IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, *Petitioner*, v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.	Case No. _____ FERC Docket Nos. CP15-115-02; CP15-115-03

PETITION FOR REVIEW

Pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b), and Rule 15(a) of the Federal Rules of Appellate Procedure (FRAP), petitioner New York State Department of Environmental Conservation (the Department) hereby petitions this Court to review (i) a final order of the Federal Energy Regulatory Commission (FERC) issued August 6, 2018, entitled "Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act" (164 FERC ¶ 60,084) (the Waiver Order); and (ii) FERC's "Order Denying Rehearings and Motions to Stay" issued April 2, , 2019 (167 FERC ¶ 61,007)("Rehearing Denial").

This Court has jurisdiction over the Department's timely petition for review under 15 U.S.C. §717r(a). The Waiver Order and the Rehearing Denial should be set aside in whole as illegal, unreasonable, arbitrary and capricious. The Waiver Order is attached as Exhibit A to this Petition. The Rehearing Denial is attached as Exhibit B.

Dated: May 28, 2019
Albany, New York

Respectfully submitted,

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EXHIBIT A

164 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

National Fuel Gas Supply Corporation Docket No. CP15-115-002
Empire Pipeline, Inc. CP15-115-003

ORDER ON REHEARING AND MOTION FOR WAIVER DETERMINATION UNDER SECTION 401 OF THE CLEAN WATER ACT

(Issued August 6, 2018)

1. On February 3, 2017, the Commission issued certificates of public convenience and necessity to National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively National Fuel) under section 7(c) of the Natural Gas Act (NGA) to construct and operate the Northern Access 2016 Project.[1] The Commission also authorized the abandonment of certain facilities under section 7(b) of the NGA. The Northern Access 2016 Project includes approximately 99 miles of pipeline, one modified and one new compressor station, a new dehydration facility, and ancillary facilities. The facilities will expand firm transportation service on National Fuel's existing system by 497,000 dekatherms (Dth) per day and will expand firm transportation service on Empire's existing system by 350,000 Dth per day.

2. On March 3, 2017, National Fuel filed a timely request for reconsideration and clarification or, in the alternative, a request for rehearing of the Certificate Order. On March 6, 2017, eleven landowners (Landowners),[2] Allegheny Defense Project and Sierra Club (collectively Allegheny), and the Town of Pendleton filed timely requests for rehearing of the Certificate Order.[3]

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[1] *Nat'l Fuel Gas Supply Corp*., 158 FERC ¶ 61,145 (2017) (Certificate Order).

[2] The Landowners comprise intervenors Jason Brosius, Barbara Ciepiela, Gary Gilman, David Hargreaves, Paula Hargreaves, Kimberly Lemieux, Roy A. Mura, Ann Marie Paglione, Sam and Lynn Pinto, Karen Slote, and Kim Zugelder.

[3] Landowners March 6, 2017 Request for Rehearing, Investigation and Stay of Certificate (Landowners Request for Rehearing); Allegheny and Sierra Club March 6,

3. Most of the requests for rehearing also sought a stay of the February 3 Order. The Commission denied those stay requests in an order issued on August 31, 2017.[4] For the reasons discussed below, the requests for rehearing of the Certificate Order are dismissed or denied.

I. Procedural Issues

A. Tolling Order

4. On April 3, 2017, the Commission issued an order in this proceeding granting rehearing for further consideration. In its rehearing petition, Allegheny asserts that by issuing such tolling orders the Commission fails to act on requests for rehearing within the NGA's 30-day limit and deprives parties of timely judicial review because project sponsors may proceed with construction and place facilities into service before the Commission addresses the issues on rehearing as a prerequisite to judicial review.

5. In the absence of Commission action on rehearing requests within 30 days, those requests for rehearing (and any timely requests filed subsequently) are deemed denied.[5] The Commission routinely issues tolling orders for the limited purpose of affording the Commission additional time for consideration of the matters raised on rehearing. Courts, including the First, Fifth, and D.C. Circuits, have upheld the validity of these tolling orders.[6] Allegheny provides no basis to persuade us that the tolling order is not valid in this case. In any case, because we are issuing the rehearing order, and parties to this proceeding may seek judicial review, this issue is moot.

2017 Request for Rehearing (Allegheny Request for Rehearing); Town of Pendleton March 6, 2017 Petition for Rehearing (Town of Pendleton Request for Rehearing). On March 7, 2017, the Town filed an errata to its request for rehearing.

[4] *Nat'l Fuel Gas Supply Corp*., 160 FERC ¶ 61,043 (2017).

[5] 15 U.S.C. § 717r(a) (2012); *see also* 18 C.F.R. § 385.713 (2017).

[6] *E.g*., *Del. Riverkeeper Network v. FERC*, No. 17-5084, slip op. at 16 (D.C. Cir. July 10, 2018) (noting that "we have long held that FERC's use of tolling orders is permissible under the Natural Gas Act"); and *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988) (citing *Cal. Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969)).

B. Companies' Renewed Motion for Expedited Action

6. On December 5, 2017, the companies submitted a filing titled "Renewed Motion for Expedited Action," in which they assert a separate basis for their claim that the New York State Department of Environmental Conservation (New York DEC) waived authority under section 401 of the Clean Water Act to issue or deny a water quality certification for the Northern Access 2016 Project.[7] To the extent the companies' seek to expand their request for rehearing with this additional waiver argument, their pleading is statutorily barred as it is outside the thirty day period for seeking rehearing.[8] However, we note that the D.C. Circuit has indicated that project applicants who believe that a state certifying agency has waived its authority under CWA section 401 to act on an application for a water quality certification must present evidence of waiver to the Commission.[9] We find that the companies, through their December 5, 2017 pleading, have presented evidence of waiver separate from the claims made in their March 3, 2017 request for rehearing and have effectively petitioned the Commission for a waiver determination. Accordingly, we treat the waiver claim asserted at pages 6–8 of the December 5, 2017 filing as a motion requesting a waiver determination.[10]

C. Motions for Leave to Answer Pleadings

7. New York DEC filed a motion for leave to answer the companies' request for reconsideration and clarification or, in the alternative, request for rehearing.[11] The

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[7] *See* National Fuel December 5, 2017 Renewed Motion for Expedited Action at 6-8.

[8] Pursuant to section 19(a) of the NGA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order. 15 U.S.C. § 717r(a) (2012).

[9] *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).

[10] *See* 18 C.F.R. § 385.212(a) (2017) (permitting a motion to be filed at any time); *see also Mobil Oil Explor. & Prod. Se. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (the Commission "enjoys broad discretion in determining how best to handle related, yet discrete issues") (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543-44 (1978)).

[11] New York DEC March 10, 2017 Motion for Leave to Answer and Opposition and Response.

companies then filed a motion for leave to answer New York DEC's answer.[12] The companies also filed a pair motions for leave to answer the requests for rehearing and stay filed by Allegheny and by the Landowners and the Town of Pendleton.[13]

8. Sierra Club and New York DEC filed answers to the companies' motion for waiver determination.[14] Seneca Resources Corporation (Seneca Resources) filed a comment on December 22, 2017, in support of the companies' motion for waiver determination. The companies filed motions for leave to answer and answer Sierra Club's and New York DEC's answers.[15]

9. Answers to motions – here Sierra Club's December 18, 2017 answer and New York DEC's December 20, 2017 answer – are permitted.[16] Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to rehearings and answers to answers unless otherwise ordered by a decisional authority.[17] The Commission finds good cause to waive Rule 213(a)(2) and admits National Fuel's March 21, 2017 Motion for Leave to Answer and Answer responding to the Landowners' and the Town of Pendleton's rehearing requests because the answer assisted the Commission in its decision-making process. All other answers filed by New York DEC and the companies are rejected.

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[12] National Fuel March 27, 2017 Response to New York DEC.

[13] National Fuel March 21, 2017 Answer to Motion for Stay, Motion for Leave to Answer, and Answer (responding to Allegheny); National Fuel March 21, 2017 Motion for Leave to Answer and Answer (responding to the Landowners and the Town of Pendleton).

[14] Sierra Club December 18, 2017 Motion for Leave to Answer and Answer; New York DEC December 20, 2017 Renewed Motion for Leave to Answer and Opposition.

[15] National Fuel January 2, 2018 Motion for Leave to Answer and Answer (responding to Sierra Club); National Fuel January 2, 2018, Motion for Leave to Answer and Answer In Response to Renewed Motion for Leave to Answer and Opposition of New York DEC; National Fuel January 5, 2018 Motion for Leave to Supplement Answer (responding to New York DEC).

[16] 18 C.F.R. § 385.213(a)(3) (2017).

[17] *Id*. § 385.213(a)(2).

D. Request for a Trial-Type Evidentiary Hearing

10. The Landowners request a hearing before an Administrative Law Judge on the issue of whether the companies may appropriately use eminent domain authority to construct a project that will deliver 72 percent of transported gas into Canada.

11. Although our regulations provide for a hearing, neither section 7 of the NGA nor our regulations require that such hearing be a trial-type evidentiary hearing. When, as the case here, the written record provides a sufficient basis for resolving the relevant issues, it is our practice to provide for a paper hearing.[18] We have reviewed the request for an evidentiary hearing and conclude that all issues of material fact relating to the companies' proposal are capable of being resolved on the basis of the written record. Accordingly, we will deny the Landowners' request for a formal hearing.

E. Access to Privileged Precedent Agreements

12. The Landowners state that they are unable to verify the companies' commitments to serve consumers in the Northeast because the precedent agreements were filed as privileged.[19] However, the Landowners could have obtained those documents. As participants to the proceeding, the Landowners could have made a written request to the companies for a copy of the complete, non-public version of the precedent agreements,

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[18] *See NE Hub Partners, L.P.*, 83 FERC ¶ 61,043, at 61,192 (1998), *reh'g denied*, 90 FERC ¶ 61,142 (2000); *Pine Needle LNG Co., LLC*, 77 FERC ¶ 61,229, at 61,916 (1996). Moreover, courts have recognized that even where there are disputed issues, the Commission need not conduct an evidentiary hearing if the disputed issues "may be adequately resolved on the written record." *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 114 (D.C. Cir. 2014) (quoting *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994)).

[19] Section 388.112 of the Commission's regulations permits any person filing a document with the Commission to request privileged treatment for some or all of the information contained in the document that the filer claims is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA), and should be withheld from public disclosure. 18 C.F.R. § 388.112(a) (2017). To obtain privileged treatment, the filer must (1) include a justification for requesting privileged treatment, (2) designate the document as privileged, and (3) submit a public version of the document with the information that is claimed to be privileged material redacted, to a practicable extent. *Id*. § 388.112(b).

pursuant to the procedures set forth in our regulations.[20] Landowners did not do so, and so cannot raise arguments resulting from this failure.

II. Discussion

A. Issues under the Natural Gas Act

1. Public Convenience and Necessity under Section 7

13. The Commission's Certificate Policy Statement explains that, in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences.[21] In the Certificate Order we found that the companies had demonstrated market demand for the Northern Access 2016 Project because all of the proposed transportation capacity has been subscribed by Seneca Resources Corporation (Seneca Resources)[22] under long-term precedent agreements.[23] The Commission explained that under these agreements, "[o]f the total incremental firm service, 140,000 Dth per day (28 percent) will be delivered into Tennessee's system for delivery into markets in the northeastern U.S. The remaining 357,000 Dth will be carried over Empire's system for intended delivery into Canada, but with the option for delivery along Empire's system in northern and central New York."[24] The Certificate Order also explained that the project "will provide benefits to all sectors of the natural gas market by providing producers access to multiple markets throughout

[20] *Id*. § 388.112(b)(2)(iii)-(iv).

[21] *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).

[22] Seneca Resources is an exploration and production subsidiary of National Fuel Gas Company, which is also the parent company of both National Fuel and Empire.

[23] Seneca Resources entered into a long-term precedent agreement with Empire for 350,000 Dth per day of firm transportation service and with National Fuel for 497,000 Dth per day of firm transportation service. *See* Certificate Order, 158 FERC 61,145 at PP 10, 11, and 16.

[24] *Id*. P 32.

the U.S. and Canada and increasing the diversity of supply to consumers in those markets."[25]

14. On rehearing, Allegheny claims that, by relying on the precedent agreements with Seneca Resources, an affiliate of both applicants, the Commission failed to adequately and independently evaluate the economic need for the project. Allegheny asserts that the Commission's reliance on precedent agreements ignores the potential for illusory contracts with affiliates. Allegheny points to former Chairman Norman Bay's separate statement to support their claim that the Commission erroneously "fixat[es] on precedent agreements."[26]

15. Allegheny, the Landowners, and the Town of Pendleton argue on rehearing that the Applicant's intent to deliver up to 350,000 Dth/d (72 percent) of transported gas to Canada undermines the Commission's finding of public benefit. Allegheny asserts that the deliveries to Canada undermine the value of the precedent agreements as evidence of economic need. The Landowners claim that the Commission should have excluded the 350,000 Dth/d from the project's public benefits.[27] In a related argument, the Landowners claim that eminent domain authority under the NGA should not be used to benefit consumers outside the U.S.[28] The Landowners also state that the authorization for Empire to export natural gas should not be allowed until the current Secretary of the U.S. Department of Energy develops a rationale why such exports accord with the current President's goal of energy independence. The Town of Pendleton asserts that there has been no showing of economic need for the project because all of the project's capacity is

[25] *Id*.

[26] Allegheny Request for Rehearing at 42. We note that then-Chairman Bay's separate statement, which accompanied the Certificate Order, spoke broadly to the Commission's certificate proceedings. It did not directly address the proceeding for the Northern Access 2016 Project.

[27] The Landowners also claim that the Commission's analysis of domestic benefits in New York should have been time-limited to reflect the companies' proposal to stop deliveries into Tennessee's Line 200 in New York on November 1, 2018. Because the Certificate Order rejected the proposal to stop deliveries as premature, we dismiss this argument as moot. *See* Certificate Order, 158 FERC 61,145 at PP 50-55.

[28] Landowners Request for Rehearing at 4-5.

subscribed by a Canadian pipeline company and, thus, the natural gas to be transported will not serve domestic consumers.[29]

16. The Certificate Policy Statement established a policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a specified percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[30] These factors can include, but are not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.[31] The Commission stated that it would consider all evidence submitted by the applicant regarding project need. Even so, the Certificate Policy Statement made clear that, although the Commission no longer requires applicants to submit precedent agreements, they are "significant evidence of demand for the project" and "will always be important evidence" of such demand.[32]

17. We affirm the Certificate Order's finding of economic need. Here, Seneca Resources has subscribed the entire project capacity for a primary term of 15 years. Our policy does not require that shippers be domestic end-use consumers of natural gas.[33] Shippers may be producers, marketers, local distribution companies, or end users. As we have previously stated, the fact that a project is driven primarily by producers does not render it speculative.[34] Producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for

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[29] Town of Pendleton Request for Rehearing at 1.

[30] Certificate Policy Statement, 88 FERC at 61,747. Prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. *See* Certificate Policy Statement, 88 FERC at 61,743.

[31] Certificate Policy Statement, 88 FERC at 61,747.

[32] *Id*. at 61,748; *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 Envtl. Pres. and Safety*, 762 F.3d at 112 n.10 (same).

[33] *See Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 29 (2017) (rejecting challenge to need for project based on allegation that some of the gas appeared destined for export).

[34] *Maritimes & Ne. Pipeline, L.L.C.*, 87 FERC ¶ 61,061, at 61,241 (1999).

selling gas to end-use consumers in a given market and have made a business decision to subscribe to the capacity on the basis of that assessment.[35]

18. It is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.[36] When considering applications for new certificates, the Commission's primary concern regarding affiliates of the pipeline as shippers has been whether there may have been undue discrimination against a non-affiliate shipper.[37] Here, no such allegations have been made, nor have we found that the project sponsors engaged in any anticompetitive behavior. We note that the companies offered proposed capacity under the same rates, terms, and conditions to other potential customers in an open season in June 2014.

19. Regarding adverse impacts, there are no facts in this record and none raised by the parties that undermine the Certificate Order's findings that the project's adverse economic impacts are limited. We affirm the findings that the companies' existing firm customers will not subsidize the project[38] or suffer degraded service, that no service on other pipelines will be displaced, that the project minimizes impacts on landowners and surrounding communities, and that the project will not significantly affect the quality of the human environment.[39]

20. Regarding public benefits, the Commission was not required to exclude those benefits related to the export of natural gas to Canada.[40] As we noted in the Certificate

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[35] *Id*.

[36] *E.g., Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 55 (2017); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 39 (2016); *Paiute Pipeline Co*., 151 FERC ¶ 61,132, at P 33 (2015); *Midwestern Gas Transmission Co*., 114 FERC ¶ 61,257, at P 34 (2006).

[37] *See* 18 C.F.R. § 284.7(b) (2017) (requiring transportation service to be provided on a non-discriminatory basis).

[38] This finding was based in part on our denial of a predetermination that Empire's project costs should receive rolled-in rate treatment in Empire's next general rate case. Certificate Order, 158 FERC 61,145 at PP 60-63. We reaffirm this denial below.

[39] Certificate Order, 158 FERC 61,145 at PP 26-30, 197.

[40] *See, e.g., Elba Liquefaction Co., L.L.C.*, 155 FERC ¶ 61,219, at PP 31-37 (2016) (authorizing the Elba Express Modification Project to deliver gas for export at the Elba Liquefaction Project), *Magnolia LNG, LLC*, 155 FERC ¶ 61,033, at PP 27-32 (2016) (authorizing the Lake Charles Expansion Project to deliver gas for export at the Magnolia

Order, the U.S. Department of Energy, not the Commission, authorizes the export or import of natural gas as a commodity.[41] The Commission does not have the authority to make an independent determination on that matter.[42] Moreover, under section 3 of the NGA, proposals to import and export natural gas to and from partner nations in free trade, like Canada, are to be deemed "consistent with the public interest."[43] The statute requires that the Department of Energy authorize such applications without modification or delay.[44]

21. A decision by the Department of Energy to authorize a company to export natural gas is not sufficient, by itself, to satisfy the section 7 public convenience and necessity standard for related, proposed facilities.[45] Here, the Certificate Order noted that the project will provide benefits to all sectors of the natural gas market by allowing producers to access multiple markets in the northeastern U.S. and in Canada, increasing the

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LNG Project); *Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at PP 25-30 (2014) (authorizing a pipeline project to transport gas for import and export to and from an LNG terminal).

[41] Certificate Order, 158 FERC 61,145 at P 32 n.21.

[42] *See ANR Pipeline Co. v. FERC*, 876 F.2d 124, 131 (D.C. Cir. 1989) (upholding the Commission's decision not to second guess, in a section 7 proceeding, the Department of Energy's determination that the import component of the proposed project would be consistent with the public interest).

[43] 15 U.S.C. § 717b(c) ("the importation . . . or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation must be granted without modification or delay.")

[44] *Id*.

