APL-2018-00225
Appellate Division Docket No. CA 17-02021
Allegany County Clerk's Index No. 45092

Court of Appeals
of the
State of New York

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner-Appellant,

– against –

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER,

Respondents-Respondents,

EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

RECORD ON APPEAL

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New York Supreme Court

Appellate Division—Fourth Department

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner-Respondent,

– against –

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER,

Respondents-Appellants,

EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case in the court below is 45092.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The proceeding was commenced in Supreme Court, Allegany County.

4. The proceeding was commenced on or about March 15, 2013 by the filing of an Order to Show Cause and Petition filed on or about March 27, 2017 by National Fuel Gas Supply Corporation. Respondents, Joseph A. Schueckler and Theresa F. Schueckler served a Verified Answer on or about April 12, 2017.

5. The nature and object of the proceeding is Petitioner's claims to entitlement to easements over Respondents' property to construct parts of a natural gas pipeline.

6. This appeal is from an Order of the Hon. Thomas P. Brown, A.J.S.C., granted June 22, 2017.

7. This appeal is on the full reproduced record.

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NOTICE OF APPEAL, DATED JULY 25, 2017, WITH PROOF OF FILING AND PROOF OF SERVICE [3-5]

19

2017 JUL 27 AM 10:04

ROBERT L. CHRISTMAN
CLERK
ALLEGANY COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,
-vs-

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,
Respondents.

NOTICE OF APPEAL

Index No. 45092

PLEASE TAKE NOTICE that the above-named Respondents Joseph and Theresa Schueckler hereby appeal to the Appellate Division of the Fourth Department from the Order issued against them in favor of the Petitioner and entered in the office of the Allegany County Clerk on or about June 28, 2017 and from every part thereof, regarding Supreme Court's authority to consider the Petition.

DATED: July 25, 2017
Humphrey, New York

Gary A. Abraham
Attorney for Joseph A. and Theresa F. Schueckler
Law Office of Gary A. Abraham
4939 Conlan Rd.
Humphrey, New York 14741
(716) 790-6141

ALLEGANY COUNTY CLERK
FILED
JUL 27 2017
ROBERT L. CHRISTMAN
CLERK

$65.00 pd

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LAW OFFICE OF GARY A. ABRAHAM

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Great Valley, New York 14741
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July 25, 2017

Allegany County Clerk
7 Court Street
Belmont, NY 14813

Re: National Fuel Gas Supply Corp. v. Schueckler et al., No. 45092

Dear County Clerk:

Enclosed for filing please find enclosed a copy of a Notice of Appeal in the above-referenced hybrid special proceeding and action, proof of service of the Notice of Appeal, and a check in the amount of $65.00 to cover the filing fee.

Do not hesitate to contact me with further questions or concerns.

Sincerely yours,

Gary A. Abraham
Attorney for Respondents-Appellants Joseph A. and Theresa F. Schueckler

gaa/encs.

cc: Paul Morrison-Taylor, Esq.
Craig A. Leslie, Esq.
Joanna Dickinson, Esq.
William Bentley
Eugene Hewitt
W. Ross Scott, Esq.
clients

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,
-vs-

Index No. 45092

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,
Respondents.

By this statement I affirm that on July 25, 2017, I did serve by U.S. Postal Service certified mail copies of the Notice of Appeal in this case, dated July 25, 2017, on Paul Morrison-Taylor, Craig A. Leslie, and Joanna Dickinson, attorneys for the Petitioner in this case, and Respondents Eugene Hewitt and William Bentley.

DATED: July 25, 2017
Humphrey, New York

Gary A. Abraham
Attorney for Joseph A. and Thersa F. Schueckler
Law Office of Gary A. Abraham
4939 Conlan Rd.
Great Valley, New York 14741
(716) 790-6141

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ORDER OF THE HON. THOMAS P. BROWN, A.J.S.C., GRANTED JUNE 22, 2017, APPEALED FROM [6-8]

At a Term of the Supreme Court, held in and for the County of Allegany, at the Allegany County Courthouse, 7 Court Street, Belmont, New York on the 19th day of May, 2017.

