153 FERC ¶ 61,323
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Gas Transmission, LLC — Docket Nos. CP15-14-000
CP15-14-001

ORDER ISSUING CERTIFICATE

(Issued December 18, 2015)

1. On November 12, 2014, Texas Gas Transmission, LLC (Texas Gas), filed an application pursuant to section 7(c) of the Natural Gas Act and Part 157 of the Commission's Regulations, for a certificate of public convenience and necessity to construct, operate, and maintain certain pipelines and appurtenant facilities (the Southern Indiana Market Lateral) to extend from Henderson County, Kentucky, to the city of Mount Vernon in Posey County, Indiana.[1] As discussed below, the Commission grants the requested certificate authorization, subject to the conditions described herein.

I. Background

2. Texas Gas is a limited liability company organized and existing under the laws of the State of Delaware and authorized to do business in the States of Texas, Louisiana, Arkansas, Mississippi, Tennessee, Kentucky, Indiana, Illinois, and Ohio. Texas Gas transports gas in interstate commerce, and thus is subject to the Commission's jurisdiction as a "natural-gas company" within the meaning of NGA section 2(6).[2]

[1] On November 12, 2014, Texas Gas filed an initial application in this proceeding, seeking authorization for additional facilities to bring additional volumes to fuel a new fertilizer plant. The sponsor of the planned plant subsequently elected not to go forward with the project, and in response, Texas Gas amended its application March 30, 2015 to downsize its proposal.

[2] 15 U.S.C. § 717a(6) (2012).

II. Proposal

3. Texas Gas states its proposed Southern Indiana Market Lateral will consist of a 30.6-mile-long, 10-inch-diameter pipeline lateral extending from Robards Junction on Texas Gas's mainline in Henderson County, Kentucky, to Mount Vernon, in Posey County, Indiana. The proposed lateral will be able to deliver 53,500 million British thermal units of gas per day (MMBtuf/d) to the existing SABIC Innovative Plastics Mt. Vernon, LLC's (SABIC) chemical manufacturing plant and planned co-generation plant in Mt. Vernon, Indiana. Power for SABIC's existing plant is provided by coal, and the proposed project will enable SABIC to convert over to gas.

4. Texas Gas conducted an open season from March 28, 2014 to April 22, 2014. Texas Gas received binding bids from SABIC for firm transportation capacity on its existing mainline and proposed pipeline lateral. Texas Gas executed precedent agreements with SABIC to provide 53,500 MMBtu/d of firm transportation service on the proposed lateral at negotiated rates for a primary term of 20 years.[3] Texas Gas plans to provide service on the proposed Southern Indiana Market Lateral facilities under its recently established Firm and Interruptible Lateral Service rate schedules.[4]

III. Notice and Interventions

5. Public notice of Texas Gas's application was published in the *Federal Register* on November 26, 2014.[5] Timely, unopposed motions to intervene were file by Atmos Energy Marketing, LLC; Atmos Energy Corporation; Western Tennessee Municipal Group jointly with the Jackson Energy Authority, City of Jackson, Tennessee, and the

[3] A portion of the mainline capacity will be the unsubscribed capacity provided by Texas Gas' recently authorized Ohio-Louisiana Access Project, *Texas Gas Transmission, LLC,* 152 FERC ¶ 61,160 (2015) (*Texas Gas*). SABIC's firm contract demand on Texas Gas' mainline system from Zone 1 to Zone 3 is 8,265 MMBtu/d and 29,235 MMBtu/d from Zone 4 to Zone 3, for a combined mainline firm transportation capacity of 37,500 MMBtu/d.

[4] Texas Gas was authorized on March 30, 2015, in Docket No. RP15-440-000, to establish new Rate Schedules Firm Lateral Service (FLS) and Interruptible Lateral Service (ILS). *See Texas Gas*, 150 FERC ¶ 61,236 (2015).

[5] 79 Fed. Reg. 70,512 (2014).

Kentucky Cities; Midwest Fertilizer Corporation; and Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.[6]

6. Motions to intervene out-of-time were submitted by the Allegheny Defense Project, the FreshWater Accountability Project, the Ohio Valley Environmental Coalition, and Heartwood (collectively, Allegheny). We will grant these late-filed motions to intervene, since Allegheny has shown an interest in this proceeding and doing so will not unduly delay, disrupt, or otherwise prejudice the proceeding or other parties.[7]

7. Allegheny submitted a protest to the proposed project,[8] to which Texas Gas submitted an answer. Although the Commission's Rules of Practice and Procedure do not permit answers to protests,[9] our rules provide that we may, for good cause, waive this provision.[10] We find good cause to accept Texas Gas's answer, as it provides information that has assisted in our decision-making process.

IV. Discussion

8. Since Texas Gas's proposed facilities will be used to transport natural gas in interstate commerce, they will be subject to the jurisdiction of the Commission, with the construction and operation of the facilities subject to the requirements of subsections (c) and (e) of NGA section 7.[11]

A. Application of the Certificate Policy Statement

9. On September 15, 1999, the Commission issued a policy statement to provide guidance as to how the Commission evaluates proposals for certificating new

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[6] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. *See* 18 C.F.R. § 385.214 (2015).

[7] S*ee* 18 C.F.R. § 385.214(d) (2015).

[8] Although Allegheny titles its Feb. 25, 2015 submission as "comments," because the comments unambiguously oppose the Texas Gas proposal, we view Allegheny's submission as a protest to the proposed project.

[9] *See* 18 C.F.R. § 385.213(a)(2) (2015).

[10] 18 C.F.R. § 385.101(e) (2015).

[11] 15 U.S.C. §§ 717f(c) and 717f(e) (2012).

construction.[12] The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances public benefits against potential adverse consequences. In doing so, the Commission considers the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, an applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain.

10. Under this policy, the threshold requirement in establishing the public convenience and necessity for proposed projects is that the applicant must be prepared financially to support the project without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effect the proposed project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the proposed location of the new facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

11. Texas Gas proposes to establish initial incremental recourse rates for firm and interruptible services on the proposed lateral under its now-existing Rate Schedules FLS and ILS.[13] Under the lateral service rate schedules, all costs associated with the new lateral services are allocated solely to new lateral customers. Therefore, we conclude Texas Gas's existing customers will not subsidize the project, and the threshold requirement of no subsidization is met.

12. The proposed project will not adversely impact: (1) Texas Gas's current customers, as it will not degrade current services or operations of the Texas Gas system; or (2) other existing pipelines or their customers, as it will not replace any service

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[12] *Certification of New Interstate Natural Gas Pipeline Facilities* (*Certificate Policy Statement*), 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

[13] *See Texas Gas,* 150 FERC ¶ 61,236.

currently provided by another pipeline. We note no pipeline opposes Texas Gas's new lateral.

13. Allegheny argues the Commission betrays the aims of its Certificate Policy Statement by underweighting landowner interests, the unnecessary disruption of the environment, the use of eminent domain, and overbuilding. Allegheny insists the National Environmental Policy Act of 1969 (NEPA) and the Certificate Policy Statement oblige the Commission to consider the upstream environmental impacts of Marcellus and Utica gas production. Allegheny believes that by authorizing "many redundant pipelines that parallel each other,"[14] the Commission is facilitating unnecessary overbuilding, the use of eminent domain, and environmental disruption.

14. We disagree with these contentions. The proposed project will affect approximately 564.5 acres during construction, of which approximately 368.9 acres will be restored, leaving approximately 195.6 acres permanently affected by the new facilities' right-of-way and access roads. Texas Gas states its intent to acquire necessary rights-of-way by negotiation whenever possible to minimize reliance on eminent domain. We find Texas Gas has made reasonable efforts to diminish impacts on landowners and communities by routing the lateral through land used primarily for agriculture and co-locating with existing utility right-of-ways where possible. We acknowledge that the construction and operation of the proposed lateral will result in certain adverse impacts on landowners and the environment, and we impose measures to mitigate these impacts.

15. We find no evidence of overbuilding given that: (1) the new lateral should not adversely impact current customers or existing pipelines serving the same market; and (2) need is demonstrated by a prospective shipper's commitment to long-term firm service for the full capacity of the new lateral.[15] Below we address, and reject, Allegheny's request to consider upstream impacts of gas production.

16. Based on the economic benefits the Southern Indiana Market Lateral is expected to provide, the absence of significant adverse impacts on existing customers or other pipelines and their captive customers, and the modest adverse impacts on landowners, communities, and the environment, we find the proposed project, as conditioned in this

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[14] Allegheny's Comments at 40.

[15] We note that the shipper, SABIC, has indicated that the gas to be delivered by the project is necessary to enable it to replace all the existing coal-fired boilers at its manufacturing plant, which it must do by January 31, 2016, in order to comply with new EPA emission standards. *See* SABIC's Comments, at 2 (Oct. 12, 2015).

order, is consistent with the Certificate Policy Statement and required by the public convenience and necessity.

B. Rates

17. Texas Gas proposes an initial daily maximum incremental firm reservation recourse rate of $0.5826 per MMBtu. The proposed maximum recourse rate for interruptible service will be the 100 percent load factor equivalent of the monthly firm transportation rate. Texas Gas's firm rate was developed by dividing the annual cost of service for the proposed lateral of $11,376,646 by the annual transportation quantity of 19,527,500 MMBtu. In developing the proposed cost-of-service rates, Texas Gas proposes using an overall rate of return of 9.88 percent based on Texas Gas's actual capital structure in its most recent Form 2 filing and a return on equity (ROE) of 14 percent.

18. We have reviewed the proposed cost of service and the proposed incremental firm recourse rate and find that they are reasonable with the exception of the use of the actual capitalization from Texas Gas's most recent FERC Form 2 and an ROE of 14 percent to calculate the overall return. With respect to developing incremental rates for expansions of existing pipeline systems, our general policy is to use the rate of return components approved in the company's last NGA general section 4 rate proceeding. The Commission has generally approved higher ROEs for new companies proposing greenfield projects,[16] but not for extensions of existing pipeline systems, such as the new lateral proposed here.