[45] *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at PP 39-40, *order denying reh'g*, 157 FERC ¶ 61,194, at PP 29-31 (2016). In *Jordan Cove Energy Project, L.P.*, the Commission refused to rely on the Department of Energy's public interest finding under section 3 for exports at the proposed Jordan Cove LNG terminal to support the Commission's separate inquiry under section 7 whether the proposed delivery pipeline would be required by the public convenience and necessity. The applicants had filed no precedent agreements for service on the pipeline, and the Commission concluded that the applicants' generalized allegations of need did not outweigh the pipeline's potential adverse impacts on landowners and communities.

diversity of supply to those markets.[46] For example, Empire can flexibly integrate the project's incremental capacity by directing the 357,000 Dth/d of natural gas to Canada, as intended, or to Empire's domestic customers under a future arrangement.[47] The parties offer neither facts nor theories to undermine our assessment.

22. Under NGA section 7, the Commission has jurisdiction to determine whether the construction and operation of proposed interstate pipeline facilities are required by the public convenience and necessity. If so the Commission issues a certificate. But it is Congress, speaking directly in NGA section 7(h), that authorized a certificate-holder to exercise eminent domain authority to acquire land or other property necessary to construct or operate the approved facilities if the certificate-holder cannot acquire such property by agreement with the owner.[48] Congress did not establish any prerequisite for eminent domain authority beyond the Commission's decision to issue a certificate.[49]

23. The Town of Pendleton is incorrect that the entire project capacity has been subscribed by TransCanada. The entire project capacity has been subscribed by Seneca Resources for deliveries to interconnection points from which the gas can be farther transported. In Seneca Resources' comments in support of the project, the company stated that it has executed long-term agreements for 350,000 Dth/d of firm transportation on TransCanada PipeLines Limited and Union Gas Limited to allow for ultimate delivery and sale of gas at the Dawn market hub in Ontario Province, Canada.[50] We noted in a recent proceeding that at the Dawn market hub, shippers may use one of the natural gas storage facilities, sell to Canadian markets, or transport gas back to United States markets in the Northeast and Midwest through interconnecting pipelines.[51]

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[46] Certificate Order, 158 FERC 61,145 at P 32.

[47] *Id*.

[48] 15 U.S.C. § 717f(h) (2012).

[49] *See, e.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at PP 30-34 (2017); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 77 (2017); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 61 (2017).

[50] Seneca Resources May 1, 2015 Comments at 3-4.

[51] *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 46 n.39 (2017).

24. For the reasons discussed above, we affirm that we appropriately balanced the Northern Access 2016 Project's limited adverse impacts, discussed below, with the evidence of public need.

2. Predetermination of Rolled-In Rate Treatment

25. Under the Commission's Certificate Policy Statement, the threshold requirement for a pipeline proposing a new project is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.[52] To receive a predetermination from the Commission that it would be appropriate to roll the costs of an expansion project into the pipeline company's system rates in a future section 4 proceeding, a pipeline must demonstrate that project revenues generated using actual contract volumes and the maximum recourse rate (or the actual negotiated rate if the negotiated rate is lower than the recourse rate) are expected to exceed the project's cost of service.[53] If that is demonstrated, we will grant the predetermination of rolled-in rate treatment for the cost of the project, absent a material change in circumstances. We make this determination in the certificate proceeding to provide certainty regarding the potential economic impacts of a project before it goes forward.[54]

26. The Certificate Order denied Empire's request for a pre-determination of rolled-in rate treatment because revenues from Empire's contract with Seneca Resources would not exceed the project's cost of service in the entire first year and most of the second year of service.[55] The Commission explained that if Empire were to file its next rate case before project revenues exceed costs on an annual basis, then rolled-in rate treatment of project costs could result in higher system rates, under which existing firm customers would subsidize the project costs.[56] However, the Certificate Order did not preclude

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[52] Certificate Policy Statement, 88 FERC at 61,745.

[53] *Tenn. Gas Pipeline, Co., L.L.C.*, 144 FERC ¶ 61,219, at P 22 (2013). In some cases where revenues and costs were approximately the same, the Commission granted a predetermination of rolled-in rate treatment but placed the company on notice that if there are cost overruns, rolled-in rate treatment should be reexamined in a future rate case. *E.g., E. Shore Nat. Gas. Co*., 115 FERC ¶ 61,311, at P 16-17 (2006).

[54] *See, e.g., Tenn. Gas Pipeline Co., L.L.C.*, 140 FERC ¶ 61,120, at P 19 (2012).

[55] Certificate Order, 158 FERC 61,145 at PP 60-63.

[56] *Id*. P 61.

Empire from seeking rolled-in rate treatment for project costs in its next section 4 rate case.[57]

27. The companies seek reconsideration and, in support, request that we reopen the record in this proceeding to accept revised Exhibits K and N showing a higher revenue stream to Empire under a renegotiated contract with shipper Seneca Resources. We deny the requests.

28. The Commission has discretion to reopen the record and consider new evidence on rehearing. However, a party seeking to reopen the record carries a heavy burden:

> . . . the requesting party must demonstrate the existence of extraordinary circumstances. The Commission has held that the requesting party must demonstrate a change in circumstances that is more than just material — it must be a change in core circumstances that goes to the very heart of the case. This policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.[58]

29. We will not reopen the record. Empire explains that increased capital costs for the project have led shipper Seneca Resources to agree to pay a higher rate, such that project revenue will exceed the project's cost of service in all years. Though the increase to the shipper's negotiated rate may evince a change in circumstances, it does not rise to the level of "extraordinary circumstances" that overcome the need for finality in the administrative process. Reopening the record at this late date would impose additional burdens on the parties. To ensure adequate process, the Commission would need to provide a formal opportunity for others to comment on the new evidence or otherwise participate in the proceeding. The Commission has granted a predetermination of rolled-in rate treatment on rehearing in a few proceedings, but none required that we reopen the record.[59]

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[57] *Id*. P 62.

[58] *See Millennium Pipeline Co., L.L.C*., 142 FERC ¶ 61,077, at PP 8-9 (2013) (internal citations and quotations omitted).

[59] *See, e.g.*, *Dominion Transmission, Inc*., 147 FERC ¶ 61,221, at PP 6-7 (2014) (noting that the Commission had granted a predetermination in a different certificate order 13 years earlier); *Transcontinental Gas Pipeline Co., LLC*, 130 FERC ¶ 61,010, at PP 6-10 (2010) (explaining that the Commission had overlooked supporting information in the original application).

30. When we decide in a certificate order whether a predetermination of rolled-in rate treatment for project costs is appropriate, we base our decision on the facts, estimates, and assumptions at the time the certificate is issued. Even if we grant a predetermination, we cannot foresee whether circumstances will change to such an extent that the project is no longer eligible for rolled-in rate treatment by the time the pipeline company files its next rate case. For this reason, the predetermination is merely a rebuttable presumption in favor of the certificate-holder. The rebuttable presumption reflects the Commission's conclusion that it is appropriate for parties who believe that circumstances have materially changed to bear the burden of proof in the rate case.

31. Here it is Empire itself who asserts that circumstances have materially changed, and we conclude that Empire will appropriately bear the burden of proof in its next rate case if Empire seeks rolled-in rate treatment for project costs. The Certificate Order explicitly does not preclude Empire from doing so, and the Certificate Order facilitates the future rate case by directing Empire to keep separate books and accounting of costs attributable to the project.[60] The information in Empire's revised Exhibits K and N is based on estimates that may change again before Empire files its next section 4 rate case. The Commission sees little value in reconsidering this moving target now, given that another material change in revenues and costs before the next section 4 rate case might negate the predetermination that Empire seeks here.

32. Accordingly, for the reasons discussed above, we will deny the companies' request for reconsideration of our denial of a predetermination of rolled-in rate treatment for the costs of Empire's portion of the project. This finding is without prejudice to Empire proposing and fully supporting rolled-in treatment in a future NGA general section 4 rate case.

3. Section 401 of the Clean Water Act - Waiver

33. The companies, in their request for rehearing and in their December 5, 2017 waiver request, assert two distinct bases for a determination that New York DEC waived its authority under section 401 of the Clean Water Act to issue or deny a water quality certification for the Northern Access 2016 Project. In their request for rehearing, the companies argue that because New York DEC failed to act on the companies' application for a water quality certification within the 90-day period established in the Commission's *Notice of Schedule for Environmental Review* for the project, the state waived certification. The companies make a different argument in their December 5 motion for a waiver determination, claiming that waiver occurred when New York DEC failed to act within one year of the date the agency received the water quality certification application.

[60] Certificate Order, 158 FERC 61,145 at PP 62-63.

34. Section 401 of the Clean Water Act requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must obtain a water quality certification from the state in which the discharge will originate.[61] If the state "fails or refuses to act on a request for certification within a reasonable period of time (not to exceed one year) after receipt of such request," then the certification requirement is waived.[62]

35. New York DEC received the companies' application for a water quality certification on March 2, 2016.[63] New York DEC and National Fuel agreed in a letter dated January 20, 2017, to extend the agency's period for decision under section 401 by establishing April 8, 2016, as the date "on which the application was deemed received by [New York] DEC".[64] New York DEC denied the application on April 7, 2017.[65]

a. Ninety-Day Commission Deadline for Federal Authorizations

36. In their request for rehearing, the companies assert that New York DEC waived its authority to issue a section 401 water quality certification for the Northern Access 2016 Project because New York DEC failed to act on the companies' March 2, 2016 application for a water quality certification within the 90-day "Federal authorization

[61] 33 U.S.C. § 1341(a)(1) (2012).

[62] *Id*.

[63] National Fuel March 4, 2016 Supplemental Environmental Information (providing joint application for section 401 water quality certification and other authorizations).

[64] New York DEC / National Fuel January 24, 2017 Water Quality Certification Permit Application receipt date agreement (filed in Docket No. CP15-115-000) (reproducing the January 20, 2017 Letter Agreement).

[65] New York DEC April 14, 2017 Corrected Notice of Denial of the Section 401 Water Quality Certification. The companies have appealed the denial to the U.S. Court of Appeals for the Second Circuit, which case is still pending. *National Fuel Gas Supply Corp. v. N. Y. State Dep't of Envtl Conservation*, No. 17-1164 (2d Cir. Fled April 21, 2017).

decision" deadline established in the Commission's *Notice of Schedule for Environmental Review*[66] for the project. We deny this claim.

37. Section 313 of the Energy Policy Act of 2005 directs the Commission to establish a schedule for all federal authorizations required under federal law with respect to an application for authorization under section 3 or section 7 of the NGA.[67] In establishing the schedule, section 313 requires that the Commission "shall . . . comply with applicable schedules established by Federal law."[68] The Commission's rule to implement section 313 requires that other agencies make a final decision on a request for a federal authorization no later than 90 days after the Commission issues its final environmental document for a proposed project, "unless a schedule is otherwise established by Federal law."[69]

38. The Commission's schedule does not apply to a water quality certification because section 401 of the Clean Water Act provides an "applicable schedule established by Federal law" when it requires that state or federal agencies act on a request for

[66] 81 Fed. Reg. 23,287 (Apr. 20, 2016) (establishing October 25, 2016, as the deadline for other federal authorizations).

[67] Pub. L. No. 109-58, 119 Stat. 594, 690 (2005) (modifying section 15 of the NGA, codified at 15 U.S.C. § 717n).

[68] *Id*.; 15 U.S.C. § 717n(c)(1)(B).

[69] *Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record*, Order 687, FERC Stats. & Regs. ¶ 31,232 (2006) cross-referenced at 117 FERC 61,076) (codified at 18 C.F.R. § 157.22). In the preamble to this rule, the Commission explained that it interprets section 313's requirement to "comply with applicable schedules established by Federal law" to refer to schedules specified either in the United States Code or in the Code of Federal Regulations, including those under the Clean Water Act and Coastal Zone Management Act. 71 Fed. Reg. 62,912 at 62,914 n.12, 62,915 n.18 (Oct. 27, 2006). The Commission also explained that in setting a schedule, the Commission has no ability to shorten or extend a schedule established by Federal law: "the Commission can only encourage agencies to act in advance of deadlines set by Federal law, it cannot compel them to do so." 71 Fed. Reg. 62,912 at 62,915.

certification "within a reasonable period of time (which shall not exceed one year) after receipt of such request . . . ."[70]

b. Failure to Act within One Year

39. In their December 5, 2017 motion, the companies assert an alternative argument that New York DEC waived its authority under section 401 by failing to act on their application within one year of the initial date of receipt on March 2, 2016. The companies describe their written agreement with New York DEC as an invalid attempt by the parties to waive section 401's jurisdiction-stripping time limit.[71]

40. New York DEC counters that nowhere in the statute or in the Commission's recent decision about section 401 waiver in *Millennium Pipeline Co., L.L.C.* is there an express prohibition against an applicant and a certifying agency agreeing to modify the receipt date from which the one-year period commences.[72] New York DEC states that prohibiting negotiated receipt dates will obligate certifying agencies to deny an application and force the applicant to reapply and recommence the entire review process, even if the original application is very close to a final decision.[73] Sierra Club similarly asserts that the mutual agreement between National Fuel and New York DEC in January 2017 produced a more expeditious decision than if the companies had withdrawn and

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[70] *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 702 (D.C. Cir. 2017) (dicta).

[71] National Fuel December 5, 2017 Renewed Motion for Expedited Action at 6-8 (citing *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,186, at P 38 (2017)). We note that the letter agreement states that "[t]he Parties reserve all rights under the applicable State and Federal laws, as may be applicable, with the exception of any claim as it may relate to the date of April 8, 2016, by which the Application was deemed received by NYSDEC as set forth herein." New York DEC / National Fuel January 24, 2017 Water Quality Certification Permit Application receipt date agreement at 1 (filed in Docket No. CP15-115-000). The Commission's construction of the law is not affected by a private agreement not to raise an issue. *See, e.g., Tenn. Gas Pipeline Co.*, 24 FERC ¶ 61,079, at 61,205 (1983) (deleting provisions of a settlement agreement that would make the Commission's legal conclusion on a question of statutory interpretation contingent upon an agreement between natural gas producers).

[72] New York DEC December 20, 2017 Renewed Motion for Leave to Answer and Opposition at 5-6 (New York DEC Answer) (*citing Millennium Pipeline Co., L.L.C.,* 161 FERC ¶ 61,186).

[73] *Id.* at 6.

refiled their application.[74] The inefficiency of denial followed by refiling, they claim, would run counter to Congress's intent in the NGA to move natural gas decisions along in a timely manner.[75] In addition, Sierra Club argues that it would be "irrational" if the Commission concludes that the agreement between New York DEC and National Fuel is different than the long-accepted practice of certifying agencies encouraging applicants to withdraw and refile applications as a means to reset the one-year period for action.[76]

41. We have recently affirmed our long-standing interpretation that a certifying agency waives the certification requirements of section 401 if the certifying agency does not act within one year after the date that the certifying agency receives a request for certification.[77] Our interpretation gives effect to the plain meaning of the words "after *receipt* of such request."[78] The execution of an agreement between an applicant and a certifying agency does not entail a "receipt" by the agency. Only if an applicant withdraws and refiles an application, no matter how formulaic or perfunctory the process,

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[74] Sierra Club December 18, 2017 Motion for Leave to Answer and Answer at 7 (Sierra Club Answer).

[75] New York DEC Answer at 6; Sierra Club Answer at 7.

[76] Sierra Club Answer at 6-7.

[77] *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 16 (tracing this interpretation back to 1987), *order denying reh'g*, 164 FERC ¶ 61,029 (2018); *Millennium Pipeline Co., L.L.C.*, 160 FERC ¶ 61,065, at PP 13-14, *order denying reh'gs and motions for stay*, 161 FERC ¶ 61,186, at P 41 (2017), *aff'd sub nom. N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018). *See also AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at PP 61-63 (2009) (finding waiver); *Ga. Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065, at P 7 (2004) (finding waiver after holding that the "clear and unambiguous language of section 401(a)(1) requires [the certifying agency] to act within one year of receiving [the] request for section 401 certification."); *cf.* 18 C.F.R. § 4.34(b)(5)(iii) (2017) (establishing same interpretation for hydroelectric projects).

[78] 33 U.S.C. § 1341(a)(1) (emphasis added); *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 455-56 (affirming the Commission's finding of waiver in the *Millennium Pipeline Co.* declaratory order and holding that the "plain language of Section 401" requires states to grant or deny an application within one year of receiving the application).

does the certifying agency's new "receipt" of the application restart the one-year waiver period under section 401(a)(1).[79]

42. In this case, only one application was ever pending before New York DEC. The agency received the companies' application on March 2, 2016, and was obligated to act on the application within one year. New York DEC failed to act by March 2, 2017, and so waived its authority under section 401 of the Clean Water Act.

43. Our decision is consistent with *Central Vermont Public Service Corporation*.[80] There the state certifying agency and project sponsor agreed to delay the issuance of a water quality certification until a future condition would be satisfied.[81] More than a year passed after the certifying agency received the last-filed application.[82] We concluded that by the plain language of section 401 the certifying agency had failed to "act" on the application for a water quality certification within one year.[83] We explained that:

> Section 401 contains no provision authorizing either the Commission or the parties to extend the statutory deadline. To the extent that [the state certifying agency and the applicant] reached private agreements about when the agency would act, they cannot operate to amend the Clean Water Act, nor are they in any way binding on the Commission.[84]

For the same reasons, the attempt by New York DEC and National Fuel to extend the statutory deadline by agreement must fail.

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[79] *Cf. Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 23.

[80] *Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167 (2005).

[81] *Id*. P 15.

[82] *Id*. PP 9, 14.

[83] *Id*. PP 14-15.

[84] *Id*. P 16. Indeed, Congress knows how to provide that statutory deadlines may be extended by agencies and other stakeholders when it wishes to permit such actions, and did not do so in the Clean Water Act. *Cf*. Endangered Species Act, Section 7(b)(1), 16 U.S.C. § 1536(b)(1) (2012) (requiring that Secretary of Interior or Commerce conclude consultation within 90 days "or within such other period of time as is mutually agreeable" to the federal action agency and, in some cases, to the private applicant).

44. There is a material distinction between the invalid negotiation of a modified date of receipt and the valid withdrawal and refiling of an application.[85] Aside from falling outside the plain meaning of "receipt," noted above, an interpretation of section 401 allowing parties to negotiate the date of receipt would force the Commission to entertain, on a case-by-case basis, challenges to the validity of the agreement between the parties.[86] For example, National Fuel alleges that "it was clear [in January 2017] that unless National Fuel and Empire agreed to a NYSDEC-drafted letter agreement changing the date [of receipt], NYSDEC would deny the application (regardless of merit)."[87] National Fuel offers no evidence of communications from New York DEC to this effect. Allegations like this one about unequal negotiating power would be common and intractable. Instead, the bargaining power between the applicant and the certifying agency is brought closer to parity by a strict interpretation of section 401 that is consistent with the letter of the law.

45. We are not persuaded by New York DEC's and Sierra Club's policy arguments that a decision not to allow negotiated dates of receipt will leave only inefficient alternatives, to the detriment of both the applicant's and the certifying agency's interests.[88] The certainty provided in our interpretation strikes the appropriate balance between the interests of the applicant and the certifying agency, to the benefit of both.[89] An applicant is guaranteed an avenue for recourse after a year of inaction by filing a petition for a waiver determination before the Commission (as did the applicant in *Millennium Pipeline*

[85] *See Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167 at P 16 (acknowledging that parties can essentially extend that one-year waiver period by withdrawing and refiling the certification application); *see also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456 (acknowledging that a state may request that the applicant withdraw and resubmit its application which would restart the one-year review period).

