

161 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Millennium Pipeline Company, L.L.C.

Docket No. CP16-17-001

ORDER ON REHEARING AND STAY

(Issued November 16, 2017)

1. On November 9, 2016, the Commission issued an order under section 7(c) of the Natural Gas Act (NGA) authorizing Millennium Pipeline Company, L.L.C. (Millennium) to construct and operate 7.8 miles of 16-inch-diameter lateral pipeline and related facilities in Orange County, New York, known as the Valley Lateral Project.¹ On December 9, 2016, Sarah Burns, Amanda King, Melody S. Brunn, and Pramilla Malick (collectively, Petitioners) timely requested rehearing of the November 9 Order. On August 31, 2017, the New York State Department of Environmental Conservation (NYSDEC or Department) filed a motion seeking to reopen the record and stay of, or, in the alternative, rehearing and stay of, the November 9 Order. On September 13, 2017, Petitioners filed a motion to join in NYSDEC's request to reopen the record. For the reasons discussed below, we dismiss or deny these requests.

I. Background and Requests for Rehearing, Reopener, and Stay

2. Millennium owns and operates an interstate natural gas pipeline system extending across much of New York's southern border. The Valley Lateral Project is a delivery lateral designed to provide capacity for 130,000 Dekatherms (Dth) per day of firm natural gas transportation service from the mainline system in the Town of Minisink, Orange County, New York, to the Valley Energy Center being developed by CPV Valley, LLC (CPV) in the Town of Wawayanda, Orange County, New York. The Valley Energy Center includes a 650 megawatt combined-cycle gas power plant and an electrical interconnect currently under construction.

¹ *Millennium Pipeline Company, L.L.C.*, 157 FERC ¶ 61,096 (2016) (November 9 Order).

3. On rehearing, Pramilla Malick, chair of Protect Orange County,² opposes both the Valley Energy Center and the Valley Lateral Project, on the grounds that both are unnecessary. Ms. Malick also claims that the Commission's environmental review of the Valley Lateral Project violated the National Environmental Policy Act (NEPA) by failing to consider: (1) Millennium's Minisink Compressor Station and Eastern System Upgrade; (2) the Valley Energy Center, including the center's location on a fault line, ongoing criminal and civil investigations, and the center's land use and habitat impacts; and (3) the Valley Lateral Project's impacts on wetlands, endangered species habitat, agricultural lands, and a nearby leaking oil pipeline.

4. Sarah Burns and Amanda King (Ms. Burns and Ms. King) are impacted landowners who argue that the Valley Lateral Project is an intrastate pipeline subject to the authority of New York, not the Commission. Ms. Burns and Ms. King also claim that the Commission violated NEPA by failing to fully examine: (1) Horizontal Directional Drilling (HDD) impacts; (2) impacts on environmental justice communities; (3) impacts to threatened and endangered species; (4) cumulative impacts on biological habitat and the human environment; and (5) other reasonable alternatives.

5. Ms. Melody Brunn, an impacted landowner, joins Ms. Burns's and Ms. King's claim that the project is a non-jurisdictional intrastate pipeline. Ms. Brunn also claims that Millennium is not complying with the November 9 Order's Endangered Species Act (ESA) compliance requirements. Ms. Brunn submitted a survey of threatened bog turtle habitat on her land which, she contends, conflicts with Millennium's alleged reports that no such habitat exists.

6. On August 31, 2017, NYSDEC filed a motion seeking to reopen the record and stay of, or, in the alternative, rehearing and stay of, the November 9 Order. NYSDEC contends that the Commission's environmental analysis for the Valley Lateral Project fails to comply with NEPA. In support of its position, NYSDEC contends that the DC Circuit's recent opinion in *Sierra Club v. FERC* requires the Commission to quantify and consider the indirect effect of downstream greenhouse gas (GHG) emissions that will result from burning the natural gas that the Valley Lateral Project will transport to the Valley Energy Center. NYSDEC asks the Commission to reopen the evidentiary record in this proceeding to quantify emissions associated with the Valley Energy Center or grant rehearing to prepare a supplemental environmental assessment (EA). Under either alternative, NYSDEC requests

² Protect Orange County is group of concerned citizens organized against the Valley Energy Center.

the Commission stay the November 9 Order until this review, and any subsequent appeal, is completed.³

7. On September 13, 2017, the Petitioners reasserted their requests for rehearing and also sought to join NYSDEC's request to reopen the record.⁴ Ms. Burns, Ms. King, Ms. Malick, and Ms. Brunn claim that, during the environmental review process, they requested that the Commission quantify end user emissions and are thus entitled to raise their concerns at this stage. The Petitioners also ask the Commission to review the potential environmental impacts associated with wetland mitigation drilling.

8. On September 15, 2017, Millennium and CPV each filed answers in opposition to the NYSDEC Motion. On September 27, 2017, Petitioners filed a reply to Millennium's answer in opposition to the NYSDEC Motion. On October 12, 2017, CPV filed a motion for leave to answer and answer in response to Petitioners' reply.

II. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise ordered by the decisional authority.⁵ Accordingly, we reject Petitioners' September 27 reply and CPV's October 12 answer to that reply.

10. Section 19 of the NGA⁶ and Rule 713(b) of the Commission's Rules of Practice and Procedure⁷ require parties to file a request for rehearing within 30 days after issuance date of any final decision or other final order in a proceeding. In this case, that date was December 9, 2016. Both the Commission and the courts have consistently held that the 30

³ NYSDEC August 31, 2017, Motion For Reopening and Stay or, In the Alternative, Request for Rehearing and Stay, at 2 (NYSDEC Motion)(citing *Sierra Club, et al. v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sierra Club*)).