19. Texas Gas has not supported its use of an ROE component different from its most recently approved ROE. Therefore, we deny Texas Gas's proposal to use the higher ROE and direct Texas Gas to make a filing no earlier than 60 days before the in-service date of the proposed project to revise the recourse rates to reflect its last approved ROE.[17]

20. Texas Gas states in its February 18, 2015 data response that it did not allocate costs and volumes to interruptible services as part of the rate design for services on its proposed lateral. When establishing initial rates applicable to new pipelines or laterals, the Commission requires that a company either provide for the crediting of all interruptible revenues, net of variable costs, to customers paying maximum rates, or that

[16] *See, e.g.*, *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at PP 48-49 (2014) and *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at PP 39-40 and n.28 (2014).

[17] *Gas Transmission Northwest, LLC*, 142 FERC ¶ 61,186 (2013).

the company allocate volumes and costs to its interruptible service.[18] Therefore, in the compliance filing required above, Texas Gas must credit interruptible revenues, net of variable costs, to maximum rate paying customers, or allocate costs and volumes to interruptible services.

21. Texas Gas asserts that prior to placing its proposed lateral in service, it will file to restate its maximum recourse rate based on costs incurred and projected costs to complete the project. If Texas Gas intends to make changes not specifically authorized by this order prior to placing the Southern Indiana Market Lateral into service, it will need to file an application under NGA section 7(c) to amend its certificate authorization sufficiently in advance of its proposed in-service date to enable the Commission to process and act upon the amendment request. In that filing, Texas Gas will need to provide cost data and the required exhibits supporting any revised rates, terms, and conditions of service. If Texas Gas chooses to place its project into service before the Commission has acted upon any amendment filed to revise its initial rates, the rates will no longer be subject to change by means of an amendment to its certificate pursuant to NGA section 7. Accordingly, in that event, the Commission would have to terminate the amendment proceeding, without prejudice to Texas Gas making an NGA section 4 filing in order to change its rates, terms, or conditions of service.[19]

22. Consistent with our Certificate Policy Statement, we direct Texas Gas to keep separate books and accounting of costs attributable to the Southern Indiana Market Lateral. The books should be maintained with applicable cross-references, as required by section 154.309 of our regulations.[20] This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case filing and the information must be provided consistent with Order No. 710.[21] Such measures protect existing customers from cost overruns and from subsidization that might result from under-collection of the new project's incremental cost of service, as well as assist the Commission and parties in any rate proceedings, to determine the costs of the new lateral.

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[18] *See Transcon. Gas Pipe Line Co.*, 130 FERC ¶ 61,019 (2010) (*Transco*) and *Maritimes and Northeast Pipeline L.L.C.*, 80 FERC ¶ 61,136 (1997).

[19] *See Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at P 90 (2014) (*Corpus Christi*).

[20] 18 C.F.R. § 154.309 (2015).

[21] *See Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines,* Order No. 710, FERC Stats. & Regs. ¶ 31,267, at P 23 (2008).

23. Texas Gas states it has executed a precedent agreement with SABIC on the Southern Indiana Market Lateral at negotiated rates and will execute and file the negotiated rate service agreement with the Commission. Texas Gas must file either its negotiated rate agreement or tariff records setting forth the essential terms of the agreement associated with the proposed lateral, in accordance with the Alternative Rate Policy Statement[22] and the Commission's negotiated rate policies.[23] This filing must be made at least 30 days, but not more than 60 days, before the proposed effective date for such rates.[24]

24. Texas Gas's application does not address the collection of fuel or lost and unaccounted for gas (LAUF) on the proposed lateral. Texas Gas states in its February 18, 2015 data response that it recovers fuel and LAUF via a zone-based annual tracker contained in its currently effective FERC tariff and that LAUF is imbedded in all fuel retention percentages. Texas Gas states all applicable fuel and LAUF will be recovered from contracts delivering into the subject lateral and that a separate LAUF charge for the lateral would result in over-recoveries of LAUF.

25. The Commission's policy is that companies are required to recover LAUF gas from customers using a new lateral just as customers using existing system facilities are assessed for LAUF gas.[25] Companies are not required to use the system rate to recover LAUF gas on the lateral, but are free to develop a methodology that fits the operational

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[22] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *clarification granted,* 74 FERC ¶ 61,194, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996), *petition for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998).

[23] *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *reh'g dismissed and clarification denied*, 114 FERC ¶ 61,304 (2006).

[24] Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement.

[25] *See, e.g., Eastern Shore Natural Gas Co.*, 145 FERC ¶ 62,153 (2013); *Transco*, 130 FERC ¶ 61,019; and *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,240 (2002) (*Columbia*).

characteristics of the lateral. Therefore, we will require Texas Gas to explain how it will determine the level of retention for LAUF on the Southern Indiana Market Lateral when it makes its first fuel tracker filing after placing the new facilities in service.

C. Environmental Analysis

26. On January 9, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Southern Indiana Market Lateral Project and Request for Comments on Environmental Issues* (NOI), which it supplemented on February 10, 2015. The original NOI and supplemental NOI were published in the Federal Register and mailed to interested parties, including federal, state, and local officials; agency representatives; environmental and other conservation organizations; Native American tribes; local libraries and newspapers; and property owners potentially affected by the proposed.

27. Comments in response to the NOIs were submitted by three landowners, the U.S. Army Corps of Engineers (Corps of Engineers), U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), the Delaware Nation, Allegheny, and one individual. The primary issues raised concerned project impacts on wildlife management areas, biological resources and wetlands, soils and drainage tiles, drinking water supplies, cultural resources and historic properties, and the project's potential to result in cumulative impacts.

28. To satisfy the requirements of NEPA, Commission staff, with the cooperation of Corps of Engineers, prepared an environmental assessment (EA) for the proposed project. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. Substantive comments received in response to the NOIs are addressed in the EA.

29. The EA was issued for a 30-day comment period and placed into the public record on September 14, 2015. The Commission received comments from one landowner, the Kentucky Heritage Council (Kentucky SHPO), EPA, and the Indiana Department of Natural Resources Division of Historic Preservation and Archaeology (Indiana SHPO). In addition, Texas Gas filed responses to some of the above comments and provided updated project information.

30. Robert Cates, a landowner, expressed concerns about the project's potential to cause soil erosion on his farmland. As discussed in the EA, Texas Gas will be required to comply with the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (*Plan*), which contains measures to minimize erosion-related impacts during construction and restoration. Further, Texas Gas states it has reached a tentative

agreement with this landowner for acquisition of an easement across this property, which satisfies all of the landowner's concerns and requests.

31. The Kentucky SHPO comments that additional archaeological work is pending on site 15He967 in order to assess the site's eligibility for the National Register of Historic Places, and notes that approximately two percent of the pipeline route has not yet been surveyed for archaeological resources. As stated in the EA, FERC staff has not completed its responsibilities under Section 106 of the National Historic Preservation Act for this property. The Kentucky SHPO states its understanding that Texas Gas will file information with the Commission, which is consistent with Environmental Condition 17 in the appendix to this order stating that prior to construction, Texas Gas must complete and submit for review and approval its remaining cultural resources survey reports.

32. EPA recommends requiring Texas Gas to identify potential design mitigation measures that could be used if the EA-recommended soil liquefaction study for the tie-in point with the meter and regulator (M&R) station identifies a potential for subsidence. EPA also recommends Texas Gas identify and discuss potential design and construction methods typically used in areas having a high potential for soil liquefaction and identify those methods it proposes to use in Posey County, Indiana. As recommended in the EA and included as Environmental Condition 13 in the appendix to this order, Texas Gas must perform a soil liquefaction study for the M&R station prior to construction to determine the settlement potential of the pipeline at the tie-in point with the M&R station at milepost 30.6. In addition, Texas Gas will hire professional engineers licensed in the State of Indiana to evaluate the liquefaction study's soil analysis to determine whether liquefaction mitigation measures for the project M&R station and pipeline are warranted.

33. EPA believes the EA should have included updated waterbody and wetland impacts and avoidance, minimization, and compensation mitigation information, an accounting of forested wetland conversion to another type of wetland, figures showing the locations of all wetlands impacted and wetlands avoided via use of a horizontal directional drill (HDD), and a wetland compensation mitigation plan that addresses both the permanent loss of wetlands and the conversion of forested wetlands to another wetland type. As discussed in the EA, the Commission's *Wetland and Waterbody Construction and Mitigation Procedures* (*Procedures*) require a number of avoidance and minimization measures for reducing impacts on wetlands. The EA accounts for the conversion of 1.12 acres of forested wetland to emergent wetland. Texas Gas states it completed payment of compensatory mitigation for the permanent conversion of forested wetlands to herbaceous wetlands through the purchase of credits from the Kentucky Department of Fish and Wildlife Resources' (KDFWR) in-lieu fee program as required

by the section 404 permit[26] issued by the Corps of Engineers on June 17, 2015. The KDFWR confirmed this agreement in a July 14, 2015 letter. This wetland compensation mitigation agreement addresses the permanent loss of all types of wetlands. In its application, Texas Gas provided detailed maps identifying wetland locations based on National Wetland Inventory data. Environmental Condition 4 in the appendix to this order requires Texas Gas to file updated maps depicting delineated (field data-derived) wetlands prior to construction and the specific locations where wetlands will be avoided by HDD.

