

154 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constitution Pipeline Company, LLC

Docket No. CP13-499-001

Iroquois Gas Transmission System, L.P.

Docket No. CP13-502-001

ORDER DENYING REHEARING AND APPROVING VARIANCE

(Issued January 28, 2016)

1. On December 2, 2014, the Commission issued an order in Docket No. CP13-499-000 authorizing Constitution Pipeline Company, LLC (Constitution), under section 7 of the Natural Gas Act (NGA), to construct and operate an approximately 125-mile-long, 30-inch-diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania, to a proposed interconnection with Iroquois Gas Transmission System, L.P.'s (Iroquois) pipeline system in Schoharie County, New York (2014 Order).¹ The proposed pipeline is designed to provide up to 650,000 dekatherms (Dth) per day of firm transportation service. The Commission also authorized Constitution to enter into a capacity lease agreement with Iroquois, whereby Iroquois will construct the compression necessary for Constitution to deliver natural gas from the terminus of its proposed interstate pipeline into the existing pipeline systems of both Iroquois and Tennessee Gas Pipeline Company, L.L.C. (Tennessee), and lease to Constitution the incremental capacity associated with the compression facilities (all together, the Constitution Pipeline Project). In Docket No. CP13-502-000, the Commission authorized Iroquois under section 7 of the NGA to construct compression facilities at its existing Wright Compressor Station in Schoharie County to support the lease agreement (the Wright Interconnection Project) and section 7(b) authority to abandon the incremental capacity to Constitution.

¹ *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014).

2. In the 2014 Order, the Commission found that the benefits the Constitution Pipeline and Wright Interconnection Projects will provide to the market outweigh any adverse effects on existing shippers, on other pipelines and their captive customers, and on landowners and surrounding communities. The Commission concluded after preparing an Environmental Impact Statement (EIS) for the projects to satisfy the requirements of the National Environmental Policy Act (NEPA) that, if constructed and operated in accordance with applicable laws and regulations, the projects will result in some adverse environmental impacts, but that these impacts will be reduced to less-than-significant levels with Constitution's and Iroquois' implementation of the required mitigation measures adopted as conditions of the order.²

3. Several parties filed timely requests for rehearing of the 2014 Order. As discussed below, we will deny the requests.

I. Procedural Issues

A. Late Interventions

4. On December 31, 2014, more than four weeks after the 2014 Order was issued, Damascus Citizens for Sustainability, Inc., (Damascus) filed a motion for leave to intervene out of time. Damascus claims that it has good cause to intervene late because it is the only entity raising concerns about levels of radon and other radioactive materials in the gas that will flow through the proposed Constitution pipeline and therefore no other party can adequately represent its interests. On May 11, 2015, more than five months after the 2014 Order was issued, Sue Chris Carrillo filed a late motion to intervene, as supplemented on May 26 and June 26. Ms. Carrillo states that she is a consultant with expertise relevant to issues in this proceeding.

5. In ruling on a late motion to intervene, we apply the criteria set forth in Rule 214(d) of our Rules of Practice and Procedure and consider, among other factors, whether the movant had good cause for failing to file the motion within the time prescribed; whether any disruption to the proceeding might result from permitting intervention; whether the movant's interest is not adequately represented by other parties in the proceeding; and whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention.³ When late intervention is sought after the issuance of a Commission order, the prejudice to other parties and burden upon

² *Id.* P 3.

³ 18 C.F.R. § 385.214(d)(1)(i)-(iv) (2015).

the Commission of granting late intervention may be substantial. Thus, petitioners bear a higher burden to show good cause for the granting of such late intervention.⁴

6. We find that Damascus and Ms. Carrillo have not shown good cause to intervene at this late stage of the proceeding. Damascus fails to adequately explain why it waited to intervene until after the Commission issued the 2014 Order, even though it had notice of the application and the proceeding.⁵ Ms. Carrillo offers no cause for her delay. The nature of an administrative proceeding includes a risk that certain interests may be harmed by a final agency decision. Entities or individuals with potentially affected interests are not entitled to wait until the outcome of a proceeding is known and then file a motion to intervene if the outcome conflicts with their interests.⁶ Here, both Damascus and Ms. Carrillo allowed over 18 months to pass from the date that Constitution and Iroquois filed their applications on June 13, 2013, until they sought to intervene. In these circumstances, we find that they have failed to show good cause to intervene at this late stage of the proceeding. Accordingly, we deny their requests for late intervention.

7. Damascus also filed a joint request for rehearing with Allegheny Defense Project (Allegheny), an existing party to this proceeding. Since Damascus is not a party to this proceeding as defined by Rule 102 of our Rules of Practice and Procedure, it cannot request rehearing.⁷ However, because Damascus filed a request for rehearing jointly with Allegheny, we will address its concerns regarding radon in response to Allegheny's request.

B. Timing of Rehearing Order

8. On January 27, 2015, the Commission issued an order in this proceeding granting rehearing for further consideration. The Commission routinely issues such orders to afford it additional time to consider matters raised on rehearing and to ensure that timely-filed rehearing requests will not be deemed denied by operation of law under section 19 of the NGA and Rule 713 of our Rules of Practice and Procedure.⁸

⁴ See, e.g., *Cameron LNG, LLC*, 112 FERC ¶ 61,146, at P 6 (2005).

⁵ Damascus filed timely comments on the draft EIS.

⁶ *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 13 (2008).

⁷ 18 C.F.R. §§ 385.102, 385.713(b) (2015).

⁸ 15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713 (2015).

9. In its rehearing petition, Stop the Pipeline asserts that the Commission's practice of not issuing a rehearing order within the 30 days prescribed by the NGA makes available remedies ineffective and violates due process.⁹ On March 30, 2015, Stop the Pipeline filed a petition with the U.S. Court of Appeals for the Second Circuit for a writ of mandamus to compel the Commission to issue an order on rehearing.¹⁰ The Second Circuit denied the mandamus petition because Stop the Pipeline failed to demonstrate that the "right to issuance of the writ is clear and indisputable."¹¹ We concur with the court's ruling and find that Stop the Pipeline has not shown that issuance of the order granting rehearing for further consideration violates due process.¹²

C. Rehearing Requests and Answer

10. We received timely requests for rehearing from Allegheny; the Capital Region Board of Cooperative Educational Services (Capital Region Board); Catskill Mountainkeeper, jointly with the Clean Air Council, Delaware-Otsego Audubon Society, Delaware Riverkeeper Network, Riverkeeper, Inc., and Sierra Club (collectively, Catskill Mountainkeeper); the Henry S. Kernan Trust (Kernan Trust); and Stop the Pipeline.¹³

11. On January 29, 2015, Constitution filed an answer to the requests for rehearing. Answers to requests for rehearing are prohibited by Rule 713(d)(1) of the Commission's Rules of Practice and Procedure¹⁴ and Constitution has not justified an exception. Accordingly, we reject Constitution's answer.

⁹ Stop the Pipeline Request for Rehearing at 50-51.

¹⁰ *In re Stop the Pipeline*, No. 15-926 (2d Cir. filed Mar. 30, 2015).

¹¹ *In re Stop the Pipeline*, No. 15-926 (2d Cir. April 21, 2015) (quoting standard from *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (internal quotation marks and citations omitted)).

¹² *See Cal. Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969) (construing the NGA to allow orders granting rehearing for further consideration); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597 (5th Cir. 1969).

¹³ Stop the Pipeline filed a privileged and a redacted public version of its request for rehearing. These versions number the pages differently. All citations in this order are to the redacted version.

¹⁴ 18 C.F.R. § 385.713(d)(1) (2015).

12. In the rehearing requests, the parties raise arguments concerning whether the projects are required by the public convenience and necessity, as well as numerous issues related to the adequacy of the Commission's environmental analysis. We will address these arguments below.

D. Requests for Stay

13. On January 13 and 14, 2016, respectively, Stop the Pipeline and a coalition of environmental conservation groups (Catskill Mountainkeeper, collectively) requested a stay of the 2014 Order and of all construction activities conducted under the certificates, pending the Commission's decision on rehearing. We dismiss these requests as moot.

14. On January 8, 2016, Constitution filed a letter with the Commission requesting a partial Notice to Proceed with non-mechanized tree-felling. In Stop the Pipeline's January 13 filing, it also requested a stay of the Commission's future Notice to Proceed. Because Commission staff has not acted upon Constitution's filing, Stop the Pipeline's request for a stay is rejected as premature.

II. Discussion

A. Public Convenience and Necessity

15. Several parties claim that the Commission failed to provide substantial evidence for its conclusion under section 7(e) of the NGA that the proposed projects are required by the public convenience and necessity.¹⁵ Stop the Pipeline claims that the Commission failed to demonstrate the need for the projects. First, it refers to the list of benefits noted in the Project Purpose and Need section of the final EIS, and it contends that nothing in the record substantiates these claims.¹⁶

¹⁵ Allegheny Request for Rehearing at 33; Catskill Mountainkeeper Request for Rehearing at 25; Stop the Pipeline Request for Rehearing at 14-25.

¹⁶ Stop the Pipeline Request for Rehearing at 16. These benefits include: (1) delivering up to 650,000 Dth per day of natural gas to the interconnection with Tennessee and Iroquois; (2) providing natural gas service to areas currently without access to natural gas; (3) expanding access to multiple sources of natural gas supply; (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market; and (5) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. EIS at 1-2.

16. Further, Stop the Pipeline contends that the Commission's justification for the projects in the 2014 Order consists of less than two pages and reaches several unsubstantiated conclusions. Specifically, Stop the Pipeline asserts that the order: (1) fails to show how the gas will get to market and has ignored capacity constraints downstream of the Wright Interconnection that the Commission previously acknowledged in the draft EIS for Algonquin Gas Transmission, LLC's Incremental Market Project (AIM Project);¹⁷ (2) relies on the fact that the company will locate the pipeline within or parallel to existing rights-of-way where feasible but fails to mention that this amounts to nine percent of the entire route; (3) finds that the company has taken sufficient steps to minimize the impacts on landowners and surrounding communities but fails to mention that approximately fifty percent of the landowners along the route refused to sign easement agreements before issuance; (4) states that the pipeline is fully subscribed and the contracts are not speculative even though the projects will only deliver up to 650,000 Dth per day of natural gas; and (5) states that there is no self-dealing as the company will have to execute firm contracts but fails to mention there is no requirement in those contracts to ship any gas.¹⁸

17. Stop the Pipeline asserts that no market study has been done for these projects, which is inconsistent with the Certificate Policy Statement's¹⁹ explanation that "the evidence necessary to establish the need for the project will usually include a market study."²⁰ Stop the Pipeline also argues that despite statements in the Certificate Policy Statement that: (1) "a project built on speculation (whether or not it will be used by affiliated shippers) will usually require more justification than a project built for a specific new market when balanced against the impact on the affected interests"; and (2) "[t]he strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures," the Commission provided no

¹⁷ Stop the Pipeline claims that the Commission used these constraints to dismiss system alternatives and prove the need to expand Algonquin's pipeline. Stop the Pipeline Request for Rehearing at 18-19 (citing the draft EIS for the AIM Project, Docket No. CP14-96-000, at section 3.3.1, Status of Existing Systems (filed Aug. 8, 2014)).

¹⁸ Stop the Pipeline Request for Rehearing at 22-23.

¹⁹ *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).

²⁰ Stop the Pipeline Request for Rehearing at 23 (citing Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748-50).

increased showing of need for the projects.²¹ Catskill Mountainkeeper argues that neither the final EIS nor the 2014 Order justify a finding, on balance, of positive public benefit because the projects' direct and indirect environmental impacts, including induced shale development and contributions to climate change, are likely significant and there is no justification that significant impacts will be adequately mitigated. Similarly, Allegheny contends that the Certificate Policy Statement requires an analysis of environmental impacts and has an explicit goal of avoiding unnecessary disruption of the environment.²² Allegheny argues that to satisfy this goal, the Commission must consider reasonably foreseeable impacts from upstream shale gas extraction, which the Commission has failed to do.

Commission Determination

18. We affirm our finding in the 2014 Order that authorizing the Constitution Pipeline Project is required by the public convenience and necessity. As explained in the 2014 Order, under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of: (1) the applicant's existing customers; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the construction.²³

19. Here, we found a strong showing of public benefit based on the fact that Constitution had executed binding precedent agreements for firm service using 100 percent of the design capacity of the pipeline project.²⁴ Stop the Pipeline's various claims that these contracts are insufficient to establish market need under the Certificate Policy Statement are without support. The Certificate Policy Statement explains that precedent agreements will always be important, significant evidence of demand for a

²¹ *Id.* at 23-24.

²² Allegheny Request for Rehearing at 33.

²³ Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,745-50.

²⁴ In its rehearing request, Stop the Pipeline conflates the balancing of economic benefits (market need) and effects under the Certificate Policy Statement with the distinct description of purpose and need in the final EIS. The purpose and need statement in the EIS complied with Council on Environmental Quality (CEQ) regulations that provide that this statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed actions" for purposes of its environmental analysis. 40 C.F.R. § 1502.13 (2015).

project.²⁵ Further, the 2014 Order rejected Stop the Pipeline's assertion that natural gas is unable to reach the intended markets in New York City and New England, explaining that the natural gas can be transported from the terminus of the Constitution Pipeline Project to downstream markets by any shipper holding capacity on Iroquois' or Tennessee's systems.²⁶ In this regard, we note that the open season notice for the project specifically put project shippers on notice that their service on Constitution would not include upstream and downstream transportation rights.²⁷ Thus, as is the case in most instances involving transportation along multiple pipelines, when shippers nominate, they will need to confirm that arrangements for upstream and downstream transportation of the gas are in place. Moreover, we have found that Stop the Pipeline has not provided any evidence of self-dealing between the project's majority shipper, Cabot Oil & Gas Corporation (Cabot), and Constitution.²⁸

20. Contrary to Stop the Pipeline's claim, the fact that a pipeline is only required to ship *up to* its shippers' maximum contract quantities does not demonstrate that the project is not fully subscribed. When a shipper contracts for firm transportation service with a pipeline, the shipper is guaranteed, and must pay reservation charges associated with, its contract quantity at the designated primary receipt and delivery points. In other words, the capacity is reserved for the use of the shipper and cannot be resold to another shipper on a firm basis. Of course, a shipper is not required to, and rarely does, use its full

²⁵ Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

²⁶ 2014 Order, 149 FERC ¶ 61,199 at P 115. Contrary to Stop the Pipeline's claim, our position here is not inconsistent with statements in the draft EIS for Algonquin's AIM Project, which indicated that Tennessee's and Iroquois' pipelines are at or near full capacity. In the context of the AIM Project, we were looking at the feasibility of the Tennessee and Iroquois pipelines functioning as system alternatives to the proposed AIM project. Here, we are explaining that existing shippers on Tennessee and Iroquois can take title to the gas transported on Constitution at the interconnect and use their existing capacity rights to transport natural gas from the terminus of the Constitution pipeline, rather than transporting other gas supplies (and recognizing that new shippers have the potential to obtain firm capacity from existing shippers through capacity release).

²⁷ See Constitution Pipeline Co., LLC, to Shippers, Potential Shippers and Interested Parties, Re Open Season for Constitution Pipeline Co., LLC at 3 (Feb. 21, 2012), <http://archive.pressconnects.com/assets/pdf/CB185497222.PDF>.

²⁸ 2014 Order, 149 FERC ¶ 61,199 at PP 27-28.

contracted capacity every day of the year. A shipper contracts for firm service in anticipation of its peak needs, notwithstanding that on a daily, monthly, and/or seasonal basis, the shipper's load requirements will vary.

21. We also disagree with Stop the Pipeline's argument that to determine need the Commission should have considered a broader range of factors, including a market study. Although the Certificate Policy Statement broadened the types of evidence certificate applicants may present to show the public benefits of a project, it did not compel an additional showing.²⁹ No market study or other additional evidence is necessary where, as here, market need is demonstrated by contracts for 100 percent of the project's capacity. This position was recently affirmed by the United States Court of Appeals for the District of Columbia Circuit in two cases.³⁰ The court found that petitioners identified "nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers."³¹

22. Stop the Pipeline cites to the Commission's denial of a certificate in *Turtle Bayou Gas Storage Company, LLC*³² to support its argument, but that decision is readily distinguishable from this proceeding. In that case, Turtle Bayou presented only general assertions of a need for natural gas storage at the regional and national level. Unlike here, in that case, there was no evidence that any of the proposed capacity had been subscribed under precedent agreements. At the same time, the record showed that Turtle Bayou owned virtually none of the property rights which would be necessary to develop its project. Given these circumstances, the Commission concluded that:

The generalized showing [of project need] made by Turtle Bayou does not outweigh the impact on the landowner that holds the majority of property rights needed to develop the

²⁹ See Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744, 61,748-49 (explaining that the Commission will consider evidence other than contracts for capacity, to support market need).

³⁰ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (*Myersville*); *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 111 n. 10 (D.C. Cir. 2014) (*Minisink*).

³¹ *Myersville*, 783 F.3d at 1311 (citing *Minisink*, 762 F.3d at 111 n.10).

³² 135 FERC ¶ 61,233 (2011).

proposed project. Therefore, we cannot find that Turtle Bayou's proposed project is required by the public convenience and necessity, and we deny its request for certificate authority to construct and operate its project.³³

In contrast, here, Constitution is fully subscribed. Constitution made considerable efforts to address landowners concerns and, as a result, Constitution was able to sign easement agreements with landowners along approximately 50 percent of the route before issuance of the 2014 Order.