⁴ The September 13 filing was joined by Protect Orange County, an entity that moved to intervene in subdocket CP16-17-002 on August 4, 2017. On that same date, CPV also moved to intervene in subdocket CP16-17-002. The order does not address those entities' requests to intervene.

⁵ 18 C.F.R. § 385.213(a)(2) (2017) ("An answer may not be made to . . . unless otherwise ordered by the decisional authority. . . . If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.").

⁶ 15 U.S.C. § 717r(a) (2012).

⁷ 18 C.F.R. § 385.713(b) (2017).

day time limit imposed by section 19(a) is a jurisdictional requirement that the Commission does not have the discretion of waiving, even for good cause.⁸

11. NYSDEC sought rehearing on August 31, 2017, over seven months past the rehearing deadline. The Petitioners seek to join in that late-filed request for rehearing and seek to raise additional issues regarding the November 9 Order well beyond the statutory rehearing period. The late-filed request for rehearing submitted by NYSDEC, as well as the new rehearing arguments asserted by the Petitioners, are jurisdictionally barred and must be rejected as untimely. As a result, we also dismiss as moot the related requests for a stay pending resolution of the rehearing requests.

12. We also decline NYSDEC's alternative request that its motion be treated as a request to reopen the record, as well as the Petitioners' request to participate in the reopened hearing. NYSDEC contends that the record should be reopened because the Commission "erred in not quantifying downstream" GHG emissions.⁹ NYSDEC's request to reopen the record to address this purported deficiency is, in substance, a request for rehearing of the November 9 Order. The Commission has consistently rejected attempts to raise new issues

⁸ See, e.g., *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1005 (D.C. Cir. 1987) (stating that "the Commission cannot waive the jurisdictional bar of [section] 19" of the Natural Gas Act.); *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (holding that an identical 30-day time requirement to file a request for rehearing in the Federal Power Act (FPA) "is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1st Cir. 1978) (holding that the rehearing provision of the NGA is "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion."); *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,160, at P 3 (2012); *Louisiana Energy and Power Authority*, 117 FERC ¶61,258, at 62,301 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 10 (2005); *Texas-New Mexico Power Company v. El Paso Electric Company*, 107 FERC ¶ 61,316, at P 22 (2004); *California Independent System Operator Corporation*, 105 FERC ¶ 61,322, at P 9 (2003); *Tennessee Gas Pipeline Company*, 95 FERC ¶ 61,169, at 61,546-47 (2001); *Columbia Gas Transmission Corp.*, 40 FERC ¶ 61,195, at 61,655 (1987). Although some of these cases were decided under the Federal Power Act, the rehearing provisions in the FPA and the NGA are identical and read in *pari materia*. See *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line v. Mobil Gas Service Corp.*, 350 U.S. 332 (1956).

⁹ NYSDEC Motion at 2.

beyond the 30-day rehearing period through motions to lodge or otherwise and we do so here as well.¹⁰

13. We note that, even if we could consider NYSDEC's request for rehearing and to reopen the record, the Commission already included the analysis that NYSDEC now seeks. Although neither NYSDEC nor any other party, including the Petitioners, raised any issues regarding downstream GHG emissions at the Valley Energy Center during the environmental review process, the November 9 Order included data from an analysis completed pursuant to New York State's Environmental Quality Review Act, which estimated that "the annual [carbon dioxide] emission rate from the proposed [Valley Energy Center] would be approximately 539,928 [metric tons of carbon equivalent] per year."¹¹ The Commission therefore already estimated and disclosed the "amount of power-plant emissions that the [Project] will make possible,"¹² as requested by NYSDEC.¹³

¹⁰ See *Texas-New Mexico Power Co.*, 107 FERC ¶ 61,316, at P 22 (2004) ("To the extent, however, that El Paso Electric seeks, through its motion to lodge, to overturn the Commission's February 18 Order, we similarly deny it.... [T]he time period within which a party must challenge a Commission order ... is statutorily established at 30 days by section 313(a) of the FPA, and the Commission has no discretion to extend that deadline."); *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,624 (1991) ("To accept the Motion to Lodge merely because of its title would allow parties to file pleadings and material not otherwise permitted We will not countenance such transparent attempt to evade our regulations") (internal quotations omitted). See also *City of Tacoma*, 110 FERC ¶ 61,120 at P 8 (2005) ("to the extent that, in the course of renewing their earlier rehearing requests, parties now make new of different arguments in support of those requests, we reject their arguments as an untimely attempt to supplement their prior requests for rehearing, which is not permitted").

¹¹ Draft Environmental Impact Statement for the CPV Valley Energy Center, at section 9.6.8.2, 9-85. See also November 9 Order, 157 FERC ¶ 61,096, at P 130 and n.196. The November 9 Order includes a minor typographical error, stating that the total annual emissions from the Valley Energy Center to be 539,938 metric tons of carbon equivalent, rather than 539,928 metric tons of carbon equivalent, but correctly calculates the total annual carbon dioxide equivalent emissions to be 1.98 million metric tons. See *id.*

¹² NYSDEC Motion at 5 (citing *Sierra Club*, 867 F.3d 1357).

¹³ In a September 15, 2017 order, the Commission found that NYSDEC, by failing to act within the one-year timeframe required by the Clean Water Act, waived its authority to issue or deny a water quality certification for the Valley Lateral Project. *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (2017) (Declaratory Order Finding Waiver). On November [15], 2017, the Commission issued an order denying NYSDEC's request for rehearing of the declaratory judgment order. *Millennium Pipeline Company, L.L.C.*, 161 FERC ¶ 61,186 (2017).