34. EPA recommends that Texas Gas undertake voluntary forest compensation for permanent and temporary tree losses not otherwise covered under existing federal and/or state regulations, and suggests that such mitigation include, but not be limited to, helping to finance forest restoration projects by local, state, and/or federal natural resource agencies. Because of the project's potential impacts on federally listed bat habitat, EPA believes the EA should have included either the U.S. Fish and Wildlife Service (FWS)-approved Memorandum of Agreement (MOA) between Texas Gas and FWS (or a FWS biological opinion) and that the EA include mitigation measures required by FWS, if applicable.

35. The MOA between FWS and Texas Gas, filed with the Commission on October 26, 2015, accounts for the loss of 12.2 forested acres of Indiana bat and northern long-eared bat habitat. The MOA contains measures to mitigate for adverse effects to Indiana bats that will occur as a result of this forest loss, including a contribution by Texas Gas to the Imperiled Bat Conservation Fund administered by the Kentucky Natural Lands Trust. Texas Gas's filing of the MOA satisfies recommended condition 16 within the EA; therefore, this recommendation is not included in the environmental conditions in the appendix to this order.

36. EPA recommends that Texas Gas continue to pursue opportunities to use clean diesel equipment, vehicles, and fuels in construction of the project, and that the Commission identify and disclose any opportunities to use these measures. Texas Gas states in its responses to comments that it will instruct project construction personnel to minimize the idle time of diesel-fueled equipment to the extent practicable. We encourage Texas Gas to pursue other opportunities to minimize emissions generated from project construction activities such as using clean diesel fuel and limiting the idle time of diesel-fueled equipment to five minutes when not in active use.

37. EPA recommends that best management practices be identified for reducing methane leakage from the project facilities. As stated in the EA, the project's potential

[26] *See* section 404 of the Clean Water Act 33 U.S.C. §§ 1251–1387 (2012).

fugitive emission releases of methane are estimated to be 71.5 tons (as carbon dioxide equivalent) per year. To minimize fugitive methane releases during project operation, Texas Gas will maintain its facilities in accordance with industry best management practices and comply with all regulatory inspection and reporting requirements.

38. EPA states that the EA should have disclosed how the proposed project may be impacted by climate change and identify best management practices that Texas Gas should employ during project construction to account for the possibility of extreme precipitation and heat events. As stated in the EA, Texas Gas will implement its *Stormwater Pollution Prevention Plan* (*SWPPP*) and *Fugitive Dust Control Plan* and comply with the Commission's *Plan* and *Procedures* during all phases of project construction and restoration. These documents describe practices Texas Gas must follow that will mitigate impacts from weather events, including extreme precipitation and heat events, that may be attributable to climate change. In addition, these plans require Texas Gas to install appropriately sized culverts at stream crossings for temporary and permanent access roads.

1. Segmentation

39. The Council on Environmental Quality (CEQ) regulations require the Commission to include "connected actions," "cumulative actions," and potentially, "similar actions" in its NEPA analyses.[27] "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."[28] "Connected actions" include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; (c) are interdependent parts of a larger action and depend on the larger action for their justification.[29]

40. In evaluating whether connected actions are improperly segmented, courts apply a "substantial independent utility" test. The test asks "whether one project will serve a

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[27] 40 C.F.R. § 1508.25(a)(1)-(3) (2015).

[28] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (*Delaware Riverkeeper*). Unlike connected and cumulative actions, analyzing similar actions is not always mandatory. *See, e.g., Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-1306 (9th Cir. 2003).

[29] 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2015).

significant purpose even if a second related project is not built."[30] For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. Similar to a highway network, "it is inherent in the very concept of" the interstate pipeline grid "that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility."[31]

41. In *Delaware Riverkeeper* the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in "a single pipeline" that was "linear and physically interdependent" and where those projects were financially interdependent.[32] The court put a particular emphasis on the four projects' timing, noting that, when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.[33] Courts have subsequently indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.[34] Further, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.[35]

42. Allegheny argues the Commission's EA neglected to consider several other projects it contends are connected, cumulative, or similar. As discussed below, we

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

[31] *Coal. on Sensible Transp.*, 826 F.2d 60, 69.

[32] 753 F.3d 1304, 1308.

[33] *Id.*

[34] *See Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014).

[35] *See Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir, 2015).

conclude there is no economic, engineering, or environmental rationale for considering these projects in conjunction with the proposed Southern Indiana Market Lateral.

43. Allegheny claims there is "clear evidence that the Southern Indiana Market Lateral is dependent upon implementation of the Ohio-Louisiana Access Project,"[36] and points to SABIC, the sole prospective shipper on the proposed lateral, having contracted for capacity on the Ohio-Louisiana Access Project. Texas Gas avers that the Southern Indiana Market Lateral and Ohio-Louisiana Access Project are independent,[37] which our review of the two projects affirms.[38] Texas Gas acknowledges that SABIC has reserved capacity on its Ohio-Louisiana Access Project, but insists that if this recently approved project is not constructed, SABIC will be able to arrange for gas to be delivered to the new lateral via Texas Gas's existing south-to-north pipeline facilities. Texas Gas explains SABIC could contract for capacity on its existing system beginning July 2016, the anticipated in-service date of the proposed lateral.[39] We affirm that although SABIC has elected to make use of capacity that will become available when the Ohio-Louisiana Access Project goes into service, SABIC could alternatively forego the new capacity that will be made available in favor of relying exclusively on existing Texas Gas facilities to transport volumes sufficient to accommodate its lateral service.

44. Allegheny asserts that the proposed lateral and Texas Gas's pending Western Kentucky Market Lateral and Northern Supply Access projects[40] "are very similar in

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[36] Allegheny's Comments at 25.

[37] Texas Gas's Answer at 15. Texas Gas adds that the "projects are geographically distinct from one another. Construction of the two projects will take place in different locations, hundreds of miles apart, on different parts of Texas Gas's system," and if one project does not go forward, the other still will.

[38] In our review of the Ohio-Louisiana Access Project, we determined the "two projects have two different purposes, involve the construction of facilities in different geographic regions hundreds of miles apart on different parts of Texas Gas's system, and neither project is operationally dependent on the other." *Texas Gas*, 152 FERC ¶ 61,160 at P 108.

[39] *See* Texas Gas's Data Response dated April 13, 2015, at 4.

[40] Texas Gas filed its application for the Western Kentucky Market Lateral Project in Docket No. CP15-105-000 on March 4, 2015 and its application for the Northern Supply Access Project in Docket No. CP15-513-000 on June 5, 2015.

purpose and geography" and "have in-service dates between 2016-2017,"[41] and so should be evaluated together in one EIS. Allegheny urges that this single EIS also include the Rockies Express Pipeline LLC's Zone 3 East-to-West project[42] "as a connected, cumulative, and/or similar action"[43] because it will make Appalachian shale gas available at Lebanon, Ohio, which the Texas Gas projects "appear to depend [upon], in large part."[44] Allegheny goes on to observe that "[s]imilar infrastructure expansions are occurring in Ohio, West Virginia, and other states in and surrounding the Marcellus and Utica shale formations," and argues that because "[a]ll of these projects are directly related to ongoing and reasonably foreseeable future gas drilling … [t]he cumulative impacts of this drilling and the other direct and indirect effects of each of these jurisdictional infrastructure projects should be considered comprehensively in an EIS, not in isolation in individual EAs."[45]

45. TheWestern Kentucky Market Lateral, like the Southern Indiana Market Lateral, is a proposed lateral line extending from the Texas Gas mainline to serve a single industrial end user. Texas Gas states that the Western Kentucky Market Lateral industrial end user "will source its gas supplies solely from the U.S. Gulf Coast, and thus will not use any capacity associated with the proposed [Southern Indiana Market Lateral] Project."[46] Allegheny turns this aside, as Texas Gas "provides no evidence to support this assertion," and adds that "once the Ohio-Louisiana Access Project is in service, and increased gas from the Marcellus and Utica shale is made available, there would be nothing to prevent [Texas Gas] from making that gas available to the customer of the Western Kentucky Market Lateral."[47]

46. Our review of the records in the Western Kentucky Market Lateral proceeding and here reveal the following: the Western Kentucky Market Lateral and the Southern Indiana Market Lateral share a similar time frame; both will be new lateral lines, though

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[41] Allegheny's Comments at 27.

[42] Rockies Express Pipeline LLC, 150 FERC ¶ 61,161 (2015) (REX).

[43] Allegheny's Comments at 27.

[44] *Id*.

[45] *Id*. at 27 and 28.

[46] Texas Gas's Application, Resource Report 1 at 1-23.

[47] Allegheny's Comments at 26.

they connect to Texas Gas's existing mainline at points approximately 50 miles apart; each has a single customer committed to firm, long-term service for the full capacity of the lateral; and all gas to be shipped on the laterals will be used to fuel the respective single customer's industrial plant . We do not find that these similarities in timing, relative location, and function is cause to consider these two projects together for the purpose of our environmental review. The lateral projects would be physically, financially, and operationally independent. Each industrial customer would be able to obtain its full contracted-for volumes by relying exclusively on south-to-north capacity available on the Texas Gas mainline. Thus, neither lateral project would affect the other, and it would be immaterial to both whether the Ohio-Louisiana Access Project goes into service.[48] We note that as solely a transporter of natural gas, Texas Gas plays no role in where shippers on its system might choose to source their supply. Moreover, whether either project may obtain gas sourced from shale reserves in the future is not a factor in our current environmental review, since there is sufficient gas available from conventional sources to supply both projects. Further, we anticipate impacts associated with each lateral project would be limited, temporary, and localized, such that the proposed projects' proximity in time and place would not cause any cumulatively significant environmental impacts.