23. Regarding economic impacts, the 2014 Order found that there would be no adverse economic impacts on either Constitution's existing customers – there are none – or on other existing pipelines or their captive customers.³⁴ Further, the Commission found that Constitution had taken sufficient steps to minimize any adverse economic impacts on landowners and surrounding communities.³⁵ On rehearing, Stop the Pipeline asserts that in making this finding the Commission failed to state that only 50 percent of landowners had signed easement agreements and that only approximately 9 percent of the route would be located within existing rights-of-way. We disagree that this constitutes error. In finding that Constitution had taken sufficient steps to minimize adverse economic impacts on them, the 2014 Order acknowledged that Constitution had been unable to reach agreements with many landowners.³⁶ The order noted that Constitution had made changes to over 50 percent of the proposed route in order to address concerns from landowners and to negotiate mutually acceptable easement agreements.³⁷ Moreover, the 2014 Order found that Constitution had proposed to locate the pipeline within or parallel to existing rights-of-way where feasible, though Stop the Pipeline is correct that only nine percent of the pipeline will be so located.³⁸ Based on the record in this proceeding, the Commission continues to find that, on balance, pursuant to the criteria set forth in the Certificate Policy Statement, the Constitution Pipeline Project is required by the public convenience and necessity.

³³ *Turtle Bayou*, 135 FERC ¶ 61,233 at P 34.

³⁴ 2014 Order, 149 FERC ¶ 61,199 at PP 24 and 25.

³⁵ *Id.* P 26.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

B. Environmental Analysis

24. Section 102 of NEPA requires federal agencies to prepare “a detailed statement . . . on the environmental impact” of any proposed major federal action “significantly affecting the quality of the human environment.”³⁹ Agencies must take a “hard look” at the environmental consequences of their actions.⁴⁰ The Council of Environmental Quality’s (CEQ) regulations require agencies to consider direct, indirect, and cumulative environmental impacts.⁴¹ To determine whether NEPA requires consideration of a particular effect, agencies must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue.⁴² NEPA prescribes a necessary process; it does not mandate particular results.⁴³

1. Public Participation and Need for Supplemental Environmental Impact Statement

25. Section 1506.6 of the CEQ regulations require agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures including, among other things, providing proper notice, holding public meetings, soliciting appropriate information from the public, and making EISs and the related comments available to the public.⁴⁴

26. Stop the Pipeline claims that the projects’ draft EIS was missing information, analyses, and reports that prevented the public from commenting on a complete integrated statement of environmental impacts.⁴⁵ Under these circumstances, Stop the Pipeline asserts that the Commission violated section 1506.6 of the CEQ regulations

³⁹ 42 U.S.C. § 4332(1)(C)(i) (2012).

⁴⁰ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (*Kleppe*).

⁴¹ 40 C.F.R. §§ 1508.7-8 (2015).

⁴² *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983).

⁴³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989) (*Robertson*).

⁴⁴ 40 C.F.R. § 1506.6 (2015).

⁴⁵ Stop the Pipeline Request for Rehearing at 37-44.

regarding public involvement and claims that NEPA requires the Commission to issue a revised draft or supplemental EIS.

27. For example, Stop the Pipeline claims that the applicants' Draft Migratory Bird and Upland Forest Plan was filed four weeks after the comment period closed and the Commission failed to issue a revised or supplemental draft EIS with a new comment period, despite a request from the U.S. Environmental Protection Agency (EPA) to do so. Stop the Pipeline also points out that several federal and state agencies, as well as itself and other organizations, submitted comments claiming that the draft EIS was inadequate and requesting the issuance of a revised draft EIS. In addition, Stop the Pipeline claims that the Commission violated NEPA by failing to provide another round of public comments on the final EIS.

28. Stop the Pipeline also claims that it could not obtain privileged information from Constitution in a timely manner. Specifically, Stop the Pipeline states that Constitution failed to file a protective agreement in the proceeding, as required by the Commission's Rules of Practice and Procedure,⁴⁶ and that the Commission failed to enforce its own requirement.

29. Stop the Pipeline argues that many closed meetings occurred between the applicants and Commission staff during the period between the issuances of the draft and final EISs with no public access to the discussions.⁴⁷

Commission Determination

30. We find that Stop the Pipeline's claim that we did not provide for adequate public involvement is unsupported. There were numerous opportunities for the public to comment on the projects' potential impacts. Constitution began the pre-filing process to get early stakeholder involvement more than a year before filing its application. Early opportunities for public involvement included company-sponsored open house meetings, public scoping meetings, and several comment periods (including notice of an additional scoping meeting and an extension of the comment date).⁴⁸

31. The fact that many of the permits, approvals, consultations, and variances required for the Constitution project have been or will be filed after the formal public notice and

⁴⁶ 18 C.F.R. § 388.112 (2015).

⁴⁷ Stop the Pipeline Request for Rehearing at 44.

⁴⁸ Final EIS at ES-2.

comment periods does not mean that the public is excluded from meaningful participation. The draft EIS put interested parties on notice of the types of activities contemplated and of their impacts. The draft EIS is a draft of the agency's proposed final EIS and, as such, its purpose is to elicit suggestions for change.⁴⁹ While the draft EIS serves as "a springboard for public comment,"⁵⁰ any information that is filed after the comment period is accessible to the public in the Commission's electronic database, eLibrary.⁵¹

32. As noted in the 2014 Order, the final EIS considered all comments filed from February 12, 2014, the date of issuance of the draft EIS, until September 19, 2014. Comments filed too late to be included in the final EIS or filed after issuance of the final EIS were addressed in the 2014 Order to the extent that they raised substantive concerns.⁵² Contrary to Stop the Pipeline's assertion, there is no NEPA requirement to take formal comment on a final EIS. Nevertheless, as indicated, the Commission considered such comments and addressed them in the 2014 Order.

33. We also disagree that there was a need to issue a revised draft or supplemental EIS. CEQ regulations require agencies to prepare supplements to either draft or final environmental impact statements if: (i) the agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impact.⁵³ Here, the final EIS, as revised from the draft EIS, contains ample information for the Commission to fully consider and address the environmental impacts associated with the Constitution Pipeline and Wright Interconnection Projects. The additional material in the final EIS relates to issues discussed in the draft EIS and does not result in any significant modification of the projects that would require additional public notice or issuance of a revised draft or supplemental EIS for further comment.

⁴⁹ *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

⁵⁰ *See Robertson*, 490 U.S. at 349.

⁵¹ The eLibrary system offers interested parties the option of receiving automatic notification of new filings.

⁵² 2014 Order, 149 FERC ¶ 61,199 at P 113.

⁵³ 40 C.F.R. § 1502.9(c) (2015).

34. We similarly disagree that Stop the Pipeline and other members of the public were prejudiced by issues relating to Constitution's delay in providing privileged information. Stop the Pipeline is correct that Constitution failed to include a model protective agreement in its application, as required by section 388.112 of the Commission's regulations.⁵⁴ On November 13, 2014, Stop the Pipeline filed a motion requesting that the Commission compel Constitution to provide privileged precedent agreements. Stop the Pipeline later withdrew its motion, stating that it had received a copy of the precedent agreements from Constitution on November 21, 2014.⁵⁵ Nevertheless, the Commission issued a notice stating that Stop the Pipeline could file additional comments in response to the privileged precedent agreements until the deadline for filing requests for rehearing of the 2014 Order, i.e., January 2, 2015. Stop the Pipeline did raise issues in its request for rehearing related to the precedent agreements that are addressed in this order. Therefore, we find that Stop the Pipeline was provided ample time to comment and was not deprived of a meaningful opportunity to challenge the evidence.⁵⁶

35. Finally, Stop the Pipeline provides no evidence of improper meetings between Commission staff and the applicants during the period between the issuance of the draft EIS and the final EIS. If Commission staff believed it needs additional information to analyze an applicant's filing, the Commission staff routinely prepares written requests for additional information – e.g., the environmental information requests issued on April 24 and May 14, 2014, in this proceeding. Such data requests and answers are part of the public record in the proceeding. Moreover, while section 385.2201 of the Commission's regulations permits off-the-record communications regarding the preparation of an EIS if the communication occurs prior to the issuance of the final EIS,⁵⁷ subject to the disclosure requirements of section 385.2201(g),⁵⁸ there were no such communications in conjunction with this proceeding. Any person may respond to an exempted, off-the-

⁵⁴ 18 C.F.R. § 388.112 (2015).

⁵⁵ On November 21, 2014, Constitution filed a Form of Protective Agreement in this proceeding.

⁵⁶ See *Minisink*, 762 F.3d at 115. We remind pipeline applicants that they must comply with section 388.112(b) of the regulations regarding the procedures for filing and obtaining privileged material.

⁵⁷ 18 C.F.R. § 385.2201(e)(1)(vi)(A) (2015).

⁵⁸ *Id.* § 385.2201(g).

record communication.⁵⁹ Stop the Pipeline has provided no evidence that this disclosure requirement was violated in this proceeding.

2. Environmental Conditions

36. The 2014 Order authorized the construction and operation of the Constitution Pipeline Project subject to the applicants' complying with 43 environmental conditions. Several parties assert that the Commission's authorizations subject to these conditions do not meet the requirements of NEPA or are otherwise unlawful.

a. Conditions Requiring Further Studies/Plans/Information

37. Catskill Mountainkeeper and Allegheny assert that the Commission authorized the Constitution Pipeline Project without acquiring and analyzing NEPA-required environmental impact information. Allegheny asserts that by issuing the 2014 Order with 43 environmental conditions – which entail additional surveys, impact avoidance and mitigation plans, consultation with state and federal agencies, and other activities – the Commission failed to provide in its final EIS a “full and fair disclosure of significant environmental impacts,” alleging that information was not available to the public before we issued the 2014 Order.⁶⁰ Allegheny seeks to reserve a right to seek rehearing based on any information arising from Constitution's actions to meet the environmental conditions or from any consultation with state and federal agencies.

38. Catskill Mountainkeeper contends that the Commission is not permitted to authorize a project and later conduct its study of environmental effects.⁶¹ It also lists a number of surveys and mitigation measures that it states are yet to be completed, including many of the same items referenced by Allegheny. In particular, it claims that

⁵⁹ *Id.* § 385.2201(g)(2).

⁶⁰ Allegheny Rehearing Request at 22 (citing 40 C.F.R. § 1500.1(b)). Allegheny emphasizes conditions that require a final Migratory Bird and Upland Forest Plan; a tree-clearing plan for the northern long-eared bat (the northern myotis); a mitigation plan for the dwarf wedgemussel; surveys for the northern monkshood perennial flower; bald eagle survey results and a mitigation plan; an impact avoidance or mitigation plan for the small-footed bat, silver haired bat, and little brown bat; and surveys and mitigation measures for 12 rare plant species and additional animal species that are state-listed in either New York or Pennsylvania. *Id.* at 22-23 (citing 2014 Order, Environmental Conditions 23, 29-31, 33-35).

⁶¹ Catskill Mountainkeeper Rehearing Request at 15-18.

there is insufficient information to conclude that the impacts to water bodies and species will be mitigated sufficiently.

39. Catskill Mountainkeeper claims that surveys and mitigation plans for numerous species, including bald eagles, have not been completed and the consultation processes with U.S. Fish & Wildlife Service (FWS) are ongoing. For example, it states that one day prior to issuance of the order in this proceeding, Commission staff sent a letter to FWS reversing its recommendation that the projects are not likely to affect the long-eared bat (which at the time was proposed for listing as an endangered species) and requested a conference opinion for this species.

40. Regarding impacts to water bodies, Catskill Mountainkeeper contends that the Commission's conclusion that the use of trenchless crossing methods to cross waterbodies and implementation of the mitigation measures in Constitution's Environmental Constructions Plans (ECPs) will avoid or adequately minimize impacts on surface water resources is unsupported because Constitution has not provided information about the crossing method it will use. For example, Catskill Mountainkeeper states that the type of dry crossing method is not specified and geotechnical data for the feasibility of using the direct pipe trenchless crossing method remains outstanding. Moreover, Catskill Mountainkeeper contends that Constitution has not provided any specific details regarding its water blasting activities.

41. In addition, Catskill Mountainkeeper maintains that the Commission improperly assumes that best management practices in Constitution's ECPs will protect against increased erosion and sedimentation of local waterbodies due to stormwater, but fails to analyze the adequacy of the best management practices and does not impose additional stormwater mitigation. Catskill Mountainkeeper asserts that the Commission should have required a Stormwater Pollution Prevention Plan and claims that, without such a plan, there is insufficient information to permit the Commission to ascertain the extent of the potential impacts of stormwater on waterbodies or whether these impacts will be mitigated sufficiently.

42. Finally, Catskill Mountainkeeper complains that there is little data on the thermal impacts to streams and wetlands as the result of the loss of vegetation and buffers or on the impact of raised ground temperatures on soil chemistry downstream of compressor stations.

Commission Determination

43. We disagree that the final EIS for the Constitution Pipeline Project was based on inadequate information. As we have explained in other cases, practicalities require the issuance of orders prior to completion of certain reports and studies because large projects such as these take considerable time and effort to develop.⁶² Perhaps more important, project development is subject to many significant variables whose outcomes cannot be predetermined. Thus, some aspects of a project may remain in the early stages of planning even as other portions of the project become a reality. Accordingly, consistent with longstanding practice, and as authorized by NGA section 7(e),⁶³ we typically authorize natural gas projects pursuant to our NGA jurisdiction, subject to conditions that must be satisfied by an applicant or others before the authorizations can be effectuated by constructing and operating the projects.⁶⁴ We do not believe the statute requires a contrary process, particularly where the Commission has deemed the pipeline to be in the public interest. As is the case with virtually every order issued by the Commission that authorizes construction of facilities, the authorization in this proceeding is subject to the applicants' compliance with the environmental conditions set forth in the order.⁶⁵

44. As the Supreme Court explained in *Robertson*, NEPA does not require a complete plan be actually formulated at the onset, but only that the proper procedures are followed for ensuring that the environmental consequences have been fairly evaluated.⁶⁶ Here, we made extensive efforts to ensure that environmental issues were resolved appropriately. The issues the parties raise were discussed in considerable detail in the final EIS and were subject to public comment. Based on the information in the record, we imposed

⁶² See, e.g., *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 108-115 (2006); *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 41-44 (2003).

⁶³ Section 7(e) of the NGA grants the Commission the "power to attach to the issuance of the certificate and to the exercise of rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717(f)(e).

⁶⁴ *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

⁶⁵ 2014 Order, 149 FERC ¶ 61,199 at Ordering Paragraph (E)(3).

⁶⁶ 490 U.S. 332, 352.

additional measures (such as a recommendation to develop a Migratory Bird and Upland Forest Plan) to mitigate any adverse environmental impact associated with the projects.

45. For example, the final EIS addresses Constitution's preliminary Migratory Bird and Upland Forest Plan and extensively discusses the impacts that would occur on both migratory birds and upland species from the direct losses of upland forest habitats and conversion of forest interiors to forest edge habitat.⁶⁷ Based on this analysis, the 2014 Order required Constitution to file the final plan developed in consultation with the appropriate regulatory agencies for review and written approval by the Director of the Commission's Office of Energy Projects (Director of OEP) prior to commencing construction.⁶⁸

46. Similarly, the final EIS included a lengthy discussion of the projects' potential impacts on the northern-long eared bat (a discussion that was expanded between the draft and final EIS), a species that was proposed for listing at the time of the issuance of the final EIS and is now listed as threatened.⁶⁹ The final EIS acknowledged this possibility and recommended a series of mitigation measures such as avoiding nighttime construction and associated lighting in northern-long eared bat habitat and completing drilling activities between September 16 and April 15. However, because our consultations with the FWS were not yet complete, the 2014 Order adopted the recommendation in the final EIS that construction not begin until all Endangered Species Act consultation, including the FWS' concurrence on staff's determination of effects on listed species, is complete.

47. The final EIS provided extensive detail and analysis about the status of the other wildlife species raised by petitioners: dwarf wedgemussel;⁷⁰ northern monkshood;⁷¹ bald

⁶⁷ Final EIS at 4-72 to 4-73.

⁶⁸ See 2014 Order, Environmental Condition 23.

⁶⁹ Final EIS at 4-101 to 4-103.

⁷⁰ *Id.* at 4-103 to 4-104 (noting impacts from de-watering or from turbidity downstream of waterbody crossings, requiring mitigation measures such as using trenchless crossing methods or mussel relocation).

⁷¹ *Id.* at 4-104 to 4-105 (noting impacts from potential habitat loss or degradation, requiring surveys on four unsurveyed parcels, requiring mitigation measures such as avoiding plant locations and habitat by reducing construction footprint, boring pipe underground, and transplanting and seed banking).

eagle;⁷² small-footed bat, silver-haired bat, and little-brown bat;⁷³ and state-listed species in New York and Pennsylvania.⁷⁴ Based on this record, the 2014 Order required additional measures to mitigate any adverse environmental impacts.

48. Regarding impacts to waterbodies, the final EIS provided a full discussion of each of the crossings methods that Constitution proposed (i.e., horizontal directional drill, flume, dam-and-pump, etc.), and the associated waterbody impacts that would occur as a result of each.⁷⁵ Contrary to Catskill Mountainkeeper's claim, the final EIS clearly lists the 289 waterbodies that would be crossed and the methods for which Constitution has proposed to cross them.⁷⁶

49. In an effort to eliminate in-stream activity at many waterbodies, Constitution proposed to use trenchless crossings (i.e., horizontal directional drill or direct pipe crossings) at several locations. As discussed in the final EIS, Constitution was unable to obtain survey access for all parcels crossed by its route.⁷⁷ Therefore, we required that

⁷² *Id.* at 4-107 to 4-109 (noting impacts of blasting on nearby nests, noting Constitution's agreement to conduct further surveys along the entire project route; describing Constitution's measures, and requiring mitigation plan to avoid or mitigate blasting near nests).

⁷³ *Id.* at 4-109 to 4-110 (noting impacts from direct mortality and indirect habitat loss or disruption due to clearing roost trees, describing mitigation by limiting tree clearing window to September 1 through March 31, with limited exceptions, as the Pennsylvania Game Commission recommended, and requiring further consultation with that agency to develop mitigation measures).