[86] *Cf. Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 20 (applying same rationale to decline request for an ad hoc determination of a "reasonable period" shorter than one year).

[87] National Fuel January 2, 2018 Motion for Leave to Answer and Answer at 9 (Responding to Sierra Club).

[88] *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456 (rejecting New York DEC's arguments that requiring it to act within one year will force it to render premature decisions among other perceived harms).

[89] *See Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 16.

Company, L.L.C.[90]) or after a denial by filing a petition for review in the court of appeals.[91] A state certifying agency remains free to deny the request for certification, with or without prejudice, within one year if the agency determines that an applicant has failed to fully comply with the state's filing or informational requirements.[92] These options do not impede a state's ability to work with an applicant to refile in accordance with the state's requirements, preclude a state from assisting applicants with revising their submissions, do not harm the process of public notice and comment, and do not increase an applicant's incentive to litigate.[93] While the Commission does not encourage this practice,[94] if the parties mutually desire a longer period for the 401 evaluation, the applicant may withdraw and refile its application.

4. Section 401 of the Clean Water Act – Conditional Certificate

46. Allegheny and the Town of Pendleton assert that the Commission violated section 401 of the Clean Water Act by issuing a conditional certificate of public convenience and necessity for the project before New York DEC acted on the companies' application for a water quality certification.

47. The Court of Appeals for the District of Columbia Circuit has rejected this argument.[95] Section 401(a)(1) of the Clean Water Act requires that "[n]o license or permit shall be granted until the certification required by this section has been obtained or

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[90] 160 FERC ¶ 61,065 (2017).

[91] *E.g., Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 108 (1st Cir. 2017) (acknowledging exclusive federal jurisdiction under NGA section 19(d)(1), 15 U.S.C. § 717r(d)(1), to review a state agency's ruling on an application for a water quality certification).

[92] *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456 (listing options state has if it deems an application incomplete, including denying the application without prejudice).

[93] *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456.

[94] *See Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167 at P 16 (withdrawal and refiling "is a scheme developed by [the certifying agency] and other parties, and neither suggested, nor approved of, by the Commission.").

[95] *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 397-399 (D.C. Cir. 2017).

has been waived."[96] But the court found that "on its face, section 401(a)(1) does not prohibit all 'license[s] or permit[s]' issued without a state water quality certification, only those that allow the licensee or permittee 'to conduct any activity . . . which may result in any discharge into the navigable waters.'"[97]

48. The Certificate Order prohibits National Fuel from commencing construction of any project facilities until the companies document that they have "received all applicable authorizations required under federal law or evidence of waiver thereof."[98] These authorizations include section 401 water quality certifications from Pennsylvania and New York. Thus, as conditioned the Certificate Order does not approve any "activity . . . which may result in any discharge," and so did not trigger the requirements of section 401 as a prerequisite to issuance.[99] Rather, the Certificate Order was "merely a first step for the companies to take in the complex procedure to actually obtaining construction approval."[100] Our issuance of the Certificate Order before New York DEC issued or denied a water quality certification for the project did not violate section 401 of the Clean Water Act.

5. Conflicts with State and Local Law

49. Several parties question how state and local law applies to the project. The companies request clarification that they are not required to obtain any "state-specific" permits from New York DEC related to stream crossings, water withdrawals, wetlands, air emissions, or any other matter because the state's regulatory authority is preempted by the NGA. By contrast, the Landowners criticize the Commission for failing to identify in the Certificate Order which New York state permits and certifications the companies must receive. They ask that the Commission specifically require all conditions that New York DEC might find to be required. The Town of Pendleton asserts that the Pendleton Compressor Station is incompatible with local zoning requirements at the chosen Killian Road site.

50. The NGA confers "exclusive jurisdiction" to the Commission over the interstate transportation and sale of natural gas, as well as over the rates and facilities of natural gas

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[96] 33 U.S.C. § 1341(a)(1).

[97] *Del. Riverkeeper Network,* 857 F.3d at 399.

[98] Certificate Order, App. B, Envtl. Condition 10.

[99] *Del. Riverkeeper Network*, 857 F.3d at 398.

[100] *Id*.

companies engaged in interstate transportation and sale.[101] We consistently state in certificate orders that we encourage cooperation between interstate pipelines and state and local agencies.[102] However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[103] The Commission's power to preempt state and local law is circumscribed by the NGA's savings clause, which saves from preemption the "rights of States" under the Coastal Zone Management Act, Clean Air Act, and Clean Water Act.[104] State agencies administering these laws appropriately determine in the first instance which requirements under state or local law are applicable or are preempted.[105]

51. Both the companies and the Landowners ask, from opposing sides, that the Commission interpret and adjudicate in their favor local, state, and federal laws that are outside of the Commission's jurisdiction. The Environmental Assessment (EA) for the project addressed potential impacts from air emissions, water withdrawals, and the crossing or disturbance of streams and wetlands, concluding that the project's impacts, if mitigated by listed measures, would not be significant. However, state and local agencies retain full authority to grant or deny the permits associated with these resources.[106] Unless a state or local agency, either through action or inaction, interferes with the timely development of the project, the question of preemption does not arise.

52. The companies also request clarification that Environmental Condition 21 in the Certificate Order, which requires that the companies file with the Commission a final

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[101] *Myersville*, 783 F.3d at 1315 (citing *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 306-308 (1988)).

[102] *See, e.g., Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 173 (2017).

[103] *Id.*; *see also* Certificate Order, 158 FERC 61,145 at P 194.

[104] 15 U.S.C. § 717b(d).

[105] *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013).

[106] For example, the Certificate Order explains both that Northern Access 2016 Project facilities that emit air pollution are subject to state review under state regulations independent of the Commission's review and also that Minor Facility Registrations or State Facility Permits under New York DEC regulations *may* constitute federally delegated state permits that the companies must receive before constructing the project. Certificate Order, 158 FERC 61,145 at P 130.

invasive plant species plan "developed through coordination with" New York DEC and the Pennsylvania Department of Conservation and Natural Resources, does not allow the states to delay or block construction of the project by withholding their cooperation, concurrence or approval of the plan. We clarify that the companies can satisfy the requirement that the plan be "developed through coordination" with the state agencies by providing documentation to the Commission of the companies' notice to and communication with the state agencies about the plan. A state agency's failure to cooperate on, concur with, or approve the plan would not preclude a finding by the Commission that the companies had coordinated with the state agency.

53. The companies further ask that the Commission clarify that the NGA preempts the requirements expressed in the EA that the companies satisfy "state-dictated conditions, authorizations, or approvals," beyond federally-delegated state law. The companies seem to interpret the savings clause of the NGA to both preserve a portion of state authority and to nullify the rest. This is not so. Section 7(e) of the NGA empowers the Commission to add to a certificate "such reasonable terms and conditions as the public convenience and necessity may require."[107] Nothing prevents the Commission from deciding that a project's potential impact, often narrowly local, should be reasonably and appropriately mitigated in coordination with a state's or local agency's statute, regulation, permit, guidance, or oversight.

6. Abuse of Commission Process

54. The Landowners assert that National Fuel is abusing the Commission's processes to obtain a certificate under section 7 with inherent eminent domain authority. The Landowners suspect that the companies intend to later operate the Northern Access 2016 Project as a nonjurisdictional Hinshaw pipeline, a status with no eminent domain authority, to transport natural gas sourced from New York when the state lifts its current moratorium on hydraulic fracturing. The Landowners request that the Commission investigate the companies' intent.[108]

55. We deny this request. The alleged future operations are wholly speculative—the Landowners acknowledge that all evidence is "circumstantial"[109]—and would not trigger Hinshaw status. Under section 1(c) of the NGA, known as the Hinshaw amendment, a natural gas company is not subject to the Commission's jurisdiction if (1) it receives the gas it transports within or at the boundary of its state, (2) all of the gas transported on its

[107] 15 U.S.C. § 717f(e).

[108] Landowners Request for Rehearing at 3-4.

[109] *Id*. at 3.

system will be consumed within its state, and (3) its rates and services will be subject to regulation by a state commission.[110] Because Hinshaw pipeline status applies to a natural gas company, not to a subset of a company's facilities, Empire and National Fuel would need to convey the Northern Access 2016 Project's facilities in New York to a third party to transport hypothetical New York-sourced natural gas entirely for intrastate consumption under rates and services regulated by the New York Public Service Commission. The Landowners offer no explanation how this arrangement would benefit the companies more than their potential to transport the same hypothetical natural gas under the certificate for intrastate, interstate, and international consumption under Commission-regulated rates and services.

B. Issues under the National Environmental Policy Act

1. Segmentation

56. Allegheny raises the same "segmentation" argument here, mostly verbatim, that it raised in our prior proceeding for National Fuel's proposed Northern Access 2015 Project.[111] Specifically, Allegheny makes the general assertion that the Northern Access 2015 Project and Northern Access 2016 Project are connected, cumulative, and similar actions that must be analyzed together in a single environmental document. In the Commission's rehearing order for the approved Northern Access 2015 Project, issued on March 9, 2016, we denied arguments from Allegheny (then filing alone) that the Commission is allowing National Fuel to segment its planned infrastructure build-out into separate proceedings in violation of the National Environmental Policy Act (NEPA).[112] We again reject these arguments based on the same reasoning we expressed in the rehearing order on March 9, 2016.

57. Allegheny argues that the Northern Access 2015 and 2016 Projects are "connected actions" because each alternative proposed by National Fuel in its application for the Northern Access 2016 Project would co-locate new facilities with an existing facility approved as part of the Northern Access 2015 Project,[113] thus the Northern Access 2016

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[110] 15 U.S.C. § 717(c).

[111] *Tenn. Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,184, at PP 39-53 (2016).

[112] *Id.*

[113] As part of the Northern Access 2016 Project, National Fuel will construct a tie-in, a metering and regulation station, and a jumper connection at the site of the Hinsdale Compressor Station, which the Northern Access 2015 Project added to National Fuel's existing Line X.

Project cannot or will not proceed in its current form unless the Northern Access 2015 Project is constructed.

58. "An agency impermissibly 'segments' its NEPA review when it divides connected federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."[114] Actions are "connected" if they: (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; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.[115] In *Delaware Riverkeeper Network v. FERC*, the court ruled that individual pipeline projects were "connected" or 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.[116]

59. There is no indication that the Northern Access 2015 or 2016 Projects require the other project's facilities to fulfill their authorized purposes.[117] Unlike the proposals before the Commission in *Delaware Riverkeeper Network* where a single pipeline company created incremental transportation capacity on its pipeline by installing a series of pipeline loops that each "fit with the others like puzzle pieces to complete an entirely new pipeline,"[118] here the two projects serve distinct purposes. The fact that National Fuel did not propose an alternative configuration of the Northern Access 2016 Project without the co-located facilities does not prove that the Northern Access 2016 Project

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[114] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (finding four pipeline projects that created a single linear pipeline with no physical offshoots not akin to a highway network).

[115] 40 C.F.R. § 1508.25(a)(1) (2017).

[116] *Del. Riverkeeper Network*, 753 F.3d at 1314; s*ee also O'Reilly v. U.S. 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 [project] either in terms of the facilities required or of profitability").

[117] *See generally City of Boston Delegation v. FERC*, D.C. Cir. Nos. 16-1081 et al., slip op. at 14-16 (July 27, 2018) (FERC did not impermissible segment its environmental review of Algonquin's three upgrade projects on its northeast pipeline system where FERC's review of the projects was not contemporaneous and where the projects had substantial independent utility).

[118] *Del. Riverkeeper Network*, 753 F.3d at 1319.

cannot or will not proceed without the tie-in, metering and regulation station, and jumper connection at the Northern Access 2015 Project's Hinsdale Compressor Station on existing Line X. We explained in the rehearing order for the Northern Access 2015 Project that, though these co-located facilities will allow National Fuel to deliver gas to the existing Line X in the future, the applicants do not propose to do so at this time nor are such deliveries necessary to justify either project.[119] The Northern Access 2016 Project pipeline will receive only electric power and telecommunication services from the Hinsdale Compressor Station, not compression.[120]

60. Also unlike the projects at issue in *Delaware Riverkeeper Network*, here there is no evidence of financial interdependence.[121] Using figures from the Northern Access 2016 Project application, the estimated increase in cost to National Fuel to construct a separate tie-in with electric power and telecommunication facilities along Line X rather than co-locating the tie-in with the Hinsdale Compressor Station would be $4.3 million, a small fraction of the $376.7 million estimated cost of National Fuel's portion of the Northern Access 2016 Project.[122] Nothing in the record indicates that this expense would influence National Fuel's and Empire's decision to proceed with the Northern Access 2016 Project.

61. In *Delaware Riverkeeper Network v. FERC*, the court also put a particular emphasis on the four projects' timing, noting that when the Commission reviewed one of the four projects, the other projects were either under construction or pending before the

[119] *Tenn. Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,184 at P 48.

[120] *Id*. (citing National Fuel and Empire March 17, 2015 Joint Application for the Northern Access 2016 Project, Ex. F, Res. Rep. 1 at 6-7).

[121] *Del. Riverkeeper Network*, 753 F.3d at 1316 (projects financially connected were company acknowledged that earlier project made it possible for it to achieve the capacity increase associated with the second project at a "*much lower* cost") (emphasis added).

[122] *Tenn. Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,184 at P 48 (citing National Fuel and Empire March 17, 2015 Joint Application for the Northern Access 2016 Project, Ex. K at 1, 3-4). The estimated cost to construct the 2016 Project's combined "Hinsdale Tie-In and M&R Station" is $2.37 million. By contrast, the estimated cost to construct the 2016 Project's proposed "TGP 200 Line Interconnect – Measurement & Regulation Station," a stand-alone tie-in with electric power and telecommunications facilities, is $6.71 million, indicating a difference of $4.3 million.

Commission.[123] Allegheny emphasizes the close timing of the Northern Access 2015 and 2016 Projects, arguing that National Fuel may have abused the Commission's pre-filing process by artificially keeping the Northern Access 2016 Project in pre-filing status until a few weeks after the Commission had issued a certificate for the Northern Access 2015 Project on February 27, 2015. Allegheny believes that this maneuvering allowed National Fuel to claim in the Northern Access 2016 Project application that no other related application was pending before the Commission.

62. We explained in the rehearing order for the Northern Access 2015 Project that the timing of the Commission's review of the Northern Access 2015 and Northern Access 2016 Project's would not overlap.[124] Allegheny offers no evidence that the pre-filing timeline for the Northern Access 2016 Project was not legitimate. Commission staff had already issued the environmental assessment for the Northern Access 2015 Project eight days before the beginning of the pre-filing process for the Northern Access 2016 Project on July 24, 2014.[125] National Fuel placed the Northern Access 2015 Project into service on November 1, 2015, more than one year before the Commission approved the Northern Access 2016 Project on February 3, 2017, and almost two years before National Fuel's then-anticipated in-service date for the Northern Access 2016 Project of November 1, 2017.[126]

63. We also find that the Northern Access 2015 Project and Northern Access 2016 Project are not cumulative or similar actions.[127] Actions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts and should therefore be discussed in the same environmental document.[128] The EA identified the Northern Access 2015 project among the past, present, or reasonably foreseeable future actions with environmental impacts in the same vicinity and time frame as the environmental impacts that will arise from the Northern Access 2016 Project.[129] The EA

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[123] *Del. Riverkeeper Network*, 753 F.3d at 1316.

[124] *Tenn. Gas Pipeline Co.*, 154 FERC ¶ 61,184 at PP 47, 49.

[125] Office of Energy Projects July 24, 2014 Letter Acknowledging Request to Use the Pre-Filing Review Process (filed in Docket No. PF14-18-000).

[126] *Tenn. Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,184 at P 47 n.85.

[127] *See also Tenn. Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,184 at PP 50-53.

[128] 40 C.F.R. § 1508.25(a)(2) (2017).

[129] EA at 139-161 (Section 10 Cumulative Impacts); *id*. at app. G, G-2 tbl.G-1 (identifying the Northern Access 2015 Project as an existing Commission-jurisdictional

assessed the Northern Access 2016 Project's cumulative effect on resources that are also affected by the Northern Access 2015 Project, and concluded that for all resources, the Northern Access 2016 Project would either contribute a negligible to minor cumulative impact when the effects of the project are added to those of the other FERC- and non-FERC jurisdictional projects or would "not add significantly to a long term cumulative impacts when considered along with other projects."[130] Accordingly, the two projects are not "cumulative actions" as defined by section 1508.25(a)(2) of the CEQ's regulations because they lack the potential to produce cumulatively significant impacts.

64. The CEQ regulations define "similar actions" as those actions "which 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."[131] As described above the Northern Access 2015 and Northern Access 2016 Projects are physically, functionally, and financially independent. Further, there is a lack of common timing between the two projects. Accordingly, we find that preparation of separate EAs for the Northern Access 2015 Project and Northern Access 2016 Project is both appropriate and consistent with CEQ guidance.

65. Moreover, even if, for the sake of argument, the Commission were to find that the projects were similar actions, our determination as to whether to prepare a single environmental document for similar actions is discretionary.[132] CEQ states that "[a]n 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."[133] We do not find that such a multi-project analysis is the best way to assess the impacts or alternatives to the Northern Access 2016 Project.

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project to be evaluated for potential cumulative impact to water resources; vegetation, fisheries, and wildlife; threatened and endangered species; land use and visual resources; socioeconomics; and climate change).

[130] *Id.* at 142-160.

[131] 40 C.F.R. § 1508.25 (2017).

[132] *See Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1305-06 (9th Cir. 2003) (finding agency's decision to not prepare a single EIS for similar actions was proper).

[133] 40 C.F.R. § 1508.25(a)(3) (2017) (emphasis added); *see also Klamath-Siskiyou Wildlands Center v. Bureau of Land Management.*, 387 F.3d 989, 1001-01 (9th Cir. 2004)

2. Need for an Environmental Impact Statement

66. Under NEPA, agencies must prepare an Environmental Impact Statement (EIS) for major federal actions that may significantly impact the environment.[134] Though the CEQ regulations do not provide an explicit definition of the term "significant impact," they do provide that whether a project's impacts on the environment will be considered "significant" depends on both "context" and "intensity."[135] With regard to "intensity," the CEQ regulations set forth ten factors that agencies should consider, including three cited by Allegheny: whether the proposed action is related to other actions with cumulatively significant impacts (factor 7); whether the proposed action threatens a violation of federal, state, or local law or requirements for the protection of the environment (factor 10); and the degree to which the proposed action's effects are likely to be highly controversial (factor 4).[136] Allegheny claims that the Commission failed to discuss these factors. This is not so.

67. With respect to factor 7, Allegheny argues that the Northern Access 2016 Project is related to both the Northern Access 2015 Project and to shale gas production by shipper Seneca Resources, which together pose a significant impact to the environment. However, the EA thoroughly evaluated the relationship between the Northern Access 2016 Project and other past, present, and reasonably foreseeable future actions posing a potential cumulative impact.[137] These other actions specifically included the Northern Access 2015 Project and shale gas development by Seneca Resources in the project area.[138] The EA and Certificate Order concluded that the cumulative impact of the

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(emphasizing that agencies are only required to assess similar actions programmatically when such review is necessarily the best way to do so).