47. The Northern Supply Access and the REX projects share even less in common with the proposal here. Like other projects identified by Allegheny, we find these projects meet the "substantial independent utility" test, because "each project would have taken place in the other's absence," the projects "have independent utility and are not considered connected actions."[49]

48. The Northern Supply Access Project involves modifications to Texas Gas's system at points in Ohio, Indiana, Kentucky, Tennessee, Mississippi, and Louisiana to "allow it to efficiently and reliably flow proposed quantities of natural gas north to south

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[48] As Texas Gas states: "The Western Kentucky Market Lateral does not depend on either the Southern Indiana Market Lateral or Ohio-Louisiana Access Project, and the Western Kentucky Market Lateral would go forward even in the absence of both Projects." Texas Gas's Application at 19.

[49] *See, e.g., Delaware Riverkeeper*, 753 F.3d 1304, 1316-17, assessing independent utility as one of four factors articulated in *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987); *Webster v. U.S. Dep't of Agric.,* 685 F.3d 411, 426 (4th Cir. 2012)*; Wilderness Workshop v. Bureau of Land Mgmt.*, 531 F.3d 1220, 229 (10th Cir. 2008); and *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

on its existing system, while retaining the current capability to flow south to north."[50] Although the Northern Supply Access Project would affect capacity on the Texas Gas mainline, Texas Gas clarifies this would be incremental. Thus, the service to be provided by the proposed Southern Indiana Market Lateral would not depend on the system enhancements the Northern Supply Access Project would provide. Since each project would be fully functional without the other, there is no cause to review the projects together.

49. The REX project has no bearing on either of Texas Gas's proposed laterals. The REX project enables bi-directional flow on its mainline, allowing gas to move east to west, from Ohio to Illinois. Although the REX and Texas Gas systems interconnect at Lebanon, Ohio, gas need not flow from one to the other in support of the proposed Southern Indiana Market Lateral service. Allegheny rejects REX's claim that its project is unrelated to Texas Gas's projects,[51] insisting Texas Gas's projects "appear to depend, in large part, on construction of the REX Pipeline Project."[52] We find no dependence. While REX and Texas Gas have projects underway in the same broad Midwestern region that are scheduled for completion within several years of one another, these projects are not physically or functionally interdependent, and we find no indication the projects' development is coordinated. Each project can proceed on its own. Consequently, we do not believe the projects' location and timing merit viewing them as similar or connected. Moreover, as with the other projects identified by Allegheny, the Northern Supply Access and REX Projects are far removed from the region of influence established for the Southern Indiana Market Lateral, thus impacts from the projects are not included in the environmental review of the Southern Indiana Market Lateral.

2. Direct, Indirect, and Cumulative Impacts

50. NEPA requires federal agencies to prepare "a detailed statement . . . on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment."[53] To prepare this statement, agencies must take "a hard look" at an action's environmental consequences. CEQ regulations require agencies to consider three kinds of impacts flowing from a federal action: direct, indirect, and

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[50] Texas Gas's Application for its Northern Supply Access Project, at 1 (June 6, 2015).

[51] *See* REX's Application, at 13, n.14 (June 10, 2014).

[52] Allegheny's Comments at 27.

[53] 42 U.S.C. § 4332(2)(c)(i) (2012).

cumulative.[54] Allegheny objects to how the Commission defined and studied these impacts.

a. Direct Impacts

51. The direct impacts of an action are caused by the action and occur at the same time and place within the footprint of the proposed action.[55] Allegheny insists the Commission must take a hard look at the direct impact of the proposed project on waterbodies and wetlands, wildlife habitat, air quality, and land use. In particular, Allegheny challenges Texas Gas's expectation that there will be no impacts on the Ohio River, due to its intent to HHD under this body of water, and asks the Commission to consider impacts to the river from the HDD process and the potential for future pipeline ruptures.

52. The EA identifies and discusses direct impacts attributable to the proposed project. To limit unavoidable impacts to waterbodies and wetlands, wildlife habitat, air quality, and land use, we require Texas Gas to adhere to our *Plan* and *Procedures*, which "are a set of construction and mitigation measures that were developed in collaboration with other federal and state agencies and the natural gas pipeline industry to minimize the potential environmental impacts of the construction of pipeline projects in general."[56] Texas Gas will also be subject to additional mitigation measures, as described in the EA. For example, to minimize unavoidable impacts on wildlife during construction, Texas Gas will limit the time that trenches are open, and all personnel on-site must participate in environmental training that outlines the appropriate steps for workers to take if animals are either encountered during construction or identified in trenches prior to commencement of construction each day.[57]

53. The EA addresses and accepts Texas Gas's plan to cross the Ohio River by HDD, observing that this approach will avoid all in-water work. The EA acknowledges there "is a slight chance of inadvertent releases underneath the river during HDD operations," but observes the "large volume of moving water within the Ohio River … would dilute any released drilling mud."[58] Although the EA does not specifically consider the

[54] 40 C.F.R. § 1508.25 (2015).

[55] 40 C.F.R. § 1508.8(b) (2015).

[56] EA at 4, n.2.

[57] *Id*. at 41.

[58] *Id*. at 44.

prospect of a pipeline rupture on the Ohio River, protecting against the risk of a rupture is factored into the safety standards developed by the U.S. Department of Transportation (DOT).[59] As a condition of our certificate authorization, Texas Gas is required to comply with these safety standards.

54. We believe the EA's review of direct impacts was sufficient and we concur with the determination that these impacts will be minor, temporary, and localized. In addition, we believe the risk of a rupture under the Ohio River, or at any other point along the length of the proposed lateral, is acceptably small, and will remain so due to Texas Gas's required adherence to DOT's safety regulations.

b. Indirect Impacts

55. Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[60] Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

56. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"[61] in order "to make an agency responsible for a particular effect under NEPA."[62] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."[63]

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[59] *See* 49 U.S.C. Chapter 601 (2012) and 49 C.F.R. Parts 190-192 (2015). DOT's Pipeline and Hazardous Materials Safety Administration manages the national regulatory program to ensure safety in the design, construction, testing, operation, and maintenance of pipeline facilities and to guide the response to an emergency.

[60] *See* 40 C.F.R. § 1508.8(b) (2015).

[61] *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (*Pub. Citizen*) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (*Metro. Edison*)).

[62] *Id.*

[63] *Id.*

Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if the causal chain is too attenuated.[64] Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[65]

57. An effect is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[66] NEPA requires "reasonable forecasting," but an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."[67]

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

59. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by the CEQ regulations.[68] A causal relationship sufficient to warrant

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[64] *Metro. Edison*, 460 U.S. 766, 774.

[65] *Pub. Citizen*, 541 U.S. 752, 770.

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

[67] *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (*Northern Plains*).

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

Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).[69] To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas. It would make little economic sense to undertake construction of a pipeline in the hope that production might later be determined to be economically feasible and that the producers will choose the previously constructed pipeline as best suited to move gas to the market.

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

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

context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.[70]

61. Nonetheless, we note that, although not required by NEPA, a number of federal agencies have examined the potential environmental issues associated with unconventional natural gas production in order to provide the public with a more complete understanding of the potential impacts. The U.S. Department of Energy (DOE) has concluded that such production, when conforming to regulatory requirements, implementing best management practices, and administering pollution prevention concepts, may have temporary, minor impacts to water resources.[71] EPA has reached a similar conclusion.[72] With respect to air quality, DOE found that natural gas development leads to both short- and long-term increases in local and regional air emissions.[73] It also found that such emissions may contribute to climate change. However, to the extent that natural gas production replaces the use of other carbon-based energy sources, DOE found there may be a net positive impact in terms of climate change.[74]

62. Allegheny contends it is reasonably foreseeable that gas supplies for the Southern Indiana Market Lateral will be extracted from shale deposits, and based on this, insists the NEPA review take into account environmental impacts associated with shale gas

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

[71] *See* DOE's *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, at 19 (Aug. 2014) (DOE Addendum), available at http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf.

[72] *See* EPA's *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, at ES-6 (June 2015), available at http://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=244651#_ga=1.161236345.552502682.1445635975. *See also Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128 (2015), a final rule by the U.S. Department of the Interior's Bureau of Land Management that promulgates regulations for hydraulic fracturing on federal and Indian lands to "provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health."

[73] DOE Addendum at 32.

[74] *Id.* at 44.

production.[75] Even if all the gas carried by the proposed project originates from these formations,[76] these formations spread over 100,000 square miles, thus any impact of this one lateral line on this vast area would be insignificant. Because we find no way to correlate gas volumes flowing on the new lateral with gas flowing from any discrete part of the shale basin, we find no way to reliably identify, much less meaningfully quantify, project impacts on production. Therefore, as we have in previous proceedings,[77]

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[75] Allegheny references *Northern Plains*, which finds the Surface Transportation Board (Board) should have taken into consideration the cumulative impacts of coal bed methane well development as part of its NEPA analysis of a proposed railroad line to transport coal from mines in three Montana counties. *Northern Plains* is distinguishable because the Bureau of Land Management and the State of Montana had prepared a programmatic EIS to estimate the reasonably foreseeable number of coal bed methane wells and field compressors, as well as the miles of roads and gathering lines that would be constructed over 20 years in the three counties that the railroad would cross. This provided the Board with information about the timing, scope, and location of future coal bed methane well development. Here, because we lack similar information, and have no way to acquire data or make informed guesses about the timing, location, and scope of future Appalachian gas development, we have no basis for undertaking a similar study.

[76] This is an uncertain proposition. The proposed lateral will interconnect with an existing Texas Gas mainline, which is part of a system of over 6,000 miles of pipeline extending from the Gulf Coast to Ohio, Indiana, and Illinois, with an average daily throughput of approximately 2.7 billion cubic feet. The proposed lateral will have access to gas from as far away as Texas and Louisiana, or still further given Texas Gas's numerous interconnections with other pipelines. Thus, over the life of the lateral, gas may be delivered from varying sources of supply. Further, in view of the proposed lateral's location more than 100 miles from the outer edge of the Marcellus and Utica formations, it does not appear as if it will function as a takeaway line for shale gas production.