PRESENT: HON. THOMAS P. BROWN
Acting Justice Presiding

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

ORDER

Index No.: 45092

Petitioner National Fuel Gas Supply Corporation ("National Fuel") having sought an order authorizing the acquisition of the permanent and temporary easements described in the Verified Petition (the "Easements"); permitting National Fuel to file the Acquisition Map relating thereto, and serve the same and this Order upon respondents by certified mail, return receipt requested; directing that title to the Easements shall vest in National Fuel upon filing of the Acquisition Map; and for other appropriate relief; and said Verified Petition having come on to be heard before me on May 19, 2017;

NOW, upon reading and filing the: Order to Show Cause dated March 28, 2017; Verified Petition filed in the Allegany County Clerk's Office on March 28, 2017; Affidavit of Craig A. Leslie in support of this application, sworn to March 27, 2017; Affidavit of Julie A. Bachan in support of this application, sworn to March 27, 2017; Verified Answer of Joseph and Theresa Schueckler (the "Schuecklers"), dated April 12, 2017; Affidavit of Regularity of Paul Morrison-Taylor, sworn to May 3, 2017; and the Affidavit of Paul Morrison-Taylor in further support of this application, sworn to May 15, 2017; upon hearing oral argument from Phillips Lytle LLP (Paul Morrison-Taylor, Esq., of counsel) on behalf of National Fuel, and the Law Office of Gary A. Abraham (Gary A. Abraham, Esq., of counsel) and The Ross Scott Law Firm (W. Ross Scott, Esq., of counsel) on behalf of the Schuecklers; and after due deliberation, and this Court having found that National Fuel has complied with the procedural requirements of the New York Eminent Domain Procedure Law ("EDPL"), it is

ORDERED that National Fuel's Verified Petition is granted, and it is further

ORDERED that National Fuel is authorized to acquire the Easements described in the Verified Petition, and it is further

ORDERED that National Fuel is permitted to file the Acquisition Map in the Allegany County Clerk's Office, and to serve the Notice of Acquisition and a copy of this Order upon respondents by certified mail, return receipt requested, and it is further

ORDERED that title to the Easements described in the Verified Petition shall vest in National Fuel upon filing of the Acquisition Map in the Allegany County Clerk's Office, and it is further

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ORDERED that National Fuel, pursuant to EDPL § 402(B)(3)(f), shall be required to file a bond in the total amount of $25,700.00, and it is further

ORDERED that each respondent having or claiming to have an interest herein, in order to preserve or assert such interest or claim, shall, within one hundred eighty (180) days from service upon it or them of the Notice of Acquisition, Acquisition Map, and a copy of this Order, file a written claim for damages, demand or notice of appearance with: (1) National Fuel at 6363 Main Street, Williamsville, New York 14221, Attn. Julie A. Bachan; and (2) the Clerk of the Supreme Court of Allegany County, New York.

ENTER: 6/22/17

HON. THOMAS P. BROWN, A.J.S.C.

GRANTED

GRANTED
June 22nd 2017
COURT CLERK

Doc #01-3022717

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NOTICE OF ENTRY, DATED JULY 13, 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND
THERESA F. SCHUECKLER, EUGENE HEWITT,
and WILLIAM BENTLEY,

Respondents.

NOTICE OF ENTRY

Index No.: 45092

PLEASE TAKE NOTICE that the accompanying Order was granted on June 22, 2017 and entered in the Allegany County Clerk's Office on June 28, 2017.

Dated: Buffalo, New York
July 13, 2017

PHILLIPS LYTLE LLP

By: _____
Paul Morrison-Taylor
Craig A. Leslie
Joanna Dickinson
Attorneys for Petitioner
National Fuel Gas Supply Corporation
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jdickinson@phillipslytle.com

Doc #01-3054046.1

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALLEGANY :

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner

-vs- Index No. 45092

JOSEPH A. and THERESA SCHUECKLER,

EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

Allegany County Courthouse
Belmont, New York 14813
May 19, 2017

Before: HON. THOMAS BROWN

A p p e a r a n c e s:

Phillips Lytle, LLP
By: Paul Morrison-Taylor
Appearing on behalf of the Petitioner
One Canalside
125 Main Street
Buffalo, New York 14203

Gary A. Abraham, Esq.
Appearing on behalf of the Respondents
4939 Conlan Road
Great Valley, New York 14741

Ross Scott Law Firm
By: Ross Scott, Esq.
Appearing on behalf of the Respondents
1759 Hawks Road
Andover, New York 14806

THE COURT: Let's go on the record in the matter of the National Fuel Gas Supply Corporation against Joseph and Teresa Schueckler. Mr. Taylor is here today representing National Fuel Gas. Who is with you today, Mr. Taylor?

