was documented during a May 2010 survey for the Silver State Solar Project is east of Primm, Nevada, approximately 20 miles from the Mountain Pass Lateral. As stated in the EA, the project area has low potential as habitat for the Gila monster because there are no perennial water sources nearby or any rocky outcrops that this species requires for refuge.

### **Mohave Ground Squirrel**

53. The Center believes that the EA incorrectly identified the range of the Mohave ground squirrel as extending into the project area and misidentifies it as a common species. The Center contends that if the EA was inaccurate in this instance, it calls into question the reliability of identification of other species in the project area. The Center claims that a complete evaluation and analysis under an EIS should be conducted to clarify the issue.

54. According to the BLM, the home range of the Mohave ground squirrel is entirely within the West Mojave Planning Area approximately 85 miles west of the project area. Consistent with the expectations based on the known home range, biologists who conducted the 2011 sensitive species surveys for the project did not encounter any Mohave ground squirrels. The Center's comments provide clarification but do not alter the conclusions contained within the EA.

### Additional Species

55. The Center contends that the EA only addressed a portion of the rare, threatened, and endangered species the Center submitted as a list with its scoping comments and requests that the Commission prepare an EIS to address sensitive species. In accordance with the ESA, the Commission and BLM required Kern River to survey for federally threatened and endangered species which may have the potential to occur in the project area. The EA and the BA address each of these species.

56. The EA discusses the potential project-related impacts on many additional rare and sensitive species that may occur in the project area. The EA also describes how the list of these species was compiled through research and in consultation with the responsible agencies and groups who maintain such information. The Biological Resource Mitigation Plan (Appendix C of the EA) explains that Kern River designed a species survey plan and developed mitigation in conjunction with the BLM, FWS, and CDFG to offset the potential impact on any of the species found in the project area.

57. Regarding any additional species identified by the Center that are not specifically named in the EA, twelve of the plant species were not required for survey because they are classified by the CDFG as either Limited Distribution or rare in California but more common elsewhere. Three additional plant species were determined to not have suitable habitat in the project area.

58. All eight bird species included in the Center's list, but not mentioned in the EA, are migratory birds protected under the Migratory Bird Treaty Act. Thus, all mitigation measures discussed in section 2.4 of the EA regarding migratory birds apply to these species as well. The BLM notes that there are no specific regulatory requirements for the BLM listed Gray-headed junco and Loggerhead shrike.

59. Of the three BLM listed bat species included in the Center's list, surveys conducted by BLM in April 2011 indicate that Pallid bats and Townsend's big-eared bats use upper elevation mine shafts in the Clark Mountains for roosting. Because no mines exist on the project right-of-way, roost sites will not be affected by the project. The third BLM sensitive bat species, the long-legged myotis, is typically uncommon in desert habitats.

60. While the project area contains suitable foraging habitat for these and other bat species, given the availability of this habitat within the greater landscape, the loss of foraging habitat due to the project will not have an appreciable impact on the health of nearby bat populations. Once restored in accordance with the *Restoration Plan*, the project footprint will regain its ability to function as a foraging area.

61. Surveys for the desert kit fox, a California species of concern, were conducted incidentally during surveys for other species and no individuals or dens were found.

### **Burros, Wild Horses, and Cattle**

62. The Western Watersheds contends that because the proposed route crosses the Clark Mountain grazing allotment, the EA should include a discussion of how restoration of the right-of-way would be protected from the impacts of cattle, wild horses, or burros. As stated in the EA,<sup>18</sup> vegetation restoration success criteria in the project area is defined as 70 percent of the cover, density, and richness of the adjacent lands over a qualitative monitoring period of five years, as typically required by BLM. This requirement is not suspended by the presence of grazing animals. However, the possibility of grazing animals greatly delaying restoration of the project area is small. The project area lies within the 97,847-acre Western Ivanpah Valley and Clark Mountain Range public lands grazing allotment area for cattle, which overlaps with the approximately 75,349-acre Clark Mountain Herd Management Area (HMA) for burros. The project footprint is 159 acres, which is less than one percent of either of those areas individually.