⁷⁴ *Id.* at 4-105 to 4-106 (noting 27 state-listed species potentially present in the pipeline project area), 4-111 to 4-112 (noting only one survey-identified plant species present, which Constitution avoided by re-routing the pipeline; noting that Constitution has agreed to survey one remaining parcel of potential habitat in Pennsylvania for one species), 4-112 to 4-114 (discussing the Timber Rattlesnake, Eastern Hellbender, and American Eel).

⁷⁵ Final EIS, sections 2.3.2.2 and 4.3.3.4. The final EIS included similar discussions related to identification of water wells and springs (*id.* at 4-38 to 4-39); surveys for proposed contractor yards concerning water wells, waterbodies, and wetlands (*id.* at 4-40); and in-stream blasting (*id.* at 4-97).

⁷⁶ *See* final EIS, Appendix K.

⁷⁷ *Id.* at 4-4.

Constitution complete geotechnical studies for these crossings after access was obtained to ensure the trenchless crossing could be completed successfully *before* construction in that area begins (Environmental Condition 14). In the event that a trenchless crossing method is determined not to be feasible, one of the alternate methods would be selected. Each of the alternative crossing methods and their requisite impacts were examined in the EIS.⁷⁸

50. The final EIS includes a lengthy discussion of the erosion control and best management practices that Constitution proposes to use as part of its ECPs.⁷⁹ During project review, Commission staff assessed Constitution's ECPs and determined whether they would be consistent with, or provide better protection than, Commission standards. These measures are discussed in great detail in both the ECPs and the final EIS and include measures such as silt-fences, straw bales, water diversion structures, and berms to reduce the velocity of runoff. Stormwater Pollution Plans are generally developed by sponsors of discrete projects that may create impervious surfaces and/or point-source discharges, in accordance with the National Pollutant Discharge Elimination System. The final EIS explains that Constitution would seek National Pollutant Discharge Elimination System permits as part of its project.⁸⁰ These permits would be reviewed by the Pennsylvania Department of Environmental Protection and the New York State Department of Environmental Conservation (NYSDEC). Furthermore, the measures that would be incorporated into any Stormwater Pollution Prevention Plan would be similar or identical to those incorporated into Constitution's ECPs. In practice, project sponsors often develop singular plans (such as an ECP) to meet the permitting needs of each agency.

51. The mitigating measures in Constitution's ECPs are common measures used by a variety of industries (not just for pipeline construction) for erosion and sedimentation control. Our review of the proposed applications deems them appropriate for use.

⁷⁸ Final EIS at 4-51 to 4-57.

⁷⁹ See Application vol. II, app. I at 44 (explaining that the ECP for Pennsylvania is the project's Stormwater Pollution Prevention Plan prepared in compliance with the EPA's National Stormwater Program); *id.* app. J (explaining same for ECP for New York). The 2014 Order's Environmental Condition 1 requires that Constitution and Iroquois follow the construction procedures and mitigation measures described in their application and supplements.

⁸⁰ Final EIS at 1-15 and 1-16.

Catskill Mountainkeeper does not identify how this determination is lacking or what parts of Constitution's ECPs are not protective of environmental resources.

52. The final EIS lists waterbodies sensitive to thermal impacts and explains that Constitution modified its proposed route to avoid waterbody crossings and waterbodies within workspaces.⁸¹ If unavoidable, Constitution will take steps to minimize disturbance to adjacent vegetation, for example by maintaining a 15-foot vegetation buffer⁸² and by stabilizing and revegetating streambanks pursuant to its ECPs.⁸³ While we recognize that localized ground heating may occur in areas immediately adjacent to compressor station discharge pipelines, this effect greatly dissipates as the distance from a station increases. Our experience is that ground heating as a result of gas compression is minimal, and impacts on waterbodies would be equally minimal, especially in the case of an approximately 125-mile-long project.

53. In summary, our review of the proposals in this proceeding discusses and identifies those limited environmental issues requiring further study and requires the completion and review of those studies prior to the commencement of construction. The extensive record on environmental issues provided the Commission with sufficient information regarding the proposed action to enable the Commission to fashion adequate mitigation measures and support a determination that Constitution's project will result in some environmental impacts, but that these impacts will be reduced to less-than-significant levels upon compliance with the mitigation measures adopted as conditions of the 2014 Order.

b. Compliance With and Enforceability of Conditions

54. Allegheny claims that the Commission's delegation of oversight of compliance with the environmental conditions of the order to the Director of OEP is not supported by the NGA or its implementing regulations.⁸⁴ Allegheny also claims that compliance with the environmental conditions will not be subject to public review to ensure that Constitution adequately performs the activities required in the conditions or that the Commission adequately enforces them.

⁸¹ Final EIS at 4-49 tbl. 4.3.3-3 (listing 21 coldwater fishery surface waters crossed by the Constitution Pipeline Project).

⁸² Final EIS at 4-52.

⁸³ Final EIS at 4-52, 4-55 to 4-56.

⁸⁴ Allegheny Request for Rehearing at 23-24.

Commission Determination

55. Allegheny's arguments are without support. The compliance matters delegated to the Director of OEP are matters within the particular technical expertise of the Director of OEP and her staff. Moreover, the applicants' various filings to comply with the conditions of the 2014 Order will be part of the record in this proceeding and are available to the public for review and comment.

56. Allegheny's assertion that the Commission will not properly enforce the conditions in the 2014 Order also is without merit. The compliance conditions are mandatory. The Commission takes matters of compliance seriously. If Constitution or Iroquois fails to comply with the conditions of the order, it is subject to sanctions and an assessment of civil penalties.⁸⁵

c. Authorization Prior to Determinations under the Clean Water Act and Endangered Species Act

57. Environmental Condition 8 requires the applicants to document that they have received all applicable federal authorizations before receiving authorization to commence construction of the projects.

i. Clean Water Act

58. Catskill Mountainkeeper, Stop the Pipeline, and the Kernan Trust argue that the Commission violated section 401 of the Clean Water Act by issuing a conditional certificate before NYSDEC issued its Water Quality Certification (WQC) for the proposed projects. They argue that the language of section 401 is unambiguous when it states that "No license or permit shall be granted until the certification required by this section has been obtained or has been waived"⁸⁶

59. Catskill claims that because the Clean Water Act expects that WQC-imposed conditions will become part of the federal license or permit, the WQC must precede the certificate. Stop the Pipeline adds that the Commission cannot override the section 401 bar to issuance by relying on the Commission's authority under section 7(e) of the NGA,

⁸⁵ 15 U.S.C. § 717t-1 (2012). Violations subject to civil penalty include violations of any rule, regulation, restriction, condition, or order issued under the NGA.

⁸⁶ Catskill Mountainkeeper Request for Rehearing at 5-6, Stop the Pipeline Request for Rehearing at 8-11; Kernan Trust Request for Rehearing at 15-17 (quoting Clean Water Act § 401(a)(1), 33 U.S.C. § 1341(a)(1) (2012)).

to attach “reasonable terms and conditions as the public convenience may require.”⁸⁷ Similarly, Catskill argues that the certificate order attempts to limit the state’s power by requiring that “any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate.”⁸⁸

60. Stop the Pipeline argues that the Commission violated section 102(2) of NEPA, which requires the federal action agency to consult and obtain comments of other jurisdictional or expert agencies before issuing an EIS, by failing to defer to NYSDEC on water quality issues and incorporate NYSDEC’s recommendations into the final EIS.⁸⁹

61. Stop the Pipeline also argues that the Commission’s issuance of the certificate prior to the issuance of the WQC violates constitutional due process.⁹⁰ According to Stop the Pipeline, public participation in NYSDEC’s proceedings on the WQC needs to occur prior to the issuance of the certificate and the commencement of eminent domain proceedings because the public is supposed to be heard before their property is taken from them. Stop the Pipeline goes on to claim that several easement agreements entered into after the issuance of the 2014 Order were coerced under false pretenses. Because the route could be rejected or modified, the Kernan Trust requests that the Commission restrict Constitution’s use of eminent domain until after a WQC is issued.⁹¹

Commission Determination

62. We disagree with the parties’ assertion that the plain language of the Clean Water Act erects an absolute bar to Commission action on a project application prior to a state’s issuance of a WQC. Section 401(a)(1) of the Clean Water Act provides that no federal “license or permit shall be granted until the” state certifies that any activity “which may result in a discharge into the navigable waters” will comply with the applicable

⁸⁷ Stop the Pipeline Request for Rehearing at 10.

⁸⁸ Catskill Mountainkeeper Request for Rehearing at 6 (citing 2014 Order, 149 FERC ¶ 61,199 at P 147).

⁸⁹ Stop the Pipeline Request for Rehearing at 47-50 (citing NEPA § 102(2), 42 U.S.C. § 4332(2) (2012) (requiring the federal action agency to consult and obtain comments of other jurisdictional or expert agencies before issuing an EIS)).

⁹⁰ Stop the Pipeline Request for Rehearing at 11-14.

⁹¹ Kernan Trust Request for Rehearing at 17.

provisions of the Act.⁹² The Commission's conditional approval of the projects does not conflict with this language. The order is an "incipient authorization without current force or effect" because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied.⁹³

63. Consistent with the language of section 401 of the Clean Water Act, the 2014 Order ensures that until NYSDEC issues the WQC, Constitution may not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies. Consequently, there can be no adverse impact on New York State jurisdictional waters until the Commission receives confirmation that NYSDEC has completed its review of the project under the Clean Water Act and issued the requisite permits.

64. The parties cite *City of Tacoma v. FERC*,⁹⁴ in which a tribe complained that the state's water quality certification, which had issued before the Commission's hydroelectric license issued, was deficient under section 401(a) of the Clean Water Act. We have previously observed the court in *City of Tacoma* did not hold that the Commission's issuance of a conditional license or certificate violates the terms of the Clean Water Act. Rather, *City of Tacoma* addressed the extent to which the Commission must verify that a state's water quality certification is valid.⁹⁵ Thus, as we describe further below, we do not believe that *City of Tacoma* limits our authority to conditionally approve applications prior to state action under the Clean Water Act.

65. Previously, in explaining our rationale for granting conditional authorizations, we have cited *City of Grapevine v. U.S. Department of Transportation*,⁹⁶ a case in which the D.C. Circuit upheld the Federal Aviation Administration's (FAA) approval of a runway

⁹² 33 U.S.C. § 1341(a)(1) (2012).

⁹³ *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 21 (2006); *Finavera Renewables Ocean Energy, Ltd.*, 122 FERC ¶ 61,248, at P 15 (2008). See also *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding that an agency can make "even a final decision" – e.g., granting a certificate before an environmental hearing was finished – as long as the agency assesses the environmental data before the certificate's effective date).

⁹⁴ 460 F.3d 53, 68 (D.C. Cir. 2006) (*City of Tacoma*).

⁹⁵ *Crown Landing LLC*, 117 FERC ¶ 61,209 at P 27 n.38 (2006).

⁹⁶ 17 F.3d 1502 (D.C. Cir. 1994) (*City of Grapevine*).

project conditioned upon the applicant's subsequent compliance with the National Historic Preservation Act (NHPA).⁹⁷ In past proceedings, we likened the NHPA to the Clean Water Act in that the NHPA states that the head of a federal agency "shall," prior to the approval of the expenditure of any federal funds on an undertaking, take into account the effect of the undertaking on historic properties. We explained that "this language expressly prohibits a federal agency from acting prior to compliance with its terms, a fact that did not deter the *City of Grapevine* court from upholding the FAA's conditional approval of a runway."⁹⁸

66. Unlike in *City of Tacoma*, the *City of Grapevine* court squarely considered a federal agency's authorization of a project subject to the applicant's subsequently fulfilling certain conditions. There, petitioners protested the FAA's approach whereby it first issued a conditional approval for a runway, and then took seven months to complete its final assessment after reviewing the conclusions and recommendations arising out of the consultation process required by NHPA section 106, and then took six more months of deliberation before submitting a multiple-agency agreement concluding that there would be no adverse effect within the meaning of the NHPA. The court accepted this multi-stage procedural approach, stating that:

Much of the relevant activity . . . took place after the FAA had issued its Decision. Although it is of course desirable for the § 106 process to occur as early as possible in a project's planning stage, we do not agree with the petitioners that in this case the FAA's conditional approval of the West Runway violated any requirement of the NHPA. Merely by issuing its Decision the FAA did not "approve the expenditure of any Federal funds" for the runway . . . [and] if the [applicant] commits its own resources to the West Runway – for further planning, engineering, or what have you short of construction – although the runway was only conditionally approved, then it does so at the risk of losing its investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval. In sum, because the FAA's approval of the West Runway was expressly conditioned upon

⁹⁷ *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245 at P 72; *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 60 (2008); *Georgia Strait Crossing Pipeline LP*, 108 FERC ¶ 61,053, at P 16 (2004).

⁹⁸ *Id.*

completion of the § 106 process, we find here no violation of the NHPA.⁹⁹

67. We interpret the court's reasoning and result to establish the principle that an agency can authorize a project conditioned on the subsequent compliance with pending applications for other necessary project authorizations.¹⁰⁰ That is the approach we adopted in this proceeding.

68. Catskill Mountainkeeper's argument that because WQC conditions must become part of the certificate, the WQC must precede the certificate is unavailing. By the terms of section 401(d) of the Clean Water Act, any limitations or monitoring prescribed in the WQC to ensure that the applicant will comply with federal or state standards under the Clean Water Act shall become conditions of the federal license or permit¹⁰¹ and thus control the construction and operation of the project. Therefore, our decision to issue a conditional certificate in no way prevents any later-adopted WQC conditions from applying to the projects.

69. Catskill Mountainkeeper is mistaken in asserting that the Commission's customary language that "[a]ny state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate"¹⁰² is an attempt to override section 401 of the Clean Water Act.¹⁰³ A section 401 WQC, though issued by the state, is an exercise of federal authority rather than state or local authority, and thus not subject to the cited admonition.

70. Nor did the Commission violate the requirement in section 102(2) of NEPA that the lead agency must consult with, and obtain comments of, other agencies before issuing

⁹⁹ *City of Grapevine*, 17 F.3d at 1509.

¹⁰⁰ Given that we conclude that section 401 of the Clean Water Act does not require that a WQC precede a conditional certificate, we also reject Stop the Pipeline's argument that the Commission violated section 15(c)(1)(B) of the NGA, which requires the Commission to "comply with applicable schedules established by federal law."

¹⁰¹ Clean Water Act § 401(d), 33 U.S.C. § 1341(d) (2012).

¹⁰² 2014 Order, 149 FERC ¶ 61,199 at P 147. This language is routine in certificate orders.

¹⁰³ Catskill Mountainkeeper Rehearing at 6.

the final EIS.¹⁰⁴ The Commission did in fact request and receive comments from NYSDEC before the final EIS issued.¹⁰⁵ If and when NYSDEC issues a WQC for the projects, Constitution will be required to comply with the requirements of the WQC. If Constitution is required to materially modify its project to satisfy any conditions imposed by NYSDEC, it would file a formal variance request with the Commission for any such modification. Such a modification (i.e., variance) would be subject to pertinent Commission scrutiny and if deemed appropriate, processed in accordance with measures discussed in the final EIS.¹⁰⁶

71. We further find Stop the Pipeline has failed to show that the Commission's decision to issue a conditional certificate violates due process, since such a decision does not restrict Stop the Pipeline's right to participate in NYSDEC's proceeding on the WQC. Moreover, although Constitution, as a certificate holder under section 7(h) of the NGA,¹⁰⁷ can commence eminent domain proceedings in a court action if it cannot acquire the property rights by contract, Constitution will not be allowed to construct any facilities on subject property unless and until there is a favorable outcome on all outstanding requests for necessary federal approvals, including a section 401 WQC. Because Constitution may go so far as to survey and designate the bounds of an easement but no further, e.g., it cannot cut vegetation or disturb ground, any impacts on landowners will be minimized. Further, Constitution will be required to compensate landowners for any property rights it acquires.

72. Under these circumstances, we find no merit in Kernan Trust's request to delay Constitution's ability to exercise eminent domain until the issuance of a WQC. Not allowing certificate holders to proceed with eminent domain proceedings until necessary permits have been obtained, could prevent project sponsors from obtaining access to property and to information necessary to obtain those permits. In any event, issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of the NGA are matters for state or federal court, not the Commission.

¹⁰⁴ 42 U.S.C. § 4332(2) (2012).

¹⁰⁵ This included Commission staff's request that NYSDEC become a cooperating agency, which NYSDEC declined to do, and NYSDEC's comments on the first scoping document, on the application, and on the draft EIS.

¹⁰⁶ Final EIS at 2-31.

¹⁰⁷ 15 U.S.C. § 717f(h) (2012).

ii. **Endangered Species Act**

73. The Endangered Species Act (ESA) requires each federal agency to ensure that any actions authorized, funded, or carried out by the agency do not jeopardize the continued existence of a federally listed endangered or threatened species or result in the destruction or adverse modification of a listed species' designated critical habitat. As the lead federal agency, the Commission is required to consult with FWS to determine whether federally listed endangered or threatened species or designated critical habitat are found in the vicinity of a proposed project and to determine the proposed action's potential effects on those species or critical habitats. Constitution and Iroquois, acting as the Commission's non-federal representatives for the purpose of complying with section 7(a)(2) of the ESA, initiated informal consultation with FWS on May 2, 2012, and February 22, 2013, respectively.

74. Allegheny argues that the Commission violated the ESA by issuing a conditional certificate before FWS had concurred with the Commission's conclusions that the proposed projects are not likely to affect the endangered wedgemussel and northern monkshood and before the FWS had completed a later-requested conference opinion about adverse impacts to the northern long-eared bat.¹⁰⁸ Allegheny contends that for any of these species FWS may conclude that a formal consultation is required. Allegheny claims that the conditional certificate violates section 7(d) of the ESA because it allows the applicants to irreversibly commit resources to their projects in a way that forecloses the reasonable and prudent alternatives that FWS might recommend in a formal consultation. Allegheny also argues that because the conditional certificate has issued, no legal mechanism remains to enforce implementation of the possible reasonable and prudent alternatives.