MR. TAYLOR: I have Julie Bachan for National Fuel this morning.

THE COURT: And we also have Mr. Abraham and Mr. Scott are here representing the Schuecklers; is that correct?

MR. SCOTT: That is correct.

THE COURT: They are present in the courtroom. Eugene Hewitt and William Bentley, my understanding is that they had oil and gas leases on this property at one point in time. I don't believe they have appeared in this proceeding; is that correct?

MR. TAYLOR: That is correct, Judge.

THE COURT: Mr. Taylor, this is your order to show cause and I have read the paperwork, including what you submitted previously and what Mr. Abraham and Mr. Scott have submitted. Also, you filed a reply. I think I got that around May 16th; a couple of days ago. I have taken a look at that as well.

MR. TAYLOR: I appreciate, it Judge.

THE COURT: It's your motion, you go first.

MR. TAYLOR: Given that you read all of the papers, I am not going to repeat at length the points that are contained in the papers. From our perspective, Judge, the papers very comprehensively discuss the matters that are at issue before this Court, and frankly, Judge, from our perspective, it's a very straight-forward matter. It's an issue not of whether or not the DEC properly denied the water quality permit, it's rather an issue as to whether or not we have the right to proceed in eminent domain to take the modest easements over the Schueckler's property that we are requesting.

So, Judge, I think you get the flavor from the papers that this has been a project that has been in the works for two years. There is two years of extensive proceedings before the Federal Energy Regulatory Commission. Since that's a mouthful, Judge, I am going to call it FERC, as we go forward.

THE COURT: That's fine.

MR. TAYLOR: Ultimately, Judge,

there were thousands of pages submitted to FERC; there were many interested parties that intervened and participated in the proceedings. Every single landowner that was potentially affected by this proposed pipeline had the opportunity to be involved in the proceeding and it was comprehensive, exhaustive, and it was completely transparent, Judge.

Ultimately, as you know, because you have read the papers, FERC issued an order, again for the sake of the court reporter and for me, let's call it the FERC Order. It's the Certificate of Public Convenience and Necessity. It was issued in the early part of February of this year and an issue as a result extensive proceedings that were had before FERC. It allowed National Fuel the right of the right of eminent domain under the Federal Natural Gas Act. I would submit that National Fuel has other rights of eminent domain under state statutes, but for the purposes of this proceeding, it's relying upon the eminent domain papers that were granted to it pursuant to the National Gas Act. I don't think there is any question about the authenticity, the validity, and the continued effectiveness of the FERC

Order. It hasn't been rescinded, it hasn't been stayed, nobody has asked FERC to do those things; it's in full force and effect. And pursuant to it, we have the right, National Fuel has the right of eminent domain.

Before you today, Judge, is whether or not National Fuel has complied with the procedural requirements of the eminent domain procedure law such that it's now entitled to the easements it has requested. I submit to you, Judge, it has, and the papers fully demonstrate that it has done that. Again, I am not going to go into chapter and verse about each aspect of that, unless the Court wants me to, or you have some questions about it, Judge, but suffice it to say this: National Fuel made really Herculean efforts to try to work something out with Mr. and Ms. Schueckler. National Fuel obtained the rights that is required to build this pipeline from probably about 95 percent of the people who it required rights from; it did it by way of negotiation. It engaged in extensive negotiations with the Schuecklers both from National Fuel to Mr. and Ms. Schueckler and also National Fuel with two different attorneys that

represented the Schuecklers throughout the course of the last two years. I personally got involved at the very end with Mr. Abraham trying to work something out. We had -- I thought we were there, we just never crossed the finished line. We were close, but we didn't cross the finish line, so, Judge, we had to commence this proceeding and I realize that in some respects these pipelines these days are hot-button issues.