[134] 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. § 1502.4 (2017).

[135] 40 C.F.R. § 1508.27.

[136] Allegheny Request for Rehearing at 15-18 (citing 40 C.F.R. § 1508.27(b)(7), (b)(10), and (b)(4), respectively).

[137] EA at 139-160.

[138] EA at 141; *id*. app. G, tbl.G-1, tbl.G-2 (identifying 75 discrete actions as well as oil and natural gas wells and gathering lines that are present "throughout the region").

Northern Access 2016 Project combined with these other actions will be minimal, temporary, and insignificant.[139]

68. Allegheny alleges that "increasing pipeline construction and shale gas development activities," generally, are detrimental to the environment, human health, public lands, and public funds. However, Allegheny's allegations are not supported with evidence and, more importantly, are not linked directly to the proposed Northern Access 2016 Project.

69. While Allegheny cites to factor 10, it offers no example of a state law, local law, or requirement for the protection of the environment that might be violated by the Northern Access 2016 Project.

70. Last, with respect to factor 4, Allegheny points to comments by New York DEC, filed August 26, 2016, that the project's potentially significant adverse impacts to water resources make an EIS necessary as proof that the Northern Access 2016 Project's effects are likely to be highly controversial.[140] For an action to qualify as highly controversial, there must be "a dispute over the size, nature or effect of the action, rather than the existence of opposition to it.[141] Here, we find that no substantial disputes exist as to the effects of the project. In the Certificate Order, we concluded that National Fuel's letter to New York DEC dated September 8, 2016, which supplemented National Fuel's joint application for all water-related state permits, had addressed all of the New York DEC's comments about both National Fuel's application and the Commission's EA.[142] New York DEC did not seek rehearing of the Certificate Order.

71. The Landowners and Allegheny assert that the Commission failed to satisfy the requirement in our own regulation that an EIS will normally be prepared first for "[m]ajor pipeline construction projects under section 7 of the Natural Gas Act using rights-of-way in which there is no existing natural gas pipeline."[143] In the Certificate Order we quoted

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[139] EA at 160; Certificate Order, 158 FERC ¶ 61, 145 at PP 168-192.

[140] Allegheny Request for Rehearing at 17-18 (quoting New York DEC August 26, 2016 Comments on the EA at 1).

[141] *Fund for Animals v. Williams*, 246 F.Supp.2d 27, 45 (D.D.C. 2003).

[142] Certificate Order, 158 FERC ¶ 61,145 at P 108.

[143] Landowners Request for Rehearing at 5 (quoting 18 C.F.R. § 380.6(a)(3) (2016)); Allegheny Request for Rehearing at 16-18 (quoting same). The Landowners assert that the route for the Northern Access 2016 Project is only co-located with existing

the exception to the same regulation, which states that an EA will be prepared first if the Commission believes that such a proposed project "may not be a major Federal action significantly affecting the quality of the human environment."[144] The Commission's conclusion was explicitly based on our expertise implementing NEPA for pipeline projects. We explained that a project like the Northern Access 2016 Project—i.e., a pipeline with 69 percent of its length co-located along existing pipeline or utility rights of way, one new and one modified gas-fired compressor station, and one new dehydration facility—normally would not fall under the "major" category for which an EIS is automatically prepared.[145]

72. Allegheny claims that the project's complexity requires an EIS, pointing to a report to investors by National Fuel Gas Company, parent company of applicant National Fuel, that describes the Northern Access 2016 Project as a "large-scale" and "major" project to "significantly increase" shipper Seneca Resources' contracted pipeline capacity.[146] Allegheny also notes both the long duration of National Fuel's consultation with New York DEC about the project's water quality issues and New York DEC August 26, 2016 comments that the project's potential adverse impacts to water resources are significant.[147]

73. We deny rehearing on this matter. The statements by National Fuel Gas Company, which is not an applicant before the Commission, were made in marketing documents[148] outside of this proceeding. The company's characterizations of the Northern Access 2016 Project are not material to the Commission's conclusion, applying our expertise to the specific evidence before us, that the Northern Access 2016 Project would not fall under the "major" category for which an EIS is automatically prepared.[149] The duration of

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powerlines, not pipelines. *Id*. In fact, the EA explains that the route would be co-located with both. *E.g.*, EA at 7, 10, 54 (specifically mentioning existing pipelines).

[144] Certificate Order, 158 FERC ¶ 61,145 at P 91 (quoting 18 C.F.R. § 380.6(b)).

[145] *Id*.

[146] Allegheny Request for Rehearing at 17.

[147] *Id*. at 17-18.

[148] *Minisink Residents for Envtl. Pres. and* Safety, 762 F.3d at 108 (affirming the Commission's rejection of a pipeline company's PowerPoint presentation as "merely a marketing document").

[149] *E.g. Transcontinental Gas Pipe Line Company, LLC*, Environmental Assessment for the Dalton Expansion Project, Docket No. CP15-117 (March 2016) (114

National Fuel's consultation with New York DEC does not necessarily indicate that the project is more complex than other projects or to what degree. As stated above, we concluded in the Certificate Order that National Fuel's letter to New York DEC dated September 8, 2016, addressed all of New York DEC comments about both National Fuel's application and the Commission's EA.[150] New York DEC did not seek rehearing of the Certificate Order.

3. Unavailable Information

74. Allegheny asserts that the Commission violated NEPA by failing to have complete environmental information, such as information about waterbody crossings and construction plans, at the time the EA was published.[151] Allegheny argues that this failure showed an implicit bias toward authorizing natural gas transportation projects and insufficient care for public participation when the Commission affirmed the EA's findings and issued a certificate for the Northern Access 2016 Project despite outstanding environmental information.

75. When Commission staff issued the EA, the extensive record provided sufficient information to estimate the project's environmental impacts and to fashion adequate mitigation measures to support the EA's finding of no significant impact.[152] The EA disclosed the nature of anticipated actions, impacts, and mitigation to provide a springboard for public comment. To instead demand fully-developed information and plans before an agency can act would be inconsistent with NEPA's reliance on procedural mechanisms rather than substantive outcomes.[153] As part of our review under the NGA

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mile pipeline project) and *Gulf South Pipeline Company, LP*, Environmental Assessment for the Coastal Bend Header Project, Docket No. CP15-517 (January 2015) (66 miles of pipeline and three new compressor stations).

[150] Certificate Order, 158 FERC ¶ 61,145 at P 108.

[151] Allegheny Request for Rehearing at 18-19.

[152] An environmental document is adequate when it allows for "meaningful analysis" and "make[s] every effort to disclose and discuss" "major points of view on the environmental impacts." 40 C.F.R. § 1502.9(a); *see also Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1328 (D.C. Cir. 2004) **(**holding that FERC's Draft EIS was adequate even though it did not have a site-specific crossing plan for a major waterway where the proposed crossing method was identified and thus provided "a springboard for public comment").

[153] *See LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (FERC did not err in permitting post-order monitoring and studies of environmental impacts); *Pub. Utils.*

and NEPA, the Commission discussed and identified those limited topics that required further information. The Certificate Order includes conditions requiring National Fuel to submit this information for Commission staff's review to verify consistency with the Commission's order prior to commencement of construction.[154] Allegheny does not demonstrate that the EA was inadequate by these standards. Nor does Allegheny demonstrate that any "omissions" in the EA left it or the public unable to make known its environmental concerns about the project's impact.[155]

76. Moreover, NEPA "does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated."[156] Here, the EA identified baseline conditions for all relevant resources. Later-filed mitigation plans will not present new environmentally-significant information nor pose substantial changes to the proposed action that would otherwise alter the finding of no significant impact. Moreover, as we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies.[157] And, as we found elsewhere, in some instances, the certificate holder may need to access property in order to acquire the

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Comm'n of Cal. v. FERC, 900 F.2d 269, 282-83 (D.C. Cir. 1990) (deferring development of specific mitigation steps until the start of construction when more details are known is "eminently reasonable"); *cf. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, at 352 (1989) (mitigation only needs to be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated).

[154] *E.g.*, Certificate Order at App. B, Envtl. Conditions 14 (report about slope stability); 15 (evaluations of karst geology), 17 (consultation with agencies about water withdrawal), 22 (surveys and consultation with agencies for protected mussels), 23 (final plan for construction across state forest), 24 (final visual screening plan), 25 (surveys and consultation with agencies and tribes for cultural resources), 26 (horizontal directional drill noise mitigation plan).

[155] *See Sierra Club, Inc. v. U.S. Forest Service*, 4th Cir. Nos. 17-2399 *et al.*, slip op. at 27-28 (July 27, 2018) (rejecting petitioners claim that FERC's draft environmental impact statement precluded meaningful comment where the applicant had not yet filed an erosion and sediment control plan at the time the draft EIS was published) (quoting *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004)).

[156] *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

[157] *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 94 (2016)*; E. Tenn. Nat. 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.

necessary information.[158] Accordingly, post-certification studies may properly be used to develop site-specific mitigation measures. It is not unreasonable for the environmental document to deal with sensitive locations in a general way, leaving specificities of certain resources for later exploration during construction.[159] What is important is that the agency make adequate provisions to assure that the certificate holder will undertake and identify appropriate mitigation measures to address impacts that are identified during construction.[160] We have and will continue to demonstrate our commitment to assuring adequate mitigation.[161]

77. With respect to Allegheny's concerns about being able to follow the developing record,[162] the Commission offers a free service, available to everyone, called eSubscription which automatically provides notification, via email, of all filings made in a specific proceeding, document summaries, and direct links to the filed documents.[163] Moreover, any entity, such as Allegheny, that files a motion to intervene and includes a contact name and email address is automatically added to the service list for the proceeding and is electronically served all documents filed or issued in the docket.[164] To the extent that any of the pending studies, surveys, consultations, or plans indicate a need for further study, consultation or mitigation measures, the Director of the Office of Energy Projects can modify the certificate conditions, implement additional mitigation measures (including stop-work orders), or withhold permission to commence

[158] *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 92 (2006).

[159] *Mojave Pipeline Co.,* 45 FERC ¶ 63,005, at 65,018 (1988).

[160] *Id*.

[161] *Id*.

[162] *See* Allegheny Request for Rehearing at 19.

[163] The April 14, 2016 Notice of Schedule for Environmental Review and July 27, 2016 Notice of Availability of the Environmental Assessment for the Northern Access 2016 Project included information about eSubscription with a link to the Commission's website to register for eSubscription.

[164] *See* 18 C.F.R. § 385.2010(e) (rule governing service).

construction.[165] Our process does not favor authorization[166] nor obstruct public review of the environmental information on which the Commission relies.

4. Purpose and Need for the Project and Alternatives

78. An agency's environmental document must include a brief statement of the purpose and need to which the proposed action is responding[167] and must analyze reasonable alternatives.[168] The EA accepted National Fuel's and Empire's articulation of the purpose and need of the Northern Access 2016 Project to provide 350,000 Dth per day of "incremental firm transportation service to markets in the northeastern United States and Canada . . . as well as markets on the Tennessee Gas 200 Line in Erie County, New York, and other interconnections with local gas distribution companies, power generators, and other interested pipelines available on both National Fuel and Empire's systems."[169] Based on the statement of purpose and need, the EA evaluated a no-action alternative, system alternatives using two existing pipeline systems in the project area, two major route alternatives, 36 potential variations to National Fuel's original proposed route, and five alternative sites for the aboveground facilities.[170] The Certificate Order affirmed the EA's analysis and conclusions for both purpose and need and for alternatives.[171] The Certificate Order also explained that the EA's omission of renewable

[165] Certificate Order at App. B, Envtl. Condition 2 (delegating authority to the Director).

[166] *See generally Del. Riverkeeper Network v. FERC*, No. 17-5084, slip op. at 11-16 (Commission is not structurally biased in making pipeline decisions); *Minisink Residents for Envtl. Pres. and Safety*, 762 F.3d at n.7 (rejecting petitioners' argument that the Commission has a "thumb on the scale for industry applicants"); *NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014) ("[t]he fact that [applicants] generally succeed in choosing to expend their resources on applications that serve their own financial interests does not mean that an agency which recognizes merit in such applications is biased.").

[167] 40 C.F.R. § 1508.9(b) (for an EA); *id.* § 1502.13 (for an EIS).

[168] *Id.* § 1508.9(b) (citing NEPA § 102(E), 42 U.S.C. § 4332(E)); *id* § 1502.14.

[169] EA at 2.

[170] EA at 161-176.

[171] Certificate Order, 158 FERC ¶ 61,145 at P 96 (purpose and need); *id*. P 100 (alternatives).

energy or increased energy efficiency as reasonable alternatives was justified because these alternatives cannot meet the purpose and need to which the Northern Access 2016 Project is responding.[172]

79. Allegheny objects to the EA's statement of the purpose and need, as well as the EA's consideration of reasonable alternatives. Allegheny specifically takes issue with how the Certificate Order characterizes past court opinions interpreting these aspects of NEPA.

80. As we have previously explained, the statement of the project's purpose and need in the environmental document differs from the Commission's determination of need under the public convenience and necessity standard of section 7(c) of the NGA.[173] The Certificate Order explained that "[c]ourts have upheld federal agencies use of applicants' identified project purpose and need as the basis for evaluating alternatives."[174] We cited the 1994 decision in *City of Grapevine v. U.S. Department of Transportation* from the U.S. Court of Appeals for the D.C. Circuit. The court stated that, "where a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'"[175] Allegheny notes that the court did not state that this substantial weight will be appropriate in every circumstance. We agree; we did not take this position. Moreover, the Fourth Circuit recently affirmed that the statement of purpose and need may be informed by "the project sponsor's goals."[176]

81. The Certificate Order explained that "[w]here an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties

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[172] *Id*. P 105.

[173] *See Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 49 (rejecting Allegheny's objection to the state of purpose and need in the NEPA document).

[174] Certificate Order, 158 FERC ¶ 61,145 at P 95 (citing *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)).

[175] *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d at 1506 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197-198 (D.C. Cir. 1991)).

[176] *Sierra Club, Inc. v. U.S. Forest Service*, 4th Cir. Nos. 17-2399 *et al.*, slip op. at 28-29 (finding the statement of purpose and need for a Commission-jurisdictional natural gas pipeline project that explained where the gas must come from, where it will go, and how much the project would deliver, allowed for a sufficiently wide range of alternatives but was narrow enough that there were not an infinite number of alternatives).

involved in the application."[177] We cited the 1991 decision in *Citizens Against Burlington, Inc. v. Busey* from the same court. The court considered whether the Federal Aviation Administration had prepared an adequate NEPA review of a city's proposal to expand its airport. The court explained that "agencies must look hard at the factors relevant to the definition of purpose."[178] By the agency's assessment, affirmed by the court, Congress had directed the agency to nurture expansions like the one proposed but had also intended that the free market, not the agency, should determine the siting of the nation's airports.[179] The court upheld both the agency's definition of purpose to help launch the expansion and the agency's elimination of alternatives that would not accomplish this purpose.[180] Allegheny emphasizes a warning from the court that its deference to an agency's reasonable discussion of objectives and alternatives "does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them."[181]

82. But here the Commission did not fulfill its own prophecy. The Certificate Order explained that the NGA does not require the Commission to analyze broad economic need for various energy resources or to plan the deployment of those resources.[182] The EA took into account the needs and goals expressed in National Fuel's application and tailored the discussion of those reasonable alternatives that could satisfy the needs and goals.

83. The Certificate Order explained that "an agency uses the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives."[183] Allegheny responds that we misrepresented language from the 1999 decision in *Colorado Environmental Coalition v. Dombeck* from the U.S. Court

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[177] Certificate Order, 158 FERC ¶ 61,145 at PP 95, 99 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 197-199).

[178] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 196 (internal citation omitted).

[179] *Id*. at 197.

[180] *Id.* at 198.

[181] *Id.* at 196.

[182] Certificate Order, 158 FERC ¶ 61,145 at P 96.

[183] *Id*. P 92 (citing *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999)).

of Appeals for the Tenth Circuit. The court does not refer to legitimate alternatives, it states that an agency must "take responsibility for defining the objectives of an action and then provide *legitimate consideration* to alternatives that fall between the obvious extremes."[184] Allegheny is correct about the mistaken paraphrasing. Even so, the project EA did provide legitimate consideration of alternatives, buttressed by the Certificate Order's explanation that the EA had justifiably omitted renewable energy or increased energy efficiency as reasonable alternatives because these alternatives cannot meet the purpose and need.[185]

84. In the EA's discussion of alternatives, Commission staff identified and evaluated each of the advantages and disadvantages of the preferred Killian Road site for the Pendleton Compressor Station in contrast to three other viable sites.[186] The Town of Pendleton does not dispute the EA's conclusion that the preferred Killian Road site poses fewer disadvantages than the rejected original Aiken Road site (Alternative Site 1). But the Town of Pendleton complains that the EA did not explain why the Killian Road site is itself acceptable given several alleged disadvantages—i.e., proximity to the hazardous waste site of Frontier Chemical Waste Process Inc., proximity to noise-sensitive areas, adverse effects to wetlands, and the need to use eminent domain to take town-owned property.[187]

85. The Town of Pendleton misunderstands that the majority of the analysis in the EA assumes a project configuration with the Pendleton Compressor Station at the preferred Killian Road site. Therefore the disadvantages of the Killian Road site are included in the analysis of the project's potential impacts (both direct and cumulative) to environmental resources.[188] The EA concluded that the site's disadvantages, even when

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[184] *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (emphasis added).

[185] Certificate Order, 158 FERC ¶ 61,145 at P 105.

[186] *E.g.*, EA at 165-176; *id*. 168 tbl.C.5-1 (comparing the Killian Road site to Alternative Sites 1, 2, and 3 across sixteen siting criteria that directly or indirectly reflect environmental impacts).

[187] Town of Pendleton Request for Rehearing at 4-5. The Town of Pendleton also criticizes the EA's consideration of the "no action" alternative. *Id*. at 1-2. But this criticism is based on the town's erroneous conclusion, discussed above, that a contract for pipeline capacity only demonstrates market need for the project if the buyer is an end user. *Supra* PP 17, 23.

[188] See discussions of the Frontier Chemical Waste Process site at pages 34 (soil contamination), 87 (land use), and 138 (public safety). See discussions of noise at 119-

combined with impacts from all other proposed facilities, do not rise to the level of significant impacts when one accounts for National Fuel's and Commission staff's proposed mitigation.[189] The Supreme Court has explained that "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[190] Further, while we seek to avoid unneeded exercise of eminent domain,[191] the possibility that National Fuel would exercise eminent domain to acquire the Killian Road site is not a basis to eliminate the site from consideration. We affirm the EA's analysis and conclusion that the Killian Road site is the preferred alternative site for the Pendleton Compressor Station.