63. In addition, as stated in the EA, no wild horses have been documented in the Clark Mountain HMA and the BLM has plans, dependent on funding, to gather and remove the remaining burros from the Clark Mountain HMA to facilitate the recovery of the desert tortoise in the project area.

### **Invasive Weeds**

64. The Western Watersheds claims that the BLM must designate the right-of-way a maintenance route consistent with 43 C.F.R. § 8342.1 for areas and trails. In response, the BLM states that 43 C.F.R. § 8342.1 does not apply to the project because that regulation is intended for access routes for public use. A “route,” as defined by 43 C.F.R. § 8342.1, is for public use (e.g., for use by climbers, photographers, and hikers). The proposed right-of-way will not be accessible to the public and will be issued a BLM Right-of-Way Grant in accordance with 43 C.F.R. Part 2800.

65. The Center contends that the pipeline corridor would contribute to the spread of invasive plant species by establishing a “weed corridor” across the landscape. The Center also asserts that the maintenance road within the permanent right-of-way will place high quality, occupied desert tortoise habitat at chronic risk of invasive species and should be eliminated from the project.

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<sup>18</sup> EA at 2-28.

66. As the Center comments, invasive plant species are already present in the project area, particularly red brome and cheatgrass. The EA describes these species as widespread and pervasive through the proposed project area and adjacent federal, state, and private land in the Ivanpah Valley.<sup>19</sup> Further, the EA includes an acknowledgement by the BLM that these species, because of their widespread distribution, are not considered feasible for general control.<sup>20</sup> Thus, because invasive species already exist in the project area in such numbers that general control is not considered feasible, the area is already at chronic risk of invasive species.

67. The Center's statement that the project area is in high quality desert tortoise habitat is inaccurate. As stated in the EA,<sup>21</sup> the project area lies within desert tortoise habitat that the BLM classifies as Category 3 habitat or habitat not critical to population maintenance and that supports low to medium densities not contiguous to medium to high-density populations. As described in its *Reclamation Plan* (EA in Appendix D), Kern River would reseed the entire area of disturbance, including the 6.1-acre maintenance road, with native species and would not mow, blade, or grade vegetation on the road beyond that necessary to ensure safe travel during maintenance activities. The EA includes a description of the Noxious Weed Control Plan that Kern River will implement to prevent the spread of noxious weeds along the right-of-way during operation. Weed removal, either through mechanical or chemical methods under BLM-specific requirements, will only be conducted with the concurrence from the BLM over the life of the project.

### **Cultural Resources**

68. The Western Watersheds comments that the EA provides no information on the cultural resources that would be affected by the alternative routes for the pipeline. The Commission notes that a detailed, comprehensive survey for cultural resources was performed on the proposed route. As stated in the EA, several sites listed on the National Register of Historic Places were identified, but none would be adversely affected by the proposed route. Thus, cultural resources were not a defining criterion for comparison between the proposed and alternate routes.

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<sup>19</sup> *Id.* at 2-25.

<sup>20</sup> *Id.* at 2-29.

<sup>21</sup> *Id.* at 2-38.

### Cumulative Impacts

69. The Western Watersheds asserts that many of the cumulative effects of the project, along with other energy developments in the Ivanpah Valley, could be minimized or avoided if the construction of the pipeline was “better coordinated” with the other projects in the area. The Commission finds that the EA has provided a full consideration of all suggested alternatives, particularly the ISEGS and I-15 alternatives, that would locate the Mountain Pass Lateral with existing or proposed facilities. The Commission agrees with the EA’s conclusion that these alternatives would result in greater impacts on desert tortoise habitat and greater impacts on previously undisturbed desert.