[77] *See, e.g., Columbia,* 153 FERC ¶ 61,064, at PP 26-28 (2015); *Corpus Christi,* 151 FERC ¶ 61,098, at P 30 (2015); *Empire Pipelin*e, *Inc*., 150 FERC ¶ 61,181, at P 110 (2015); *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at PP 127-30 (2015); *Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039, at PP 93-96, *order denying reh'g and stay*, 140 FERC ¶ 61,076, at PP 12-13 (2012); Sabine Pass Liquefaction Expansion, LLC, 151 FERC ¶ 61,012, at P 90, *reh'g denied*, 151 FERC ¶ 61,253, at PP 16-23 (2015); *National Fuel Gas Supply Corp.,* 150 FERC ¶ 61,162, at P 46 (2015); *REX*,150 FERC ¶ 61,161, at PP 38-40 (2015); *Tennessee Gas Pipeline Co., L.L.C.,* 150 FERC ¶ 61,160, at PP 61-62 (2015); *Texas Eastern Transmission, LP,* 149 FERC ¶ 61,259, at PP 52-53, P 60 (2014); *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244, at PP 228-37 (2014);

(continued…)

Allegheny contends it is reasonably foreseeable that gas supplies for the Southern Indiana Market Lateral will be extracted from shale deposits, and based on this, insists the NEPA review take into account environmental impacts associated with shale gas production.[78] Even if all the gas carried by the proposed project originates from these formations,[79] these formations spread over 100,000 square miles, thus any impact of this one lateral

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Cheniere Creole Trail Pipeline, L.P., 145 FERC ¶ 61,074, at PP 8-19 (2013); *Central New York*, 137 FERC ¶ 61,121 at PP 81-101, *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review denied sub nom. Coal. for Responsible Growth and Resource Conservation v. FERC*, 485 Fed. Appx. at 474-75. *See also Border Power Plant Working Group v. U.S. Dep't of Energy,* 260 F. Supp. 2d 997, 1027, 1028 (S.D. Cal. 2003), finding a NEPA study of electric transmission lines was not required to consider indirect effects of a subsequent increase in power plant emissions, because power plant expansion was "a speculative possibility, dependent on the market for electricity and other factors," and there was "nothing to show that the specific operating details of [power] plants are reasonably foreseeable."

[78] Allegheny references *Northern Plains*, which finds the Surface Transportation Board (Board) should have taken into consideration the cumulative impacts of coal bed methane well development as part of its NEPA analysis of a proposed railroad line to transport coal from mines in three Montana counties. *Northern Plains* is distinguishable because the Bureau of Land Management and the State of Montana had prepared a programmatic EIS to estimate the reasonably foreseeable number of coal bed methane wells and field compressors, as well as the miles of roads and gathering lines that would be constructed over 20 years in the three counties that the railroad would cross. This provided the Board with information about the timing, scope, and location of future coal bed methane well development. Here, because we lack similar information, and have no way to acquire data or make informed guesses about the timing, location, and scope of future Appalachian gas development, we have no basis for undertaking a similar study.

[79] This is an uncertain proposition. The proposed lateral will interconnect with an existing Texas Gas mainline, which is part of a system of over 6,000 miles of pipeline extending from the Gulf Coast to Ohio, Indiana, and Illinois, with an average daily throughput of approximately 2.7 billion cubic feet. The proposed lateral will have access to gas from as far away as Texas and Louisiana, or still further given Texas Gas's numerous interconnections with other pipelines. Thus, over the life of the lateral, gas may be delivered from varying sources of supply. Further, in view of the proposed lateral's location more than 100 miles from the outer edge of the Appalachian shale gas formations, it does not appear as if it will function as a takeaway line for such gas production.

line on this vast area would be insignificant. Because we find no way to correlate gas volumes flowing on the new lateral with gas flowing from any discrete part of the shale basin, we find no way to reliably identify, much less meaningfully quantify, project impacts on production. Therefore, we conclude there is insufficient justification for undertaking a study of potential project impacts on the development of the Appalachian shale gas reserves.

63. Allegheny argues pipelines represent a link in the chain connecting supplies to markets. We acknowledge that production and transportation facilities are components of the general supply chain required to bring gas to market. However, NEPA requires "a reasonably close causal relationship between a change in the physical environment and the effect at issue,"[80] and as noted above, we have yet to be presented with a project that can be linked to the predictable development of specific gas reserves.[81]

c. Cumulative Impacts

64. CEQ defines "cumulative impact" as "the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions."[82] The requirement that an impact must be "reasonably foreseeable" to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

65. The "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies."[83] CEQ has explained that "it is not practical to analyze the cumulative effects of an action on the universe; the

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[80] *See Metro. Edison*, 460 U.S. 766, 774.

[81] By way of contrast, because the proposed lateral will be the sole source of gas for SABIC's existing chemical manufacturing and planned co-generation plant, we view the lateral as a link to the plants that will induce a quantifiable increase in gas consumption. Consequently, the EA views and reviews possible changes to the plant's environmental impacts as being caused by the proposed lateral; *see, e.g.*, the calculation of the potential impact of the lateral on emissions from SABIC's facilities, p. 67, Table 23.

[82] 40 C.F.R. § 1508.7 (2015).

[83] *Kleppe v. Sierra Club,* 427 U.S. 390, 413 (1976) (*Kleppe*).

list of environmental effects must focus on those that are truly meaningful."[84] Further, a cumulative impact analysis need only include "such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible."[85] An agency's analysis should be proportional to the magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.[86]

66. Consistent with CEQ guidance, in order to determine the scope of a cumulative impacts analysis for each project, Commission staff establishes a "region of influence" in which various resources may be affected by both a proposed project and other past, present, and reasonably foreseeable future actions.[87] While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that, where the Commission lacks meaningful information regarding potential future gas production in a region of influence, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.[88]

67. In this case, Commission staff followed CEQ guidance by: (1) identifying the significant cumulative effects issues associated with the proposed action;[89] (2) establishing the geographic scope for analysis;[90] (3) establishing a time frame for

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[84] CEQ's *Considering Cumulative Effects under the National Environmental Policy Act* (*1997 Guidance on Cumulative Effects*), at 8 (January 1997), *available at*: http:// energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf.

[85] *New York Natural Res. Def. Council, Inc. v. Kleppe,* 429 U.S. 1307, 1311 (1976) (quoting *Natural Res. Def. Council v. Calloway,* 524 F.2d 79, 88 (2d Cir. 1975)).

[86] *See* CEQ's *2005 Guidance on Cumulative Effects* at 2-3. *See also El Paso Natural Gas Company*, 136 FERC ¶ 61,175, at P 15 (2011).

[87] *See, e.g., Columbia*, 149 FERC ¶ 61,255, at P 113 (2014).

[88] *Id*. P 120.

[89] CEQ's *1997 Guidance on Cumulative Effects* at 11.

[90] *Id*. We note that CEQ's *1997 Guidance on Cumulative Effects* at 15 states that the "applicable geographic scope needs to be defined case-by-case."

analysis equal to the timespan of the proposed project's direct and indirect impacts,[91] and; (4) identifying other actions that potentially affect the same resources, ecosystems, and human communities affected by the proposed action.[92] With respect to the geographic scope for analysis, given the small scale of the proposed project, the lack of significant direct and indirect impacts on resources, and the expectation that impacts would be minor, temporary, and local, staff adopted a 0.5-mile radius for ground-disturbing activities, one mile for noise from the operation of aboveground facilities, and 50 kilometers (approximately 31 miles) for impacts from air-emissions-producing facilities. The time frame employed was the proposed project's construction schedule.[93] These are parameters the Commission has previously relied upon in conducting cumulative impacts reviews. We believe the EA established an appropriate region of influence and concur with the EA's conclusion that the cumulative impacts of the construction and operation of the proposed project will not significantly affect the quality of the human environment.

68. Allegheny contends shale gas drilling will have substantial impacts, thus the Commission "has an obligation under NEPA to take a hard look at these impacts on a much broader scale than it has in previous proceedings."[94] Allegheny cautions against using "arbitrarily narrow cumulative impacts analysis areas, or 'regions of influence,' to ignore many of the cumulative impacts associated with past, present, and reasonably foreseeable future gas development."[95] Allegheny contends that here, as in *LaFlamme v*.

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[91] *Id*.

[92] *Id*.

[93] *See* EA at 78-79 and 80-81.

[94] Allegheny's Comments at 24.

[95] *Id*. at 16. Allegheny cites CEQ guidance stating that "[p]roject-specific analyses are usually conducted on the scale of counties, forest management units, or installation boundaries, whereas cumulative effects analysis should be conducted on the scale of human communities, landscapes, watersheds, or airsheds." CEQ's *1997 Guidance on Cumulative Effects* at 12. We note CEQ's subsequent observation that the scope of a NEPA analysis will depend on the magnitude of the environmental impacts of the proposed project, thus "proposed actions of limited scope typically do not require as comprehensive an assessment of cumulative impacts as proposed actions that have significant environmental impacts over a large area." *2005 Guidance on Cumulative Effects* at 3.

FERC (*LaFlamme*),[96] the region of influence employed is too narrow to properly account for the cumulative impacts. Allegheny cites *Mid States Coal. for Progress v. Surface Transp. Bd.* (*Mid States*)[97] in support of its claim that the Commission may not neglect an assessment of shale development based on the rationale that it does not know the extent of ongoing and future drilling. Allegheny cites *Natural Res. Def. Council, Inc. v. Hodel* (*Hodel*)[98] in arguing that the Commission is required to consider the "inter-regional" impacts of Marcellus and Utica shale development activities.[99]

69. We find *Mid States* to be distinguishable from the circumstances here. *Mid States* involved the Surface Transportation Board's failure to analyze the downstream effects of a proposal to build and upgrade rail systems to reach coal mines in Wyoming's Powder River Basin.[100] The court found – and the project proponent did not dispute – that the proposed project would increase the use of coal for power generation. The court held that where such downstream effects are reasonably foreseeable, they must be analyzed, even if the extent of those effects is uncertain.[101] Here, Allegheny asserts that construction of the Southern Indiana Market Lateral would increase production, rather than end use. And unlike *Mid States*, there is an insufficient causal link between our authorization of the project and any additional production. As we have explained, natural gas development will likely continue with or without the Southern Indiana Market Lateral. Thus, it is not

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[96] 852 F.2d 389 (9th Cir. 1988).