5. Direct Impacts

86. As discussed in the EA and Certificate Order, the Commission requires that noise levels generated by a proposed new compressor station or by the combination of an existing station and expansion facilities may not exceed a day-night sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at any pre-existing noise sensitive area.[192] The U.S. Environmental Protection Agency determined that the 55-dBA standard protects the public from indoor and outdoor activity noise interference.[193] The Town of Pendleton objects that the EA's and the Certificate Order's reliance on the federal standard is improper because a consultant to the town found that a noise level of 55 dBA represents an increase of 10 decibels over the baseline at nearby residences, which exceeds state guidance that treats an increase of 6 decibels as significant.

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120 (construction noise), 125-128 (operational noise), and 157-158 (cumulative noise). See discussions of impacts to wetlands at 28 (geology), 48-51 (wetland resources), and 68 (wildlife).

[189] EA at 177.

[190] *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350.

[191] Certificate Order, 158 FERC ¶ 61,145 at P 24 (citing Certificate Policy Statement, 88 FERC at 61,736).

[192] EA at 118-128; Certificate Order, 158 FERC ¶ 61,145 at PP 128-129; *id*. App. B, Envtl. Condition 27.

[193] EA at 118 (citing EPA, *Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety* (1974)).

87. The Town of Pendleton does not refute the federal standard; rather, it points to a possible discrepancy with state guidance. The Commission's analysis of noise impacts must be "reasonable and adequately explained," but our "choice among reasonable analytical methodologies is entitled to deference."[194] The Commission consistently applies the EPA's 55-dBA day-night average as a standard in every environmental review of infrastructure projects and finds this standard to be a reasonable guideline for assessing noise impacts.[195] Commission staff has not found any other federal standard for reasonable background noise. Moreover, the Certificate Order is conditioned to ensure that the operational noise at the Pendleton Compressor Station will not exceed 55 dBA.[196]

88. The Town of Pendleton repeats a claim that the Commission ignored future noise-sensitive areas in a proposed housing subdivision that would be closer to the new Pendleton Compressor Station than any housing subdivision considered in the EA. The Certificate Order explained that NEPA review is not warranted for an unconstructed residence that would be part of a residential development not yet under construction.[197] Here, the town attaches the minutes from the February 17, 2015 meeting of the Town Planning Board, at which the board conditionally approved the "Major Subdivision Preliminary Plat" for the relevant site, noting that the applicant must provide missing information required under the town's code.[198] The Town Planning Board's conditional approval of a preliminary plat appears to be incomplete. The Commission has no way to determine whether or when plans for this housing subdivision will be final and

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[194] *Sierra Club v. FERC*, 867 F.3d 1357, at 1368 (D.C. Cir. 2017) (quoting *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004)).

[195] *See e.g.,* 18 C.F.R. § 380.12(k)(4)(v)(a) (2017) (requiring this noise standard of all new or modified compressor stations); *Williams Gas Pipelines Central, Inc.*, 93 FERC ¶ 61,159, 61,531-32 (2000) (affirming the Commission's consistent finding that the EPA's guideline that maintaining an outdoor Ldn below 55 dBA would ensure adequate protection for the indoor noise environment); *see also Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, at 378 (1989) (when parties and experts express conflicting views, the reviewing agency has discretion to choose to rely on the reasonable opinion of one or some of the disputing parties or experts).

[196] Certificate Order, App. B, Envtl. Condition 27 (requiring National Fuel to file a noise survey within 60 days after placing the compressor into service and requiring National Fuel to install additional noise controls if noise exceeds 55 dBA).

[197] Certificate Order, 158 FERC ¶ 61,145 at P 127.

[198] Town of Pendleton Request for Rehearing, Attachment at 4, 6.

construction may begin. The Commission's NEPA review of the proposed future noise-sensitive area is still not warranted.[199]

89. The Town of Pendleton warns that the project's stream crossing at Bull Creek in Niagara County will mobilize sediments contaminated with "bioaccumulative chemicals of concern" in violation of the Great Lakes Initiative under the Clean Water Act. The town states, without citation, that these chemicals were found in a lengthy investigation of a facility.[200] The Town of Pendleton urges the Commission to condition the certificate to require an alternative crossing method at Bull Creek that would not mobilize sediments.

90. In the Certificate Order we considered and affirmed National Fuel's assessment that trenchless crossing methods, which pose the least risk of mobilizing sediments, are only feasible at five stream and wetland crossings.[201] Because there is no evidence of contaminated sediment at the stream crossing at Bull Creek, National Fuel did not evaluate a trenchless crossing method for this site and Commission staff did not require an evaluation. National Fuel will use dry crossing methods at Bull Creek.[202] In National Fuel's answer to the Town of Pendleton's request for rehearing, National Fuel explains that the location where Line EMP-03 will cross Bull Creek is approximately 0.2 miles upstream of the Frontier Chemical Waste Process Inc. hazardous waste site.[203] National Fuel states that New York DEC concluded in 1992, based on sediment samples, that the hazardous waste site's effect on water quality in Bull Creek was "negligible."[204] National

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[199] *See Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d at 282-83 (finding NEPA does not require agencies to consider environmental effects of actions that are not reasonably foreseeable).

[200] Given the town's other concerns, we assume that the unnamed facility is the nearby Frontier Chemical Waste Process Inc. hazardous waste site.

[201] Certificate Order, 158 FERC ¶ 61,145 at P 109 (citing National Fuel September 8, 2016 Supplement to Joint Application for Permits in Response to New York DEC Comments, Attachment F (filed Sept. 13, 2016)).

[202] National Fuel September 8, 2016 Supplement to Joint Application for Permits in Response to New York DEC Comments at 3-19 tbl. 2; *id*. at 4-4 to 4-6 (describing dry crossing methods for both flowing and ephemeral dry streams).

[203] National Fuel and Empire March 21, 2017 Motion for Leave to Answer and Answer at 10 (National Fuel Answer to Town of Pendleton).

[204] *Id*.

Fuel also states that New York DEC concluded in 1996 that no further remediation for the site was necessary in Bull Creek.[205] National Fuel acknowledges that New York DEC has designated Bull Creek as impaired due to "unknown toxicity," but National Fuel notes that this designation was based on samples taken from Bull Creek 0.8 mile downstream of the planned Line EMP-03 crossing.[206] For the Northern Access 2016 Project, National Fuel reviewed federal and state databases to identify potential sources of contaminants within a three-mile radius of the Line EMP-03 crossing at Bull Creek. National Fuel states that it discovered no contamination or sources of contamination within the Bull Creek drainage at or above the proposed crossing. Based on the preceding information, we find that the proposal to use a dry crossing method at Bull Creek does not present a significant risk of increased mobilization of contaminated sediments. Accordingly, we deny the Town of Pendleton's request that the Commission require an alternative crossing method.

6. Indirect Impacts of Natural Gas Production

91. On rehearing, Allegheny argues that the Commission violated NEPA by failing to consider, as indirect effects, the impacts from upstream natural gas production activities.

92. 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."[208] Further, indirect effects "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population

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[205] *Id*.

[206] *Id*.; *see* New York DEC, *The Niagara River/Lake Erie Basin Waterbody Inventory and Priority Waterbodies List* at 49-50 (Sept. 2010), http://www.dec.ny.gov/docs/water_pdf/pwlniag10.pdf. The New York DEC continues to identify Bull Creek as impaired because "Unknown Pollutants" cause "biological impacts." *See* New York DEC, *Final 2016 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy* at 27 (Nov. 2016), http://www.dec.ny.gov/docs/water_pdf/303dListfinal2016.pdf; New York DEC, *Consolidated Assessment and Listing Methodology: Section 305(b) Assessment Methodology* at 27 tbl. 11 (Mar. 2015) (defining "Unknown Pollutants" and "biological impact"), http://www.dec.ny.gov/docs/water_pdf/asmtmethdrft15.pdf.

[207] 40 C.F.R. § 1508.25(c).

[208] *Id*. § 1508.8(b).

density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[209]

93. Consistent with prior natural gas infrastructure proceedings, we concluded in the Certificate Order that evidence in the record does not demonstrate a reasonably close causal relationship between the Northern Access 2016 Project and the impacts of future natural gas production warranting their review under NEPA.[210] We further concluded that evidence in the record does not allow the Commission to reasonably foresee the impacts of future natural gas production.[211] Nevertheless, we provided upperbound estimates of upstream and downstream effects based on DOE and Environmental Protection Agency (EPA) methodologies.[212]

94. Allegheny disputes both conclusions about causation and reasonable foreseeability.

a. Causation

95. Much of Allegheny's argument turns on the nature and degree of causation that Congress intended between a federal action and indirect impacts.[213] Allegheny claims

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[209] *Id.*

[210] Certificate Order, 158 FERC ¶ 61,145 at PP 155; *id*. PP 149-159. Specifically, we found no indication that the Northern Access 2016 Project is an essential predicate for production growth, given that a number of factors, such as domestic natural gas prices and production costs, drive new drilling. *Id*. PP 154-157. We also found that it is reasonable to assume that new production by shipper Seneca Resources would reach intended markets through alternate pipelines or other modes of transportation. *Id*. PP 157-159.

[211] *Id*. P 163; *id*. PP 160-167.

[212] Certificate Order, 158 FERC ¶ 61,145 at PP 184-189.

[213] Allegheny Request for Rehearing at 22-24, 28-29. Allegheny discussing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007), *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) (*Freeport*), and *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016) (*Sabine Pass*). Allegheny also points to a 2015 draft Environmental Impact Statement issued by the federal Surface Transportation Board as an example where an agency analyzed indirect

that the limitation on NEPA in *U.S. Department of Transportation v. Public Citizen*[214] does not apply in this case because the Commission has the discretion to attach conditions to a certificate and to deny a certificate that is not required by the public convenience and necessity.[215]

96. Allegheny mischaracterizes the Certificate Order. Our determination that potential incremental upstream production activities are not indirect effects of the Project did not rely on the reasoning in *Public Citizen*. Rather, we explained that a causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if a 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).[216] Based on the information Commission staff obtained through data requests,[217] we determined that the project shipper's (Seneca Resources) natural gas development activities contemplated under the shipper's Joint Development Agreement will precede the Northern Access 2016

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impacts from coal production upstream of a proposed railroad, regardless that the agency had no jurisdiction over coal production. Allegheny Request for Rehearing at 25-26.

[214] *See* 541 U.S. at 770 ("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."); *cf. Sierra Club v. FERC*, 867 F.3d at 1373 (interpreting *Public Citizen*'s limitation on NEPA to apply only where environmental effects are outside the factors that an agency can consider when regulating in its proper sphere).

[215] Allegheny Request for Rehearing at 24.

[216] Certificate Order, 158 FERC ¶ 61,145 at P 154; *see also* Certificate Order, 158 FERC ¶ 61,145 at PP 149-159.

[217] National Fuel stated that the drilling of the 75 wells (with the option for one additional 7-well pad) under the Joint Development Agreement "is not contingent upon any milestone in the regulatory process for the Northern Access 2016 Project" and will move forward without assurance that a certificate will issue. National Fuel June 23, 2016 Response to Environmental Data Request. National Fuel also expected that all wells would be drilled by February 2017, 9 months before the Northern Access 2016 Project's anticipated in-service date. *Id.* In an update filed September 20, 2016, National Fuel reported that 63 wells had been drilled, with 46 of these wells completed. *See* National Fuel September 20, 2016 Motion for Leave to Answer and Answer, app. B at 15-16.

Project and does not rely on it.[218] As discussed in more detail below, neither Allegheny nor the dissent has presented or pointed to any evidence that contradicts our finding. Thus, we affirm our prior conclusion that the Project's incremental transportation capacity is not an essential predicate for production growth or that the Project must precede production growth for the production activities contemplated under the Joint Development Agreement to occur.

97. Allegheny argues on rehearing that the drilling and completion of wells under the Joint Development Agreement are only interim steps to get the wells as close as possible to the remaining production phase of development.[219] Allegheny asserts that these interim steps do not prove that the wells will be producing gas before the Northern Access 2016 Project's in-service date. Allegheny suggests that because the Commission rarely denies an application for a natural gas pipeline, Seneca did in fact rely on the high degree of certainty that the approved project would provide an outlet for Seneca's gas. In Allegheny's view, Seneca was and is ready to immediately place the completed wells into production when the project enters service.[220] Allegheny cites statements from parent company National Fuel Gas Company to investors in 2016 and 2017 that the Northern Access 2016 Project is "designed to provide Seneca with a key outlet for its natural gas production," that Seneca has been "developing an inventory of reserves that would begin flowing into the [Northern Access 2016] pipeline," and that Seneca plans to increase its rig count in the Clermont/Rich Valley area in fiscal years 2017 and 2018 "to grow into Northern Access 2016 capacity."[221]

98. Allegheny's arguments are speculative and they do not refute the Certificate Order's conclusion that Seneca Resources' production – driven by domestic natural gas prices, production costs, and a number of other factors – would reach intended markets through alternate pipelines or other modes of transportation.[222] Allegheny offers no evidence that Seneca Resources has relied on the Northern Access 2016 Project to take steps toward the development of its resources that Seneca Resources would not have taken absent the project. The statements by parent company National Fuel Gas Company

[218] Certificate Order, 158 FERC ¶ 61,145 at P 153.

[219] Allegheny Request for Rehearing at 27.

[220] *Id*. at 26-27.

[221] *Id*. at 27-28.

[222] Certificate Order, 158 FERC ¶ 61,145 at PP 157-159.

to investors were not made before the Commission[223] and do not show that the Northern Access 2016 Project will transport new production that would not occur absent the project. The statement that the project is designed to provide an outlet for Seneca's production may show the opposite causal relationship, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas. The statements that Seneca is developing or growing its production capacity to use the Northern Access 2016 Project's transportation capacity also do not prove that new growth is caused by *this* project, given that a number of factors drive Seneca's production decisions and that alternate pipelines and other modes of transportation exist.

99. Allegheny also points to various statements from the Commission and our staff acknowledging that natural gas transportation and storage facilities, as components in the general supply chain between producers and consumers, determine which supply basins are used and the amount of gas that can be transported.[224] Allegheny claims that these broad Commission statements demonstrate that the Northern Access 2016 Project and natural gas development in the Marcellus and Utica shale formations are "two links of a single chain."[225]

100. The statements from the Commission and our staff cited by Allegheny do not reveal that transportation infrastructure causes production. Many factors drive new drilling, including production costs and market prices for natural gas. The opposite causal relationship is more 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.[226]

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[223] *Minisink Residents for Envtl. Preservation*, 762 F.3d at 108 (affirming the Commission's rejection of a pipeline company's PowerPoint presentation as "merely a marketing document").

[224] Allegheny Request for Rehearing at 24 (quoting Certificate Order, 158 FERC ¶ 61,145 at P 157 and Div. of Energy Market Oversight, FERC, *Energy Primer: A Handbook of Energy Market Basics* at 6 (Nov. 2015), http://www.ferc.gov/market-oversight/guide/energy-primer.pdf).

[225] Allegheny Request for Rehearing at 24 (citing *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989)).

[226] *E.g.*, *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 167 (2017); *see also Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) (accepting the U.S. Department of Energy's explanation that "it would be impossible to identify with any confidence the marginal production at the wellhead or local level" that would be induced by a specific natural gas export project, given that every natural-gas-producing

101. Addressing the degree of causation, Allegheny argues that the fact that other factors may influence a producer's decision to drill does not mean that additional pipeline capacity does not drive additional shale gas development. An agency's obligation under NEPA to analyze impacts only partially caused by a proposed action is subject to a rule of reason. "The [indirect] effect must be sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[227] Here, because there are other confounding factors that influence a producer's decision to drill, the effects of partially-induced natural gas development are not sufficiently likely to occur that NEPA analysis was required. The courts have upheld agencies' decisions not to analyze a proposed action's partially-induced development where the proposed action was responding to existing problems.[228]

b. Reasonable Foreseeability

102. In the Certificate Order we denied Allegheny's argument that indirect impacts of induced natural gas production are reasonably foreseeable and must be analyzed under NEPA.[229] Allegheny repeats this argument on rehearing in substantially the same

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region across the lower 48 states is part of the interconnected pipeline system and may respond in unpredictable ways to prices that rise or fall with export demand); *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).

[227] *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d, slip op. at 14 (Aug. 15, 2017) (internal quotation marks and citations omitted).

[228] *Compare 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), *with City of Davis v. Coleman*, 521 F.2d 661, 674-677 (9th Cir. 1975) (remanding decision for further analysis where a proposed freeway interchange would intentionally and necessarily lead to development at the interchange's location in an undeveloped agricultural area).

[229] Certificate Order, 158 FERC ¶ 61,145 at 160-167.

form.[230] This issue does not warrant further comment as it was fully addressed in the Certificate Order and in other natural gas infrastructure proceedings.[231] Further, the U.S. Court of Appeals for the D.C. Circuit has upheld an agency's determination that indirect effects pertaining to induced natural gas production were not reasonably foreseeable where predicting both the incremental quantity of natural gas that might be produced and where at the local level such production might occur is difficult, and where economic models estimating localized impacts would be too speculative to be useful.[232] The dissent relies on *Mid States Coalition for Progress v. Surface Transportation Board*[233] and *Barnes v. Department of Transportation*[234] to argue that the Commission must "engage in reasonable forecasting" and "at the very least, examine the effects that an expansion of pipeline capacity might have on production." The Commission has previously distinguished *Mid States* and *Barnes*.[235]

103. Thus, for the reasons stated in the Certificate Order, we continue to find that impacts from upstream production activities do not meet the definition of indirect effects, and therefore they are not mandated to be included in the Commission's NEPA review. Nevertheless, the Certificate Order did provide estimates of the potential impacts

[230] Allegheny Request for Rehearing at 30-31.

[231] *See e.g.*, *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,229, at PP 155-62 (2017); *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at PP 52-55 (2018); *Dominion Transmission, Inc.*, 156 FERC ¶ 61,140, at PP 41-60 (2016).

[232] *See Sierra Club v. U. S. Dep't of Energy*, 867 F.3d at 200 (D.C. Cir. 2017) (accepting DOE's "reasoned explanation").

[233] 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*).

[234] 655 F.3d 1124, 1138 (9th Cir. 2011) (*Barnes*).

[235] *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 64-66 (2018) (LaFleur, Comm'r, dissenting in part; Glick, Comm'r, dissenting in part); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190, at PP 64-66 (2018) (LaFleur, Comm'r, concurring; Glick, Comm'r, dissenting in part); *Nexus Gas Transmission, LLC*, 164 FERC ¶ 61,054, at P 96 (2018) (LaFleur, Comm'r, dissenting; Glick, Comm'r, dissenting); and Certificate Order at PP 166-167 (distinguishing *Mid States*).

associated with upstream unconventional gas production and of natural gas.[236] Allegheny is thus mistaken in asserting that the public has been left to make these assessments.[237]

104. Allegheny asserts that the estimates of potential upstream impacts to land resources from unconventional natural gas development are inaccurate because studies by the U.S. Geological Survey, the New York DEC, and the Nature Conservancy assume higher rates of land use for Marcellus shale well pads and associated infrastructure.[238]

105. Although the Commission was not obligated to include an estimate of upstream production impacts,[239] we reasonably relied on publicly available methodologies specifically designed by the U.S. Department of Energy's National Energy Technology Laboratory to predict impacts from unconventional natural gas development to develop an estimate where, as here, the specific location of such development is not reasonably foreseeable. The difference between these methodologies and those in Allegheny's cited studies do not stray beyond a difference in view or the product of agency expertise. Allegheny points to no specific flaw in the National Energy Technology Laboratory's methodologies, except to say that the figures are too low.