Commission Determination

75. The ESA requires that consultation be completed before construction begins,¹⁰⁹ and that while consultation is pending "the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or

¹⁰⁸ Allegheny Request for Rehearing at 31-33.

¹⁰⁹ ESA § 7(c)(1), 16 U.S.C. § 1536(c)(1) (2012) ("before any contract for construction is entered into and before construction is begun with respect to such action").

implementation of any reasonable and prudent alternative measures”¹¹⁰ The NGA authorization granted by our 2014 Order is consistent with ESA’s requirements.

76. The 2014 Order requires that Constitution complete ESA consultation with FWS and the Commission and file mitigation measures prior to construction.¹¹¹ This process includes complete surveys and consultation on the northern monkshood, anticipatory mitigation measures for the dwarf wedgemussel and northern monkshood if Constitution were to later encounter them, and a project- and site-specific tree clearing plan for the northern myotis if clearing occurs outside the prescribed window.¹¹² More generally, after the ESA is satisfied, Constitution must receive written notification from the Director of OEP that it may begin construction or the use of mitigation.¹¹³ Because the 2014 Order requires that Constitution comply with the ESA before construction begins, Constitution cannot “make any irreversible or irretrievable commitment of resources” that would foreclose “the formulation or implementation of any reasonable and prudent alternative measures.” The 2014 Order does not violate section 7(d) of the ESA.

77. There is no support for Allegheny’s assertion that issuance of the 2014 Order prior to completion of ESA consultation precludes enforceable implementation of FWS’s reasonable and prudent alternatives, if recommended. Based on these mandatory filings, which would include reasonable and prudent alternatives if recommended, the Director of

¹¹⁰ *Id.* § 7(d), 16 U.S.C. § 1536(d).

¹¹¹ *See, e.g., Idaho v. Interstate Commerce Comm’n*, 35 F.3d 585, 598 (D.C. Cir. 1994). The Interstate Commerce Commission authorized a railroad company to abandon and salvage a portion of track on the condition that the railroad company first comply with the ESA. The court noted that through the condition the agency had retained a later, final approval such that the agency would itself ultimately determine the project’s likely impact on listed species, thus satisfying the ESA’s requirements. Our authorization for the Constitution Pipeline and Wright Interconnection Projects is structured in the same way. Even an automatic authorization, if conditioned on compliance with the ESA, satisfies the statute. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) (addressing an Army Corps of Engineers’ nationwide permit for dredge and fill activities).

¹¹² 2014 Order, Environmental Conditions 29-31.

¹¹³ *Id.*, Environmental Condition 32.

OEP may impose additional mitigation measures in order to mitigate identified impacts. Therefore, any reasonable or prudent alternative measures are not foreclosed.¹¹⁴

3. Programmatic Environmental Impact Statement

78. CEQ's regulations do not require broad or "programmatic" NEPA reviews. CEQ has stated that such a review may be appropriate where an agency is: (1) adopting official policy; (2) adopting a formal plan; (3) adopting an agency program; or (4) proceeding with multiple projects that are temporally and spatially connected.¹¹⁵ The Supreme Court has held that a NEPA review covering an entire region (that is, a programmatic review) is required only "if there has been a report or recommendation on a proposal for major federal action" with respect to the region,¹¹⁶ and the courts have concluded that there is no requirement for a programmatic EIS where the agency cannot identify the projects that may be sited within a region because individual permit applications will be filed at a later time.¹¹⁷

79. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.¹¹⁸ Rather, the Commission acts on individual applications filed by entities proposing to construct interstate natural gas pipelines.

¹¹⁴ We note that other conditions in the 2014 Order require that, prior to construction, Constitution must file with the Commission survey results and mitigation plans or measures regarding state-listed species such as the bald eagle, small-footed bat, silver-haired bat, little brown bat, and others in New York and Pennsylvania. 2014 Order, Environmental Conditions 33-35. In the same way, based on these filings, the Director of OEP may impose additional mitigation measures.

¹¹⁵ Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* 13-15 (Dec. 24, 2014) (citing 40 C.F.R. §1508.18(b)), https://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf. We refer to the memorandum as 2014 Programmatic Guidance.

¹¹⁶ *Kleppe*, 427 U.S. at 390 (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

¹¹⁷ See *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009).

¹¹⁸ See, e.g., *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014); *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 (2014).

Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities “is or will be required by the present or future public convenience and necessity.”¹¹⁹ What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. In the circumstances of the Commission’s actions, a broad, regional analysis would “be little more than a study . . . concerning estimates of potential development and attendant environmental consequences,”¹²⁰ which would not present “a credible forward look and would therefore not be a useful tool for basic program planning.”¹²¹ As to projects that are closely related in time or geography, the Commission may, however, choose to prepare a multi-project environmental document, where that is the most efficient way to review project proposals.¹²²

80. As they have in other proceedings, Allegheny contends that the Commission violated NEPA by failing to prepare a programmatic EIS for natural gas infrastructure projects in the Marcellus and Utica Shale formations.¹²³ Allegheny claims that the Commission is engaged in regional development and planning with the gas industry as evidenced by: (1) the Commission’s participation in the development of the National Petroleum Council’s 2007 Prudent Development Report, which stresses the need to increase natural gas infrastructure; (2) the Commission’s Strategic Plan that identifies the approval of natural gas pipeline infrastructure as a specific goal; and (3) the Commission’s initiation of proceedings related to the Coordination Between Natural Gas and Electricity Markets (Docket No. AD12-12-000).

81. Further, Allegheny claims that even if future pipeline projects may be theoretical, this does not mean that the Commission would not be able to “establish parameters for subsequent analysis.”¹²⁴ Allegheny claims that a programmatic EIS may aid the

¹¹⁹ 15 U.S.C. § 717f(e) (2012).

¹²⁰ *Kleppe*, 427 U.S. at 402.

¹²¹ *Piedmont Env'tl. Council*, 558 F.3d at 316.

¹²² *See, e.g.*, Environmental Assessment for the Monroe to Cornwell Project and Utica Access Project, Docket Nos. CP15-7-000 and CP15-87-000 (filed Aug. 19, 2015); Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, Project Nos. 1888-030, 2355-018, and 405-106 (filed Mar. 11, 2015).

¹²³ Allegheny Request for Rehearing at 24-30.

¹²⁴ *Id.* at 25 (citing 2014 Programmatic Guidance at 11).

Commission's and the public's understandings of broadly foreseeable consequences of NGA-jurisdictional projects and non-jurisdictional shale gas production.

82. Allegheny also argues that CEQ's 2014 Programmatic Guidance explicitly recommends a programmatic EIS when "several energy development programs proposed in the same region of the country . . . [have] similar proposed methods of implementation and similar best practice and mitigation measures that can be analyzed in the same document."¹²⁵ In support, Allegheny points to, among other things, a table listing a number of projects planned, proposed, or placed in service and an Energy Information Administration publication discussing new pipeline projects to move Marcellus and/or Utica Shale production. Allegheny asserts that an agency cannot escape the existence of a comprehensive program with cumulative environmental effects by "disingenuously describing it as only an amalgamation of unrelated smaller projects."¹²⁶

83. Allegheny also disputes the statement in the final EIS that because the Commission has no jurisdiction to direct or mitigate shale extraction, a programmatic EIS would be "for naught."¹²⁷

Commission Determination

84. Documents cited by Allegheny do not show that the Commission is engaged in regional planning. For example, the Strategic Plan sets forth goals for the efficient processing of individual pipeline applications in order to carry out the Commission's statutory responsibilities under the NGA. Similarly, the other proceedings cited by Allegheny focus on various initiatives proposed by the Commission to carry out its statutory responsibilities under the NGA or the Federal Power Act.

85. In addition, the mere fact that there currently are a number of planned, proposed, or approved infrastructure projects to increase infrastructure capacity to transport natural gas from the Marcellus and Utica Shale does not establish that the Commission is engaged in regional development or planning. Rather, this information confirms that pipeline projects to transport Marcellus and Utica Shale gas are initiated solely by a number of different companies in private industry. As we have noted previously, a programmatic EIS is not required to evaluate the regional development of a resource by

¹²⁵ *Id.* (citing 2014 Programmatic Guidance at 21).

¹²⁶ *Id.* at 28 (citing *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001)).

¹²⁷ *Id.* at 30 (citing final EIS, app. S at S-393).

private industry if the development is not part of, or responsive to, a federal plan or program in that region.¹²⁸

86. The Commission's siting decisions regarding pending and future natural gas pipeline facilities will be in response to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the type of facilities that will be proposed.¹²⁹ Any broad, regional environmental analysis would "be little more than a study . . . containing estimates of potential development and attendant environmental consequences,"¹³⁰ and could not present "a credible forward look" that would be "a useful tool for basic program planning."¹³¹ In these circumstances, the Commission's longstanding practice to conduct an environmental review for each proposed project, or a number of proposed projects that are interdependent or otherwise interrelated or connected, "should facilitate, not impede, adequate environmental assessment."¹³² Thus, here, the Commission's environmental review of Constitution's and Iroquois' actual proposed pipeline project in a discrete EIS is appropriate under NEPA.

87. In sum, CEQ states a programmatic EIS can "add value and efficiency to the decision-making process when they inform the scope of decisions," "facilitate decisions on agency actions that precede site- or project-specific decisions and actions," or "provide information and analyses that can be incorporated by reference in future NEPA reviews."¹³³ The Commission does not believe these benefits can be realized by a programmatic review of natural gas infrastructure projects because the projects subject to

¹²⁸ See *Kleppe*, 427 U.S. at 401-02.

¹²⁹ We agree with Allegheny that lack of jurisdiction over an action does not necessarily preclude an agency from considering the potential impacts. However, as explained in the indirect and cumulative impact sections of this order, it reinforces our finding that because states, and not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting), the location, scale, timing, and potential impacts from such development are even more speculative.

¹³⁰ *Kleppe*, 427 U.S. at 402.

¹³¹ *Piedmont Env'tl. Council*, 558 F.3d at 316.

¹³² *Id.*

¹³³ 2014 Programmatic Guidance at 13.

our jurisdiction do not share sufficient elements in common to narrow future alternatives or expedite the current detailed assessment of each particular project.

4. Segmentation

88. CEQ regulations require the Commission to include “connected actions,” “cumulative actions,” and potentially “similar actions” in its NEPA analyses.¹³⁴ “An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.”¹³⁵ “Connected actions” include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; (c) are interdependent parts of a larger action and depend on the larger action for their justification.¹³⁶

89. In evaluating whether connected actions are improperly segmented, courts apply a “substantial independent utility” test. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”¹³⁷ For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. Similar to a highway network, “it is inherent in the very concept of” the interstate pipeline grid “that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”¹³⁸

¹³⁴ 40 C.F.R. § 1508.25(a)(1)-(3) (2015).

¹³⁵ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Unlike for connected and cumulative actions, for similar actions an agency has some discretion about combining environmental review. *E.g.*, *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-06 (9th Cir. 2003).

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

¹³⁷ *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987); *see also O’Reilly v. Army Corps of Eng’rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project “can stand alone without requiring construction of the other [projects] either in terms of the facilities required or of profitability”).

¹³⁸ *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

90. In *Delaware Riverkeeper Network v. FERC*, the D.C. Circuit ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and where those projects were financially interdependent.¹³⁹ The court put a particular emphasis on the four projects’ timing, noting that, when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.¹⁴⁰ Subsequently, the same court has indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.¹⁴¹ Further, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.¹⁴²

91. Stop the Pipeline argues that Iroquois’ South to North Project and Tennessee’s Northeast Energy Direct Project are connected actions that must be analyzed with the proposed projects in a single, combined NEPA document.¹⁴³ Stop the Pipeline asserts that the Constitution Pipeline Project has no “substantial independent utility” and no “logical termini,” another factor applied in *Delaware Riverkeeper*.¹⁴⁴ Stop the Pipeline claims that beyond the terminus of the Constitution Pipeline Project at the Wright Interconnection in New York, both the Tennessee and Iroquois systems are constrained.¹⁴⁵ Stop the Pipeline contends that there are no markets for the gas along the project route, claiming that the local distributor, Leatherstocking Gas Company, LLC, would at most take 0.6 percent of the project’s maximum volumes. According to Stop

¹³⁹ 753 F.3d at 1308.

¹⁴⁰ *Id.*

¹⁴¹ *Minisink*, 762 F.3d at 113 n.11.

¹⁴² *See Myersville*, 783 F.3d at 1326.

¹⁴³ Stop the Pipeline Request for Rehearing at 25-35.

¹⁴⁴ *Id.* at 32 (citing 753 F.3d at 1315)).

¹⁴⁵ *Id.* at 27 (citing the draft EIS for Algonquin’s AIM Project, Docket No. CP14-96-000, at section 3.3.1 (filed Aug. 6, 2014) and the April 7, 2014 filing of Anne Marie Garti, attach. 1 (reproducing Levitan & Associates, Inc., *NYCA Pipeline Congestion and Infrastructure Adequacy Assessment* for the N.Y. Indep. System Operator (September 2013)).

the Pipeline, the Wright Interconnection is not a logical terminus because the project's purpose and need are to serve New York City and New England markets, which cannot be reached due to constraints beyond the Wright Interconnection. Stop the Pipeline argues that Iroquois' South to North Project and Tennessee's Northeast Energy Direct Project are needed to relieve the constraints and therefore are "connected actions."

92. Stop the Pipeline further contends that Iroquois' South to North Project, which proposes to reverse gas flow on the Iroquois system, is a "connected action" because the reversal of flow is only possible if the Constitution pipeline becomes operational, making the two projects interdependent.¹⁴⁶ In support, Stop the Pipeline refers to the brochure for the open season for the South to North Project, which lists the Algonquin, Constitution, and Dominion Transmission, Inc. pipelines as sources for the project.

93. Stop the Pipeline asserts that the 2014 Order erroneously concluded that Tennessee's Northeast Energy Direct Project was not a connected action due to its timing – Constitution would be operational in 2015, three years before the Northeast Energy Direct Project's expected in-service date of 2018. According to Allegheny, Constitution's in-service date will likely be closer to the Northeast Energy Direct Project's 2018 in-service date because construction of the Constitution Pipeline Project will be delayed pending the section 401 WQC and many other unfulfilled environmental conditions. In addition, Stop the Pipeline contends that Tennessee's Northeast Energy Direct Project is a "reasonably foreseeable future" action since Tennessee has entered pre-filing and the two pipelines would be constructed closely in time and geography.

94. Allegheny asserts that the Commission improperly segmented its environmental review of the Constitution Pipeline Project from approximately 46 other pipeline projects, 10 of which are listed in the cumulative impact section of the final EIS.¹⁴⁷ According to Allegheny, these projects are either connected, cumulative, or similar actions because all the projects target the same Marcellus and Utica Shale formations. Allegheny also claims that many of these projects share similar timing and should be analyzed together to adequately assess the combined impacts and better evaluate alternatives that reduce overall environmental impacts.¹⁴⁸

¹⁴⁶ *Id.* at 31.

¹⁴⁷ Allegheny Request for Rehearing at 30-31.

¹⁴⁸ Notwithstanding the arguments made by Allegheny in its request for rehearing, in that request's Statement of Issues, Allegheny asserts only that the Commission is improperly segmenting the environmental review here with two other projects, the Northeast Energy Direct Project and the possible interconnection with Leatherstocking

(continued...)

Commission Determination

95. We disagree with Stop the Pipeline that Iroquois' South to North Project and Tennessee's Northeast Energy Direct Project are "connected actions." The 2014 Order explained that the Constitution Pipeline and Wright Interconnection Projects are stand-alone projects designed to meet the market needs of all shippers who signed binding precedent agreements in response to the open season notice for the projects.¹⁴⁹ The projects can go forward regardless whether any other project, including the South to North Project or the Northeast Energy Direct Project, is authorized. The 2014 Order fully addressed Stop the Pipeline's capacity-constraint argument by explaining that natural gas can be transported from the terminus of the Constitution Pipeline Project to downstream markets by any shipper holding capacity on Iroquois' or Tennessee's systems.¹⁵⁰ Nothing suggests that the utility of the Constitution project is dependent on the downstream systems being expanded to accommodate the Constitution throughput on an incremental basis. Thus, there is no basis for Stop the Pipeline's claim that the Constitution Pipeline Project does not have substantial independent utility or a logical terminus.

96. Moreover, connected actions must be proposed.¹⁵¹ Although Tennessee entered into the pre-filing process in October 2014, it did not file its certificate application for the Northeast Energy Direct Project until November 20, 2015, in Docket No. CP16-21-000. Therefore, when the Commission was conducting its environmental review of the Constitution Pipeline Project, the Northeast Energy Direct Project was not a proposed action. Iroquois has not yet filed a certificate application for its South to North Project.

Gas Company, LLC's, distribution system. In support of that claim, Allegheny merely states that these projects are cumulative or similar projects that the Commission must consider in the same EIS. Allegheny Request for Rehearing at 4.

¹⁴⁹ 2014 Order, 149 FERC ¶ 61,199 at P 116. In support of our finding that the Constitution Pipeline and Northeast Energy Direct Pipeline Projects were not "connected actions" under NEPA, we noted that the Constitution Pipeline Project is proposed to be placed in service in 2015, three years earlier than the 2018 in-service date planned for Tennessee's Northeast Energy Direct Pipeline Project. While the in-service date for the Constitution Pipeline Project has been delayed beyond 2015, it does not alter the fact that the two projects are not dependent upon each other.

¹⁵⁰ *Id.* P 115.

¹⁵¹ *Minisink*, 762 F.3d at 113 n.11; *Del. Riverkeeper*, 753 F.3d at 1317 (citing *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (1981)).