14. In addition, as discussed below, the impacts associated with wetland mitigation drilling (or HDD), were fully analyzed in the EA and considered by the Commission in the November 9 Order and no additional environmental analysis is necessary.

III. Timely-Filed Requests for Rehearing

A. The Natural Gas Act

1. The Commission Has Jurisdiction over the Valley Lateral Project

15. In their December 9, 2016 rehearing requests, Ms. Burns, Ms. King, and Ms. Brunn argue that the Commission lacks authority under the NGA to permit what they contend is a non-jurisdictional intrastate pipeline. Burns and King argue that the Commission cannot assert jurisdiction because: 1) the project will transport gas solely within the state of New York, and; 2) interstate gas transportation is not a basis for establishing jurisdiction because there is no natural gas flow associated with the siting and construction of the project.¹⁴

16. The Commission fully addressed these concerns in the November 9 Order. While Millennium's system is located entirely within the state of New York, the system – and the Valley Lateral – transports natural gas in interstate commerce by connecting with several other interstate pipelines.¹⁵ The Commission's jurisdiction attaches to any facility constructed by an interstate pipeline and used as part of its integrated system.¹⁶

17. We also reject the contention that the Commission lacks jurisdiction over the construction and operation of facilities to be used for the interstate transportation of natural gas.¹⁷ Section 7(c) of the NGA expressly authorizes the Commission to issue certificates of public convenience and necessity to “undertake the construction or extension of any facilities” for “the transportation or sale of natural gas, subject to the jurisdiction of the

¹⁴ Burns and King Rehearing Request at 9.

¹⁵ November 9 Order, 157 FERC ¶ 61,096 at PP 18-23.

¹⁶ *Id.* at P 19. See also *Gulf S. Pipeline Co., LP*, 154 FERC ¶ 61,219, at n.58 (2016) (citing *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1287 (D.C. Cir. 1994)); *Transcontinental Gas Pipe Line Company, LLC*, 157 FERC ¶ 61,095, at P 10 (2016) (“The fact that pertinent construction activity will only affect facilities in a single state does not strip the Project of its interstate character and thus does not place it beyond the Commission’s jurisdiction.”).

¹⁷ See Burns and King Request for Rehearing at 9 (arguing that “[t]here is no natural gas flow in connection with the siting and building of a pipeline facility. FERC’s interest in the project can go no farther than a decision whether to permit the connection of the proposed pipeline to an existing interstate pipeline once the project is sited and built”).

Commission.”¹⁸ The Valley Lateral Project is fully integrated with Millennium’s existing system. The project is an extension of Millennium’s larger pipeline system, Millennium will coordinate operations by delivering mainline system volumes to the Valley Lateral Project, and the project will improve capacity on the mainline through backhaul.¹⁹ The fact that siting and construction activity is a prerequisite to future service on the Valley Lateral does not strip the project of its interstate character and place it beyond the Commission’s jurisdiction.²⁰

2. The Valley Lateral Project is Needed

18. Ms. Malick argues that the Commission erred in concluding that there was a public need for the Valley Lateral Project under section 7(c) of the NGA. According to Ms. Malick, the project is unnecessary because the Valley Energy Center is no longer needed given regional electricity demands and, in any event, could be served by an existing pipeline in the area. Ms. Malick also alleges that the Valley Energy Center should not have been approved because the center is subject to ongoing criminal and civil investigations. Finally, the project should not be approved when, as Ms. Malick alleges, Commission approvals show bias in favor of pipeline applicants. We disagree with each of Ms. Malick’s claims.

19. As discussed in the November 9 Order, the Commission applied its Certificate Policy Statement to balance the project’s public benefit against potential adverse consequences. Here, CPV entered into a precedent agreement for all 127,000 Dth per day of lateral-only, project-enabled firm service for delivery to the Valley Energy Center, indicating a strong need for the project.²¹ The Commission found that the benefits of serving this demand outweigh the minimal adverse impacts, much of which will be mitigated by the environmental conditions required by the November 9 Order.²²

20. Ms. Malick contends that approval of the Valley Energy Center may be rescinded because a former New York State government employee, Joseph Percoco, was indicted on

¹⁸ 15 U.S.C. § 717f (2012).

¹⁹ November 9 Order, 157 FERC ¶ 61,096 at PP 18-19.

²⁰ *See id.* P 23.

²¹ *Id.* P 31.

²² *See id.* P 31.

corruption and bribery charges.²³ We find that Ms. Malick's arguments in this regard are entirely speculative. None of the materials relating to the investigation submitted by Ms. Malick indicate that state approval of the Valley Energy Center is subject to the outcome of any investigation. In addition, the record indicates that the Valley Energy Center is approximately 85% complete and is currently scheduled to commence commercial operation in mid-February 2018.²⁴ Moreover, under the Certificate Policy Statement, precedent agreements represent "significant evidence of project need."²⁵ Here, Millennium and CPV entered into a precedent agreement for the project's full design capacity.²⁶ The evidence of need reflected in that agreement was confirmed when the parties executed a firm transportation service agreement for the project's capacity.²⁷

21. Moreover, the Commission is not persuaded by Ms. Malick's claim that the Valley Energy Center could reasonably be served by a second pipeline. The only evidence Ms. Malick provides to support this argument is a newspaper article from 2008, which stated that the Orange and Rockland Utilities plan to build an intrastate line.²⁸ The Commission, however, considered connections to the Orange and Rockland system as system alternatives. As discussed in the November 9 Order and the EA, these alternatives would require

²³ Mr. Percoco is alleged to have used his official position and influence to help CPV obtain emission reduction credits in New York for a power plant in New Jersey and unsuccessfully sought to obtain a state power purchase agreement for the Valley Energy Center.