[97] 345 F.3d 520 (8th Cir. 2003)

[98] 865 F.2d 288 (D.C. Cir. 1988).

[99] In arguing for expanding the region of influence, Allegheny cites EPA comments in *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163. We believe those comments are inapplicable here. In that proceeding, to define the region of influence, we excluded from our review shale wells that were more than 10 miles away from the project site. EPA requested we reconsider on the grounds that geographic proximity is not in and of itself the standard. In that case and this one, we establish a region of influence based not on geographic proximity, but on our assessment of the reasonably foreseeable impacts associated with each individual proposal. However, although the relevant region for review is not determined by geographic proximity, it is expressed in geographic (as well as temporal) terms. We note EPA did not comment on the region of influence in this proceeding, and further note that the proposed project site in this proceeding is more than 100 miles from a Marcellus or Utica well.

[100] *Mid States*, 345 F.3d at 550.

[101] *Id.*

merely the extent of production-related impacts that we find speculative, as was the case in *Mid States*, but also whether the project at issue will have any such impacts.

70. Allegheny's reliance on *LaFlamme* is misplaced, as that case in fact supports the Commission's use of a region of influence and an analysis of cumulative impacts limited to those impacts occurring in the area of the project at issue. In *LaFlamme*, the court found that in preparing an EA for the Sayles Flat Project, a hydroelectric project on the American River in California, the Commission failed to consider the cumulative impacts of other projects on the American River because it had relied on a previous EIS for another project on the river, which had limited its review to assessing the impact of that project's diversion dams and other proposed facilities in that project's area. Thus, the court criticized the Commission's use of the "narrow analysis" of another project's EIS as a substitute for the analysis required for the Sayles Flat Project.[102] The court in *LaFlamme* did not fault the Commission for limiting its cumulative impacts analysis for the Sayles Flat Project to the cumulative effects of dams and facilities in the area of the project. If anything, *LaFlamme* supports identifying a region of influence appropriately connected to the location of the project under review.

71. Similarly, we do not believe the Texas Gas proposal raises the same concerns as those in *Hodel*. In *Hodel* the court considered the U.S. Department of the Interior's EIS conducted in conjunction with its plan to award five-year leases for hydrocarbon exploration and production on multiple offshore blocks. The court found that the EIS focused primarily on assessing impacts associated with the region proximate to each lease block, and thereby failed to capture potential inter-regional cumulative impacts on migratory species if exploration and production were to take place simultaneously on several lease blocks within the migratory range of a species. However, *Hodel* considered a plan for resource-development leasing over a vast geographic area (including the North Atlantic, North Aleutian Basin, Straits of Florida, Eastern Gulf of Mexico, and waters off California, Oregon, and Washington). In contrast, the 'plan' before us is for a single lateral line with a clear and compact footprint.[103] Because we find the proposal

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[102] *LaFlamme,* 852 F.2d 389 at 401-02. The court stated: "At no point did the [[Upper Mountain Project] EIS analyze the effects of other projects, pending or otherwise, might have on this section of the American River Basin," i.e., the Sayles Flat Project section. *Id*. at 399.

[103] Allegheny references a study it claims demonstrates that shale gas drilling is having and will continue to have impacts on wildlife throughout the Marcellus and Utica shale formations. Allegheny's Comments at 24, Attachment 22, *Ecological Risks of Shale Oil and Gas Development to Wildlife, Aquatic Resources, and their Habitats*, M.C. Brittingham, *et al*., Environmental Science & Technology, at 11035–37 (Sept. 4, 2014).

(continued…)

will have no reasonably foreseeable impacts on shale development, we find no reason to adopt a region of influence for reviewing cumulative impacts that would include, as Allegheny urges, all the "states in and surrounding the Marcellus and Utica shale formations."[104] The Department of Interior's leasing of large tracts in federal waters in *Hodel* is dissimilar from the Commission's case-by-case review of individual and independent infrastructure projects. Whereas mineral leases, especially those that cover extensive and contiguous areas, establish the location and time frame for future development, the Commission does not permit, and indeed has no jurisdiction over, activities upstream of the point of interconnection with an interstate pipeline, e.g., leasing, exploration, production, processing, and gathering. To the extent the court in *Hodel* was persuaded by an earlier Supreme Court statement that under NEPA "proposals for . . . related actions that will have cumulative or synergistic environmental impact upon a region *concurrently pending before an agency* must be considered together,"[105] production and gathering activities in the Appalachian shale areas are not related actions concurrently pending before the Commission. Thus, there is no way to relate any specific production and gathering activities to this project.

72. Attempting to assess impacts across the shale basin and adjacent states would render our review both imprecise, because we can do no better than speculate on the path that development may take, and impractical, because data is unavailable to determine with any clarity the locations and resources that may be impacted. Furthermore, we do not believe it would be possible to discern any effect that 30 miles of 10-inch-diameter pipe, located more than 100 miles away from Marcellus and Utica wells, could have on drilling in those formations. As noted above, CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action,[106] and in this case, we find the modest size of the proposed project and its limited impacts do not warrant the large scale review that Allegheny requests.

We find this study offers general conclusions about the potential qualitative impacts on terrestrial and aquatic ecosystems from shale development, but provides no specifics regarding those impacts, much less specifics with respect to impacts that might be attributed to the distant Southern Indiana Market Lateral.

[104] Allegheny's Comments at 28.

[105] 865 F.2d 288, at 297 (citing *Kleppe,* 427 U.S. 390, 410) (emphasis added).

[106] *See* CEQ's *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis,* at 2 (June 24, 2005), which notes that agencies have substantial discretion in determining the appropriate level of their cumulative impact assessments and that agencies should relate the scope of their analyses to the magnitude

(continued…)

3. Programmatic EIS

73. CEQ's regulations do not require broad or "programmatic" NEPA reviews. CEQ has stated, however, that such a review may be appropriate where an agency is: (1) adopting official policy; (2) adopting a formal plan; (3) adopting an agency program; or (4) proceeding with multiple projects that are temporally and spatially connected.[107] The Supreme Court has held that a NEPA review covering an entire region (that is, a programmatic review) is required only "if there has been a report or recommendation on a proposal for major federal action" with respect to the region,[108] and the courts have concluded that there is no requirement for a programmatic EIS where the agency cannot identify the projects that may be sited within a region because individual permit applications will be filed at a later time.[109]

74. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.[110] Rather, the Commission acts on individual applications filed by entities proposing to construct interstate natural gas pipelines. Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities "is or will be required by the present or future public convenience and necessity."[111] What is required by NEPA, and

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of the environmental impacts of the proposed action. Further, the Supreme Court held that determination of the extent and effect of cumulative impacts, "and particularly identification of the geographic area within which they occur, is a task assigned to the special competency of the appropriate agencies," and is overturned only if arbitrary and capricious. *See Kleppe*, 427 U.S. 390, 414.

[107] *See Memorandum from CEQ to Heads of Federal Departments and Agencies, Effective Use of Programmatic NEPA Reviews* (*Programmatic Guidance*), at 11, 79 Fed. Reg. 76,986 (2014).

[108] *Kleppe*, 427 U.S. 390, 399, holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region.

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

[110] *See, e.g., Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014) and *Columbia*, 149 FERC ¶ 61,255, *order denying reh'g*, 153 FERC ¶ 61,064.

[111] 15 U.S.C. § 717f(e) (2012).

what the Commission provides, is a thorough examination of the potential impacts of specific projects. In the circumstances of the Commission's actions, a broad, regional analysis would "be little more than a study … concerning estimates of potential development and attendant environmental consequences," [112] which would not present "a credible forward look and would therefore not be a useful tool for basic program planning."[113] As to projects that are closely related in time or geography, the Commission may, however, prepare a multi-project environmental document, where that is the most efficient way to review project proposals.[114]

75. Allegheny contends that the Commission should have prepared a multi-project programmatic environmental document to review "gas infrastructure projects related to development of the Marcellus and Utica shale formations."[115] Allegheny maintains such projects should be considered together as they conform to CEQ's description of "energy development programs proposed in the same region of the country [with] similar proposed methods of implementation and similar best practice and mitigation measures that can be analyzed in the same document."[116]

76. Allegheny maintains a programmatic EIS is needed because the Commission "is engaged in long-term regional gas infrastructure planning and development related to the Marcellus and Utica shale formations."[117] Allegheny highlights the Commission's *FY2014-2018 Strategic Plan,* which states that "fostering economic and environmental benefits for the nation through approval of natural gas" is a Commission objective.[118] Allegheny points to Commission proceedings that address coordination between the gas

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[112] *Kleppe*, 427 U.S. 390, 402.

[113] *Piedmont,* 558 F.3d 304, 316.

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

[115] Allegheny's Comments at 31.

[116] CEQ's *Programmatic Guidance* at 21. *See also* 40 C.F.R. § 1508.25(a)(3) (2015).

[117] Allegheny's Comments at 37.

[118] *FY2014-2018 Strategic Plan* at 17.

and electricity markets[119] and what Allegheny believes are Commission efforts to coordinate energy infrastructure development.[120] Allegheny observes that Commission personnel take an active part in public and private discussions of energy policy, which it interprets as the Commission promoting a pro-gas policy.