70. The Center claims that the EA failed to consider all known projects in the cumulative impacts analysis, including the Silver State North Project, the Desert Xpress high-speed rail project, and “other proposed projects in the Ivanpah Valley in Nevada.” To the contrary, the Silver State North and Desert Xpress high-speed rail projects are, in fact, included in the EA in Tables 2.10-1 and 2.10-2, and are accounted for within the discussion of general cumulative impacts along with the other identified past, present, or reasonably foreseeable projects occurring within the Ivanpah Valley. The Commission finds that the EA’s cumulative impacts analysis is appropriate.<sup>22</sup>

### Alternatives

71. The Western Watersheds states that the EA provides no comparative analysis of the route alternatives and the NEPA analysis fails to consider alternative routes that avoid or minimize impacts from the project, including noise, dust, vibrations, and other disturbances. The EA contains a comparative analysis of the ability of alternatives to avoid or minimize impacts on sensitive resources, as illustrated in Table 3.1.4-1 and the accompanying analysis of each alternative route. With respect to noise, dust, vibration, and other disturbances during construction, the EA states that noise produced from construction activities will be minor and temporary. The EA also describes Kern River’s *Fugitive Dust Control Plan* to minimize dust from construction activities. In comparing the alternatives, the EA finds that the proposed route is shorter than any of the alternative routes, resulting in less ground disturbance. Consequently, construction of the proposed route will be completed in less time and create less noise, vibration, dust, and other disturbances. The Commission finds the EA’s discussion of alternatives to be adequate.

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<sup>22</sup> The CEQ states that agencies have substantial discretion in determining the appropriate level of their cumulative impact assessments and that agencies should relate the scope of their analyses to the magnitude of the environmental impacts of the proposed action. See *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

72. The Western Watersheds asserts that many of the cumulative effects of the project, along with other energy developments in the Ivanpah Valley, could be minimized or avoided if “alternative routes such as the I-15 route” were given “serious consideration.” The Commission finds that the EA has considered alternative routes along I-15. Specifically, the EA analyzes the I-15 Corridor Route Variation A and I-15 Corridor Route Variation B as alternatives. In both cases, the EA concludes that the longer length of the pipeline would result in a greater disturbance to desert tortoise habitat and other affected resources, and would disturb a greater area of previously undisturbed desert compared to the proposed route. The Commission agrees with the EA’s conclusion that the alternatives are not environmentally preferable to the proposed route.

73. The Desert Tortoise Council comments that it believes that the I-15 Corridor Route Variation A should be chosen as the preferred alternative. The Desert Tortoise Council cites a letter from the FWS to Commission staff stating that “a route along [I-15] where desert tortoise numbers are low and the habitat is relatively degraded would result in a reduced level of disturbance.”<sup>23</sup> There are no surveys, studies, or regulatory designations that identify the desert tortoise habitat along I-15 as inferior in quality to other habitat in the project area. Thus, the Commission concludes that the EA properly considered each route alternative on an equivalent metric for desert tortoise habitat quality.

### **Mitigation**

74. The Western Watersheds comments that the EA should explain how proposed mitigations actually offset the specific impacts of the project. Contrary to the Western Watersheds’s comments, the EA explains how Kern River would mitigate the specific impacts of the project and how impacts would be offset. For example, the recovery of native vegetation would be facilitated through implementation of the *Reclamation Plan* and the *Noxious Weed Control Plan*. For each resource area that would be affected by the project, the EA states how impacts would be mitigated and whether the measures are committed to by Kern River or are included in an environmental condition.

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<sup>23</sup> FWS’s letter of June 16, 2011. We note that subsequent to the date of that letter, FWS became a cooperating agency and fully participated in the development of the EA. As discussed above in the section titled Desert Tortoise, at paragraph 40, the FWS did not recommend tortoise surveys for each alternative route because they believe surveys conducted for linear projects do not provide a useful estimate of how many tortoises would be affected.

### **EA vs. EIS**

75. The Center claims that the preparation of an EA for this project is inconsistent with policies, laws, and regulations and “encourages” the Commission to prepare an EIS. The Desert Tortoise Council also comments that it believes an EIS is necessary because the project will potentially have direct, indirect, and cumulative impacts on the desert tortoise and its habitat. Similarly, the Western Watersheds claims that an EIS must be prepared because the project would likely have significant direct, indirect, and cumulative effects on sensitive species that are avoidable.