I want the Court to appreciate that National Fuel is the local company that has an extremely good safety track record and in this particular instance, specially with the Schuecklers, Judge, they made every effort to try to work something out and avoid coming here today. I thought we were there, we weren't quite there, so here we are.

From a procedural standpoint, Judge, we followed the letter of the law. We have done everything that the eminent domain procedural law requires. When I look hard at the answer and the memo that was filed on behalf of the Schuecklers, it seems to me the one argument that they are primarily relying upon is this notion that somehow because the DEC denied the water quality

permit, that somehow negates our ability to proceed with eminent domain under the FERC Order. It doesn't, Judge. There is no conditions in the FERC Order or the Certificate that requires us to get any kind of approval from the DEC in order to proceed with eminent domain. It's just not in there.

THE COURT: Erie Line, essentially on the supremacy clause, the federal government made the ruling and it doesn't matter what the state ruled, the federal government ruled over the state?

MR. TAYLOR: With all due respect, Judge, that's right.

THE COURT: Very simply put.

MR. TAYLOR: At this point it's really a matter of what should we pay for the right. Obviously the Schuecklers will have an opportunity to contest that, they will have an opportunity. Whatever the Court wants to give them by way of time to submit a claim and when we submit a claim - and if the Court wants we will post a bond right now to guarantee that they will be paid on that claim. I submit, Judge, it's not necessary to post a bond because National Fuel is

here, it's not going anyplace, and we are capable of compensating the Schuecklers for whatever the value is of the easements that we intend to take.

THE COURT: Do you want to address for me, Mr. Taylor, the argument that I read from -- we will hear from the Respondents, of course, the argument that this FERC Order is somehow conditional and it's effectiveness?

MR. TAYLOR: Yes, Judge. We have talked about that extensively in the brief and I would rely primarily on the things we say there, but, Judge, it's clear when you read the FERC Order, it doesn't condition our right of eminent domain on obtaining any DEC permits or anything like that. From time to time FERC does do that and I have seen other cases where they did specifically in the FERC Order, or the Certificate, condition the right of eminent domain on doing something first. Here there wasn't something like that and it's very similar to what occurred in the Constitution Pipeline case that you read about in the papers. Judge, I submit this is not Constitution -- this is not the Constitution Pipeline case for a lot of reasons, and we don't need to get into that here,

but National Fuel did not do anything even remotely close to what Constitution did in this case. Quite the contrary. We went to court and followed the law in every single phase of this proceeding, Judge, but regardless, in Constitution the Court found reading the very clear language in the FERC Order there, which is similar to ours, that there was no condition on proceeding with the right of eminent domain. It's not there; it wasn't there in this case and it's not there here. There are certainly conditions with respect to proceeding with construction. We are not here talking about construction, we are here today about taking the last really moderate easements over the Schuecklers and a few other easements that we require so we can construct, once we have the appropriate authorizations to construct.

THE COURT: That's an important distinction, is it not, from moving from the FERC Order to the eminent domain proceeding, and moving from the eminent domain proceeding to construction is a separate issue altogether, and you may need to get different permits and do different things at that point in time, is that

accurate?

MR. TAYLOR: That's it, Judge, I appreciate that. It's a hot-topic button issue, but in this case it's very straight forward. The Court's role is to examine whether or not procedurally we have done what is necessary to take the easements. I submit there is no question about that from a legal standpoint, Judge, frankly from any other standpoint you want to view this from, we have the right to proceed.

As I said, we are willing to post the bond, we are willing to give the Schuecklers whatever time they need to fully vent whatever their claim is for damages, but today we are asking the Court to issue an order that allows us the easements. Thank you.

THE COURT: Thank you, Mr. Taylor. Mr. Abraham, you're up.

MR. ABRAHAM: Thank you, your Honor. I was intrigued by your reference to the supremacy clause because the Clean Water Act, which authorizes the DEC to do what it did here says, "No license or permit shall be granted until the certification required by the section of the Water Quality Certification has been

obtained or has been waived. No license or permit shall be granted if certification has been denied by the state." So under the Supremacy Clause there is no project. No construction can occur. I agree that there is a distinction legally.