77. We have previously refuted Allegheny's contention that we have an 'official policy' to increase the nation's reliance on gas.[121] We confine our consideration to the merits of and need for each project as it is presented, and do not, as Allegheny alleges, act to promulgate and enforce a national energy policy or to promote one energy source over another. Our *FY2014-2018 Strategic Plan* reflects the fact that new projects may be needed to respond to future increases in production and demand,[122] but does not establish an objective to increase gas production, transportation, or consumption. With respect to the gas and electric markets, while we have sought to provide additional scheduling

[119] Allegheny cites the Commission's *Coordination Between Natural Gas and Electricity Markets* proceeding in Docket No. AD12-12-000 and other proceedings examining the interdependencies between the gas and electric industries, such as *Coordination of the Scheduling Processes of Natural Gas Pipelines and Public Utilities* in Docket No. RM14-2-000. Allegheny also notes the Commission's quarterly reports providing updates on national and regional gas-electric coordination activities. Allegheny's Comments at 35-36.

[120] *Id*. at 31. As examples of the Commission's involvement in regional infrastructure planning, Allegheny cites *Coordination Between Natural Gas and Electricity Markets*, 141 FERC ¶ 61,125 (2012); *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, Order No. 809, 80 Fed. Reg. 23,198 (2015), FERC Stats. & Regs. ¶ 31,368 (2015) (cross-referenced at 151 FERC ¶ 61,049 (2015)) (*Coordination of Scheduling*), *order on clarification,* 152 FERC ¶ 61,095*, order on reh'g,* 152 FERC ¶ 61,212*, order on clarification,* 153 FERC ¶ 61,049 (2015); *Order Initiating Investigation into ISO and RTO Scheduling Practices and Establishing Paper Hearing Procedures*, 146 FERC ¶ 61,202 (2104); and *Posting of Offers to Purchase Capacity,* 146 FERC ¶ 61,203 (2014).

[121] *See, e.g., Columbia*, 149 FERC ¶ 61,255 at PP 122-23 and 153 FERC ¶ 61,064 at PP 53 and 61.

[122] "Demand for natural gas in the United States is at its highest levels on record, and natural gas production continues to increase due to the development of shale gas" and to "meet the growing demand for energy, FERC must respond to energy infrastructure applications with timely and well-reasoned decisions that protect the environment while fostering the growth of a sustainable infrastructure." *FY2014-2018 Strategic Plan* at 17.

flexibility for gas transported on interstate pipelines, which may better match the demands of gas-fueled electric power plants, it is unwarranted to characterize this as regional planning.[123]

78. We concur with Allegheny's observation that Commission personnel actively participate in public and private discussions of energy policy; however, staff does so not to promote a pro-gas policy, but to identify, examine, and publicize energy issues. Commission policy, in contrast to opinions Commission personnel may express, is expressed exclusively by a majority vote of the Commissioners.[124] The fact that Commission personnel take part in a forum that advocates for or against a certain approach to energy sources or infrastructure does not bind the Commission to the outcome of that forum[125] and in no way prejudices the Commission's assessment of energy project applications.

79. In sum, CEQ states a programmatic EIS can "add value and efficiency to the decision-making process when they inform the scope of decisions," "facilitate decisions on agency actions that precede site- or project-specific decisions and actions," or

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[123] Further, as we noted in the *Coordination of Scheduling* proceeding, 80 Fed. Reg. 23,198, 23,225-26, FERC Stats. & Regs. ¶ 31,368 at P 161 (cross-referenced at 151 FERC ¶ 61,049), rules to address scheduling practices do not involve construction, and consequently qualify for a categorical exemption from environmental review under the Commission's NEPA regulations. *See* 18 C.F.R. § 380.4(a)(27) (2015), which exempts the "[s]ale, exchange, and transportation of natural gas under sections 4, 5, and 7 of the Natural Gas Act that require no construction of facilities" from environmental review. The Commission's NEPA-exempt consideration of the operational integration of the gas and electric markets is divorced from the Commission's consideration of proposed gas and electric infrastructure projects, which require NEPA review.

[124] We note that other statements of policy – e.g., in a Director's Order, General Counsel Opinion letter, No-Action Letter, or by Commission staff at scoping meetings – are staff *interpretations* of policy, and are not binding on the Commission.

[125] For example, Allegheny notes Commission personnel's participation in preparing the National Petroleum Council's *Prudent Development: Realizing the Potential of North America's Abundant Natural Gas and Oil Resources*, a 2011 document containing recommendations on the development of the nation's gas and oil resources. That document reflects input from numerous individuals representing industry, regulatory, academic, environmental, and manufacturing interests, and it would be unwarranted to read recommendations in that document as statements of Commission policy. *See* Allegheny's Comments, Attachment 2.

"provide information and analyses that can be incorporated by reference in future NEPA reviews." The Commission does not believe these benefits can be realized by a programmatic review of shale gas development because the projects subject to our jurisdiction do not share sufficient elements in common to narrow future alternatives or expedite the current detailed assessment of each particular project.

4. EA v. EIS

80. In addition to objecting to the Commission's decision to forego a programmatic EIS, Allegheny argues the Commission erred by electing to conduct an EA rather than an EIS. NEPA regulations permit an agency to prepare an EA – a "concise public document" – to determine whether a proposed project will have a significant adverse impact on the human environment.[126] The Commission concluded, after completing an EA, that the proposed project would not have a significant adverse environmental impact, and as a result, found no reason to initiate an EIS.[127] Allegheny believes the Commission erred by unduly constraining the scope of the EA, and that the Southern Indiana Market Lateral, even if constructed and operated in accordance with the mitigation measures described in the EA, would have a significant adverse environmental impact.

81. While the CEQ regulations do not define "significant," they do explain that whether an impact is "significant" depends on both "context" and "intensity."[128] Context means that the "significance of an action must be analyzed in several contexts," including "the affected region, the affected interest, and the locality."[129] Intensity is determined by considering the unique characteristics of the geographic area, the degree to which the

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[126] 40 C.F.R. §§ 1508.4 and 1508.9 (2015).

[127] *See* 18 C.F.R. § 380.6(b) (2015). The decision to prepare an EA in this case is in keeping with Commission practice for projects that, like this one, are relatively routine and minor, *cf., Midwestern Gas Transmission Co*., 116 FERC ¶ 61,182, at P 75 (2006), determining that "a 30-mile, 16-inch line would not fall within the category of 'major pipeline construction project' as contemplated by Section 380.6(a)(3) of our regulations" and *Central New York*, 137 FERC ¶ 61,121 at P 55, stating "the Commission's years of experience with NEPA implementation for pipeline projects indicate that a new 39-mile-long, 30-inch-diameter pipeline normally would not fall under the "major" category for which an EIS is automatically prepared."

[128] 40 C.F.R. § 1508.27 (2015).

[129] 40 C.F.R. § 1508.24(a) (2015).

effects are highly controversial or highly uncertain or unknown, the degree to which the action may establish a precedent for future actions, whether the action is related to other actions with insignificant but cumulatively significant impacts, and the degree to which the action may adversely affect threatened and endangered species.[130]

82. Allegheny argues that by reviewing the impacts of the proposed lateral in isolation, rather than as a component of a series of interrelated Texas Gas projects, the Commission is unduly constricting the context of its environmental assessment, thereby isolating segments that show no significant impact when viewed individually, but would demonstrate a significant impact if viewed as a whole.[131] We reiterate our conclusion, as discussed above, that the proper context for considering the proposed lateral is as a stand-alone project. Its independence from any other Texas Gas project, its concise geographic and temporal footprint, and the limited reach of its insignificant (as mitigated) impacts, do not merit expanding the context of our review to include other projects, a larger region, or additional interests.

83. Allegheny argues the intensity of the proposed project's impacts render them significant. In particular, Allegheny identifies two aspects of intensity: "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts"[132] and "the degree to which the effects on the quality of the human environment are likely to be highly controversial."[133] We have previously considered and rejected Allegheny's assertion that the proposed project be characterized as a component of a larger action. In view of this, we find no justification for treating the impacts of the project as being intensified as a result of their interaction with any other actions.

84. We also find no justification for characterizing this proposed project as "highly controversial." We reiterate our finding in the Texas Gas Ohio-Louisiana Access Project proceeding that:

> for an action to qualify as "highly controversial" for NEPA purposes, there must be a "dispute over the size, nature, or effect of the action, rather than

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[130] 40 C.F.R. § 1508.24(b) (2015).

[131] Allegheny cites 40 C.F.R. § 1508.27(b)(7) (2015): "Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."

[132] 40 C.F.R. § 1508.27(b)(7) (2015).

[133] 40 C.F.R. §1508.27(b)(4) (2015).

> the existence of opposition to it."[134] A controversy does not exist merely because individuals or groups vigorously oppose, or have raised questions about, an action,[135] nor does a controversy exist simply because there are conflicting views among experts.[136] Further, the Commission's approval of the proposed project is not establishing a precedent for future actions, as we base our determinations on the specific facts of each individual application before us.[137]

85. We note that although this project has generated opposition from affected landowners,[138] so do most of the projects presented to the Commission. Similarly, although comments have questioned the justification for this proposed lateral,[139] so do most of the projects presented to the Commission. Thus, while the proposed project can be described as "controversial," in that it is opposed, there is nothing that distinguishes this conventional opposition as "highly controversial."

86. Allegheny's opposition is essentially generic, in that it presents the same arguments in numerous and divergent proceedings. It appears Allegheny's opposition is not as much to a particular proposal, but reflects a general objection to past, present, and future development of the Appalachian shale reserves. While we acknowledge the concerns raised, these represent larger issues that lie beyond the Commission's jurisdictional reach; our statutory mandate is restricted to the transportation of gas in interstate commerce, whereas the development of shale gas reserves (i.e., leasing, exploration, production, gathering, and processing) lies primarily in the hands of state and local authorities.