76. The Commission’s regulations require preparation of an EIS for “[m]ajor pipeline construction projects . . .” The regulations do not define or explain what constitutes a “major” pipeline project. However, based on the Commission’s experience with NEPA implementation for pipeline projects, an 8.6-mile-long, 8-inch-diameter pipeline normally does not fall under the “major” category for which an EIS is automatically prepared.

77. The CEQ regulations implementing NEPA state that one of the purposes of an EA is to assist agencies in determining whether to prepare an EIS or a finding of no significant impact.<sup>24</sup> The Commission’s staff prepared an EA to determine whether the Mountain Pass Lateral would have significant impacts, thus necessitating the preparation of an EIS. As part of that review, the Commission’s staff evaluated the project’s potential impact on the Mojave desert tortoise and other sensitive species. The EA concludes that the Mountain Pass Lateral would not have a significant impact on the quality of the human environment. Thus, the Commission agrees with the EA and concludes that an EIS is not required.<sup>25</sup>

### **FLPMA and the CDCA Plan**

78. The Center claims that the EA failed to identify how the project would comply with the CDCA Plan or the Federal Land Policy and Management Act (FLPMA). Specifically, the Center claims that the EA is inconsistent with the CDCA Plan because Kern River proposes to construct the project on Multiple-Use Class L lands. The Center also claims that the EA is not consistent with FLPMA because the EA failed to show that it is necessary to approve the project at this location and that there are no other suitable alternative sites within the CDCA. Further, the Center claims that the project is not

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<sup>24</sup> 40 C.F.R. § 1508.9(a)(1) (2011).

<sup>25</sup> The CEQ regulations state that, where an EA concludes in a finding of no significant impact, an agency may proceed without preparing an EIS. *See* 40 C.F.R. §§ 1501.4(e) and 1508.13 (2011).

consistent with FLPMA's planning provisions related to developing and revising land use plans and preparing and maintaining adequate inventory data on the resources of an area to inform the planning process.

79. As stated in the EA, the location of the project includes land that is classified as Multiple-Use Class L (Limited Use) and Multiple-Use Class M (Moderate).<sup>26</sup> The CDCA Plan's Multiple Use Class Guidelines state that in Limited Use and Multiple Use areas, a new distribution system, which is BLM's categorization of the Mountain Pass Lateral, is allowed. In addition, the BLM cooperated with the Commission in preparation of the EA and found the project's construction and operation to be consistent with FLPMA's planning provisions. Thus, the Commission disagrees with the Center's claims.

#### **NEPA "Inadequacies"**

80. The Center comments that it found the analysis in the EA to be inadequate. The Commission finds that the EA contains a full evaluation of project-related impacts. The Commission's staff reviewed Kern River's application for nearly one year. During that time, the staff conducted a public site visit of the proposed pipeline route and sought input from interested stakeholders. The Commission's staff prepared the EA with the assistance of the BLM and FWS, as well as local and regional agencies having expertise in the project area. The EA includes the results of detailed analyses of the relevant topics, presents a thorough consideration of the scoping issues and alternatives, and identifies ways to avoid or minimize project impacts.

81. Based on the analysis in the EA, the Commission concludes that if constructed in accordance with Kern River's application and supplements, and in compliance with the environmental conditions in Appendix B to this order, the Commission's approval of Kern River's proposal would not constitute a major federal action significantly affecting the quality of the human environment.

82. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or

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<sup>26</sup> EA at 2-53.

local laws, may prohibit or unreasonably delay the construction of facilities approved by this Commission.<sup>27</sup>

83. At a hearing on January 19, 2012, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, as supplemented, and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued authorizing Kern River to construct and operate the Mountain Pass Lateral facilities, as described more fully in the application and in the body of this order.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on:

- (a) Kern River's completing the authorized construction of the proposed facilities and making them available for service within one year of the date of this order pursuant to paragraph (b) of section 157.20 of the Commission's regulations;
- (b) Kern River's compliance with all applicable Commission regulations, including paragraphs (a), (c), (e), and (f) of section 157.20;
- (c) Kern River's compliance with the environmental conditions listed in Appendix B to this order.