²⁴ See CPV Valley Answer In Opposition to NYSDEC Motion at 3. By November 2016, CPV Valley had obtained "all regulatory approvals, including its air permits from [NYSDEC] and a certificate of public convenience and necessity from the New York Public Service Commission." *Id.* at 11.

²⁵ *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 40 (2017). See also *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). See also *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (*Myersville*) (rejecting argument that precedent agreements are inadequate to demonstrate market need); *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014) (same) (*Minisink*).

²⁶ November 9 Order, 157 FERC ¶ 61,096 at P 4.

²⁷ See Millennium June 2, 2017 Abbreviated Application for a Limited Amendment of Certificate of Public Convenience and Necessity at Exhibit N (noting that Millennium has executed a contract with a 15-year primary term for service on the Valley Lateral Project).

²⁸ Malick Rehearing Request at Exhibit J, Michael Levensohn, O&R Plans 8-Mile Pipeline, Times Herald-Record, April 30, 2008.

additional looping or compression facilities to meet the capacity needs, would be within 50 feet of residential structures and, in one system alternative, would cross a major waterbody.²⁹ Thus, despite Ms. Malick's assertions, these alternatives do not provide a significant environmental advantage to the proposed route.³⁰

22. Citing comments submitted by Riverkeeper, Inc., Ms. Malick next contends the project is not needed because electricity demand can be met by other generation sources in the region.³¹ Again, construction of the Valley Energy Center is well underway and a contract for the full capacity of the Valley Lateral Project is already in place, which demonstrates that there is a need for the project.

23. Finally, we disagree that the Commission favors pipeline applicants. As evidence of such bias, Ms. Malick points to testimony by herself and others concluding that the Commission is biased because the Commission recovers its annual operating costs directly from the entities it regulates and because opposed projects were ultimately approved.³² As recently explained by a federal district court in rejecting a similar claim of bias, the "[Commission] stands to gain no direct benefit from the approval of a particular pipeline project."³³ Ms. Malick may disagree with our decision, but we fully considered input by her and other commenters by: examining other route and system alternatives; balancing the project's environmental and economic impacts against the demand for the project; and considering and responding to her concerns during the certificate proceeding and again on rehearing.

IV. Environmental Review

A. The Commission Did Not Segment its Environmental Review

24. Ms. Malick asserts that the Commission improperly segmented from the Valley Lateral Project's environmental analysis three other infrastructure projects: the Valley Energy Center; Millennium's Minisink Compressor Station; and Millennium's Eastern System Upgrade Project (Eastern System Upgrade). Segmentation refers to the requirement that an agency must consider other connected and cumulative actions, and may consider

²⁹ Commission Staff May 9, 2016, Environmental Assessment (EA) at 113-116.

³⁰ November 9 Order, 157 FERC ¶ 61,096 at P 114; EA at 115.

³¹ Malick Rehearing Request at 2 (citing Exhibit I, Comments submitted by Riverkeeper, Inc. (March 25, 2016)).

³² Malick Rehearing Request at 2 (citing <http://www.peopleshearing.org/>).

³³ *Del. Riverkeeper Network, et al., v. Fed. Energy Reg. Comm'n*, No. 16-cv-416 (D.D.C. March 22, 2017).

similar actions, in a single environmental document to “prevent agencies from dividing one project into multiple individual actions” with less significant environmental effects.³⁴

25. Connected actions must be federal and do not include non-jurisdictional facilities.³⁵ Connected actions must also: (i) automatically trigger other actions, which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; and (iii) are interdependent parts of a larger action and depend on the larger action for their justification.³⁶ Actions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts and should therefore be discussed in the same impact statement.³⁷ In addition, connected and cumulative actions must be proposed or pending at the same time.³⁸ 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.³⁹

26. The Commission did not impermissibly segment the Valley Lateral Project and Valley Energy Center. With the exception of hydropower projects, the Commission has no authority over the construction or maintenance of electricity generation plants,⁴⁰ such as the Valley Energy Center. Accordingly, the Valley Energy Center is a non-jurisdictional project that is not a “federal action” subject to the Commission’s environmental review under NEPA.⁴¹ Thus, the Commission did not impermissibly segment the Valley Energy Center from its environmental review of the Valley Lateral Project.⁴²

³⁴ *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015) (Court approved FERC's determination that, although a Dominion-owned pipeline project's excess capacity may be used to move gas to the Cove Point terminal for export, the projects are “unrelated” for purposes of NEPA).

³⁵ *Sierra Club v. U.S. Army Corps of Eng’r*, 803 F.3d 31, 50 (D.C. Cir. 2015).

³⁶ *Id.* §1508.25(a)(1)

³⁷ 40 C.F.R. § 1508.25(a)(2).

³⁸ *Id.* §1508.25 (a)(1) - (2) (defining connected and cumulative actions).

³⁹ *See Minisink Residents for Env’tl. Pres. and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014).

⁴⁰ 40 C.F.R. § 1508.18(b) (listing categories of federal actions) (2016).

⁴¹ *See* 40 C.F.R. § 1508.18(b) (listing categories of federal actions).

⁴² *See* November 9 Order, 157 FERC ¶ 61,096 at P 120. *See also Dominion Transmission, Inc.*, 156 FERC ¶ 61,140, at P 62 (2016).

27. Ms. Malick appears to suggest that the Valley Lateral Project and Minisink Compressor Station are connected actions. Ms. Malick asserts that the Minisink Compressor Station was built with a bidirectional valve that is only useful in light of the Valley Lateral Project. Ms. Malick also claims Millennium originally proposed adding a compressor to the Valley Lateral Project, which was later eliminated.