97. Contrary to Stop the Pipeline's assertion, the Constitution Pipeline and Northeast Energy Direct Projects are not similar actions¹⁵² that share common timing and geography. As indicated above, the certificate application for the Northeast Energy Direct Project was only recently filed and, if authorized, the project will likely be constructed during a later time-span and have a later in-service date than the Constitution Pipeline Project. In any event, timing by itself is not determinative. The projects are not similar in other respects, including sharing common geography. While one pipeline segment of the Northeast Energy Direct Project, as currently planned, would roughly parallel the Constitution pipeline from Susquehanna County, Pennsylvania, to Wright, New York, a second segment would extend to Dracut, Massachusetts, with laterals in New York and Connecticut and would serve the Northeast/New England market. Thus, the Northeast Energy Direct Project has a greater geographic footprint and is designed to serve different markets independent of the Constitution Pipeline Project. Under these circumstances, the Commission finds that a single environmental analysis is neither required nor the best way to assess these proposals.¹⁵³ The Commission has appropriately conducted a comprehensive environmental review of the Constitution Pipeline Project, including an analysis of the potential cumulative impacts of the Northeast Energy Direct and South to North Projects.¹⁵⁴ Of course, before either the Northeast Energy Direct Project or the South to North Project could be constructed, each would be subject to full Commission scrutiny, including NEPA analysis.

¹⁵² Actions are "similar" if they, "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25(3) (2015).

¹⁵³ "An agency *may* wish to analyze [similar] actions in the same impact statement. It *should* do so when the *best way* to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement." 40 C.F.R. § 1508.25(a)(3) (2015) (emphasis added). *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-1001 (9th Cir. 2004) (similarly emphasizing that agencies are only required to assess similar actions programmatically when such review is necessarily the *best way* to do so).

¹⁵⁴ *See* final EIS, section 4.13.4. The final EIS also conducted an analysis of the potential cumulative impacts of the Leatherstocking Project, referred to by Allegheny. *See id.* section 4.13.2.2. Since the Leatherstocking Project is non-jurisdictional, no more is required.

98. Allegheny's claim that we improperly segmented the environmental review for the Constitution Pipeline Project from approximately 46 other natural gas pipeline projects is without merit. The fact that certain projects may transport gas from the Utica and Marcellus Shale formations does not make them connected, cumulative, or similar actions for NEPA purposes. The Constitution Pipeline Project is in no way connected with or dependent upon the 46 other projects that Allegheny references. The Constitution Pipeline Project can go forward regardless of whether any of these other pipeline projects are authorized by the Commission. To the extent that any of these projects could cumulatively affect the same resources affected by the Constitution Pipeline Project, they were included and discussed in the cumulative analysis section of the final EIS. The Commission will separately consider each of the other non-connected, jurisdictional actions on its own merits, based on the facts and circumstances specific to each proposal.

5. Alternatives

99. Section 102(C)(iii) of NEPA requires that an EIS discuss alternatives to the proposed action.¹⁵⁵ Based on a brief statement of the purpose and need for the proposed action,¹⁵⁶ CEQ regulations require agencies to evaluate all reasonable alternatives, including no-action alternatives and alternatives outside the lead agency's jurisdiction.¹⁵⁷ Guidance from CEQ explains that reasonable alternatives "include those that are practical or feasible from the technical and economic standpoint and using common sense rather than simply desirable from the standpoint of the [permit] applicant."¹⁵⁸ Yet CEQ has also stated that there is "no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives."¹⁵⁹ For eliminated alternatives, agencies must briefly discuss the reasons for the elimination.¹⁶⁰

¹⁵⁵ 42 U.S.C. § 4332(C)(iii) (2012). Section 102(E) of NEPA also requires agencies "to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(E).

¹⁵⁶ 40 C.F.R. § 1502.13 (2015).

¹⁵⁷ *Id.* § 1502.14.

¹⁵⁸ *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

¹⁵⁹ *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34,262, 34,267 (July 22, 1983).

¹⁶⁰ *See* 40 C.F.R. § 1502.14(a) (2015).

An agency's specification of the range of reasonable alternatives is entitled to deference.¹⁶¹

a. Purpose and Need and No-action Alternative

100. Stop the Pipeline asserts that the final EIS did not include any discussion of need for the projects, contrary to the requirements of NEPA.¹⁶² On the other hand, Catskill Mountainkeeper claims that although a broader purpose of the projects was stated at the beginning of the final EIS, in the analysis of alternatives, the Commission determined that to be considered feasible, alternatives to the projects must be capable of meeting the requirements of the two shippers, Cabot and Southwestern Energy Services Company.¹⁶³ Catskill Mountainkeeper argues that agencies may not so narrow the purpose and need as to push reasonable alternatives out of consideration.

101. Catskill Mountainkeeper contends that the no-action alternative adopted by the Commission fails to weigh appropriately the environmental benefits of the status quo against the adverse environmental impacts of the projects.¹⁶⁴ According to Catskill Mountainkeeper, although the Commission admits that under the no-action alternative no environmental effects would occur, the EIS did not take into account the full extent of the projects' environmental impacts, and therefore the Commission underestimates the environmental impacts that would be avoided by the no-action alternative.

Commission Determination

102. Contrary to Stop the Pipeline's assertion, section 1.1 of the final EIS sets forth the "purpose and need" of the projects, as required by NEPA.¹⁶⁵ That section describes Constitution's stated purpose of the projects as: (1) delivering up to 650,000 Dth per day of natural gas supply to the interconnect with Tennessee and Iroquois; (2) providing natural gas service to areas currently without access to natural gas; (3) expanding access to multiple sources of natural gas supply; (4) optimizing the existing systems for the

¹⁶¹ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

¹⁶² Stop the Pipeline Rehearing Request at 45.

¹⁶³ Catskill Mountainkeeper Request for Rehearing at 25 (citing final EIS at 3-14).

¹⁶⁴ *Id.* at 24.

¹⁶⁵ The final EIS also explains that Commission staff deferred the analysis of need to the certificate order. Final EIS at 1-3.

benefit of both current and new customers by creating a more competitive market; and (5) providing opportunities to improve regional air quality by utilizing cleaner burning natural gas in lieu of fossil fuels. In contrast, 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 the 2014 Order and in this order based on the fact that the pipeline project was fully subscribed.

103. Courts have upheld federal agencies use of applicants’ identified project purpose and need as the basis for evaluating alternatives.¹⁶⁶ This general principle, as noted above, is subject to the admonition that a project’s purpose and need may not be so narrowly defined as to preclude consideration of what may actually be reasonable choices.¹⁶⁷ Thus, objectives must be reasonably identified and defined.¹⁶⁸ Here, Catskill Mountainkeeper does not object to the final EIS’s adoption of the applicants’ objectives as described above. Rather, it contends that a statement in the final EIS limits alternatives to those that can meet the requirements of the project shippers. Catskill Mountainkeeper misconstrues this language.

104. The alternative section of the final EIS (section 3) evaluates a host of alternatives, including the no-action alternative, system alternatives, minor route variations, and the use of alternative energy sources. Each alternative was evaluated in consideration of whether or not it would: (1) be technically feasible and practical; (2) offer a significant advantage over the proposed action; and (3) meet the projects’ objectives as described in section 1.1 of the final EIS (as described above).¹⁶⁹ The language that Catskill Mountainkeeper refers to is in section 3.2 (System Alternatives) and merely explains that one important consideration in analyzing a system alternative is whether it is “economically practicable” in meeting the needs of the project shippers.

¹⁶⁶ *E.g.*, *City of Grapevine*, 17 F.3d at 1506.

¹⁶⁷ *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2012); *Simmons v. U.S. Army Corps. of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 198-99.

¹⁶⁸ *See, e.g.*, *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded “considerable discretion to define the purpose and need of a project,” agencies’ definitions will “be evaluated under a reasonableness standard.”).

¹⁶⁹ *See* final EIS at 3-1.

105. Contrary to Stop the Pipeline's claim, the final EIS did not dismiss all other alternatives on the basis that they could not meet the requirements of the two project shippers. Rather, other alternatives were dismissed because they were limited by technology, by economics, by time, by location, or by comparative environmental harm and were found not to be practicable substitutes for a natural gas pipeline. It is also worth noting that not all alternatives were dismissed, rather, numerous route variations were adopted or required over the course of this proceeding.¹⁷⁰

106. We also reject Catskill Mountainkeeper's argument that the final EIS understates the environmental impacts avoided by a no-action alternative. The resource-by-resource discussion in section 4 of the final EIS first details the existing state of each resource and then describes the environmental impacts of the preferred alternative.¹⁷¹ Section 5 of the final EIS summarizes staff's conclusions about those impacts.¹⁷² By providing a description of the existing state of each resource and a description of the environmental impacts of the preferred alternative, the final EIS provides the decision maker with a meaningful comparison of the harm to be avoided under a no-action alternative. Far from summarily dismissing the no-action alternative, Commission staff considered a variety of other means to potentially satisfy the demand for natural gas including energy conservation and efficiency, cogeneration technology, nuclear generation, other fossil fuels, and seven forms of renewable energy. The analysis noted both the likely benefits and adverse impacts of each substitute and concluded that a no-action alternative would not meet the objectives of the proposed projects.

b. Alternative M

107. Section 3.4.1.2 of the final EIS discusses Alternative M, which was developed to evaluate the possibility of locating the pipeline within Interstate 88's right-of-way.

108. The Kernan Trust claims that the Commission failed to justify its rejection of Alternative M, contending that our siting regulations require consideration of the use, widening, or extension of existing rights-of-way in locating proposed facilities.¹⁷³ The Kernan Trust also disagrees with the Commission's finding that to obtain approval from

¹⁷⁰ See *id.* at 3-27 to 3-75.

¹⁷¹ *Id.* at 4-1 to 4-258.

¹⁷² *Id.* at 5-1 to 5-17.

¹⁷³ Kernan Trust Request for Rehearing at 18 (citing 18 C.F.R. § 380.15(e)(1) (2015)).

the New York State Department of Transportation (NYSDOT), Constitution would need to demonstrate that no feasible alternative route exists. The Kernan Trust asserts that this finding erroneously relies on a draft guidance document that NYSDOT has not officially adopted and which does not require such a feasibility demonstration.¹⁷⁴

109. The Kernan Trust also disagrees that the final EIS's preferred route would have fewer impacts than Alternative M Segment 5/6.¹⁷⁵ The Kernan Trust asserts that the preferred route would eliminate nearly 1,000 more acres of interior forest habitat than would Alternative M Segment 5/6. The Kernan Trust bases this conclusion on the acreage within the 300-foot buffer zone in which interior forest habitat will become edge forest habitat, as the final EIS acknowledged.¹⁷⁶

Commission Determination

110. We reject the Kernan Trust's arguments. Consistent with section 380.15(e)(1) of our regulations, the final EIS considered the use of various ways to locate the pipeline within Interstate 88's right-of-way and fully explained why they were not feasible or preferable to the preferred route.¹⁷⁷

111. Regarding NYSDOT's guidance and regulations, we have no authority to interpret, implement, or enforce state agency authority. The conclusions in the final EIS comparing alternatives are not based upon any Commission staff interpretation of NYSDOT guidance, but on environmental and technical analysis of the route, on submittals by the public and Constitution, and on staff discussions with the Federal Highway Administration, which participated as a cooperating agency in staff's review.

112. The final EIS includes a full discussion of project alternatives, including Alternative M Segment 5/6. As stated in the final EIS, this alternative would result in greater impacts than the preferred route on forested wetlands, waterbodies, and nearby

¹⁷⁴ *Id.* (citing N.Y. Comp. Codes R. & Regs. tit. 17, pt 131 Accommodation of Utilities Within State Highway Right-of-Way (2015)).

¹⁷⁵ Alternative M Segment 5/6 diverges from the proposed route at Milepost 77.4 in Delaware County, New York, and reconnects with the proposed route at Milepost 121.3. Final EIS at section 3.4.1.2.

¹⁷⁶ *Id.* at 20, 21 tbl. (see row labeled "Direct + Indirect Forested Interior Impacts (acres)").

¹⁷⁷ Final EIS, section 3.4.1.2.

residences, and would require additional side slope construction (increasing the technical difficulties and risks of construction). The final EIS states that Alternative M Segment 5/6 would result in less clearing of forested lands, as noted by the Kernan Trust. It would be inappropriate, however, to select one route over another simply because it crosses less upland forest while ignoring all other impacts. Rather, we considered all the relevant impacts and on this basis found that Alternative M Segment 5/6 would have greater impacts and therefore was not a preferred route.¹⁷⁸

6. Direct Impacts

a. Air Emissions

113. Catskill Mountainkeeper disputes the environmental analysis of the projects' direct and indirect air emissions, claiming that Commission staff unlawfully relied on the Clean Air Act's "major source" regulatory threshold as a basis for assuming that the projects' below-threshold effects on air quality would not be significant. Catskill Mountainkeeper further argues that the Commission unlawfully assumed that because the Wright Compressor Station would be subject to monitoring and performance testing under the Clean Air Act, the emissions would not have significant impacts.¹⁷⁹

114. Catskill Mountainkeeper argues that the final EIS dismisses the projects' construction-related air impacts based on a mischaracterization that these emissions would be intermittent and short-term as construction passes quickly through an area. Catskill Mountainkeeper counters that emissions of nitrous oxides, volatile organic compounds, and carbon monoxide from construction would exceed the Clean Air Act's major source threshold if the emissions were emitted over a longer period of time. Catskill Mountainkeeper notes that New York and Pennsylvania are in the Northeast Ozone Transport Region and that nitrous oxides and volatile organic compounds are precursors to ozone.¹⁸⁰

115. Catskill Mountainkeeper complains that without explanation Commission staff used lower project emissions of nitrous oxides and volatile organic compounds in the final EIS's General Conformity analysis for Schoharie County, New York, which is in

¹⁷⁸ *Id.* at 3-36 to 3-47.

¹⁷⁹ Catskill Mountainkeeper Request for Rehearing at 19 (citing *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1124 (D.C. Cir. 1971)).

¹⁸⁰ *Id.*

non-attainment for the 1997 8-hour ozone National Ambient Air Quality Standard, than staff used in the draft EIS. Catskill Mountainkeeper argues that this allegedly unsupported change led Commission staff to omit the draft EIS's recommendation for Construction Emission Plans from the final EIS.¹⁸¹

Commission Determination

116. The regulatory standards set by the EPA for the Clean Air Act were established through extensive modeling and research for the purpose of protecting the public health and welfare. Under the Clean Air Act, projects above the established thresholds are considered "major" sources and undergo a more extensive review. Catskill Mountainkeeper implies that Commission staff should have extrapolated the projects' short-term construction-related air emissions into a hypothetical long-term quantity. This is not required and is not a realistic analysis of air emissions.

117. The final EIS includes an extensive discussion of the construction emissions of the projects based on the types and use of construction equipment for a reasonably projected duration. The final EIS explained that the construction emissions would not be concentrated in any one area but, rather, spread over the approximately 125 miles of construction. Catskill Mountainkeeper, though correct that the pipeline project crosses the Northeast Ozone Transport Region, fails to convincingly argue how this should have influenced our analysis.

118. The change in the Commission's General Conformity analysis between the draft and final EIS is supported. The final EIS indicated that "[c]onstruction emissions for Schoharie County were reassessed after Constitution's November 12, 2013 filing to reflect refined construction procedures (i.e., a better model), resulting in lower emissions for all pollutants."¹⁸² Commission staff appropriately revised the draft EIS to incorporate better data to more accurately reflect projected construction emissions. Because this revision resulted in lower projected emissions, Commission staff removed the draft EIS's recommendation for Construction Emission Plans in the final EIS.

b. Forest Fragmentation

119. Catskill Mountainkeeper contends that the Commission improperly ignored the long-term and permanent impacts of the projects' fragmentation of interior forest

¹⁸¹ *Id.* at 20.

¹⁸² Final EIS at 4-179 n.7.

habitat.¹⁸³ In addition, Catskill Mountainkeeper argues that Constitution's actions to minimize the impacts of fragmented interior forest habitat – i.e. to locate 9 percent of the route within existing rights-of-way and to reduce right-of-way width from 110 feet to 100 feet – are inadequate and show the Commission's failure to evaluate the full breadth of the projects' long-term impacts to interior forest habitat.

120. Catskill Mountainkeeper maintains that the final EIS significantly underestimated negative impacts on birds by focusing on only species of concern identified by state or federal agencies. Catskill Mountainkeeper asserts that of about 60 species of birds potentially affected by habitat changes, 26 have demonstrably declined for decades in New York.¹⁸⁴ Catskill Mountainkeeper argues that Constitution's proposed Migratory Bird and Upland Forest Plan underestimates the impacts of forest fragmentation by assuming, allegedly without support, that 35-acre interior forest blocks are sufficient to support bird species identified in the vicinity of the pipeline project.

121. In addition, Catskill Mountainkeeper asserts that the remedial fund that the final EIS recommends that Constitution establish will not compensate for the clearing of contiguous mature forest. In this regard, Catskill Mountainkeeper contends that it will take lifetimes to recreate these woodlands that are critical to bird species at risk, which is an unproven length of time for bird populations to endure the impact to habitat.¹⁸⁵

Commission Determination

122. Contrary to Catskill Mountainkeeper's assertion, the final EIS discussed impacts on interior forest habitat and acknowledged that the proposed pipeline project would result in some permanent loss of interior forest wildlife habitat.¹⁸⁶ Moreover, while Constitution reduced impacts by routing the proposed pipeline to minimize sensitive areas and reduced the construction right-of-way through wetlands and interior forests, these were not the only measures we imposed to mitigate impacts. Environmental Condition 23 requires that Constitution finalize its Migratory Bird and Upland Forest Plan in consultation with FWS, NYSDEC, the Pennsylvania Department of Conservation and Natural Resources, and the Pennsylvania Game Commission. This plan is required to include compensatory mitigation to offset the unavoidable impacts on upland interior

¹⁸³ Catskill Mountainkeeper Request for Rehearing at 22-23.

¹⁸⁴ *Id.* at 23.

¹⁸⁵ *Id.* at 23.