7. Cumulative Impacts

106. On rehearing, Allegheny argues that the EA's cumulative impacts analysis was insufficient. Specifically, Allegheny asserts that the Commission failed to take a hard look at natural gas development's potential cumulative impacts to water resources; vegetation, fisheries, and wildlife; threatened and endangered species; and climate change.

107. A "cumulative impact," as defined by CEQ is the "impact on the environment which results from the incremental impact of the action when added to other past,

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[236] Certificate Order, 158 FERC ¶ 61,145 at PP184-189.

[237] Allegheny Request for Rehearing at 31-32.

[238] *Id*. at 38-39.

[239] *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 41-43 (2018) (explaining that the Commission is not required to consider environmental effects that are outside of our NEPA analysis of the proposed action in our determination of whether a project is in the public convenience and necessity under section 7(c)). *See also 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).

present, and reasonably foreseeable future actions."[240] The D.C. Circuit has explained that "a meaningful cumulative impacts analysis must identify: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."[241] The geographic scope of the Commission's cumulative impacts analysis varies from case to case, and resource to resource, depending on the facts presented. Further, where the Commission lacks meaningful information about potential future natural gas production within the geographic scope of a project-affected resource, then production-related impacts are not reasonably foreseeable so as to be included in a cumulative impacts analysis.[242]

108. Regarding water resources, Allegheny argues that the EA looked only at the potential cumulative impact of development-related water withdrawals, while ignoring impacts of erosion and sedimentation resulting from the construction of new roads, well sites, and associated infrastructure. Allegheny states that the EA made no attempt to quantify the current, extensive level of gas development in McKean County, instead treating all the oil and natural gas wells and gathering lines as one project.[243] Because the EA did separately identify 119 wells (proposed, active, or abandoned) within 0.25 mile of project facilities as part of the analysis of the cumulative impact to soils and geology, Allegheny concludes that hundreds or thousands of wells may exist within a larger boundary at a watershed or landscape scale.[244] Allegheny faults the EA for providing no

[240] 40 C.F.R. § 1508.7.

[241] *Freeport*, 827 F.3d 36, 39 (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) and *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002)); *See also Sierra Club v. U.S. Dep't of Energy*, 867 F.3d at 14 (holding that the dividing line between what is reasonable forecasting and speculation is the "usefulness of any new potential information to the decision-making process").

[242] *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 34 (citing *Columbia Gas Transmission, LLC*, 149 FERC 61,255, at P 120 (2014)).

[243] Allegheny Request for Rehearing at 37 (quoting EA app. G at G-5 and Certificate Order, 158 FERC ¶ 61,145 at P 183)

[244] Allegheny Request for Rehearing at 37 (citing EA at 142).

analysis of broader development-related cumulative impacts to the Upper Allegheny River watershed where the project sits in McKean County or any subwatersheds therein.

109. The project crosses four watershed subbasins that together comprise 4,667 square miles of land. Of these, the Upper Allegheny subbasin comprises 2,591 square miles.[245] The effort required to identify discrete natural gas development infrastructure within the Upper Allegheny subbasin is not proportional to the limited magnitude of the impacts from the Northern Access 2016 Project's 27.8 miles of pipeline in McKean County, Pennsylvania, of which 14 miles are co-located with existing rights-of-way.[246] Here, the Commission's cumulative impacts analysis was correctly proportional to the magnitude of the environmental impacts of the proposed action.[247] The remaining 71 miles of pipeline, both compressor stations, and the dehydration facility sit in New York where shale gas development is prohibited.

110. The EA appropriately quantified potential cumulative impacts to the extent practicable and otherwise described them qualitatively.[248] For example, the EA used figures from the U.S. Geological Survey to calculate that the development of the 118 wells currently drilled or proposed within 0.25 mile of the project would use 1,062 acres

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[245] EA at 143; Certificate Order, 158 FERC ¶ 61,145 at P 172 n.231 (citing U.S. Geological Survey, *Watershed Boundary Dataset* (last visited Dec. 8, 2016), http://water.usgs.gov/GIS/wbd_huc8.pdf).

[246] EA at 7 tbl.A.4.a-1.

[247] *See* CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005) (2005 CEQ Guidance), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf (actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis).

[248] *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d at 200 (concluding that the U.S. Department of Energy acted consistently with the "rule of reason" when it determined that even knowing the shale plays likely to contribute to export-induced production would not add any confidence to projections about impacts on particular water resources, which are unique for each location and may vary widely from well to well, and thus projections about play-level impacts to water resources would not "facilitate meaningful analysis."); *id*. at 200 ("At a certain point, the Department's obligation to drill down into increasingly speculative projections about regional environmental impacts is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects.") (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. at 768).

of land and indirectly affect 2,478 acres of land presumed to be forested.[249] The EA did not ignore cumulative impacts to water resources from erosion and sedimentation related to the construction of new roads, well sites, and associated infrastructure. The EA acknowledged that the greatest potential cumulative impact to wetlands and surface waters from other activities, including oil and natural gas wells and gathering lines, is sediment loading both from construction within or adjacent to wetlands and surface waters and storm runoff from areas disturbed by construction.[250] The EA also explains that these other activities and the Northern Access 2016 Project would avoid or minimize sediment loading through mandatory mitigation and erosion and sedimentation control measures.[251] The EA points to National Fuel's implementation of its Erosion and Sediment Control & Agricultural Mitigation Plan and National Fuel's use of horizontal directional drilling and dry crossing methods; both are required.[252] This analysis satisfied NEPA and conformed with CEQ guidance.[253]

111. The EA also used project-crossed watershed subbasins as the geographic area to analyze cumulative impacts on vegetation, fisheries, and wildlife. Allegheny objects that the watershed subbasin is not a natural ecological boundary for vegetation and wildlife, so the choice defies guidance from CEQ to analyze cumulative impacts at the ecosystem level.[254] The same guidance from CEQ also states, however, that that the largest geographic area occupied by an affected resource will be the appropriate area for the

[249] EA at 151.

[250] EA at 145-46.

[251] EA at 145.

[252] *Id.*

[253] *See, e.g.*, CEQ, *Considering Cumulative Effects under the National Environmental Policy Act* at 8 (1997) ("it is not practical to analyze the cumulative effects of an action on the universe; the list of environment effects must focus on those that are truly meaningful"); *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (a cumulative impact analysis should 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").

[254] Allegheny Request for Rehearing at 34-35 (quoting CEQ, *Considering Cumulative Effects under the National Environmental Policy Act* at 15.

analysis of cumulative effects.[255] We noted above that the four watershed subbasins comprise a total of 4,667 square miles of land, of which the Upper Allegheny subbasin comprises 2,591.[256] The EA explained that vegetation, fisheries, and wildlife "can be specialized *within* a watershed."[257] Allegheny does not identify any community of plants or animals whose ecological boundary extends or may extend beyond the project-crossed watershed subbasins. Allegheny offers no rationale to delineate a broader geographic scope.

112. The EA used a geographic area within 5 miles of project facilities to analyze cumulative impacts to threatened, endangered, and special status species.[258] Allegheny criticizes the geographic area as "small" and "irrational" given these species' more vulnerable status.[259] Allegheny also asserts that the 5-mile area drastically misrepresents the existing baseline for the threatened northern long-eared bat habitat, which Allegheny claims has been degraded by tree-cutting and other disruption from thousands of oil and gas wells developed in McKean County and eleven other counties in northwestern Pennsylvania. Given the extensive past, present, and future development-related impacts, Allegheny claims that the EA lacked supporting data for its conclusions that the Northern Access 2016 Project "may affect but is not likely to adversely affect" northern long-eared bats because comparable roosting habitat is available in McKean County, Pennsylvania, and Cattaraugus County, New York.[260]

113. The EA's use of a 5-mile area to analyze the Northern Access 2016 Project's potential cumulative impact to threatened, endangered, and special status species was a

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[255] CEQ, *Considering Cumulative Effects under the National Environmental Policy Act* at 15.

[256] EA at 143; Certificate Order, 158 FERC ¶ 61,145 at P 172 n.231 (citing U.S. Geological Survey, *Watershed Boundary Dataset* (last visited Dec. 8, 2016), http://water.usgs.gov/GIS/wbd_huc8.pdf). The EA's other choices of geographic scope include: watershed subbasin for land use; 5 miles for threatened and endangered species; affected counties for socioeconomic conditions; 0.25 mile for short-term air impacts; 31 miles for long-term air impacts; 0.25 mile for short-term noise impacts; and 1 mile for long-term noise impacts. EA at 141.

[257] EA at 146 (emphasis added).

[258] *Id*.

[259] Allegheny Request for Rehearing at 35.

[260] Allegheny Request for Rehearing at 36 (quoting EA at 74-75).

reasonable choice informed by Commission staff's expertise and proportional to the magnitude of the environmental impacts of the proposed action. In the EA's discussion of the Northern Access 2016 Project's direct and indirect impacts, the EA explained that the project could potentially impact only four federally listed threatened or endangered species—three species of freshwater mussel and the northern long-eared bat—and eleven additional state-listed species.[261] The EA concluded that the Northern Access 2016 Project "may affect but is not likely to adversely affect" each of the four federally listed species.[262] For the northern long-eared bat, the EA's conclusion was based on the bats' roosting characteristics (as habitat generalists they routinely locate alternate roost trees each year),[263] the availability of alternative habitat (identified roost trees in McKean County "are surrounded by relatively contiguous forest that could provide an abundance of suitable roost trees"),[264] National Fuel's adherence to mitigation measures from the U.S. Fish and Wildlife Service (avoiding tree-clearing during the bats' pup season),[265] and National Fuel's minimization of lost roosting habitat by co-locating the majority of the project route with existing rights-of-way.[266] The EA also concluded that because National Fuel has agreed to implement conservation measures prescribed by the Pennsylvania Fish and Boat Commission for each state-listed species, impacts to these species would be sufficiently minimized.[267] Allegheny presses for a much more expansive and detailed analysis of the impacts from natural gas development, especially lost roost trees for the northern long-eared bat. But again analyzing the project's impacts in all of McKean County or the eleven other counties of northwest Pennsylvania is not proportional to the limited magnitude of the direct and indirect impacts from the Northern Access 2016 Project.

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[261] EA at 73-78. The state-listed species potentially occurring in project areas in Pennsylvania are the blue-spotted salamander, eastern hellbender, burbot, wavy-rayed lampmussel, and stalked bulrush. EA at 78 tbl.B.4.d-2.

[262] EA at 73-77.

[263] EA at 74.

[264] *Id*.

[265] EA at 74-75.

[266] EA at 75. Of the project's 27.8 miles of pipeline in McKean County, Pennsylvania, 14 miles are co-located with existing right-of-way. EA at 7 tbl.A.4.a-1.

[267] EA at 78-83.

114. The EA went on to reasonably conclude that the Northern Access 2016 Project, in combination with other actions, could pose only a minor cumulative effect on threatened, endangered, and other special status species primarily because the sponsors of all other actions are required, like National Fuel, to consult with the appropriate federal, state, and local agencies about which of these species might be affected, how they might be affected, and what mandatory measures would avoid, minimize, or otherwise mitigate the effects.[268] The northern long-eared bat is an immediate example. The Certificate Order explained that National Fuel will not be authorized to begin construction until Commission staff completes formal consultation with the U.S. Fish and Wildlife Service about the species.[269] For formal consultation, FWS must prepare a biological opinion to advise the Commission whether the Northern Access 2016 Project, alone or "taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[270] The FWS is in a better position to, and must, analyze the effects of natural gas development on the northern long-eared bat. The biological opinion must discuss the environmental baseline, which includes effects both from "State, tribal, local, and private actions," such as natural gas development, "already affecting the species or that will occur contemporaneously with the consultation in progress" and also from "[u]nrelated Federal actions . . . that have completed formal or informal consultation . . . ."[271] The biological opinion must also analyze "cumulative effects" that will arise from "future State or private activities that are reasonably certain to occur within the action area of the Federal action subject to consultation."[272] Guidance from FWS directs staff biologists to seek out the best available scientific and commercial data including: listing packages, recovery plans, active recovery teams, species experts, State/tribal wildlife and plant experts, universities, peer-reviewed journals and State Heritage programs, and prior consultations about the species. [273] If the biological opinion finds that the Northern Access 2016 Project is likely to jeopardize the continued existence of the northern long-eared bat or to result in the destruction or adverse modification of its critical habitat, then the biological

[268] EA at 150.

[269] Certificate Order, 158 FERC ¶ 61,145 at P 123; app. B, envtl. condition 22.

[270] 50 C.F.R. § 402.14(g)(4) (2017).

[271] U.S. Fish and Wildlife Service, *Endangered Species Act Consultation Handbook* at 4-22 to 4-23 (1998).

[272] 50 C.F.R. § 402.02.

[273] U.S. Fish and Wildlife Service, *Endangered Species Act Consultation Handbook* at 1-7.

opinion will provide reasonable and prudent alternatives to avoid jeopardy.[274] The Commission will incorporate any reasonable and prudent alternatives as conditions to our certificate for the project. Thus, Commission staff appropriately scaled the EA's analysis of the cumulative impact to threatened, endangered, or special status species in proportion to the limited magnitude of the Northern Access 2016 Project's direct and indirect impacts, identified the relevant policymakers and laws that govern these impacts,[275] and reflected the Commission's lack of jurisdiction to control natural gas development or its harmful effects.[276]

115. Allegheny alleges that the Commission failed to take a hard look at the cumulative impacts of greenhouse gas emissions to climate change. Specifically, Allegheny faults the EA for failing to quantify greenhouse gas emissions from project-related shale gas development. Instead, the EA broadly concluded that greenhouse gas emissions from the Northern Access 2016 Project and from the past, present, and reasonably foreseeable future actions identified in the EA's cumulative impact analysis "would be minor in the context of the total GHG emissions" in Pennsylvania and New York.[277]

116. Here, the EA considered the direct GHG emissions associated with the construction and operation of the Project and added those emissions to the GHG emissions from other activities (including oil and natural gas wells and gathering lines identified in appendix G to the EA) in the project's geographic scope.[278] The EA noted that most of the identified oil and gas production activities were outside the identified geographic scope.[279] Accordingly, the EA correctly concluded that because the emissions from the construction and operation of the Project were minimal (representing a less than

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[274] 50 C.F.R. § 402.14(h)(3).

[275] *See* EA at 77-83 (citing 75 Pa. Cons. Stat § 75.1-4; N.Y. Envtl. Conserv. Law § 11-0535; N.Y. Compilation of Codes Rules & Regs. title 6, pt. 182; various measures required by the Pennsylvania Fish and Boat Commission).

[276] *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d at 19-20 (accepting the Department's decision not to make specific projections about cumulative impacts from specific levels of export-induced gas production because, among other reasons, the Department had identified the relevant policymakers and existing state and federal laws that govern and might curtail, the environmental impacts).

[277] EA at 160.

[278] EA at 141 and 160.

[279] EA at 160.

0.1 percent increase in Pennsylvania's and New York's state emissions totals)[280] coupled with the fact that most of the identified production activities were outside the geographic scope of the project, the cumulative impacts of the Project on climate change is anticipated to be minimal or insignificant.[281]

117. The impacts from natural gas development on a broader scale are appropriately omitted from the EA. Given the large geographic scope of the Marcellus and Utica Shale natural gas production areas,[282] the magnitude of analysis requested by Allegheny bears no relationship to the limited magnitude of the Northern Access 2016 Project's construction- and operation-related emissions. Moreover, the majority of the project is located within the state of New York, which has banned hydraulic fracturing. In short, with the exception of the discrete oil and gas production facilities identified in the EA, the incremental upstream activities that are the subject of Allegheny's rehearing request do not meet the definition of cumulative impacts. NEPA does not require analysis of impacts that are not indirect or cumulative, and a broad analysis based on generalized assumptions rather than reasonably specific information does not meaningfully inform the Commission's project-specific review.[283] As such, the Commission declines to further address upstream GHG emissions.

118. Allegheny also cites recent statements from academic researchers that an observed "rapid increase" in background levels of methane in the Marcellus Shale region is "likely due to the increased production" in the region and that these increased background levels of methane reduce "the relative climate benefit of natural gas over coal."[284] Allegheny asserts that these findings directly contradict the EA's conclusion that

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[280] The Certificate Order sufficiently addressed the criticism from Allegheny and other conservation groups about the EA's comparison of cumulative greenhouse gas emissions to total state emissions. *See* Certificate Order at PP 187-188. This issue does not warrant further comment.

[281] *Id.*

[282] Natural gas is extracted from the Marcellus and Utica Shale formation through hydraulic fracturing.

[283] *Id.* P 42.

[284] Allegheny Request for Rehearing at 40 (quoting Department of Chemistry, Drexel University, *Methane Levels Have Increased in Marcellus Shale Region Despite a Dip in Well Installation* (Feb. 9, 2017), http://drexel/edu/coas/academics/departments-centers/chemistry/news/2017/February/methane-increases-in-Marcellus-Shale/).

the Northern Access 2016 Project "would likely displace some use of higher carbon emitting fuels" and "would result in a potential reduction in regional GHG emissions."[285]

119. Similar to the EA, the Certificate Order concluded that some transported gas "may displace other fuels, which could actually lower total [carbon dioxide equivalent] emissions," while "some may displace gas that otherwise would be transported via different means, resulting in no change in [carbon dioxide equivalent] emissions."[286] The statements from academic researchers cited by Allegheny are inconclusive and lack detail. A finding that increased background levels of production-related methane reduce "the relative climate benefit of natural gas over coal" does not contradict the conclusions in the EA and Certificate Order that the project "would result in a potential reduction" or "could actually lower" net greenhouse gas emissions on a carbon dioxide equivalent basis.[287]

The Commission orders:

(A) The requests for rehearing are denied as discussed above.

(B) National Fuel and Empire's motion for waiver determination is granted. The New York State Department of Environmental Conservation has waived its water quality certification authority under section 401 of the Clean Water Act with respect to the Northern Access 2016 Project, CP15-115-000 and CP15-115-001.

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[285] Allegheny Request for Rehearing at 40 (quoting EA at 160). Allegheny also argues on rehearing that the Commission did not provide any discussion why the lower global warming potential for methane used by the EPA was more reliable than the higher global warming potential for methane used by the Intergovernmental Panel on Climate Change (IPCC). *Id*. at 39-40. The EA did use the lower global warming potential explicitly to conform with the EPA's Greenhouse Gas Mandatory Reporting Rule and Greenhouse Gas Tailoring Rule. EA at 109-110, 112, 160. The Certificate Order, however, calculated the life cycle greenhouse gas emissions of project-transported natural gas using the methodology published in the 2016 *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, which applies the IPCC's higher 100- and 20-year global warming potentials for methane. National Energy Technology Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, DOE/NETL-2015/1714, at 2.

[286] Certificate Order, 158 FERC ¶ 61,145 at P 190.

[287] EA at 160 (emphasis added); Certificate Order, 158 FERC ¶ 61,145 at P 190 (emphasis added).