28. The Commission disagrees that the Minisink Compressor Station constitutes a connected action. First, there is no temporal overlap between the Commission's consideration of the Valley Lateral Project and the Minisink Compressor Station. The Minisink Compressor Station went into service on June 1, 2013.⁴³ Over two years later, on November 13, 2015, Millennium filed an application for the Valley Lateral Project.

29. The distinct timing of the two projects is consistent with each's independent purpose. There is no evidence that the Minisink Compressor Station included any facilities to accommodate the future Valley Lateral Project. With respect to the bi-directional valve cited by Ms. Malick, the Commission has previously explained that Millennium's system is bi-directional and the bi-directional flow valve at the Minisink Compressor Station simply allowed the new compressor station to be compatible with the operational capabilities of the rest of the system.⁴⁴ And contrary to Ms. Malick's claims, the Valley Lateral Project will not dramatically alter operations at the Minisink Compressor Station. Commission staff explained in the EA that Millennium does not propose any changes to or expect increased emissions from the station.⁴⁵

30. Ms. Malick also argues that the Commission improperly segmented the Eastern System Upgrade from its review of the Valley Lateral Project. But, similar to the Minisink Compressor Station, there is no indication that the Eastern System Upgrade and the Valley Lateral Project are connected actions. The November 9 Order explained that the Eastern System Upgrade, which was proposed after Commission staff completed the Valley Lateral Project EA,⁴⁶ would include construction of a pipeline loop along Millennium's existing mainline pipeline. The Eastern System Upgrade would also include an alternative interconnect to supply gas to the Valley Lateral Project in the event that Millennium's 24-inch-diameter mainline pipeline is taken out of service. This interconnect is not a basis for finding that the Eastern System Upgrade and the Valley Lateral Project are connected

⁴³ June 10, 2013 Notice of Commencement of Service on June 1, 2013, Docket No. CP11-515-000.

⁴⁴ *Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61,045, at P 69 (2012).

⁴⁵ EA at 79.

⁴⁶ The Eastern System Upgrade Project application was filed on July 29, 2016, several months after the Valley Lateral EA was issued. *See* Millennium July 29, 2016, Application for the Eastern System Upgrade Project, Docket No. CP16-486-000.

actions. As we explained in the November 9 Order, pipeline interconnects are commonly installed to provide a backup and/or alternative source of natural gas to ensure an uninterrupted supply of gas to intended customers during pipeline maintenance activities.⁴⁷

31. Ms. Malick offers no explanation as to why the Eastern System Upgrade and Minisink Compressor Station should be characterized as “cumulative actions,” as that term is defined by the CEQ regulations implementing NEPA.⁴⁸ We nonetheless note that these projects, along with the Valley Energy Center, were identified as past, present or reasonably foreseeable future actions with environmental impacts in the same vicinity and time frame as the Valley Lateral Project.⁴⁹ Thus, these three projects were included in the cumulative impacts analysis. Specifically, the Commission found that the Valley Lateral Project’s impacts, when added to the impacts from these three facilities, would have cumulative environmental impacts, although these impacts would not be significant.⁵⁰

32. The cumulative impacts associated with the Valley Energy Center were discussed extensively in the November 9 Order.⁵¹ With respect to the Minisink Compressor Station, the EA determined that it was ultimately outside the geographic scope of the Valley Lateral Project’s impact for most resources.⁵² But for those resources that may overlap, such as noise, the EA found that there would be no cumulatively significant impacts.⁵³ The Commission also examined the project’s impacts with all reasonably foreseeable impacts from the Eastern System Upgrade,⁵⁴ but we note that Millennium had not yet applied for the Eastern System Upgrade at that time.⁵⁵ Once Millennium proposed the Eastern System Upgrade, Commission staff was able to fully examine both projects, finding that the Eastern

⁴⁷ November 9 Order, 157 FERC ¶ 61,096 at P 55 & n.74.

⁴⁸ 40 C.F.R. § 1508.25(a)(2) (defining “cumulative actions”).

⁴⁹ EA at 100-103; *see also* 40 C.F.R. § 1508.7 (defining “cumulative impacts”).

⁵⁰ November 9 Order, 157 FERC ¶ 61,096 at PP 61, 121-30; EA at 111.

⁵¹ *See* November 9 Order, 157 FERC ¶ 61,096 at PP 121-30.

⁵² EA at 105 (explaining that the Minisink Compressor Station was outside the region of influence for wetlands and waterbodies).

⁵³ EA at 111.

⁵⁴ EA at 104 (determining there would be no significant cumulative impacts on geology and soil resources for the Eastern System Upgrade Project and the Valley Lateral Project).

⁵⁵ *See supra* n.52.

System Upgrade Project would contribute to a negligible to minor cumulative impact, and thus not significant, when the effects of the project are added to the past, present, and reasonably foreseeable projects in the region, including the Valley Lateral Project.⁵⁶ We note that Ms. Malick does not take issue with the EA's cumulative impact analysis.

B. The Commission Fully Considered Horizontal Directional Drilling

33. In the November 9 Order, the Commission approved Millennium's use of the HDD construction method to install facilities under wetlands, waterways, and roads along the route. Ms. Burns and Ms. King allege that the EA failed to disclose the risk of HDD bentonite spills and potential impacts associated with pipeline repair. Ms. Brunn is also concerned that HDD will not mitigate impacts on wetlands and bog turtle habitat when, as she contends, only trenching, and not HDD, can be used for future pipeline repairs. Because a future emergency or repair will necessarily require trenching, this will adversely impact wetlands and sensitive habitat. Ms. Brunn asks that the Commission address this concern by moving the pipeline route.⁵⁷ We disagree that moving the route to avoid HDD is a reasonable alternative and deny the request for rehearing on this issue.