¹⁸⁶ Final EIS at 4-77.

forests, including allocation of funds for acquisition of lands for conservation and/or restoration, grants for habitat conservation, and long-term management of lands for migratory birds. Further, Environmental Condition 26 requires that Constitution employ qualified personnel to conduct nest surveys within areas proposed for any tree clearing between April 1 and August 31 to detect birds of conservation concern. Environmental Condition 26 also requires Constitution to provide a buffer around any active nests to avoid potential impacts until the young have fledged. The final EIS concluded, and we agree, that vegetation resources and wildlife resources are not expected to be significantly impacted given these avoidance and mitigation measures, as well as the amount of similar adjacent habitat available, and the applicants' adherence to their ECPs and the Commission's Plan and Procedures.¹⁸⁷

123. We disagree with Catskill Mountainkeeper's assertion that the final EIS underestimates negative impacts on birds by focusing only on species of concern identified by state or federal agencies. The applicants consulted with federal and state resource agencies and conducted surveys to identify sensitive or protected vegetation types, natural areas, and unique plant communities,¹⁸⁸ as well as significant sensitive wildlife habitats in the vicinity of the projects.¹⁸⁹ The analysis in the final EIS included more than protected bird species. By consulting FWS's list of Birds of Conservation Concern, which are expected to be listed under the ESA if not conserved, the final EIS identified 30 species for which the preferred habitat is known or expected within the projects' area or for which breeding has been documented in projects-affected counties.¹⁹⁰

124. Constitution's preliminary Migratory Bird and Upland Forest Plan relied on academic literature to select 35 acres as the minimum size that would support most interior forest bird species.¹⁹¹ Moreover, we disagree with Catskill Mountainkeeper's claim that the level of mitigation required in the Migratory Bird and Upland Forest Plan will not compensate for the impact of the projects on forest habitat. As explained in the

¹⁸⁷ *Id.* at 4-79 (conclusion about potential impacts on vegetation); 4-91 to 4-92 (conclusion about potential impacts to wildlife).

¹⁸⁸ *Id.* at 4-69 to 4-71.

¹⁸⁹ *Id.* at 4-80.

¹⁹⁰ *Id.* at 4-83, 4-84 to 4-85 tbl. 4.6.1-2.

¹⁹¹ *Id.* at 4-71 (citing C.S. Robbins, et al., *Habitat requirements of breeding forest birds of the middle Atlantic states*, Wildlife Monographs 103 (1989)).

final EIS, Constitution would deposit funds in an account(s) for use in the conservation of migratory bird habitat. The amount of the funds deposited would be based on the total value of habitat lost and the cost of desired conservation efforts and would be determined in coordination with FWS, NYSDEC, the Pennsylvania Department of Conservation and Natural Resources, and the Pennsylvania Game Commission.¹⁹²

c. Climate Change

125. Catskill Mountainkeeper contends that the final EIS fails to evaluate the full extent of the greenhouse gas (GHG) emissions and fails to analyze the climate impacts of those emissions. Catskill Mountainkeeper argues that the final EIS's total GHG emissions did not include emissions related to clearing 217.7 acres of interior forest, disturbing 439.7 acres of interior forest, and disturbing 95.3 acres of wetlands.¹⁹³ Catskill Mountainkeeper further argues that the final EIS improperly dismisses the projects' construction- and operation-related GHG emissions as unimportant because they are small in contrast to the U.S. GHG Inventory. Catskill Mountainkeeper asserts that the latest CEQ draft guidance explains that this contrast is not an appropriate basis for deciding whether to consider climate impacts under NEPA.¹⁹⁴

126. Catskill Mountainkeeper asserts that the final EIS only used EPA's "social cost of carbon" protocol to estimate the monetized climate impacts of one year's emissions and did not meaningfully use the resulting figure in staff's analysis. According to Catskill Mountainkeeper, the final EIS should have estimated climate impacts across the projects' lifetime, or for at least 10 years, and meaningfully incorporated the resulting figure into the environmental analysis.

Commission Determination

127. The final EIS appropriately considered the GHG emissions that would result from the construction and operation of the projects. Specifically, the final EIS: (1) presented all GHG emissions converted to carbon dioxide-equivalent metric tons based on the individual GHG's global warming potential; and (2) explained that fossil-fuel combustion emits the greenhouse gases carbon dioxide, methane, and nitrous oxide, adding that on a 100-year timescale, methane's global warming potential is 25 times greater than that of

¹⁹² *Id.* at 4-73.

¹⁹³ Catskill Mountainkeeper Request for Rehearing at 21 (citing figures in the final EIS).

¹⁹⁴ *Id.* (citing 2014 Draft GHG Guidance, 79 Fed. Reg. at 77,825).

carbon dioxide.¹⁹⁵ Using EPA emissions models for gasoline- and diesel-fueled on-road vehicles and non-road construction equipment, the final EIS calculated the GHG emissions to construct and operate the projects, including vented gas and fugitive emissions during operation.¹⁹⁶ The final EIS noted that for both projects, construction emissions would be temporary and would be minimized by enumerated mitigation measures. The final EIS explained that for the Constitution Pipeline Project the operation emissions would be limited only to maintenance vehicles and equipment and fugitive carbon dioxide emissions. For the Wright Interconnection Project, the proposed low-emission turbines are designed to emit even less pollution than the Clean Air Act's Best Available Control Technology standards allow. The final EIS appropriately concluded that neither construction- nor operation-related air emissions are expected to result in a significant impact on local or regional air quality.¹⁹⁷ NEPA requires nothing more.

128. The Commission did not err by excluding the alleged loss of carbon sinks from the GHG emission calculations. Catskill Mountainkeeper cites two governmental sources which acknowledge such emissions, but neither source provides a reliable method to calculate them.¹⁹⁸

¹⁹⁵ Final EIS at 4-171.

¹⁹⁶ *Id.* at 4-180 to 4-182.

¹⁹⁷ *Id.* at 4-181 to 4-183, 4-186.

¹⁹⁸ Catskill Mountainkeeper Request for Rehearing at 21(citing O. Edenhofer et al., Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change*, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 825 (2014) (2014 IPCC Report), <http://mitigation2014.org/report/publication/>; and CEQ's *Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews*, 79 Fed. Reg. 77,802, 77,823 n.1 (Dec. 24, 2014) (2014 Draft GHG Guidance)). The 2014 IPCC report considers the sink capacity of forests only at global, regional, and country scales. 2014 IPCC Report at 819, 825. CEQ's 2014 Draft GHG Guidance emphasizes that agencies have the discretion to determine the type and level of analysis that is appropriate and that the investment of time and resources should be reasonably proportional to the importance of climate change-related considerations." 79 Fed. Reg. 77,802, 77,822, 77,827 (Dec. 24, 2014). CEQ states that GHG estimation tools have become widely available but cites only the U.S. Department of Agriculture's (USDA) COMET-Farm tool. This tool relies on figures from a separate USDA report about quantifying GHG sources and sinks for

(continued...)

129. While true that the final EIS noted that the construction-and operation-related GHG emissions are very small when compared with the U.S. Greenhouse Gas Inventory,¹⁹⁹ the final EIS's conclusions about impact significance do not rely on this comparison. In addition to disclosing greenhouse gas emissions from project construction and operations, the final EIS explains that GHG emissions are a primary cause of climate change, that methane accounts for 9 percent of total U.S. emissions, that natural gas and petroleum systems accounted for 29 percent of U.S. methane emissions from 1990 to 2012, and that fugitive methane emissions are common in natural gas systems during production, transmission, storage, and distribution.²⁰⁰ The final EIS identifies many climate change related environmental effects in the projects' Northeast region resulting from overall GHG emissions, including higher temperatures, heavier

forests, wetlands, and other landscapes. The USDA report itself relies on IPCC algorithms. The USDA is forthcoming about weaknesses:

There is often tremendous uncertainty associated with estimates of forest carbon baselines, such that even at large scales (e.g., state-level) the power to detect statistically significant changes in forest carbon stocks is limited to major disturbances [e.g., insects, drought, or wildfire]. Compounding the sampling error often associated with forest inventories, there is measurement and model error that may not be acknowledged. . . . There is a level of uncertainty associated with not only tree volume/biomass equations, but also with the various forest carbon pools . . . found across a diversity of forest ecosystems . . .

USDA, *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory* 6-28 (July 2014), http://www.usda.gov/oce/climate_change/Quantifying_GHG/USDATB1939_07072014.pdf

¹⁹⁹ Final EIS at 4-186, 4-256.

²⁰⁰ *Id.* at 4-255 to 4-256 (citing information from the EPA).

precipitation, and sea level rise.²⁰¹ Both the final EIS's alternatives analysis and cumulative impact analysis consider GHG emissions in a comparative way.²⁰²

130. As a matter of cumulative impact, the final EIS explained that no standard methodology exists to determine how the projects' incremental contribution to GHG emissions would result in physical effects on the global environment.²⁰³ Catskill Mountainkeeper fails to provide any evidence that the social cost of carbon protocol can be used to predict the individual projects' actual environmental impacts.

131. As Catskill Mountainkeeper requested in an earlier filing, the final EIS considered whether to use EPA's "Social Cost of Carbon" protocol in the analysis of climate change impacts.²⁰⁴ The social cost of carbon tool provides monetized values of addressing the climate change impacts on a global level from each metric ton of CO₂ emitted in a given year. To reflect the rising magnitude of climate change impacts as time passes, the protocol reduces the discount rate for emissions in each later year. The tool was created to estimate the climate benefits of rulemakings and policy alternatives. The final EIS explained that EPA has indicated that the methodology can be useful to decision makers as a comparative tool, but "any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional."²⁰⁵ As we have noted in past orders, the EPA has stated that

²⁰¹ *Id.* at 4-255.

²⁰² *Id.* at 3-1 (contrasted with fuel oil), 3-6 (with nuclear), 3-7 (with coal and fuel oil), 3-11, 4-256 (with fuel oil).

²⁰³ *Id.* at 4-256.

²⁰⁴ *Id.* at 4-256. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp.3d 1174, 1193 (D. Colo. 2014) ("... a 'hard look' has to include a 'hard look' at whether [the social cost of carbon protocol], however imprecise it may be, might contribute to a more informed assessment of the impacts than if it were simply ignored.").

²⁰⁵ *Id.* at 4-256 (quoting Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* at 2 (Feb. 2010) (2010 Technical Support Document) <http://www3.epa.gov/otaq/climate/regulations/scc-tds.pdf>. *See* 2010 Technical Support Document at 29-31 (discussing limitations of the analysis); 2014 Draft GHG Guidance, 79 Fed. Reg. at 77,827 ("When using the Federal social cost of carbon, the agency should disclose that these estimates vary over time, are associated with different discount rates and risks, and are intended to be updated as scientific and economic understanding improves.").

“no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations,” the tool does not measure the actual incremental impacts of a project on the environment, and there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.²⁰⁶ For these reasons the tool is not appropriate for estimating these projects’ impacts. Accordingly, we took the requisite hard look at whether the social cost of carbon tool would assist in our decision making and concluded that it would not.

132. Nonetheless, in response to comments on the draft EIS, the final EIS calculated the social cost of carbon of one year of the projects’ operation-related CO₂ emissions under three discount rates for 2015. Catskill Mountainkeeper argues that if the final EIS had calculated the projects’ social cost of carbon over a decade or longer, the resulting cost would have been significantly higher. However, the final EIS explicitly affirmed the EPA’s caveat that the protocol’s results have no scientifically reliable meaning and concluded that their use as a comparative tool should not be the sole basis for any decision. In comparing alternatives, the final EIS eliminated alternatives on other grounds than relative GHG emissions. Thus, a comparison of the social costs of carbon resulting from those emissions on a one-year, ten-year, or longer timespan would not contribute to a more informative NEPA assessment. The social cost of carbon protocol is provisional and is evolving, and the 2014 Order did employ alternative methods to discuss GHGs. The air quality information in the EIS does not become unreliable because the final EIS employed the social cost of carbon tool in a limited way proportional to its utility.

7. Indirect Impacts of Natural Gas Production

133. CEQ’s regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.²⁰⁷ Indirect impacts are defined as those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including

²⁰⁶ See, e.g., *Corpus Christi Liquefaction, LLC*, 151 FERC ¶ 61,098, at P 51 (2015) (quoting EPA, *Fact Sheet: Social Cost of Carbon* (Nov. 2013), <http://www.epa.gov/climatechange/Downloads/EPAactivities/scc-fact-sheet.pdf>); *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095, at P 54 (2015).

²⁰⁷ 40 C.F.R. § 1508.25(c) (2015).

ecosystems.”²⁰⁸ Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

134. With respect to causation, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause”²⁰⁹ in order “to make an agency responsible for a particular effect under NEPA.”²¹⁰ As the Supreme Court explained, “a ‘but for’ causal relationship is insufficient [to establish cause for purposes of NEPA].”²¹¹ Thus, “[s]ome effects that are ‘caused by’ a change in the physical environment in the sense of ‘but for’ causation,” will not fall within NEPA if the causal chain is too attenuated.²¹² Further, the Court has stated that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”²¹³

135. An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”²¹⁴ NEPA requires “reasonable forecasting,” but an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”²¹⁵

²⁰⁸ *Id.* § 1508.8(b).

²⁰⁹ *U.S. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 at 767 (2004) (quoting *Metro. Edison Co.*, 460 U.S. at 774).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Metro. Edison Co.*, 460 U.S. at 774.

²¹³ *Pub. Citizen*, 541 U.S. at 770.

²¹⁴ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). *See also City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).

²¹⁵ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

136. Catskill Mountainkeeper and Allegheny argue that the Commission did not adequately consider the projects' indirect impacts, in particular induced upstream production of natural gas from the Marcellus and Utica Shales.²¹⁶

137. The Commission does not have jurisdiction over natural gas production. The potential impacts of natural gas production, with the exception of greenhouse gases and climate change, would be on a local and regional level. Each locale includes unique conditions and environmental resources. Production activities are thus regulated at a state and local level. In addition, the EPA regulates deep underground injection and disposal of wastewaters and liquids under the Safe Drinking Water Act, as well as air emissions under the Clean Air Act. On public lands, federal agencies are responsible for the enforcement of regulations that apply to natural gas wells.

138. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.²¹⁷ A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).²¹⁸ To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more

²¹⁶ Catskill Mountainkeeper Request for Rehearing at 7-12; Allegheny Request for Rehearing at 5-10.

²¹⁷ See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion).

²¹⁸ See *cf. Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project). See also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport plan was not an indirect, "growth-inducing" impact); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the project's potential to induce additional development).

likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas. It would make little economic sense to undertake construction of a pipeline in the hope that production might later be determined to be economically feasible and that the producers will choose the previously-constructed pipeline as best suited for moving their gas to market.

139. Even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, we have found that the potential environmental impacts resulting from such production are not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. We are aware of no forecasts by such entities, making it impossible for the Commission to meaningfully predict production-related impacts, many of which are highly localized. Thus, even if the Commission knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depending on the applicable regulations in the various states. Accordingly, the impacts of natural gas production are not reasonably foreseeable because they are “so nebulous” that we “cannot forecast [their] likely effects” in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.²¹⁹

140. Nonetheless, we note that, although not required by NEPA, a number of federal agencies have examined the potential environmental issues associated with unconventional natural gas production in order to provide the public with a more complete understanding of the potential impacts. The Department of Energy has concluded that such production, when conforming to regulatory requirements, implementing best management practices, and administering pollution prevention concepts, may have temporary, minor impacts to water resources.²²⁰ The EPA has

²¹⁹ *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with enough specificity to make their consideration meaningful need not be included in the environmental analysis).

²²⁰ U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From The United States* 19 (Aug. 2014) (DOE Addendum), <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf>.

reached a similar conclusion.²²¹ With respect to air quality, the Department of Energy found that natural gas development leads to both short- and long-term increases in local and regional air emissions.²²² It also found that such emissions may contribute to climate change. But to the extent that natural gas production replaces the use of other carbon-based energy sources, the Department of Energy found that there may be a net positive impact in terms of climate change.²²³

141. Allegheny argues that the proposed projects and regional shale gas extraction are “two links of a single chain” as allegedly shown by multiple industry and government sources, as well as common sense.²²⁴

²²¹ See U.S. EPA, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, at ES-6 (June 2015) (external review draft), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523539 (finding the number of identified instances of impacts on drinking water resources to be small compared to the number of hydraulically fractured wells). See also *Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128, 16,130 (Mar. 26, 2015) (Bureau of Land Management promulgated regulations for hydraulic fracturing on federal and Indian lands to “provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health”).

²²² DOE Addendum at 32.

²²³ *Id.* at 44.

²²⁴ Allegheny Request for Rehearing at 5-10 (quoting *Sylvester*, 884 F.2d at 400)); Allegheny cites National Petroleum Council, *Prudent Development: Realizing the Potential of North America’s Abundant Natural Gas and Oil Resources* 51-52 (2011) (describing natural gas transportation infrastructure as a “key link in the chain” between producers and consumers); the Commission’s *Strategic Plan FY2014-2018* at 17 (2014) (describing the development of interstate natural gas infrastructure as “a critical link in ensuring that natural gas supply can reach market areas.”); Cabot Oil and Gas Corp., *2012 Annual Report* 4 (informing shareholders that the Constitution Pipeline “is specifically designed to transport [Cabot’s] Marcellus production to both the New England and New York markets.”)). These sources appear in Allegheny’s attachments 1, 3, and 4, respectively. We have previously rejected the National Petroleum Council’s 2011 report as immaterial. *E.g.*, *Columbia Gas Transmission, LLC*, 153 FERC ¶ 61,064, PP 23, 26 (2015); *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095, PP 28-29 (2015); *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,198, PP 50-61 (2014)).