I want to get back to this between construction and eminent domain. The failure of the appropriate construction makes this case moot. And it deprives National Fuel's standing. They are in the wrong court. They are not supposed to be in court at all, I would argue. But even if they were to go into court, Judge Curtin in the Western District issued a decision citing half a dozen cases showing the Federal Rules of Civil Procedure require anybody who wants to exercise the national power of eminent domain to go to Federal District Court. This case is in the wrong court in the first place. It probably shouldn't be in court at all because of the mootness in standing in the second place.

THE COURT: One question, though, in doing my research prior to this motion, I read Section 15 U.S.C.A Section 717f, particularly paragraph (h), which is right of eminent domain

for construction of pipeline, etc., in pertinent part it indicates, "When any holder of a certificate of public convenience and necessity cannot acquire by contract or is unable to agree with the owner of the property to the compensation to be paid for the necessity right-of-way to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas," and I am going jump to the pertinent part, "It may acquire the same by the exercise of the right of eminent domain in the District Court of the United States or the district in which such property may be located, or in the state courts." How would you address that?

MR. ABRAHAM: Judge, I have analyzed that fully, cited several cases that did the same and came to the conclusion that the Federal Rules of Civil Procedure requiring that the national eminent domain be brought in Federal District Court was put in place to create uniform procedure where those cases in the national eminent domain power is used.

THE COURT: Okay.

MR. ABRAHAM: Now, I would go back

also to the case that Mr. Taylor emphasizes, the Constitution Pipeline case. In fact, all of the cases I find in the papers that they reply upon, none of those cases involve this situation where a Water Quality Certification was denied removing the effectiveness of the FERC Order. We don't argue that the FERC Order is destroyed, we argue that it's gone away. We argue it's hanging out there as a conditional order whose conditions cannot be met until they get out of the obstacle of DEC denial. So based on the FERC Order they can't be here; based on the FERC Order they can't be here because the project has been disapproved. FERC cannot approve a project, which I read from the Clean Water Act provision. When that happens, the final approval, final authorization to construct cannot issue from FERC until they win their case in the Second Circuit Court of Appeals against the DEC.

I want to point out to your Honor both sides have included the 13-page DEC denial letter in their papers. If you look at the first footnote on the first page, this is the -- this is what they are hanging their hat on in their Second Circuit Court of Appeals case against the

DEC. They are claiming the DEC waived their power to deny because they exceeded the 12-month limit for the DEC to act on their application and the DEC says in the first footnote, "We agree to identify the time that the application by National Fuel was made to us at this case, making the 12-month deadline within the time that they issued the order." So that's the only basis it seems, from what I have read, that they have against the DEC and it's very unlikely, I would submit, that they are ever going to win. The probability that they will ever get out from under this fundamental obstacle to construct, which they need to have standing to be here, is very unlikely. And they haven't made any effort to demonstrate that they will have a probability of success, which is what they need, which is what I show in my brief, to overcome our claim that the case is moot. The case is moot if there is no probability that the underlying thing, underlying risk, underlying project will ever get off the ground. Thank you.

THE COURT: Mr. Taylor, anything else?

MR. TAYLOR: Briefly, Judge, if I could. With all due respect to Mr. Abraham, the

same essential argument that he has made to the Court was made to the Northern District in the Constitution Pipeline matter and they were rejected, essentially for the reason that your Honor has already indicated; it's a matter of supremacy. It's sort of a convoluted course that Mr. Abraham would have this Court follow to get to this notion that somehow this is moot or we lack standing. They don't cite any case law for that support because, frankly, Judge, there isn't any. Ultimately, even if this were in federal court - which we have the right to bring it to state court, and we did. We chose to bring it to state court, Judge, for a number of reasons, and important reasons. One, that the property is closer to the state court than it is to the federal court. It is easier for the homeowners to appear here than to traipse up to Buffalo or some other place that federal court is located. And, Judge, if they really thought it belonged in federal court, they have the right to try to remove it to federal court.

Judge Curtin's case they are referring to was expensed in federal court. There was a combination of requirements that the gas company

there followed both the state law with respect to the requirements of eminent domain, as well as federal law.

I submit, Judge, that if we were held to the federal law standard, the one overriding factor under the federal statute would be that we made a good-faith effort to negotiate, and we were unable to come to an agreement. And here we made more than a good-faith effort. We spent two years trying to get it done, I thought we were there, but we didn't quite get there.