34. The Commission fully addressed the potential harms from HDD and mitigation to minimize those impacts, including the risk of bentonite spills from drilling mud. As explained in the EA, drilling mud is composed of non-toxic bentonite clay and water. During the HDD process, drilling mud would be used to lubricate the drill bit, remove the drill cuttings, and stabilize the borehole from collapse.⁵⁸ The risk of an inadvertent return of this mud typically occurs at the exit and entry points of the drill alignment. Consequently, the Commission requires all pipelines proposing to use HDD to describe how an inadvertent release of drilling mud would be contained and cleaned up.⁵⁹ Consistent with this

⁵⁶ Commission Staff, March 31, 2017, Environmental Assessment for the Eastern System Upgrade Project (CP16-486-000) at 166. We note that the D.C. Circuit has ruled that this approach is consistent with our cumulative impact, and consequently cumulative action, requirements under NEPA. See *Minisink Residents for Env'tl. Pres. and Safety, v. FERC*, 762 F.3d 97, n.11 (D.C. Cir. 2014).

⁵⁷ Ms. Brunn Rehearing Request at 6.

⁵⁸ EA at 17.

⁵⁹ The Wetland and Waterbody Mitigation Procedures (Procedures) at 9. The Procedures identify mitigation measures that are required, as applicable, to minimize the extent and duration of disturbance on wetlands and waterbodies during and following project construction. *Notice of Availability of Final Revisions to the Plan and Procedures*, 78 Fed. Reg. 34,374 (June 7, 2013). The current versions of the Plan and Procedures are available on the Commission's website at <http://www.ferc.gov/industries/gas/enviro/guidelines.asp>.

requirement, Millennium proposed, and the Commission approved, a Horizontal Directional Drill Contingency Plan.⁶⁰

35. Ms. Burns and Ms. King are also mistaken that future pipeline repair will require trenching or other procedures that will adversely impact waterbodies or wetlands. In the event pipeline installed by HDD would need to be repaired, excavation to expose the pipeline installed using HDD would not be feasible. These pipeline sections will be installed at an average depth of 32 to 47 feet, which is too deep for the type of trenching suggested by petitioners.⁶¹ Accordingly, the affected pipeline would be abandoned in place and a new section of pipeline would be installed by HDD, which does not require trenching.

C. The Commission Properly Examined the Risk of Seismic Activity

36. Ms. Burns and Ms. King allege that the Commission failed to consider the risk of the Valley Lateral's failure due to seismic activity. Ms. Malick asserts that the Commission failed to consider the risks posed by a purported fault line crossing the site of the Valley Energy Center. We disagree.

37. The Commission fully considered the seismic risk posed to the pipeline. As explained in the EA, the proposed project is located in a region with relatively low historical seismic activity, and the little activity that has occurred would be unlikely to damage the pipeline.⁶² And, though outside the scope of the Commission's jurisdiction and NEPA review, we note that the Town of Wawayanda Planning Board also considered and responded to the substance of Ms. Malick's concerns regarding seismic risk to the Valley Energy Center. The State Environmental Quality Review for the Valley Energy Center

⁶⁰ November 9 Order, 157 FERC ¶ 61,096 at ordering paragraph (A); EA at 17.

⁶¹ See Millennium December 21, 2016 Implementation Plan at Attachment C. We note that Millennium's implementation plan incorporates four additional conventional bores and two HDDs to further minimize impacts on wetlands and waterbodies. These project changes were reviewed and approved by the Commission on October 27, 2017.

⁶² EA at 28-29. The EA explained that 63 seismic events, all with magnitudes of 3.6 or less, have occurred within 50 miles of the project within the last 50 years. This does not conflict with the information submitted on rehearing by Ms. Burns and Ms. King. Ms. Burns's and Ms. King's Rehearing Request at 7, n.10 (noting that two seismic events, with a level of 2.3 and 1.9, occurred in Wawayanda County in 2008).

considered the relatively low seismic activity for the area and indicated that structures at the facility will be designed to meet or exceed local seismic hazards.⁶³

D. Threatened and Endangered Species

1. The Commission Examined the Impacts to Threatened and Endangered Species

38. Ms. Burns and Ms. King claim that the presence of endangered species habitat, including the bog turtle, northern long-eared bat, and Indiana bat, required the Commission to prepare a full environmental impact statement (EIS) rather than an EA. Ms. Malick contends that the Commission failed to consider the previous adverse impacts to the Indiana Bat and bog turtle habitats at the Valley Energy Center. We disagree.

39. NEPA requires federal agencies to prepare an EIS for major federal actions significantly affecting the quality of the human environment.⁶⁴ In order to determine whether an action requires an EIS, an agency may first prepare an EA.⁶⁵ If the agency concludes there will not be any significant environmental impact, the agency may issue a Finding of No Significant Impact (FONSI) and is not required to prepare an EIS.⁶⁶

40. The mere possibility that threatened and endangered species may exist in the area does not automatically require the preparation of an EIS. Rather, the Council on Environmental Quality (CEQ) regulations indicate that an adverse effect on listed species is a factor to be considered in determining whether a proposed action will have a significant impact on the environment.⁶⁷ Here, the Commission fully considered the project's impacts, including cumulative impacts, on threatened and endangered species. The EA found, and the Commission agreed, that the project would not have a significant impact on threatened

⁶³ New York State February 8, 2012 Final Environmental Impact Statement for the CPV Valley Energy Center at 4-217, at http://www.cpvvalley.com/pdfs/CPV_Valley_FEIS/Volume%20I_FEIS_CPV_Valley_Energy/FEIS_Sections_1_to_5.pdf.