142. Catskill Mountainkeeper argues that the Commission impermissibly denies a causal link to induced production in New York on the basis that the proposed pipeline represents only 2.5 percent of the existing interstate pipeline mileage in New York.²²⁵ It contends that the existence of other interstate pipelines in New York does not alter the fact that the pipeline project's incremental capacity has the potential to induce additional natural gas production along and around the pipeline over the project's lifetime. By serving an area that currently has little major pipeline infrastructure, Catskill Mountainkeeper argues that the project will allow natural gas development "where it otherwise may not be permitted or would otherwise be too expensive to develop."²²⁶ In support, Catskill Mountainkeeper asserts that the high demand for gas drilling in the Marcellus Shale region and the requirement by EPA and likely other agencies for green completion of all new wells will increase incentives to construct wells in the vicinity of existing and new interstate pipelines. It also claims that significant cost savings are associated with siting well pads as close as possible to pipeline receipt points.

143. Catskill Mountainkeeper and Allegheny dispute the Commission's finding that there is adequate, ongoing natural gas production to fully support the proposed projects. They claim that the Commission impermissibly relies on Constitution's representation to that effect without evidence.²²⁷ Both Catskill Mountainkeeper and Allegheny cite recent reports which suggest that shale wells sharply decline in volume after the first few years, making new production more likely. Catskill Mountainkeeper argues that existing supplies in Pennsylvania are unlikely to fill the projects' capacity over its lifespan, especially given that much of the existing supply is already being transported in other pipelines to other destinations. The group notes that Cabot, a major producer and shipper on Constitution, has many other commitments for its existing production, making it reasonably foreseeable that Cabot will need new production to fulfill its commitment to Constitution.

144. Catskill Mountainkeeper responds to the Commission's statement in the 2014 Order that any induced development in Pennsylvania would be subject to regulation by the Pennsylvania Department of Environmental Protection and the Susquehanna River Basin Commission. It argues that states' jurisdiction over production does not eliminate the Commission's obligation under NEPA to "account for the environmental effects of drilling and fracturing at each newly developed or serviced well induced by projects

²²⁵ Catskill Mountainkeeper Request for Rehearing at 8-9.

²²⁶ *Id.* at 9.

²²⁷ *Id.* at 9-11 (citing 2014 Order at P 100) Allegheny at 8-9.

under its jurisdiction.”²²⁸ Catskill Mountainkeeper also claims that the Commission is impermissibly limiting the requirement to evaluate the indirect impacts of a project to situations where the project is causing all, as opposed to some, of the development in an area.²²⁹

145. Allegheny asserts that the Commission’s claim that the causal connection between gas drilling and the projects is insufficient because natural gas development will continue and is indeed continuing with or without the project is similar to the argument rejected by the 8th Circuit in *Mid States Coalition for Progress v. Surface Transportation Board*.²³⁰

146. Catskill Mountainkeeper and Allegheny contend that tools exist to facilitate the analysis of induced natural gas development and its environmental impacts.²³¹ For example, Catskill Mountainkeeper claims that a 2011 environmental impact statement from NYSDEC on horizontal drilling and high-volume hydraulic fracturing has generated information regarding future shale gas development that can be used to predict future development patterns. Allegheny contends that the Commission is attempting to shirk its responsibilities under NEPA to engage in reasonable forecasting, similar to the agency’s

²²⁸ *Id.* at 11 (citing *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d at 1125).

²²⁹ *Id.* at 12.

²³⁰ Allegheny at 8 (citing *Mid States*, 345 F.3d 520, 549 (8th Cir. 2003)).

²³¹ Catskill Mountainkeeper Request for Rehearing. at 8 n.7-8 (citing N. Johnson, et al., The Nature Conservancy, *Natural Gas Pipelines: Excerpt from Report 2 of Pennsylvania Energy Impacts Assessment* (Dec. 16, 2011) (Nature Conservancy Report), <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/pennsylvania/ng-pipelines.pdf>; NYSDEC, *Revised Draft Supplemental Generic Environmental Impact Statement on The Oil, Gas and Solution Mining Regulatory Program: Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs* (Sept. 7, 2011) (Revised Draft SGEIS), <http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf>); Allegheny Request for Rehearing at 9-10 (citing E.T. Slonecker, et al., *Landscape consequences of natural gas extraction in Allegheny and Susquehanna Counties, Pennsylvania, 2004-2010*, U.S. Geological Survey Open-File Report 2013-1025 (2013) (2013 USGS Report), <http://pubs.usgs.gov/of/2013/1025>; The Nature Conservancy, presentation on the Pennsylvania Energy Impacts Assessment 13 (2012)). Allegheny reproduces the Nature Conservancy’s presentation in attachment 7 to its request for rehearing.

analysis rejected in *Northern Plains Resource Council. v. Surface Transportation Board*.²³²

Commission Determination

147. The record in this proceeding, including the statements and reports cited by Allegheny and Catskill Mountainkeeper, does not demonstrate the requisite reasonably close causal relationship between the impacts of future natural gas production and the Constitution Pipeline and Wright Interconnection Projects that would necessitate further analysis. The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. We have acknowledged that the pipeline project is designed to move gas supplies from northeastern Pennsylvania to markets in New York and New England.²³³ However, this does not mean that the Commission's action of approving these particular projects will cause or induce the effect of additional or further shale gas production. Rather, as we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs drive new drilling.²³⁴ If the projects were not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.²³⁵ Again, any such production would take place pursuant to the regulatory authority of state and local governments.

²³² Allegheny Request for Rehearing at 9 (citing 668 F.3d 1067, 1078-79 (9th Cir. 2011)).

²³³ 2014 Order, 149 FERC ¶ 61,199 at PP 25, 27; Constitution Application at 5, 16.

²³⁴ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015). *See also Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

²³⁵ *Id.* P 39.

148. We reject Catskill Mountainkeeper's arguments that the projects will incentivize production along and around the projects' area in New York and Pennsylvania. The Constitution Pipeline Project, as proposed, will only have receipt points in the Susquehanna Supply Area in Pennsylvania, none in New York. As explained in the final EIS and 2014 Order, New York currently prohibits hydraulic fracturing and there is no basis to conclude that our approval of this pipeline will lead to changes to those restrictions. Moreover, if hydraulic fracturing were to be allowed in New York, the fact that there are many alternatives pipelines (more than 5,000 miles of existing natural gas pipelines across New York with Constitution representing about 2.5 percent of that total) supports our conclusion that if new supplies were to be developed, this will likely occur with or without the Constitution Pipeline Project. Natural gas production in Pennsylvania is forecast to nearly double between 2015 and 2020, as noted in the 2014 Order and the EIS.²³⁶ In 2014, actual unconventional natural gas production in Pennsylvania exceeded 11.15 billion cubic feet per day, a 48 percent increase beyond the predicted 7.5 billion cubic feet per day in 2015 quoted in the final EIS.²³⁷ Therefore, existing and ongoing production could support the projects for many years, if not their entire useful life.

149. We acknowledge that NEPA may obligate an agency to evaluate the environmental impacts of non-jurisdictional activities. However, the fact that states, not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting) supports the conclusion that information about the scale, timing, and location of such development and potential environmental impacts are even more speculative, as further explained below.

150. We find *Mid States* to be distinguishable from the circumstances here. *Mid States* involved the Surface Transportation Board's failure to analyze the downstream effects of a proposal to build and upgrade rail systems to reach coal mines in Wyoming's Powder River Basin.²³⁸ The court found – and the project proponent did not dispute – that the proposed project would increase the use of coal for power generation. The court held that where such downstream effects are reasonably foreseeable, they must be analyzed, even

²³⁶ 2014 Order, 149 FERC ¶ 61,199 at P 100 (citing final EIS at 4-232).

²³⁷ Pennsylvania Department of Environmental Protection, *2014 Oil and Gas Annual Report 7* (July 2015), http://www.portal.state.pa.us/portal/server.pt/community/annual_report/21786 (sum of 2014 unconventional production divided by 365 days).

²³⁸ *Mid States*, 345 F.3d at 550.

if the extent of those effects is uncertain.²³⁹ Here, Allegheny asserts that construction of the Constitution Pipeline and Wright Interconnection Projects would increase production, rather than end use, as was the case in *Mid States*. Unlike *Mid States*, here there is an insufficient causal link between our authorization of the projects and any additional production. As we have explained, natural gas development will likely continue with or without the Constitution Pipeline and Wright Interconnection Projects. Thus, it is not merely the extent of production-related impacts that we find speculative, as was the case in *Mid States*, but also whether the projects at issue will have any such impacts.

151. Moreover, even if a causal relationship between our action here and additional production were presumed, the scope of the impacts from any induced production is not reasonably foreseeable. The fact that there may be some incentives for producers to locate wells close to pipeline infrastructure does not alter the fact that the location, scale, and timing of any additional wells are matters of speculation, particularly with respect to their relationship to the projects. In addition, the statements and reports cited by the parties are broad generic reports that do not show where or when additional development will occur because the projects were approved.²⁴⁰ As we have previously explained, a broad analysis, based on generalized assumptions rather than reasonably specific information of this type, will not yield information that would provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to the specific proposal before it.²⁴¹

152. Taking one example, NYSDEC's 2011 revised draft supplemental generic environmental impact statement cited by Catskill Mountainkeeper is a programmatic analysis prepared to assess the potential environmental impacts created by the use of high-volume hydraulic fracturing for natural gas extraction in New York. It relied on industry projections to estimate that NYSDEC may receive applications to drill approximately 1,700 to 2,500 wells for development of Marcellus Shale during a peak development year in New York and used this range as a basis for projecting

²³⁹ *Id.*

²⁴⁰ For example, the Nature Conservancy Report relied on assumptions to calculate a wide range of development and land impacts over a 20 year period – e.g. between 360,000 and 900,000 acres of forest edge affected by 2030. Nature Conservancy Report at 5 (*supra* note 231). The 2013 USGS Report provides only a retrospective analysis based on aerial images of land use and land cover changes in Susquehanna County, Pennsylvania, between 2004 and 2010 due to natural gas production. 2013 USGS Report at 6-7 (*supra* note 231).

²⁴¹ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 at P 40.

environmental impacts.²⁴² As discussed in the 2014 Order, the final EIS did, in fact, use estimates from the NYSDEC Revised Draft SGEIS of individual well productivity and individual well construction-based and operation-based land disturbance, both expressed as broad ranges, to calculate the extent of acreage that might hypothetically be impacted if all of the gas to be transported by the projects were to be produced solely from unconventional resources, and solely from a concentrated production area in Susquehanna County, Pennsylvania, located adjacent to the receipt points of the Constitution pipeline.²⁴³ The final EIS noted that sourcing the proposed 650,000 Dth per day would disturb or would have already disturbed anywhere from 355 to 10,248 acres during well construction, with one-tenth of this acreage disturbed during operation.²⁴⁴ However, the Commission concluded that this information was speculative and unlikely, given the complexities of the interstate natural gas system, and that because the location, scale, and timing of future facilities are unknown, the available information did not, and could not, inform our decision.²⁴⁵

153. The Commission is not shirking its responsibilities under NEPA, as the court held against the Surface Transportation Board in *Northern Plains*. In that case, the agency benefitted from an earlier programmatic EIS in which the Bureau of Land Management had analyzed reasonably foreseeable coal bed methane well development. This provided specific information to the Surface Transportation Board as it considered the potential cumulative impact of a proposed 89-mile rail line to serve specific new coal mines in three Montana Counties. In the present case, the Commission has no similar specific information about the timing, location, and scope of future shale (or conventional) well development in the projects' area. Significantly, the court pointed out that the Surface Transportation Board was aware that *future* coal mine development in the project area

²⁴² Revised Draft SGEIS at 4, 5, 2-1 (*supra* note 231).

²⁴³ 2014 Order, 149 FERC ¶ 61,199 at P 107.

²⁴⁴ Final EIS at 4-233.

²⁴⁵ 2014 Order, 149 FERC ¶ 61,199 at P 107. Catskill Mountainkeeper objects that the final EIS calculated a range of wells that is “too broad to allow a meaningful analysis of their cumulative effects.” Catskill Mountainkeeper adds that even accepting the ranges provided, the final EIS “fails to include a meaningful analysis of the cumulative impacts of the assumed well development and lost acreage.” But, this is our point. Given the complexities of the interstate natural gas system and the numerous variables, assumptions, and unknowns involved, the Commission cannot meaningfully quantify the cumulative impacts of natural gas development on the broad scale that the challengers seek.

was imminent because the Board relied on such future development to justify the financial soundness of the proposed rail line. Here, as noted above, it is unknown how much, if any, new shale gas production the Constitution Pipeline Project will transport, much less the location, timing, or scope such future well development. Moreover, *Northern Plains* establishes that while agencies must engage in reasonable forecasting in considering cumulative impacts, NEPA does not require an agency to “engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”²⁴⁶

8. Indirect Impacts of Natural Gas Consumption

154. Allegheny asserts that the Commission failed to assess the health risk associated from exposure to radon and other radioactive substances from the downstream consumption of the gas that will flow through the pipeline. Allegheny complains that despite the EIS’s acknowledgement that radon levels in natural gas are highly variable and that burning natural gas can release radon inside the home, the EIS provided no data and the Commission has not required the applicants to monitor, collect, and report any of the radon levels in the gas that will be transported by the proposed projects.²⁴⁷

Commission Determination

155. We reject Allegheny’s argument that the Commission failed to assess impacts related to radon. In response to comments, the final EIS discussed radon exposure, providing general background and a review of literature on radon.²⁴⁸ The final EIS noted that regardless of the highly variable radon content of natural gas,²⁴⁹ radon content decreases due to radioactive decay over time; gas processing and removal of natural gas liquids; commingling with other gas supplies, which may occur as the gas enters and moves beyond the Wright Interconnection; and improved ventilation in newer homes, improved energy efficiency of modern boilers, furnaces, and hot water heaters, and new building codes requiring venting of gas-fired stoves and ovens. The final EIS cited several studies finding that indoor radon concentrations from use of natural gas in the home are unlikely to pose a radiological hazard to users. The final EIS calculated an

²⁴⁶ 668 F.3d at 1079.

²⁴⁷ Allegheny Request for Rehearing at 10.

²⁴⁸ Final EIS at 4-187 to 4-188.

²⁴⁹ Based on an EPA area rating, natural gas from the Susquehanna Supply Area would have either the highest or a moderate potential to contain radon.

incremental radon concentration from natural gas consumption in a residence, based on the median radon concentration found at gas wells in Pennsylvania in a 2012 study by the U.S. Geological Survey multiplied by two different dilution factors.²⁵⁰ Both results – 0.005 and 0.009 picocuries per liter above background levels – are well below the EPA’s concentration of 4.000 picocuries per liter to trigger remedial action.²⁵¹ As explained in the final EIS, the Commission has no regulatory authority to set, monitor, or respond to indoor radon levels, but many local, state, and federal entities establish and enforce radon exposure standards for indoor air.

9. Cumulative Impacts

156. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions”²⁵² The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

157. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”²⁵³ CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”²⁵⁴ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”²⁵⁵ An agency’s analysis should be proportional to the

²⁵⁰ Final EIS at 4-188, 4-188 n.10. The final EIS used a dilution factor of 7,111 from a 1973 study. In 2012, Dr. Marvin Resnikoff disputed certain assumptions in the 1973 study and proposed a dilution factor of 4,053, which the final EIS also used.

²⁵¹ Final EIS at 4-188.

²⁵² 40 C.F.R. § 1508.7 (2015).

²⁵³ *Kleppe*, 427 U.S. at 413.

²⁵⁴ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (January 1997) (1997 Cumulative Effects Guidance).

²⁵⁵ *Id.*

magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.²⁵⁶

158. Consistent with CEQ's 1997 Cumulative Effects Guidance, in order to determine the scope of a cumulative impacts analysis for each project, Commission staff establishes a "region of influence" in which various resources may be affected by both a proposed project and other past, present, and reasonably foreseeable future actions.²⁵⁷ While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that, where the Commission lacks meaningful information regarding potential future natural gas production in a region of influence, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.²⁵⁸

159. Catskill Mountainkeeper and Allegheny argue that the cumulative impact analysis in the final EIS did not adequately consider the environmental harms associated with natural gas development activities in the Marcellus and Utica Shale formations. Allegheny asserts that the Commission provided no rational explanation for its 10-mile "region of influence" for considering the cumulative impacts of ongoing and future Marcellus and Utica Shale gas extraction activities.²⁵⁹ Catskill Mountainkeeper argues that the cumulative impact analysis does not reflect a baseline of past and present activities in the broader Marcellus Shale region where "substantial development of natural gas production and transportation infrastructure . . . has caused significant negative cumulative effects on air and water quality, created GHG emissions, and severely fragmented forests."²⁶⁰

160. Allegheny asserts that the Commission misreads the 1997 Cumulative Effects Guidance "to impose a rigid geographic scope in order to substantially and arbitrarily

²⁵⁶ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005).

²⁵⁷ See, e.g., *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

²⁵⁸ *Id.* P 120.

²⁵⁹ Allegheny Request for Rehearing at 10-13.

²⁶⁰ Catskill Mountainkeeper Request for Rehearing at 13.

narrow the cumulative impact analysis.”²⁶¹ Allegheny notes that the 1997 Cumulative Effects Guidance contrasts between a project-specific analysis, for which it often suffices to analyze effects within the immediate area of the proposed action, and an analysis of the proposed action’s contribution to cumulative effects, for which “the geographic boundaries of the analysis almost always should be expanded.”²⁶² Allegheny cites *Natural Resources Defense Council v. Hodel* to bolster its claim that the Commission is required to consider the “inter-regional” impacts of Marcellus and Utica Shale development activities.²⁶³ Allegheny also asserts that “recent research” identifies the “substantial impact” that shale gas drilling will have throughout the Marcellus and Utica Shale formations, obligating the Commission under NEPA to take a hard look at these impacts on a broader scale.²⁶⁴

161. Catskill Mountainkeeper argues that the final EIS and 2014 Order improperly concluded that cumulative impacts would be minimized below a significant level by implementing staff’s recommended mitigation measures, which Catskill Mountainkeeper criticizes as not “clearly described” or “enforceable,” in combination with measures proposed or required by state and local agencies with overlapping or complementary

²⁶¹ Allegheny Request for Rehearing at 11. We are puzzled by Allegheny’s statement that the Commission “tries to dodge its legal obligation to consider the cumulative impact of shale extraction” by misinterpreting that there is a “causation” element for an agency’s consideration of cumulative effects. The 2014 Order states no such thing. Indeed, as discussed in the order, the final EIS considered the cumulative impacts of a number of activities that were non-Federal (including shale extraction activities), non-jurisdictional, and clearly not caused by the projects. *See* final EIS at 4-232 (noting that staff considered the general development of Marcellus Shale in the cumulative impacts analysis); 4-218 (identifying all Marcellus Shale wells permitted in Pennsylvania and New York); 4-241 through 4-254 (discussing cumulative impacts from Marcellus Shale development on numerous resources).