(C) Kern River's proposed initial recourse rates for firm transportation service on the Mountain Pass Lateral are approved.

(D) Kern River shall file its negotiated rate agreement or a tariff record describing the essential elements of the agreement no less than 30 days, and not more than 60 days, prior to the commencement of service.

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<sup>27</sup> See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

(E) Kern River is directed to maintain separate and identifiable accounts for volumes transported, billing determinants, rate components, surcharges, and revenues associated with its negotiated rates in sufficient detail so that they can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case.

(F) Kern River shall notify the Commission's environmental staff by telephone, e-mail, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Kern River. Kern River shall file written confirmation of such notification with the Secretary of the Commission (Secretary) within 24 hours.

(G) The untimely motions to intervene are granted.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

**Appendix A**

**Timely Interventions**

Basin and Range Watch  
Desert Tortoise Council  
Nevada Power Company  
Southwest Gas Corporation  
Western Watersheds Project

## Appendix B

This order is subject to the following environmental conditions:

1. Kern River shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Kern River must:
  - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary;
  - b. justify each modification relative to site-specific conditions;
  - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
  - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) before using that modification.
2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
  - a. the modification of conditions of the Order; and
  - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Kern River shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA. **As soon as they are available, and before the start of construction**, Kern River shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

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

This requirement does not apply to extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments which do not affect sensitive environmental areas.

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

- a. implementation of cultural resources mitigation measures;
  - b. implementation of endangered, threatened, or special concern species mitigation measures;
  - c. recommendations by state regulatory authorities; and
  - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the certificate and before construction** begins, Kern River shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Kern River must file revisions to the plan as schedules change. The plan shall identify:
    - a. how Kern River will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
    - b. how Kern River will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
    - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;

- d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
  - e. the location and dates of the environmental compliance training and instructions Kern River will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change),
  - f. the company personnel (if known) and specific portion of Kern River's organization having responsibility for compliance;
  - g. the procedures (including use of contract penalties) Kern River will follow if noncompliance occurs; and
  - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
    - (1) the completion of all required surveys and reports;
    - (2) the environmental compliance training of onsite personnel;
    - (3) the start of construction; and
    - (4) the start and completion of restoration.
7. Kern River shall employ at least one EI per construction spread. The EI shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
  - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
  - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
  - d. a full-time position, separate from all other activity inspectors;
  - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
  - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Kern River shall file updated status reports with the Secretary on a weekly basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Kern River's efforts to obtain the necessary federal authorizations;

- b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
  - c. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
  - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
  - e. the effectiveness of all corrective actions implemented;
  - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
  - g. copies of any correspondence received by Kern River from other federal, state, or local permitting agencies concerning instances of noncompliance, and Kern River's response.
9. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, Kern River shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
10. Kern River shall file with its Implementation Plan a revised *Reclamation Plan* developed in consultation with the BLM that includes measures to: (a) protect vegetative communities from the effects of piling topsoil and trench spoil; (b) lessen the potential of wind and water erosion on topsoil and trench spoil pile; (c) minimize the impact on cryptobiotic soil crust communities; and, (d) define success criteria as achieved if native plants reach 70 percent of cover, density, and richness over a qualitative monitoring period of five years on the construction right-of-way.
11. Kern River shall not begin construction activities until the Commission's staff completes formal consultation with the FWS and Kern River has received written notification from the Director of OEP that construction or use of mitigation may begin.
12. Kern River must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
13. **Within 30 days of placing the authorized facilities in service**, Kern River shall file an affirmative statement with the Secretary, certified by a senior company official:

- a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
- b. identifying which of the certificate conditions Kern River has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.