⁶⁴ 42 U.S.C. § 4332(C) (2012).

⁶⁵ 40 C.F.R. §§ 1501.4(b), 1508.9.

⁶⁶ *See id.* §§ 1501.3; 1501.4(c), (e); 1508.9.

⁶⁷ *Id.* § 1508.27(b)(9). *See also El Paso Nat. Gas Co.*, 136 FERC ¶ 61,175, at P 20 (2011) (“the regulations require an agency to consider whether adverse effects on listed species are sufficiently severe to require preparation of an EIS”).

and endangered species nor significantly add to the cumulative impacts on these resources.⁶⁸ Thus, the Commission was not required to prepare an EIS.

2. The Commission Fully Considered Threatened Bog Turtle Habitat on Ms. Brunn's Property

41. Ms. Brunn alleges that the Commission violated the ESA because the project could impact federally-listed threatened species. In this regard, Ms. Brunn submitted a report by Dr. John Crow, who inspected Ms. Brunn's land for the threatened bog turtle's habitat with Millennium's contractors. Based on this survey, Ms. Brunn claims that bog turtle habitat is present, which purportedly conflicts with Millennium's November 19, 2016 report that no such habitat exists.

42. The November 19, 2016 bog turtle survey cited by Ms. Brunn did not initially address her land. A survey addendum, however, submitted by Millennium on December 16, 2016, did assess Ms. Brunn's land and found that bog turtle habitat was present.⁶⁹ As a result, Millennium proposed to conduct HDD to avoid impacting wetlands that may support bog turtle habitat. During HDD, approved bog turtle monitors will be onsite to ensure that no turtles are in the work zones.

43. On February 2, 2017, the U.S. Fish and Wildlife Service reviewed Millennium's project changes and concurred with the finding that the project is not likely to adversely affect bog turtles.⁷⁰ At that point, no additional measures or alternatives to the project route were necessary to ensure ESA compliance.⁷¹

E. The Analysis for Environmental Justice Communities Was Proper

44. Ms. King and Ms. Burns contend that the Commission violated NEPA by failing to fully consider impacts on environmental justice communities. Ms. King and Ms. Burns

⁶⁸ EA at 106.

⁶⁹ December 16, 2016 Letter: Phase I Bog Turtle Survey Addendum from Mr. John Zimmer, Market Director, Pipeline/LNG, Millennium, to Mr. Tim Sullivan, Office Supervisor, U.S. Fish and Wildlife, New York Field Office, at 6 (December 21, 2016).

⁷⁰ Millennium February 15, 2017 Bi-Weekly Status Report #4, at 7, February 2, 2017 Letter from David Stilwell, Office Supervisor, New York, U.S. Fish and Wildlife Service Letter to Mr. Ron Happach, Chief Operating Officer, Millennium.

⁷¹ See 50 C.F.R. § 402.13(a) ("If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.").

argue that the EA erroneously relied on information from the 2000 census and should have included a more thorough analysis of impacts on environmental justice communities based on 2010 census figures.

45. This argument was fully addressed in the November 9 Order,⁷² which explained that the data sets used in the EA are consistent with that used by the State of New York. The EA's environmental justice analysis was based on 2015 mapping data provided by the New York State Office of Environmental Justice, which itself incorporated 2000 census data. In any event, the 2010 census data indicates that the nearest potential environmental justice area is approximately 0.4 miles from the Valley Lateral Project.⁷³ This would not alter the EA's conclusion that the project would not disproportionately impact potential environmental justice communities.

F. The Commission Examined All Project Impacts on Cropland

46. Ms. Malick argues that the Commission violated NEPA by failing to examine the crop damage associated with Millennium's system. Ms. Malick cites a comment by a landowner in the Hancock Compressor Project proceeding, which stated that Millennium "damaged the property so badly and never followed the Black Dirt Plan."⁷⁴ Ms. Malick claims this comment is evidence that heat from the Millennium pipeline causes crop damage and decreased crop production.

47. Regardless of its validity, the comment cited by Ms. Malick is not relevant here because it refers to the impact of a compressor station in a different proceeding. Ms. Malick provides no evidence that Millennium's system causes heat-induced impacts on any cropland at issue in this proceeding.

48. Moreover, Millennium fully considered and mitigated the project's impacts on farmland. To mitigate cropland loss, Millennium committed to compensate landowners for any production losses, reduce impacts on adjacent areas of farmland through inspection, and mitigate for the permanent loss of agricultural lands through individual landowner agreements.⁷⁵ The Commission found these mitigation measures to be adequate in the November 9 Order. No additional analysis or mitigation measures are necessary.

⁷² November 9 Order, 157 FERC ¶ 61,096 at PP 131-132.

⁷³ *Id.* P 132.

⁷⁴ Malick Rehearing at 2 (citing April 16, 2015 Comments by James Bastek (CP13-14)).

⁷⁵ EA at 67.

G. The Commission's Cumulative Impacts Analysis Was Proper

49. Ms. Burns and Ms. King claim the Commission failed to assess cumulative impacts including degradation to biological habitat and the human environment. Ms. Malick also argues that the Commission failed to consider New York state protected agricultural districts at the Valley Energy Center, the loss of Indiana bat habitat on agricultural lands, and the possibility of leaking oil from an abandoned pipeline near Millennium's system. Finally, Ms. Burns and Ms. King contend that the Commission omitted the Eastern System Upgrade, Minisink Compressor Station, and Valley Energy Center from the cumulative impacts analysis. We disagree.