I submit that even if you apply the federal standard, which doesn't apply here, that it's not moot; it's ripe. We would ask the Court to decide it now and give us the order and paperwork that we have submitted to the Court.

THE COURT: Mr. Abraham, one more chance, and you know the rules. Mr. Taylor has the burden here, so he gets last word. Certainly, you can speak for as long as you like.

MR. ABRAHAM: Thank you. National Fuel is taking the position that it can exercise eminent domain even if the project is never built. It doesn't make any sense. The Schuecklers have 200 acres. They want to come

right through the middle of the that. It's short and long. They want to go the long way, severely diminishing the value of the property on the other side of the pipeline because there is a weight limit. You can't travel, I think it's 40 tons. They can't log over there. You can get the logging trucks in, but you can't get them out.

THE COURT: If the pipeline is there?

MR. ABRAHAM: Why would anybody entertain this claim of theirs under these circumstances, and I want to emphasize that the Constitution Pipeline case and this case are the only two cases that we know of where the DEC has denied a Water Quality Certification and essentially cut the legs off from under the project.

In the Constitution Pipeline case that they are talking about today and in their papers, which is the Constitution Pipeline versus Permanent Easement for 0.42 Acres, which came from the Northern District in 2014. None of these questions arose, but the DEC hadn't acted. A little more than a year later DEC denied the Water Quality Certification to that project and

the same court, the North District, they came back and said we want some other relief and the Court threw that out for lack of standing because the legs had been cut from under the project. Same thing here. Those are the only two cases where that has happened. All of the other cases they have gotten approval from the court to exercise eminent domain; this has never happened, this did not happen. There were lots of conditions that needed to be met and the courts generally say in those circumstances we can't wait for all of the conditions to be met because some of your rights require eminent domain. That's not the case here. They don't have any rights, they don't have any land rights because they don't have a final approval to construct. They cannot put a shovel in the ground, but if you give them eminent domain, they will start clear-cutting the right-of-way on the Schuecklers' land. For what? For nothing. For no hope that they will ever have a product. We are asking the Court to dismiss the case on these grounds, but I think an equally acceptable outcome would be to hold the decision in abeyance until such time that National Fuel can come back

to you and say, "See, we won in the Second Circuit and we overcame that obstacle, the Schuecklers are our only obstacle now," then I think it would be a completely different case.

THE COURT: Thank you. Last word, Mr. Taylor?

MR. TAYLOR: Mr. Abraham, again, with all due respect, we have already discussed the issue and we do have the right of eminent domain. The FERC Order is in existence. There is no conditions in the FERC Order that requires us to get any permits from the state in order for it to be effective. It is effective, it continues to be effective, and with all due respect to your Honor, as you mentioned because of supremacy notions and the like, this is not the arena to litigate whether it is effective or not. If they want to do that, if they wanted to do that there is other ways for them to challenge it and they did not do that. We are past that point. A lot of what Mr. Abraham just mentioned has to do with damage and we stand here ready, willing, and able to address those claims. In fact, we understand our Constitutional responsibility to address those claims and we have always taken that

responsibility seriously for. The 30 years I have done this type of work we have never walked away from that, and we bent over backwards to make sure we fulfill that responsibility. It is circular reasoning, it tries to attack the FERC Order; it's the wrong forum to do that, they have no basis. We have the right of eminent domain and we simply ask your Honor grant the easements and give the Schuecklers whatever time they think they need to submit the appropriate claims. I would say by way of this is not in the papers Ms. Bachan is here, she slipped me a note that they do allow timber trucks to cross pipelines, they can beef up the crossing, if necessary, and I know from personal experience in the past they have done that, they do it routinely and they do everything. They have to allow the homeowners to continue to use their property in a way that is safe.

THE COURT: Thank you. Mr. Abraham, you have something else you want to add?

MR. ABRAHAM: I do, your Honor.

THE COURT: Go ahead and we will wrap this up. I clearly understand both arguments; I do understand the arguments. Take your time.