²⁶² *Id.* (citing 1997 Cumulative Effects Guidance at 12).

²⁶³ 865 F.2d 288 (D.C. Cir. 1988).

²⁶⁴ Allegheny Rehearing at 16 (citing M.C. Brittingham, et al., *Ecological Risks of Shale Oil and Gas Development to Wildlife, Aquatic Resources, and their Habitats*, *Environmental Science & Technology* 11035–37 (Sept. 4, 2014)); *id.* at 17-22 tbl. 1 (Allegheny provides a table of alleged deficiencies in our analysis of the Marcellus Shale development’s potential cumulative impacts on most resources).

jurisdiction.²⁶⁵ Catskill Mountainkeeper contends that the applicants' post-authorization adherence to permitting conditions does not eliminate the Commission's responsibility to conduct a pre-authorization analysis under NEPA.²⁶⁶ Catskill Mountainkeeper further contends that other Commission-authorized pipeline projects for which state permits were granted have resulted in adverse impacts. It adds that Cabot, the projects' majority supplier, and Williams Fields Services Company, an operator of one of the two compressor stations, have violated permits at other projects. Catskill Mountainkeeper asserts that the Commission must consider "the high likelihood that permit conditions will be violated and that best management practices will not be implemented effectively."²⁶⁷

Commission Determination

162. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.²⁶⁸ The agency should then establish the geographic scope for analysis. Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts. Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.²⁶⁹ As noted above, CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.²⁷⁰

²⁶⁵ Catskill Mountainkeeper Request for Rehearing at 13, 15, 17-18.

²⁶⁶ *Id.* at 14 (citing *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d at 1124). We note that the Atomic Energy Commission in the cited case had issued rules forbidding its own consideration of a variety of environmental issues under NEPA in total deference to the analysis and mitigation by other agencies with overlapping jurisdiction. 449 F.2d at 1122.

²⁶⁷ *Id.* at 14-15.

²⁶⁸ 1997 Cumulative Effects Guidance at 11.

²⁶⁹ *Id.*

²⁷⁰ CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

163. The cumulative effects analysis in the final EIS took precisely the approach CEQ guidance advises.²⁷¹ Commission staff identified areas within 0.25 mile of the proposed Constitution Pipeline and Wright Interconnection Projects as its geographic scope for purposes of the cumulative effects review for minor projects (e.g., residential or small commercial development projects). For major projects, such as large commercial, industrial, and energy development, including natural gas development, the EIS expanded the geographic scope to include activities within 10 miles of the approximately 125-mile length of the pipeline. The cumulative effects analysis also more broadly considered major projects located within watersheds crossed by the proposed projects and considered projects with the potential to result in longer-term impacts on air quality, such as compressor stations, located within an Air Quality Control Region crossed by the proposed projects.²⁷² The geographic scope of the cumulative impact analysis was appropriately reflective of the magnitude of the proposed projects' direct and indirect environmental impacts.²⁷³

164. Based on these regions of influence, the final EIS identified 102 other projects in 4 categories, including natural gas development in the region of influence of the projects, whose impacts when added to the impacts of the proposed actions could result in cumulative impacts.²⁷⁴ The final EIS considered the potential cumulative impacts associated with the Constitution Pipeline and Wright Interconnection Projects and these 102 other projects pertaining to each potentially affected resource, including: geology and soils; groundwater, surface water, and wetlands; vegetation; wildlife; fisheries and aquatic resources; land use, recreation, special interest areas, and visual resources; socioeconomics; cultural resources; air quality and noise; and reliability and safety.²⁷⁵ The final EIS concluded that the cumulative impacts of the Constitution and Iroquois projects, when combined with other known or reasonably foreseeable projects, would be effectively limited given that project design, best management practices, and regulatory

²⁷¹ We note that the 1997 Cumulative Effects Guidance at 15 states that the “applicable geographic scope needs to be defined case-by-case.”

²⁷² Final EIS at 4-217.

²⁷³ *Kleppe*, 427 U.S. at 413 (The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”).

²⁷⁴ Final EIS at 4-218 to 4-230 tbl. 4.13-1.

²⁷⁵ *Id.* at 4-241 to 4-258.

agency permitting would avoid or effectively minimize or mitigate all projects' impacts on sensitive environmental resources.²⁷⁶

165. For these reasons, we find that the final EIS properly excluded from its cumulative impacts analysis the impacts from all shale gas development in the Marcellus Shale formation. Given the large geographic scope of this formation, the magnitude of the analysis requested by Allegheny and Catskill Mountainkeeper bears no relationship to the limited magnitude of Constitution's and Iroquois' instant proposals. Moreover, even if the Commission were to vastly expand the geographic scope of the cumulative impacts analysis, impacts from such development are not reasonably foreseeable.²⁷⁷

166. In our view, Catskill Mountainkeeper's and Allegheny's arguments with respect to the geographic scope of the analysis are based on their erroneous claim that the final EIS must conduct a regional programmatic NEPA review of natural gas development and production in the Marcellus and Utica Shale formations, an area that covers potentially thousands of square miles. We decline to do so. As the Commission has explained, there is no Commission program or policy to promote additional natural gas development and production in shale formations.

167. Allegheny's reliance on *Hodel*²⁷⁸ is misplaced. In *Hodel*, the court considered the U.S. Department of the Interior's EIS composed in conjunction with its plan to award five-year leases for hydrocarbon exploration and production on multiple offshore blocks. The court found that the EIS focused primarily on assessing impacts associated with the region proximate to each lease block, and thereby failed to capture potential inter-regional cumulative impacts on migratory species if exploration and production were to take place simultaneously on several lease blocks within the species' migratory range. However, *Hodel* considered a plan for resource-development leasing over a vast geographic area (including the North Atlantic, North Aleutian Basin, Straits of Florida, Eastern Gulf of Mexico, and waters off California, Oregon, and Washington). In contrast, the "plan" before us involves constructing approximately 125 miles of pipeline running from Pennsylvania into New York and adding compression at an existing

²⁷⁶ *Id.* at 4-258, 5-16.

²⁷⁷ The 2014 study published by M.C. Brittingham and other authors, *supra* note 264, offers only general conclusions about the potential qualitative impacts on terrestrial and aquatic ecosystems from shale development. It provides no specific details regarding those impacts, much less specific details regarding the Constitution Pipeline and Wright Interconnection Projects.

²⁷⁸ 865 F.2d 288 (D.C. Cir. 1988).

compressor station. Because we find the proposal will have no reasonably foreseeable impacts on shale development, we find no reason to adopt a region of influence for reviewing cumulative impacts that would include, as Allegheny urges, all “shale gas extraction in the Marcellus and Utica shale formations.”²⁷⁹

168. The Department of Interior’s leasing of large tracts in federal waters in *Hodel* is dissimilar from the Commission’s case-by-case review of individual and independent infrastructure projects. Whereas mineral leases, especially those that cover extensive and contiguous areas, establish the location and time frame for future development, the Commission does not permit, and indeed has no jurisdiction over, activities upstream of the point of interconnection with an interstate pipeline, e.g., leasing, exploration, production, processing, and gathering. To the extent the court in *Hodel* was persuaded by an earlier Supreme Court statement 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,”²⁸⁰ production and gathering activities in the Marcellus and Utica Shale areas are not related actions concurrently pending before the Commission. Thus, there is no way to relate any specific production and gathering activities to these projects. Accordingly, we find *Hodel* unavailing.

169. We find it is appropriate for the Commission to look to its required mitigation measures to determine whether an applicant’s compliance with those requirements will adequately safeguard and protect resources. Federal agencies may incorporate mitigation measures as part of a proposed action.²⁸¹ In developing mitigation, agencies necessarily rely on their staff’s expertise to assess mitigation needs, develop mitigation plans, and oversee mitigation implementation.²⁸² Mitigation measures are sufficient when based on agency assessments or studies,²⁸³ or when they are likely to be adequately policed, such

²⁷⁹ Allegheny Request for Rehearing at 10, 13, 14.

²⁸⁰ *Hodel*, 865 F.2d at 297 (citing *Kleppe*, 427 U.S. at 410) (emphasis added).

²⁸¹ See, e.g., *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1015 (9th Cir. 2006).

²⁸² CEQ, *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 *Fed. Reg.* 3843, 3847 (2011).

²⁸³ See *Transcont’l Gas Pipe Line Corp.*, 126 FERC ¶ 61,097, at P 20 (2009) (citing *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (citing *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556-57 (2d Cir. 1992)).

as when they are included as mandatory conditions imposed on licenses.²⁸⁴ It is also appropriate for the Commission to look to the requirements of other expert agencies to determine whether an applicant's compliance with those agencies' permitting and other requirements will adequately safeguard and protect resources. In doing so, we do not abdicate our responsibilities under NEPA.²⁸⁵

170. Here, the mitigation measures imposed to reduce any adverse environmental impacts associated with the projects were discussed in the EIS and were based on the detailed record, including public comments, developed regarding the projects' impacts on specific resources, as well as reflecting our staff's expertise. For example, section 4.5.3 of the EIS discussed impacts to interior forest wildlife habitat associated with the pipeline project and, based on this information, required Constitution to file, prior to construction, a final Migratory Bird and Upland Forest Plan for review and written approval by the Director of OEP, that includes a discussion of compliance with the Migratory Bird Treaty Act's and the Bald and Golden Eagle Protection Act's measures to avoid, reduce, or minimize unavoidable impacts on forests and migratory birds. Further, section 4.5.3 established mitigation plans for conservation of migratory bird habitat (Environmental Condition 23).²⁸⁶

171. Moreover, the conditions imposed in the 2014 Order are mandatory and, viewed as a whole, are sufficient to ensure Constitution's and Iroquois' compliance with the requirements of the Commission order. For example, Constitution is required to employ environmental inspectors to monitor and ensure compliance with all mitigation measures required by the order (Environmental Condition 3) and to identify any area of non-compliance during construction in weekly status reports (Environmental Condition 7), as well as in the report filed after the in-service date of the facilities (Environmental Condition 10) so that we can take appropriate action. We will ensure that Constitution is

²⁸⁴ See *id.* (citing *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 239 n.9 (D. Vt. 1992), *aff'd* 990 F.2d 729 (2d Cir. 1993)).

²⁸⁵ See *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121 at PP 131-132 (2011), *order on reh'g*, 138 FERC ¶ 61,104 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F. Appx. 472 (2d Cir. 2012) (unpublished opinion). See also *Transcont'l Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091, at PP 140-141 (2012) (citing *Sierra Club v. Hassell*, 636 F.2d 1095, 1098 (5th Cir. 1981)).

²⁸⁶ Also see discussion *infra* at PP 43-52.

fulfilling its duties by conducting our own compliance monitoring during construction, including regular field inspections.

172. Further, there is no evidence that past history of non-compliance in other proceedings by other entities has any bearing in this proceeding. Catskill Mountainkeeper offers no detail about the violations it cites by Cabot, the project shipper, or Williams Fields Services Company, the compressor operator, other than their number and related fines. The Commission takes matters of non-compliance seriously and will ensure that the applicants in this proceeding comply with the condition of our 2014 Order.

10. Public Health

173. Stop the Pipeline asserts that the Commission should have included a “comprehensive health impact assessment,” including an analysis of three studies submitted by the Center for Sustainable Communities, which Stop the Pipeline claims demonstrate that short-term toxic emissions close to natural gas development can exceed federal emission guidelines.²⁸⁷

174. We disagree. The three studies cited by Stop the Pipeline are general studies concerning potential impacts from oil and gas development, and have no connection to the Constitution Pipeline Project. We gave full consideration to the potential health effects of the projects, including an analysis of potential air emissions impacts, including fugitive emissions, as well as potential health effects regarding methane, and appropriately determined that no significant health impacts were presented.²⁸⁸

11. Pennsylvania Natural Gas Reserves

175. Stop the Pipeline claims that the extraction and transport of shale gas is an “irreversible and irretrievable commitment[] of resources” and therefore the Commission violated NEPA by failing to analyze shale gas reserves in Pennsylvania, and whether

²⁸⁷ Stop the Pipeline Request for Rehearing at 46-47. We note that the Center for Sustainable Communities, which filed the three studies one month after issuance of the final EIS with minimal analysis, did not seek rehearing of the 2014 Order.

²⁸⁸ Final EIS at 4-171 to 4-188 (section 4.11.1, Air Quality), 4-203 to 4-215 (section 4.12, Reliability and Safety).

these reserves are sufficient to keep the gas flowing for all of the pipeline projects in Pennsylvania.²⁸⁹

176. The comprehensive analysis of shale gas development that Stop the Pipeline seeks is beyond the scope of the EIS.²⁹⁰ Stop the Pipeline is in essence asking the Commission to prepare a programmatic review of shale gas development in Pennsylvania which, for the reasons discussed above, we decline to do.

12. Capital Region Board

177. The Capital Region Board opposes the Commission's approval of the routing of the pipeline through the property of the Capital Region Career and Technical School, in Schoharie, New York. It maintains that the crossing of the school property is not required by the public convenience and necessity and that the Commission failed to properly evaluate the impact of the pipeline project upon the operation and safety of the school.

178. The Capital Region Board alleges that the Commission's order is deficient because it does not evaluate a minor route deviation that would put the pipeline beyond the school's campus, either within the I-88 corridor or along some other path. It states that while the Commission directed the pipeline to assess minor route deviations to protect other special land uses, the Commission made no effort to avoid and protect the school's academic resources.

179. The Capital Region Board also maintains that the Commission ignored the fact that the project's taking of 6 acres from the school's 23-acre outdoor classroom would destroy two construction/heavy equipment programs. The board argues that the Commission failed to consider the geotechnical impact of students operating heavy equipment in proximity to the pipeline, including trenchers and compactors. It contends that the Commission's requirements for the installation of a temporary safety fence along the temporary right-of-way and a permanent fence and signage along the permanent right-of-way do not sufficiently mitigate the impact on the school.

180. It also asserts that deferring the issue to the Office of Energy Projects to resolve the issue before construction does not constitute the hard look required by NEPA.

²⁸⁹ Stop the Pipeline Request for Rehearing at 46 (citing 42 U.S.C. § 102(2)(C) (2012)).

²⁹⁰ See 2014 Order, 149 FERC ¶ 61,199 at PP 98-101.

Finally, it contends that the 2014 Order fails to impose any mandatory conditions to mitigate impacts on the school.

Commission Determination

181. We disagree with the Capital Region Board's assessment of the final EIS. As explained below, the Commission fully examined the impacts on the school and imposed appropriate conditions.

182. As explained in the final EIS, Constitution was directed to evaluate alternatives to avoid impacts on the school directly in response to comments on the draft EIS.²⁹¹ In response, Constitution shifted its proposed route further to the north away from the location that the school actively uses for instruction purposes. Furthermore, Constitution eliminated a proposed access road that would have been located on the school's property. The final EIS concluded that avoidance of the school property altogether was not practical due to development and homes along Highway 30A/30 and the high number of new parcels that would be affected. However, the 2014 Order also required an additional impact avoidance measure, as recommended in the final EIS, that Constitution install a temporary safety fence and signage along the southern edge of the construction right-of-way and a permanent fence and signage along the southern edge of the permanent right-of-way.²⁹² The 2014 Order adopted all the findings in the final EIS regarding the school property and therefore these conditions are mandatory.²⁹³

183. We have re-examined the information in the final EIS and have determined that adequate measures were taken to reduce impacts on the school including alignment shifts, and implementation of visible safety measures to alert students to the presence of the pipeline should they access that part of the property.

13. Kernan Trust Property

184. In its rehearing request, the Kernan Trust raises issues related to the impacts of the Constitution pipeline on the trust property. We note that in a July 15, 2015 supplement to its May 19, 2015 Implementation Plan, Constitution requested a variance that would

²⁹¹ Final EIS at 3-75.

²⁹² See 2014 Order, Environmental Condition 12.

²⁹³ Because these are mandatory conditions, it is unclear what the Capital Region Board refers to when it claims that we have deferred the issue to the Office of Energy Projects.

avoid the Kernan Trust property. Constitution indicated in its July 2015 filing that this variance, in part, was developed to address comments received on its Joint Application to the U.S. Army Corps of Engineers and NYSDEC. As described, this variance would adjust almost 3 miles of the pipeline route, re-route the pipeline around the trust property, and affect 11 new landowners. In support of this request, Constitution provided documentation that it had successfully negotiated easements with each of the newly affected landowners. Additionally, in accordance with Condition 5 of our December 2014 Order, Constitution also completed field surveys for sensitive species and cultural resources which did not identify any resources of concern which would be impacted by the requested variance. We note that this project change would minimally increase the permanent land disturbances associated with the project (just under 2 acres). Although the change would impact 11 previously unaffected landowners, Constitution's documentation of executed easements for each of these properties is evidence that any landowner concerns have been satisfactorily addressed. We have determined that this request is environmentally acceptable, and therefore, with this order, we are approving Constitution's July 15, 2015 TRK 925.10 variance request. Therefore, we find that the issues raised on rehearing that relate to impacts on the trust property are moot.

The Commission orders:

- (A) The requests for rehearing are denied, as discussed in the body of this order.
- (B) The requests for late intervention are denied, as discussed in the body of this order.
- (C) The requests for stay are dismissed and rejected, as discussed in the body of this order.
- (D) Constitution's July 15, 2015 TRK 925.10 variance request is approved.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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