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation	Docket Nos. CP15-115-002
Empire Pipeline, Inc.	CP15-115-003

(Issued August 6, 2018)

GLICK, Commissioner, *dissenting*:

Today's order denies rehearing of the Commission's decision to authorize the Northern Access 2016 Project (Project) under section 7 of the Natural Gas Act (NGA).[1] I dissent from the order because it fails to comply with our obligations under the NGA and the National Environmental Policy Act (NEPA).[2] First, I disagree with the majority's finding that the Project is needed. The majority relies exclusively on the existence of an affiliate precedent agreement to make its determination. The Commission cannot rely on this evidence alone to find need. Second, the majority maintains that it need not consider the harm from the Project's contribution to climate change. While the Commission has quantified the Project's upstream greenhouse gas (GHG) emissions, the majority nonetheless concludes that these emissions are not reasonably foreseeable.[3] I do not believe the Commission can find that the Project is in the public interest without determining the significance of the Project's contribution to climate change.

[1] 15 U.S.C. § 717f (2012).

[2] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852. Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f (2012). Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[3] *See Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084, at PP 94, 102 (2018) (Rehearing Order).

The Commission Has Not Demonstrated that the Project Is Needed

Section 7 of the NGA requires that, prior to issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline, and that, on balance, the pipeline's benefits outweigh its harms.[4] In today's order, the majority relies exclusively on the existence of a precedent agreement with the applicant's affiliate to conclude that the Project is needed.[5] While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline,[6] contracts among affiliates are less probative of that need because they are not necessarily the result of an arms-length negotiation.[7] By itself, the existence of a precedent agreement between the pipeline developer and its affiliate is insufficient to carry the developer's burden to show that the pipeline is needed.

Under these circumstances, I believe that the Commission must consider additional evidence regarding the need for a pipeline. As the Commission explained in the Certificate Policy Statement, this additional evidence might include, among other things, projections of the demand for natural gas, analyses of the available pipeline capacity, and an assessment of the cost savings that the proposed pipeline would provide to consumers.[8] The majority, however, did not consider any such evidence in finding that there is a need for the Northern Access 2016 Project, instead relying entirely on the

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[4] *See Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce "necessarily and typically have dramatic natural resource impacts.").

[5] Rehearing Order, 164 FERC ¶ 61,084 at P 19 (explaining that "it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers").

[6] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999) (Certificate Policy Statement) ("[T]he Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.").

[7] Certificate Policy Statement, 88 FERC at 61,744.

[8] *Id.* at 61,747.

existence of a precedent agreement between the pipeline developer and its affiliate. Accordingly, I do not believe that today's order properly concludes that the Project is needed.

The Order Does Not Adequately Evaluate the Project's Environmental Impact

The majority contends that it is not required to consider the Project's contribution to climate change from upstream GHG emissions because the record in this proceeding does not demonstrate that the emissions are indirect effects of the Project.[9] Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and the consumption of natural gas. Accordingly, it is critical that the Commission carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is in the public interest under the NGA.

While the Commission quantified the annual upstream GHG emissions from the Project in the Certificate Order,[10] the majority refuses to consider these emissions as indirect effects. The majority claims that only where it has definitive information about the specific location and timing of upstream production can it conclude that GHG emissions from these activities are reasonably foreseeable.[11] But this definition of indirect effects is overly narrow and circular.[12] Under this view, even if the Commission

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[9] Rehearing Order, 164 FERC ¶ 61,084 at PP 97, 99, 102.

[10] *Nat'l Fuel Gas Supply Corp*., 158 FERC ¶ 61,145, at P 189 (2017) (Certificate Order) (estimating "upstream GHG emissions as: 410,000 tpy CO_2e from extraction, 790,000 tpy CO_2e from processing, and 250,000 tpy CO_2e from the non-project pipelines (both upstream and downstream to the delivery point in Chippawa)"). The Commission calculated these estimates using a methodology published by the U.S. Department of Energy's National Energy Technology Laboratory: *Environmental Impacts of Unconventional Natural Gas Development* and *Life Cycle Analysis of Natural Gas Extraction and Power Generation*. *See id.* P 189 n.264 (citing National Energy Technology Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, DOE/NETL-2015/1714 (2016)).

[11] Rehearing Order, 164 FERC ¶ 61,084 at P 97.

[12] *See WildEarth Guardians v. U.S. Bureau of Land Mgt.*, 870 F.3d 1222, 1228–29 (2017) (holding that it was arbitrary and capricious for an agency to rely on a "perfect substitution assumption . . . because the assumption itself is irrational (i.e., contrary to basic supply and demand principles)"); *see also San Juan Citizens All. et al. v. U.S.*

knows that new pipeline facilities would have an environmental impact—in this case, causing GHG emissions by facilitating additional production—the Commission is not obligated to consider those impacts unless the Commission knows definitively that the production would not occur absent the pipeline.[13] NEPA, after all, does not require exact certainty. Instead, it requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action where doing so would further the statute's two-fold purpose: (1) ensuring that the relevant agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) that this information will be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[14] The fact that an agency may not know the exact location and amount of

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Bureau of Land Mgmt., No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (holding that it was arbitrary for the Bureau of Land Management to conclude "that consumption is not 'an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption'" as "this statement is circular and worded as though it is a legal conclusion"). The Commission must use its "best efforts" to identify and quantify the full scope of the environmental impacts and, as the U.S. Court of Appeals for the District of Columbia found in *Sierra Club v. FERC*, educated assumptions are inevitable in the process of emission quantification. *See* 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*).

[13] *See* Rehearing Order, 164 FERC ¶ 61,084 at PP 97, 99.

[14] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). In order to evaluate circumstances in which upstream impacts of a pipeline facility are reasonably foreseeable results of constructing and operating the proposed facility, I am relying on precisely the sort of "reasonably close causal relationship" that the Supreme Court has required in the NEPA context and analogized to proximate cause. *See id.* at 767 ("NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause. The Court [has] analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)); *see also Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003) ("[I]n addition to being the cause in fact of the injury [the but for cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well. To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct.") (internal quotation marks and citations omitted).

GHG emissions to attribute to the federal action is no excuse for assuming that impact is zero.[15] Instead, the agency must engage in a case-by-case inquiry into what effects are reasonably foreseeable and estimate the potential emissions associated with that project—making assumptions where necessary—and then give that estimate the weight it deserves. The record here is sufficient to demonstrate that the nature of the effect is GHG emissions from producing the natural gas that the Project is designed to transport.

In adopting an overly narrow definition of indirect effects, the majority disregards the Project's central purpose—to facilitate natural gas production and consumption.[16]

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[15] As the U.S. Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that involved the downstream GHG emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" is reasonably foreseeable, but "its extent is not," an agency may not simply ignore the effect. *Mid States Coal. for Progress v. Surface Transp. Bd.,* 345 F.3d 520, 549 (8th Cir. 2003). The majority cites *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) to support its narrow definition of indirect effects in this case, but the facts here are readily distinguishable. In *Sierra Club*, the Department of Energy concluded that it was not possible to identify local environmental impacts resulting from natural gas production induced by anticipated exports of liquefied natural gas (LNG), and the court deferred to the agency's "reasonable explanation as to why it believed the indirect effects pertaining to increased gas production were not reasonably foreseeable." *Sierra Club*, 867 F.3d at 198. The majority's reasoning in today's order deserves no such deference. Despite repeated statements in the record from the Project's only shipper that it "has made significant investments in developing its oil and gas assets in Pennsylvania *that require timely completion of the Project*," the majority maintains that it cannot determine whether the Project will cause any upstream production, because, while the Project may "partially" induce natural gas development, somehow "the opposite causal relationship is more likely." *See infra* notes 19 & 21; *see also* Certificate Order, 158 FERC ¶ 61,145 at P 150 (acknowledging that "Seneca Resources entered into a Joint Development Agreement with another producer to develop specific shale resources in the Clermont/Rich Valley area (within Seneca Resources' Western Development Area) that will use the transportation capacity created by the [Project]"). The majority's blanket assertion that the record does "not reveal that transportation infrastructure causes production" is arbitrary and capricious and not the product of reasoned decisionmaking.

[16] EA at 2 (explaining that, according to the applicant, the "Project Purpose and Need" is to "provide incremental firm transportation to markets in the northeastern United States and Canada . . . and other interconnections with local gas distribution companies, power generators, and other interstate pipelines available on both the National Fuel and Empire systems").

The majority claims that it cannot conclude that the Project causes natural gas production because "[m]any factors drive new drilling, including production costs and market prices for natural gas"[17] and "alternate pipelines and other modes of transportation exist."[18] But the evidence in the record plainly demonstrates that this Project "will provide needed pipeline capacity" for Seneca Resources Corporation—the Project's only shipper, a natural gas production company and the applicant's affiliate—and is specifically designed "to deliver its shale gas produced in Appalachia to markets in New York and Canada."[19] The majority also claims, without support, that the "opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end uses will support the development of a pipeline to move the produced gas."[20] But, once again, evidence in the record contradicts this. As Seneca explains in its comments, it "has made significant investments in developing its oil and gas assets in Pennsylvania *that require timely completion of the Project* so that Seneca's produced natural gas can be transported . . . to markets in the United States and Canada in accordance with Seneca's business plan."[21] Therefore, it is entirely foreseeable that the Project has resulted in investment in significant new natural gas production and will continue to facilitate additional production in the future, emitting GHGs that contribute to climate change.

The majority contends that it need not consider GHG emissions because "the effects of partially-induced natural gas development are not sufficiently likely to occur."[22] But the Commission cannot ignore the fact that adding transportation capacity is likely to "spur demand" and, for that reason, it must, at the very least, examine the effects that an expansion of pipeline capacity might have on production.[23] Indeed, if a proposed

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[17] Rehearing Order, 164 FERC ¶ 61,084 at P 101.

[18] *Id.* P 99.

[19] Seneca December 22, 2017 Comments at 2; Seneca May 1, 2015 Comments at 3.

[20] Rehearing Order, 164 FERC ¶ 61,084 at P 101.

[21] Seneca December 22, 2017 Comments at 3 (emphasis added); *see also* Seneca May 1, 2015 Comments at 3.

[22] Rehearing Order, 164 FERC ¶ 61,084 at P 102.

[23] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138 (9th Cir. 2011) (holding that it "is completely inadequate" for an agency to ignore a project's "growth inducing effects" where the project has a unique potential to spur demand); *id.* at 1139 (distinguishing *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th

pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be "needed" in the first place.

Even where exact information regarding the source of the gas to be transported is not available to the pipeline developer, the Commission will often be able to produce comparably useful information based on reasonable forecasts of the GHG emissions associated with production.[24] Forecasting environmental impacts is a regular component of NEPA reviews and a reasonable estimate may inform the federal decisionmaking process even where the agency is not completely confident in the results of its forecast.[25] Similar forecasts can play a useful role in the Commission's evaluation of the public interest, even in those instances when the Commission must make a number of assumptions in its forecasting process.[26]

Cir. 1997), which the majority relies on in today's order) ("[O]ur cases have consistently noted that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements, like changing flight patterns, improving a terminal, or adding a taxiway, which increase demand only marginally, if at all."); *id.* at 1139 ("[E]ven if the stated purpose of [a new airport runway project] is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects."); *see* Rehearing Order, 164 FERC ¶ 61,084 at P 102 & n.235. Although sales price and production costs are, undoubtedly, factors that influence natural gas production, that fact is no answer to the argument that the Commission must at least consider the demand-inducing effects of new capacity. After all, surely the sales prices and production costs associated with air travel and coal mining affected demand in *Barnes* and *Mid States*, respectively.

[24] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (2014) (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); *see Sierra Club*, 867 F.3d at 198 ("In determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation.'") (quoting *Del. Riverkeeper*, 753 F.3d at 1310).

[25] In determining what constitutes reasonable forecasting, it is relevant to consider the "usefulness of any new potential information to the decisionmaking process." *Sierra Club*, 867 F.3d at 198 (citing *Pub. Citizen*, 541 U.S. at 767).

[26] In comments recently submitted in the Commission's pending review of the natural gas certification process, the current Administration's Environmental Protection Agency identified a number of tools the Commission can use to quantify the reasonably foreseeable "upstream and downstream GHG emissions associated with a proposed

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Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find both a public need for the Project and that, on balance, that the Project's benefits outweigh the harms, including the environmental impacts associated with the harm from the Project's contribution to climate change.

Because I disagree with the majority's conclusion that it has fulfilled its responsibilities under the NGA and NEPA, I respectfully dissent.

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Richard Glick
Commissioner

natural gas pipeline." These include "economic modeling tools" that can aid in determining the "reasonably foreseeable energy market impacts of a proposed project." U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 3–4 (filed June 21, 2018) (explaining that the "EPA has emission factors and methods" available to estimate GHG emissions—from activities upstream and downstream of a proposed natural gas pipeline—through the U.S. Greenhouse Gas Inventory and the Greenhouse Gas Reporting Program); *see Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

EXHIBIT B

167 FERC ¶ 61,007
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

National Fuel Gas Supply Corporation Docket No. CP15-115-004
Empire Pipeline, Inc.

ORDER DENYING REHEARING

(Issued April 2, 2019)

1. On August 6, 2018, the Commission determined that New York State Department of Environmental Conservation (New York DEC) waived its authority, under section 401 of the Clean Water Act,[1] to issue or deny a water quality certification for the Northern Access 2016 Project sponsored by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, National Fuel),[2] by failing to act within a year from when it received the application for water quality certification.[3]

[1] 33 U.S.C. § 1341(a)(1) (2012).

[2] 164 FERC ¶ 61,084 (2018) (Waiver Order). These proceedings began on March 17, 2015, when National Fuel applied for a certificate of public convenience and necessity to construct and operate the Northern Access 2016 Project. The project includes approximately 99 miles of pipeline, new and modified compression facilities, and ancillary facilities in Pennsylvania and New York. *Nat'l Fuel Gas Supply Corp.,* 158 FERC ¶ 61,145, at P 1 (2017) (Certificate Order), *reh'g denied,* Waiver Order, 164 FERC ¶ 61,084. For a more detailed description of the Northern Access 2016 Project, *see* Certificate Order, 158 FERC ¶ 61,145 at PP 6-17, and July 27, 2016 Environmental Assessment at 5-10.

[3] Waiver Order, 164 FERC ¶ 61,084 at P 42.

2. On August 14, 2018, New York DEC requested rehearing of the Waiver Order. New York DEC argues that its April 7, 2017 denial of the water quality certification was timely because National Fuel agreed to extend the one-year deadline.[4] New York DEC also seeks a stay of the Waiver Order.[5]

3. On September 5, 2018, Sierra Club also requested rehearing. Sierra Club argues the Commission irrationally interpreted section 401 and allowed National Fuel to flout an agreement with New York DEC.[6]

I. Background

4. New York DEC received National Fuel's application for water quality certification on March 2, 2016.[7] On January 20, 2017, National Fuel and New York DEC agreed to revise "the date, to the mutual benefit of both parties, on which the Application was deemed received by [New York DEC] to April 8, 2016."[8] Thus, the agreement attempted to extend the date for New York DEC to make a "final determination on the application until April 7, 2017."[9] New York DEC denied National Fuel's application on April 7, 2017.[10]

[4] New York DEC Rehearing Request at 2.

[5] *Id.* at 2-3.

[6] Sierra Club Rehearing Request at 1.

[7] Waiver Order, 164 FERC ¶ 61,084 at P 35. *See* New York DEC Rehearing Request at 4.

[8] *See* New York DEC Rehearing Request, Exhibit A.

[9] *See id.*

[10] Waiver Order, 164 FERC ¶ 61,084 at P 35. *See* New York DEC Rehearing Request at 3. A copy of New York DEC's April 7, 2017 denial is attached to its rehearing request. *See id*., Exhibit B. On February 5, 2019, the United States Court of Appeals for the Second Circuit vacated and remanded this denial to give New York DEC an "opportunity to explain more clearly – should it choose to do so – the basis for its decision." *Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation*, No. 17-1164, 2019 WL 446990 (2d Cir. Feb. 5, 2019).

5. Based on these facts, the Waiver Order determined that Clean Water Act section 401 required New York DEC to act by March 2, 2017, despite the agreement to alter the receipt date. Accordingly, the Waiver Order determined that New York DEC waived its authority to issue a water quality certification.[11]

6. National Fuel filed an answer to New York DEC's rehearing request and motion for stay on August 29, 2018, and an answer to Sierra Club's rehearing request and motion for stay on September 20, 2018. Our rules permit answers to motions,[12] but do not permit answers to requests for rehearing, unless otherwise ordered by the decisional authority.[13] Accordingly, we accept the answers to the motions for stay, but reject the answers to the rehearing requests.

II. Analysis

A. Statutory Interpretation

7. "Section 401 of the CWA requires an applicant for a federal permit to conduct any activity that 'may result in any discharge into the navigable waters' of the United States to obtain 'a certification from the State in which the discharge ... will originate ... that any such discharge will comply with,' *inter alia*, the state's water quality standards."[14] Section 401 provides that if a state "fails or refuses to act on a request for certification within a reasonable period of time (not to exceed one year) after receipt of such request," then the certification requirement is waived.[15]

8. The Commission has long interpreted section 401 as meaning "that a certifying agency waives the certification requirements of section 401 if the certifying agency does not act within one year after the date that the certifying agency receives a request for a certification."[16] We base this interpretation on giving plain meaning to the words "after

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[11] Waiver Order, 164 FERC ¶ 61,084 at P 42.

[12] 18 C.F.R. § 385.213(d) (2018).

[13] *Id.* § 385.213(a)(2); *id.* § 385.713(d)(1).

[14] *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 99 (2d Cir. 2017) (quoting 33 U.S.C. § 1341(a)(1)).

[15] 33 U.S.C. § 1341(a)(1).

[16] Waiver Order, 164 FERC ¶ 61,084 at P 41. *See Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 16 (tracing this interpretation back to 1987), *order denying*

receipt of such request."[17] The Commission explained in the Waiver Order that our determination here is consistent with our order in *Central Vermont Public Service Corporation*, holding that section 401 "contains no provision authorizing either the Commission or the parties to extend the statutory deadline" and that "private agreements . . . cannot operate to amend the Clean Water Act, nor are they in any way binding on the Commission."[18]

9. On rehearing, New York DEC states that the Commission erroneously applied principles of statutory construction in the Waiver Order when it found that the section 401 deadline cannot be altered by agreement.[19] Citing the general principle that statutory rights are waivable, New York DEC argues that when it acted on National Fuel's application on April 7, 2017, it had acted within one year from the receipt of the application as established by agreement.[20] Rather than address *Central Vermont Public Service,* New York DEC states that section 401 contains no provision explicitly prohibiting waiver, and emphasizes cases demonstrating that statutory rights are waivable unless Congress affirmatively provides they are not.[21] New York DEC's arguments fail because they support an interpretation of section 401 that would run counter to the statutory intent of preventing delay.

10. Two of the cases cited by New York DEC address waiver of rights by persons in criminal proceedings.[22] The outcomes in these cases depended on whether permitting

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reh'g, 164 FERC ¶ 61,029 (2018).

[17] 33 U.S.C. § 1341(a)(1). *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) (holding that the "plain language of Section 401" requires states to grant or deny an application within one year of receiving the application, not the date the agency deems the application to be complete).