MR. ABRAHAM: Well, I have to speculate as to why they are going forward with this when they don't have any light at the end of the tunnel, frankly. Why the Schuecklers are going to have to suffer this clear-cutting of a new right-of-way alongside the old right-of-way, which is management and doesn't have a weight restriction on it, by the way. So why are they -- I think National Fuel is quite litigious. It's not a strike against them, but their name is on a lot of court papers. If you do West Law or Lexis, you will get a long list and in that context I think what it's trying to do here is merely obtain an advisory opinion that it can use in later litigation probably regarding other products, not this one. This one isn't going anywhere. It would be nice if they made an effort to show it to the contrary that it is going anywhere, but they haven't made that effort. I think we have plenty of stuff in the papers to make up your mind as to whether that is the case, that this is a project that doesn't have any light at the end of the tunnel, but in the Constitution Pipeline, the Court said they had lack of standing, not on eminent domain, but

standing is a threshold requirement. Mr. Taylor can't avoid the question of standing. If he wants to rely on the order, still you have to look at whether there is standing or whether the underlying reason for the case is moot. Those things have to be determined first in order to determine whether we go forward or not.

THE COURT: Last word, Mr. Taylor?

MR. TAYLOR: With some trepidation, Judge, we are not here to litigate whether or not the project will go forward, that is in other hands right now. I am not here to speculate about whether it will or won't go forward. Ultimately, Judge, this is not an advisory opinion. This is a litigated matter. It's being contested and ultimately the Court will rule. It's not an advisory opinion, and as I said before, Judge, we understand and we welcome the opportunity to fairly compensate the Schuecklers, but that ultimately is the last issue.

THE COURT: Very good. Counsel, of course, I will reserve, I will put my decision in writing, but you will hear from me soon. Thank you for your argument. Thank you for your papers as well.

MR. TAYLOR: Appreciate it.

* * *

C E R T I F I C A T I O N

STATE OF NEW YORK:

COUNTY OF ALLEGANY:

I, BREILLE KELLEHER, being a Court Reporter in and for Allegany County, New York, do hereby certify that I reported in machine shorthand, the proceeding in the above-styled case, and that the foregoing pages constitute a true record of the proceeding to the best of my ability.

BREILLE A. KELLEHER
Court Reporter

DECISION OF THE HON. THOMAS P. BROWN, A.J.S.C., DATED MAY 26, 2017 [33- 42]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

-vs-

DECISION

JOSEPH A. SCHUECKLER and THERESA F. SCHUECLKER, EUGENE HEWITT and WILLIAM BENTLEY,

Index No. 45092

Respondents.

Appearances of Counsel

Phillips Lytle LLP (Paul Morrison-Taylor, Esq., of counsel) for petitioner

Gary Abraham, Esq. and W. Ross Scott, Esq. for respondents Schueckler

Decision

By order to show cause and petition, National Fuel Gas Supply Corporation (National Fuel) has made application to the Court for an order granting it easements over real property owned by the defendants Schueckler[1]. Defendants Schueckler have answered the petition and appeared in opposition to the application.

In support of the application, the Court has read the petition, verified March 27, 2017, the affidavit of Julie A. Bachan, sworn to March 27, 2017, the affidavit of Craig A. Leslie, sworn to March 27, 2017, the affidavit of regularity of Paul Morrison-Taylor, sworn to May 3, 2017 and the affidavit of Paul Morrison-Taylor, sworn to May 15, 2017. In opposition to the application, the Court has read the verified answer of Joseph and Theresa Schueckler, dated April 12, 2017.

[1]Defendants Hewitt and Bentley, who may own mineral rights to the Schueckler's property, have not appeared in this proceeding.

The Court has also reviewed memoranda of law (MOL) submitted by National Fuel and the Schuecklers.

Contentions of the Parties:

In its petition, National Fuel claims it is entitled to an order granting it easements over the Schueckers' property so that it can construct parts of a natural gas pipeline. The basis for its claim is that the Federal Energy Regulatory Commission (FERC) granted it a certificate of public convenience and necessity (certificate) for the pipeline project. Such a certificate satisfies the requirements of Article 2 of the Eminent Domain Procedure Law (EDPL), which requires a determination that a condemnation is for a public use or benefit [see EDPL section 204(b)(1)], and then allows a condemnor to initiate eminent domain proceedings. National Fuel pledges, as the Constitution requires it to do, to pay the Schuecklers fair value for the taking of their property, and claims to have satisfied the requirements of EDPL 303 by making an offer to the respondents that it believed to represent just compensation for the real property to be acquired.[2] It has offered to post a bond securing that payment if the Court grants it the order it seeks. It claims that it has followed all applicable procedures set forth in the EDPL and has submitted an affidavit of regularity to that effect.