50. The EA analyzed the cumulative impact of the Valley Lateral Project with twenty other existing or proposed projects, including the Eastern System Upgrade, Minisink Compressor Station, and Valley Energy Center.⁷⁶ The EA detailed these projects' impacts on geology and soils, water resources and wetlands, vegetation and wildlife, land use and visual resources, air quality, climate change, and noise.⁷⁷

51. The EA explained that the ESA consultation process considered the current status of affected species and cumulative impacts, but concluded that these impacts would not be significant. The EA concluded that the project's loss of prime farmland and farmland of statewide importance would not be significant.⁷⁸ The EA also specifically addressed Ms. Malick's concerns with the Valley Energy Center, explaining that the center would be developed on agricultural land, but that the Town of Wawayanda determined that this change is compatible with its Comprehensive Plan and the mixed commercial use zoning for the area.⁷⁹

52. We dismiss Ms. Malick's arguments regarding the abandoned oil pipeline because she raises them for the first time on rehearing. The Commission looks with disfavor on parties raising issues for the first time on rehearing that could have been raised earlier, particularly during NEPA scoping, in part, because other parties are not permitted to respond to requests for rehearing.⁸⁰

53. Moreover, Ms. Malick has provided very little information regarding the abandoned oil pipeline cited in her rehearing request. Although the request references an "Exhibit G" with information regarding the oil pipeline, the exhibit itself was not submitted with Ms.

⁷⁶ *Id.* at 101 – 111.

⁷⁷ *Id.*

⁷⁸ *Id.* at 31-33, 67, 106-107.

⁷⁹ *Id.* at 107.

⁸⁰ *See, e.g., Northwest Pipeline, LLC*, 157 FERC ¶ 61,093, at P 27 (2016).

Malick's filing. The EA does not identify this abandoned oil pipeline in the cumulative impacts analysis and there is no evidence suggesting that the oil pipeline contributes to cumulative impacts in the area.

H. The Commission Fully Considered All Feasible Alternatives

54. Ms. Burns, Ms. King, and Ms. Brunn allege that the Commission failed to fully consider alternatives that would collocate the project pipeline along existing road and railway easements. Ms. Brunn argues that the Commission should reconsider route alternatives based on a bog turtle habitat report by Dr. John Crow. Dr. Crow's survey results indicated that the accepted route crossing Ms. Brunn's land will impact potential bog turtle habitat, wetlands, and a stream crossing. Ms. Brunn also argues the accepted route is located in a flood hazard area and pipeline emergencies will be difficult to address during a flood. In light of this information, Ms. Brunn urges the Commission to reconsider routing the project to collocate the pipeline along either nearby Route 84 or a railway easement. Finally, Ms. Burns and Ms. King contend that the Commission violated its own guidelines to avoid wetlands when it accepted the proposed route.

55. Courts review both an agency's stated project purpose and its selection of alternatives under the "rule of reason," where an agency must both reasonably define its goals and an alternative is reasonable if it can feasibly achieve those goals.⁸¹ When an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal to adopting it to varying degrees or with modifications.⁸²

56. The EA met these requirements. The EA identified and evaluated thirteen alternatives to the project, including the no-action alternative, two system alternatives, six major alternative routes, and four minor route variations.⁸³ As discussed in the EA and November 9 Order, none of these alternatives offer significant environmental advantages over the accepted route. Ms. Brunn's information about wetland, turtle habitat, and flooding on her property does not alter this analysis. The Commission had already considered Ms.

⁸¹ 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 the rule of reason.). See also *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2016) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action").

⁸² See *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72-74 (D.C. Cir. 2011).

⁸³ EA at 113-24.

Brunn's flooding concerns, and, as mentioned above, Millennium will mitigate impacts on potential bog turtle wetland habitat through HDD drilling. In contrast, the Interstate 84 collocation alternative would result in greater impacts on wetlands and forested land; would require crossing of a major waterbody; and would require more temporary workspace for side-slope construction. The railroad easement alternative would result in impacts on a municipal park (a potential high consequence area), additional wetlands, and Caitlin Creek, which parallels the route.⁸⁴ Based on this information, the accepted route continues to be the environmentally preferable alternative.

57. Finally, the Commission did adhere to its wetland guidance in accepting the preferred route. The Wetland and Waterbody Construction and Mitigation Procedures (Procedures) directs applicants to route the pipeline to avoid wetlands to the maximum extent possible, and if a wetland cannot be avoided, to minimize disturbance to wetlands.⁸⁵ That is exactly what the preferred route does. As discussed in the EA, Millennium proposed efforts to minimize disturbance to at least 650 linear feet of the 1,259 linear feet of wetlands crossed by the project by using HDD drilling and conventional bore construction methods.⁸⁶ Millennium will also follow the Procedures during construction to further minimize impacts. Of all the route alternatives, the accepted route would impact the least acres of wetlands and was ultimately determined to be environmentally preferable.⁸⁷

The Commission orders:

The requests for rehearing and stay are denied or rejected, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸⁴ This easement also poses a risk of disturbing possible soil contamination from nearby creosote treatment on the railroad ties.

⁸⁵ Procedures at 13.

⁸⁶ EA at Appendix E. *See also* Millennium December 21, 2016 Implementation Plan at Attachment C (adding four additional conventional bores and two HDDs to further minimize impacts on wetlands and waterbodies).

⁸⁷ November 9 Order, 157 FERC ¶ 61,096 at P 78; EA at 119.