[18] 113 FERC ¶ 61,167, at P 16 (2005). *See* Waiver Order, 164 FERC ¶ 61,084 at P 43.

[19] New York DEC Rehearing Request at 2.

[20] *Id.* at 4-6.

[21] New York DEC Rehearing Request at 5-6 (citing *Price v. U.S. Department of Justice,* 865 F.3d 676 (D.C. Cir. 2017); *United States v. Mezzanatto*, 513 U.S. 196 (1995); and *U.S. Department of Labor v. Preston,* 873 F.3d 877 (11th Cir. 2017)).

[22] *See Price,* 865 F.3d 676 (holding that a plea agreement waiving rights under the Freedom of Information Act (FOIA) is unenforceable because the government did not, in that case, identify a legitimate criminal-justice interest in honoring the waiver); and

waiver advances a legitimate criminal-justice interest. Another case cited by New York DEC, *U.S. Department of Labor v. Preston*,[23] holds that an Employee Retirement Income Security Act statute of repose was subject to waiver. The court in *Preston* reasoned in part that disallowing waiver would be contrary to the "overarching purpose" of ERISA.[24]

11. By contrast to the statutory schemes at issue in the cases cited by New York DEC, the section 401 deadline cannot be waived by agreement. In *Hoopa Valley Tribe v. FERC,*[25] the court considered whether waiver occurs when there is a "written agreement with the reviewing states to delay water quality certification."[26] The court concluded that such an agreement constituted a failure and a refusal to act under section 401.[27] The events in *Hoopa Valley Tribe* and these proceedings share the same salient facts, i.e. an agreement was reached to delay the state agency's action on a water quality certification application. *Hoopa Valley Tribe* held that such an agreement results in a refusal and failure to act. Similarly, we find that the lack of action by the March 2, 2017 deadline here constituted a failure and refusal to act as contemplated by section 401. Therefore, New York DEC waived its authority to issue a water quality certification.

12. The language of section 401 that reflects a Congressional intent to establish a statutory policy of preventing delay distinguishes it from the cases cited by New York DEC. *Hoopa Valley Tribe* determined that a "deliberate and contractual idleness" not only usurps the Commission's "control over whether and when a federal [authorization] will issue," but would contravene section 401's intended purpose, i.e. to prevent a state's "dalliance or unreasonable delay."[28] By contrast to the statutory schemes addressed in the cases cited by New York DEC, accommodating extension of the deadline here would

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United States v. Mezzanatto, 513 U.S. 196 (holding that a criminal defendant can waive evidentiary and procedural rules designed to protect plea discussion statements as inadmissible). Neither of these cases involve statutory deadlines.

[23] 873 F.3d 877.

[24] *Id.* at 885.

[25] 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley Tribe*).

[26] *Id.* at 1104.

[27] *Id*.

[28] *Id.* at 1104-05 (quoting 115 Cong. Rec. 9264 (1969) (quotation omitted)).

contravene the statutory purpose of encouraging timely action on water quality certification applications.

13. Sierra Club claims that *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*[29] and *New York State Department of Environmental Conservation v. FERC*[30] demonstrate that "courts . . . concluded Section 401 allows the parties to move the date an application is 'received.'"[31] In neither case did the court hold that the state and an applicant could agree to move the date an application is "received." In *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, the court found that it lacked jurisdiction to address the waiver issue and merely noted that the applicant had withdrawn and resubmitted an application for certification.[32] *New York State Department of Environmental Conservation v. FERC* addressed whether a state may defer the date of "receipt" by deeming an application "incomplete."[33] The court found such an approach contrary to the plain language of the statute. And the court further dismissed New York DEC's policy concerns by, in part, noting that a state "could also request that the applicant withdraw and resubmit the application."[34]

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[29] 868 F.3d 87, 94 (2d Cir. 2017) (finding no jurisdiction to consider Constitution Pipeline's argument that action on water quality certification application was untimely, but denying petition for review on the merits). Following the Second Circuit's decision, Constitution Pipeline sought and was denied a declaratory order from the Commission finding waiver. *Constitution Pipeline Co., LLC,* 162 FERC ¶ 61,014, *reh'g denied,* 164 FERC ¶ 61,029 (2018). Constitution Pipeline petitioned for review of those orders and, following *Hoopa Valley Tribe*, the D.C. Circuit granted the Commission's motion for voluntary remand of its decision. *Constitution Pipeline Co., LLC v FERC*, D.C. Cir. No. 18-1251 (issued Feb. 28, 2018).

[30] 884 F.3d 450 (affirming the Commission's determination that the section 401 one-year review period began when New York DEC received Millennium Pipeline Company's request, not when New York DEC deemed the application complete).

[31] Sierra Club Rehearing Request at 6.

[32] 868 F.3d at 94.

[33] 884 F.3d 450 at 456.

[34] *Id*.

14. Similarly, New York DEC relies on the Commission' earlier acknowledgement that an applicant can elect to withdraw and resubmit its application.[35] But whether the "withdrawal-and-resubmission scheme" continues to be a viable procedure is in doubt after *Hoopa Valley Tribe*.[36] At a minimum, we take the reasoning in *Hoopa Valley Tribe* – disapproval of an agreement to withdraw and resubmit as a failure and refusal to act resulting in a scheme that thwarts a Congressionally-imposed statutory limit – to apply equally to the facts here.

15. New York DEC cites the Commission's practice of issuing tolling orders as a similar extension of a statutorily-designated deadline.[37] New York DEC points out that the NGA (like the Clean Water Act) requires the Commission to "act" within 30 days, and that no provision in the NGA permits the Commission to extend the time for acting.[38]

16. New York DEC's reasoning that NGA section 19 "does not contain any language expressly authorizing [the Commission] to extend the 30-day statutory deadline" is inapt because Commission tolling orders do not extend the deadline. Tolling orders comply with NGA section 19 because they reflect the Commission action required by the statute.[39] By contrast, the authority to extend the deadline for acting under Clean Water Act section 401 that New York DEC seeks to exercise by agreement with National Fuel does not fit within the language of the statute.

17. Finally, New York DEC is not without suitable recourse in the case of an incomplete application. New York DEC can deny an application with or without prejudice.[40]

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[35] New York DEC Rehearing Request at 6. *See* Waiver Order, 164 FERC ¶ 61,084 at P 45.

[36] In *New York State Dep't of Envtl. Conservation v. FERC*, the court stated that a state could "request that the applicant withdraw and resubmit the application." 884 F.3d at 455-56. However, the D.C. Circuit in *Hoopa Valley Tribe* described that statement as "dicta." 913 F.3d at 1105.

[37] New York DEC Rehearing Request at 5-6.

[38] *Id*. (citing 15 U.S.C. § 717r (2012)).

[39] *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988).

[40] Wavier Order, 164 FERC ¶ 61,084 at P 45. *See N.Y. State Dep't of Envtl. Conservation v. FERC,* 884 F.3d at 456 ("If a state deems an application incomplete, it

B. Policy

18. New York DEC argues that the Commission's ruling encourages the "withdraw and refile" practice and would therefore cause more delay than permitting agreements to extend the deadline.[41] According to New York DEC, delay would result for two reasons: (1) the refiling would require the agency to issue notice of the new application; and (2) the new filing would extend the deadline up to a year – in this case a much longer extension than agreed to between New York DEC and National Fuel.[42] New York DEC adds that the agreement between it and National Fuel was mutually beneficial, and disallowing the extension by agreement would not further any energy or environmental policy.[43] With respect to the pragmatic benefit of avoiding case-by-case determinations, Sierra Club states that such case-by-case determinations will be required in any event.[44] Sierra Club adds that the waiver finding is "contrary to the goals Congress established in passing the [Clean Water Act] and Section 401."[45]

19. The Clean Water Act provides for a state to issue a certification within a reasonable period of time, not to exceed one year, and includes language expressly providing for waiver in the absence of action within one-year. As discussed above, the purpose of this provision is to prevent delay.[46] The responsibility to act within a reasonable period of time, not to exceed a year, lies with New York DEC. Given New York DEC has the ability to timely act on a section 401 water quality certification request, the Commission finds it misguided to blame the Commission for not facilitating extensions of time. Congress expressly provided for projects to move forward without state water quality certification when the state waives its authority.

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can simply deny the application without prejudice – which would constitute "acting" on the request under the language of Section 401.").

[41] New York DEC Rehearing Request at 7.

[42] *Id.*

[43] *Id.*

[44] Sierra Club Rehearing Request at 7.

[45] *Id.* at 8.

[46] *See Hoopa Valley Tribe,* 913 F.3d at 1104-05.

20. We find that the statute prohibits state agencies and applicants from entering into written agreements to delay water quality certifications, an interpretation consistent with *Hoopa Valley Tribe*.[47] We have reasonably interpreted section 401 and find that the policy interests advanced by New York DEC cannot override the statute. In addition, New York DEC's policy arguments fail to recognize countervailing considerations, including the interest in providing certainty around the deadline for state action.[48] Binding calculation of the deadline to application receipt (as contemplated by the statutory language) makes determining the deadline more straightforward.

C. Agreement

21. New York DEC argues the Commission erred by disregarding the agreement.[49] In the Waiver Order, the Commission found that its construction of the Clean Water Act is not affected by a "private agreement not to raise an issue."[50]

22. Quoting *Erie Boulevard Hydropower, LP v. FERC*,[51] New York DEC states that the D.C. Circuit "has consistently required the Commission to give weight to the contracts and settlements of the parties before it."[52] New York's reliance on *Erie Boulevard* is unavailing. In *Erie Boulevard,* the D.C. Circuit affirmed Commission orders regarding headwater benefits assessments pursuant to Federal Power Act section 10(f).[53] In the underlying orders, the Commission considered a settlement between one of the headwater beneficiaries and the State of New York. Although *Erie Boulevard* gave effect to an agreement between parties while the Commission fulfilled its responsibilities under Part I of the Federal Power Act (FPA), by doing so, the

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[47] *Id.* at 1103-05.

[48] *See* Waiver Order, 164 FERC ¶ 61,084 at P 45.

[49] New York DEC Rehearing Request at 7-8.

[50] Waiver Order, 164 FERC ¶ 61,084 at P 39 n.71. *See Central Vermont Public Service,* 113 FERC ¶ 61,167 at P 19 ("However, nothing in the Clean Water Act allows a state to use procedures agreed to in a settlement to indefinitely extend the statutory deadline, nor, as we have stated, do we endorse such delay.").

[51] 878 F.3d 258, 268 (D.C. Cir. 2017) (internal quotation marks and citation omitted).

[52] New York DEC Rehearing Request at 8.

[53] 16 U.S.C. § 803(f) (2012).

Commission did not act in defiance of the statute, but instead acted consistently with its statutory authority to assess an equitable amount to compensate for headwater benefits.[54] Unlike these proceedings, *Erie Boulevard* did not involve an agreement that contravened the intent behind a statutory provision.

D. Estoppel, Waiver, and Ratification

23. New York DEC argues that waiver, estoppel, ratification, and basic contract law should bar National Fuel from challenging the agreement's legal basis.[55] Sierra Club argues that National Fuel is estopped from asserting the agreement was not valid, because New York DEC relied on the agreement.[56] New York DEC points out that National Fuel accepted the benefits of the agreement, which meant avoiding both an earlier denial of the application and the subsequent need to resubmit a new section 401 application.[57] Citing *DiRose v. PK Mgmt. Corp.*,[58] New York DEC states that when a contract is invalid, a party must act promptly to repudiate it "or he will be deemed to have waived his right to do so."

24. We disagree that contract principles change the outcome. Our interpretation of section 401 is not affected by the existence of a contract between New York DEC and National Fuel.[59] Rather, we find, consistent with *Hoopa Valley Tribe,* that National Fuel and New York DEC cannot enter into "a written agreement . . . to delay water quality certification."[60] New York DEC states that National Fuel's partial performance "is an

[54] 878 F.3d at 267-68.

[55] New York DEC Rehearing Request at 2, 8-10.

[56] Sierra Club Rehearing Request at 10-11.

[57] New York DEC Rehearing Request at 9.

[58] 691 F.2d 628, 633-34 (2d Cir. 1982).

[59] *See Central Vermont Public Service*, 113 FERC ¶ 61,167 at P 16 ("VANR's agreements with other parties are simply not relevant to the issue of whether it met the requirement of the Clean Water Act that it act on a certification application within one year, which it does not dispute it failed to do.").

[60] 913 F.3d at 1104.

unmistakable signal that one party believes there is a contract,"[61] however, the validity of a contract does not control how we view the controlling language of section 401.

E. Untimely

25. New York DEC and Sierra Club argue that National Fuel's waiver argument was untimely.[62] New York DEC states that the Commission erred by construing National Fuel's December 5, 2017 filing as a separate motion requesting a waiver determination. New York DEC explains that National Fuel knew of the waiver argument when it filed its March 3, 2017 rehearing request, yet failed to raise it then.[63] Accordingly, New York DEC believes National Fuel's December 5, 2017 filing amounts to an untimely supplement to its rehearing request, which should have been rejected.[64]

26. The Waiver Order recognized that National Fuel's December 5, 2017 filing was a "separate basis for their claim that the New York [DEC] waived authority under section 401 of the Clean Water Act to issue or deny a water quality certification for the Northern Access 2016 Project."[65] The Commission recognized that, as an expansion of its request for rehearing, the December 5, 2017 filing was "statutorily barred as outside the thirty day period for seeking rehearing;" however, the Commission, referring to *Millennium Pipeline Co., L.L.C. v. Seggos*,[66] recognized that applicants can present evidence of waiver of a water quality certification to the Commission.[67] Therefore, the Commission interpreted National Fuel's filing as "effectively" a petition for a waiver determination."[68]

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[61] New York DEC Rehearing Request at 9 (quoting *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d 69, 75-76 (2d Cir. 1984)).

[62] New York DEC Rehearing Request at 10; Sierra Club Rehearing Request at 9-11.

[63] New York DEC Rehearing Request at 9-10.

[64] *Id.* (citing *City of Tacoma, Washington*, 110 FERC ¶ 61,140 (2005); and *In Re CMS Midland, Inc.,* 56 FERC ¶ 61,177 (1991)).

[65] Waiver Order, 164 FERC ¶ 61,084 at P 6.

[66] 860 F.3d 696, 701 (D.C. Cir. 2017).

[67] Waiver Order, 164 FERC ¶ 61,084 at P 6.

[68] *Id.* P 6.

27. We deny rehearing. The Commission reasonably treated National Fuel's December 5, 2017 filing as a motion in these circumstances. The Commission's regulations do not specify the timing or form for an applicant for water quality certification to present evidence of waiver of water quality certification. As noted in the Waiver Order, a motion may be filed at any time in a proceeding.[69] Thus, the timing of National Fuel bringing the issue to the Commission's attention (or whether it did so at all) are irrelevant for purposes of the determinations made in the Waiver Order. National Fuel was not required to file its request at any particular time, and in this case National Fuel's timing did not result in its inability to seek the determination.

III. Stay Request

28. New York DEC and Sierra Club also request a stay of the Waiver Order.[70] Finding that justice did not require a stay, the Commission denied an earlier stay request in an order issued on August 31, 2017.[71]

29. The Commission grants a stay when "justice so requires."[72] In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is

[69] Waiver Order, 164 FERC ¶ 61,084 at P 6 n.10 (citing 18 C.F.R. § 385.212(a) (2018)). "[T]he Commission has discretion to determine the actual nature of the filing and to treat the filing accordingly." *Alcoa Power Generating Inc.*, 152 FERC ¶ 61,040, at P 17 (2015).

[70] New York DEC Rehearing Request at 10-12; Sierra Club Rehearing Request at 11-13.

[71] 160 FERC ¶ 61,043 (2017) (Order Denying Stay).

[72] *Tennessee Gas Pipeline Co., L.L.C.,* 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055, at P 118 (2015); *Transcontinental Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015).

in the public interest.[73] If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.[74]

30. In order to support a stay, the movant must substantiate that irreparable injury is "likely" to occur.[75] The injury must be both certain and great and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.[76] The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.[77] Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.[78]

31. New York DEC states that the Environmental Assessment's (EA) finding of no significant impact and the subsequent section 7 conditional certificate authority is no longer valid given the denial of the water quality certification.[79] New York DEC states that the impact of allowing the project to go forward without the New York DEC mitigation measures would be severe.[80] New York DEC explains that the EA assumed the existence of certain mitigation measures,[81] including those in a future section 401 water quality certification.[82] Sierra Club relies on the significant damage that will be

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[73] Ensuring definiteness and finality in our proceedings also is important to the Commission. *See Enable*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline Co*., 141 FERC ¶ 61,022, at P 13 (2012).

[74] *See, e.g*., *Algonquin Gas Transmission*, 156 FERC ¶ 61,111 at P 9.

[75] *See Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183, at P 10 (2015) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[76] *Id*.

[77] *Id*.

[78] *Id.*

[79] New York DEC Rehearing Request at 11.

[80] *Id.*

[81] EA at 20 (Table A.8-1) (list of federal and Pennsylvania and New York permits, approvals, and consultations required for the project).

[82] New York DEC Rehearing Request at 11.

caused if the project moves forward in what Sierra Club calls a violation of the Clean Water Act.[83]

32. New York DEC and Sierra Club have failed to demonstrate "proof indicating that the harm is certain to occur in the near future."[84] In the EA, Commission staff examined the project's impacts on geology, soils, groundwater, surface water, wetlands, vegetation, aquatic resources, wildlife, threatened and endangered species, land use, visual resources, socioeconomics, cultural resources, air quality, noise, reliability and safety, cumulative impacts, and alternatives.[85] None of the EA's findings are now wrong as a result of New York DEC's waiver, because Commission staff did not base those findings on any forthcoming conditions from New Yok DEC.[86] Accordingly, the EA did not provide for alternative mitigation in the event that New York DEC waived water quality certification.[87]

33. When it approved the Northern Access 2016 Project, the Commission fully considered the EA prepared by Commission staff and addressed the comments of New York DEC, Allegheny Defense Project, Town of Pendleton and others in the Certificate Order's environmental discussion.[88] The Commission determined that, on balance, the Northern Access 2016 Project, if constructed and operated in accordance with the application and environmental conditions imposed by the Certificate Order, would not significantly affect the quality of the human environment and would be an environmentally acceptable action.[89] This finding did not assume conditions by New York DEC. Given this conclusion, New York DEC and Sierra Club have not demonstrated that irreparable harm is likely to occur, and we deny their motions for stay.

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[83] Sierra Club Rehearing Request at 11.

[84] *Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183 at P 10 (citing *Wisconsin Gas Co.*, 758 F.2d 669 at 674).

[85] The EA addressed issues raised by New York DEC. *See, e.g.,* EA at 55 (sensitive vegetation communities) and 57 (forest fragmentation).

[86] *See* EA at 47.

[87] *Id.*

[88] *See* Certificate Order, 158 FERC ¶ 61,145 at PP 68-197.

[89] *Id.* P 197.

The Commission orders:

(A) The requests for rehearing filed by New York DEC and Sierra Club are denied.

(B) The requests for stay filed by New York DEC and Sierra Club are denied.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.