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[134] *See Cheniere Creole Trail Pipeline, L.P.*, 145 FERC ¶ 61,074 at P 23 (citing *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2d Cir. 1992)).

[135] *Id.*

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

[137] 152 FERC ¶ 61,160 at P 122.

[138] *See, e.g.,* the March 10, 2015 Comments of Terrell W. and Sondra E. Holt, expressing concerns about potential damage to their property.

[139] *See, e.g.,* the March 9, 2015 Comments of David Denton, at 1: "The disruption to the lives of many to support the greed of the few is why my family and I are in agreement with those who have voiced their opposition to the project."

5. Alternatives

87. Allegheny asserts the Commission's case-by-case consideration of pipeline applications "has resulted in redundant pipelines that needlessly fragment habitat, and increase impacts on watersheds, air quality, recreation opportunities, and landowners."[140] As a remedy, Allegheny urges the Commission to consider alternatives that would have companies coordinate and consolidate projects, asserting that "[d]oing so would further the goals of the Certificate Policy Statement to avoid unnecessary disruption of the environment, reduce the threat of overbuilding infrastructure, and avoid unneeded exercise of eminent domain."[141]

88. We acknowledge potential benefits in efficiency, economy, and diminished environmental impacts that might be realized if a single entity were to consolidate and coordinate energy infrastructure projects on a national scale. However, that has not been and is not now the statutory regime we are subject to, and the Commission has no jurisdictional authority to command that natural gas companies collaborate.

89. Allegheny argues Texas Gas has not given sufficient consideration to energy conservation as an alternative to the proposed project and requests Texas Gas provide data comparing conservation measures with the energy capacity of its proposal. Allegheny also faults the Texas Gas no-action alternative for discounting the potential of renewable energy sources and for failing to take into account adverse impacts of continuing to rely on gas as compared to employing larger scale renewables.

90. The EA determined that "[r]enewable energy sources are not currently available to meet the Project's needs and it is beyond our scope to attempt to predict when they might be available and what environmental cost tradeoffs might be associated."[142] Conservation is not a practical option, as there is no decrease in demand that could substitute for the coal-fired boilers that SABIC seek to replace – natural gas is the only readily available alternative source of power for the plant.

V. Conclusion

[140] Allegheny's Comments at 30.

[141] *Id*.

[142] EA at 83.

91. Based on the analysis in the EA and the additional analysis in this order, we conclude that if constructed and operated in accordance with Texas Gas's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

92. For the reasons set forth herein, we find that granting authorization under NGA section 7(c) for Texas Gas's proposal is required by the public convenience and necessity. Thus, we grant Texas Gas's requested authorizations.

93. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this authorization. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[143]

94. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, as amended and supplemented, and exhibits thereto submitted in support of the authorizations sought herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Texas Gas under NGA section 7(c), authorizing the construction and operation of natural gas facilities as described in this order and in the application.

(B) The authorization in Ordering Paragraph (A) is conditioned on Texas Gas:

(1) complying with the conditions set forth in the appendix to this order and all regulations under the NGA, including but not limited to Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;

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[143] *See, e.g., Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summer*s, 723 F.3d 238, 243 (D.C. Cir. 2013) (holding state and local regulation is preempted by the Natural Gas Act to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by FERC); and *Iroquois Gas Transmission System, L.P.,* 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

(2) constructing and making available for service the facilities described in this order and in the application within one year of the issuance of this order pursuant to section 157.20(b) of the Commission's regulations; and

(3) executing firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(C) Texas Gas's request for authority to charge incremental rates for service on the proposed Southern Indiana Market Lateral is approved, subject to Texas Gas filing to revise the rates as discussed in the body of this order.

(D) Texas Gas shall file revised tariff records that comply with the requirements contained in the body of this order no earlier than 60 days and no later than 30 days prior to the date the Southern Indiana Market Lateral goes into service. The filing should be made as an eTariff compliance filing using type of filing code 580, and will be assigned an RP docket and processed separately from this certificate proceeding.

(E) When Texas Gas makes its first fuel tracker filing after the in-service date of the Southern Indiana Market Lateral, it must propose how it will estimate and recover costs associated with any LAUF gas over the new facilities.

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

(G) Motions to intervene out-of-time by the Allegheny Defense Project, the FreshWater Accountability Project, the Ohio Valley Environmental Coalition, and Heartwood are granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX

As recommended in the Environmental Assessment (EA), this authorization includes the following conditions:

1. Texas Gas shall follow the construction procedures and mitigation measures described in its amended application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the order. Texas Gas must:

    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
    b. justify each modification relative to site-specific conditions;
    c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
    d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification**.

2. The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:

    a. the modification of conditions of the order; and
    b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.

3. **Prior to any construction**, Texas Gas shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Texas Gas shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the order. All requests for modifications of environmental conditions of the order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Texas Gas's exercise of eminent domain authority granted under Natural Gas Act section 7(h) in any condemnation proceedings related to the order must be consistent with these authorized facilities and locations. Texas Gas's right of eminent domain granted under Natural Gas Act section 7(h) does not authorize it to increase the size of its natural gas pipeline facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

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

   This requirement does not apply to extra workspace allowed by the FERC *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

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

   a. implementation of cultural resources mitigation measures;
   b. implementation of endangered, threatened, or special concern species mitigation measures;
   c. recommendations by state regulatory authorities; and
   d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the authorization and before construction begins**, Texas Gas shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Texas Gas must file revisions to the plan as schedules change. The plan shall identify:

   a. how Texas Gas will implement the construction procedures and mitigation

measures described in its amended application and supplements (including responses to staff data requests), identified in the EA, and required by the order;

b. how Texas Gas will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;

c. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;

d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;

e. the location and dates of the environmental compliance training and instructions Texas Gas will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);

f. the company personnel (if known) and specific portion of Texas Gas's organization having responsibility for compliance;

g. the procedures (including use of contract penalties) Texas Gas will follow if noncompliance occurs; and

h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:

(1) the completion of all required surveys and reports;
(2) the environmental compliance training of onsite personnel; (3) the start of construction; and
(4) the start and completion of restoration.

7. Texas Gas shall employ at least one EI per construction spread. The EI(s) shall be:

a. responsible for monitoring and ensuring compliance with all mitigation measures required by the order and other grants, permits, certificates, or other authorizing documents;

b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;

c. empowered to order correction of acts that violate the environmental conditions of the order, and any other authorizing document;

d. a full-time position, separate from all other activity inspectors;

e. responsible for documenting compliance with the environmental conditions of the order, as well as any environmental conditions/permit requirements

imposed by other federal, state, or local agencies; and

f. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, Texas Gas shall file updated status reports with the Secretary on a **weekly basis** until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

   a. an update on Texas Gas's efforts to obtain the necessary federal authorizations;
   b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
   c. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
   d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
   e. the effectiveness of all corrective actions implemented;
   f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the order, and the measures taken to satisfy their concerns; and
   g. copies of any correspondence received by Texas Gas from other federal, state, or local permitting agencies concerning instances of noncompliance, and Texas Gas's response.

9. **Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities**, Texas Gas shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

10. Texas Gas must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.

11. **Within 30 days of placing the authorized facilities in service**, Texas Gas shall file an affirmative statement with the Secretary, certified by a senior company official:

    a. that the facilities have been constructed in compliance with all applicable

conditions, and that continuing activities will be consistent with all applicable conditions; or

b. identifying which of the conditions in the order Texas Gas has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

12. **Prior to construction**, Texas Gas shall file with the Secretary for review and written approval by the Director of OEP, an unanticipated discovery plan that includes the requirement that Texas Gas consult a qualified paleontologist to investigate and document any potential fossil finds.

13. **Prior to construction**, Texas Gas shall file with the Secretary, stamped and sealed by the professional engineer-of-record registered in the state where the facility is being constructed, a soil liquefaction study performed at the M&R station to determine the settlement potential of the pipeline at the tie-in point with the M&R station at milepost 30.6. The report shall include mitigation details if necessary.

14. **Prior to construction**, Texas Gas shall file with the Secretary the location by milepost of all active private wells within 150 feet of construction activities. Texas Gas shall conduct, with the well owner's permission, pre- and post-construction monitoring of well yield and water quality for these wells. **Within 30 days of placing the facilities in service**, Texas Gas shall file a report with the Secretary discussing whether any complaints were received concerning well yield or water quality and how each was resolved.

15. **If vegetation clearing is required between April 15 and August 31**, Texas Gas shall submit to the FWS and file concurrently with the Secretary a migratory bird conservation plan. Texas Gas shall not clear any woody vegetation between April 15 and August 31 until FERC staff has reviewed the plan and any FWS comments on the plan, and the Director of OEP has notified Texas Gas in writing that Project clearing can begin.

16. **Prior to construction**, Texas Gas shall coordinate with the KDFWR regarding the potential for seasonal hunting restrictions near the Peabody Wildlife Management Area (WMA), or adjusting the project schedule or activities in the vicinity of WMA during the hunting season. Texas Gas shall file with the Secretary copies of all communication between Texas Gas and the KDFWR regarding hunting-related matters.

17. Texas Gas **shall not begin construction** of facilities and/or use of any staging, storage, or temporary work areas and improved access roads **until**:

a. Texas Gas files with the Secretary:
   (1) all of the correspondence with the Kentucky and Indiana SHPOs;
   (2) remaining cultural resources survey report(s) and addendum(s);
   (3) site evaluation report(s) and avoidance/treatment plan(s), as required; and
   (4) comments on the cultural resources reports, addendums and plans from the Kentucky and Indiana SHPOs;
b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and
c. the FERC staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Texas Gas in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CONTAINS PRIVILEGED INFORMATION - DO NOT RELEASE**."