The defendants Schueckler respond that National Fuel does not presently have the right to take their property, regardless of the compensation it offers. They claim that National Fuel's certificate is conditional, that the taking does not serve a public purpose, that the certificate has been invalidated by the New York Department of Environmental Conservation and that its application is premature because FERC has not yet ruled on requests for rehearing.

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[2]See Exhibit A to affidavit of Julie A. Bachan, sworn to March 27, 2017.

In their memorandum of law, the Schuecklers also argue that National Fuel lacks standing to bring the petition, that the petition is moot because it is improbable that National Fuel will be able to satisfy the conditions in its certificate and that Rule 71(a), F.R.Civ.P. provides for the exclusive forum for federal eminent domain cases.

Analysis:

The Court finds that petitioner has made a prima facie showing of entitlement to the easements. First, it has shown that FERC has issued it an order granting a certificate of public convenience for its pipeline project, exempting it from the requirements of Article 2 of the EDPL. Second, it has shown that it has made an offer to respondents that it believes to represent just compensation for the real property to be acquired, satisfying the requirements of EDPL Article 3 [*Anderson v. National Fuel Gas Supply Corporation*, 105 A.D.2d 1097 (4th Dept. 1984); *Mater of National Gas Fuel Supply Corporation v. Town of Concord*, 299 A.D.2d 898 (4th Dept. 2002)].

Nevertheless the petition should not be granted unless the respondents' objections or defenses are without merit.

In considering respondents' first defense that petitioner's certificate is conditional, the Court begins by reviewing FERC's order granting a certificate to National Fuel[3]. In its order, FERC states that "a certificate of public convenience and necessity is issued to National Fuel Gas Supply Corporation authorizing it to construct and operate [the pipeline], as described and conditioned herein [...]." The order goes on to specify that the "certificate authority" is conditioned upon "completing the authorized construction [...] within two years [...] compliance with all applicable Commission regulations [...] with the environmental conditions in Appendix B

[3]See Exhibit F to verified petition

[...] and executing contracts, prior to the commencement of construction, for [...] the terms of service reflected in its precedent agreements"[4].

The Court interprets that portion of the order that reads "as described and conditioned therein" as referring to "authorizing it to construct and operate" and not to "a certificate of public convenience and necessity is issued." In other words, it is the construction and operation of the pipeline that is conditioned, not the issuance of the certificate. This conclusion is reached by application of the rule of the last antecedent[5].

The Court's interpretation is also supported by the condition that National Fuel complete the project within two years. If the condition applied to the issuance of the certificate, National Fuel could not even begin construction, much less complete it, because without the certificate it could not take title to the easements that are a prerequisite to construction. On the other hand, if the condition applied to the authority to construct, then National Fuel could satisfy the condition by first, using the certificate to take title to the easements and then, second, by completing construction within two years. The Court 's interpretation is also supported by the condition that National Fuel execute certain contracts prior to the commencement of construction. If the order was read as conditioning the issuance of the certificate, as urged by respondents, it would be impossible for National Fuel to execute such contracts, because, lacking a certificate, it could not take title to the easements that would be a prerequisite to any such contracts. On the other hand, if what the order conditions is the authorization to construct the pipeline, not the issuance of the

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[4] Id at pp. 76-77

[5] "An interpretive principle by which a court determines that the qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote." Bryan A. Garner, Ed., *Black's Law Dictionary*, West (1999)

certificate, then National Fuel could comply with the condition by using the certificate to take title to the easements, and then executing contracts, prior to the commencement of construction, according the terms of preceding agreements.

National Fuel is in the same position here as the Constitution Pipeline Co. was in *Constitution Pipeline Co. LLC v. A Permanent Easement for 0.81 Acres, 2015 WL 12556143 _____ F.Supp. _____ (N.D.N.Y 2015)*. Both are petitioners holding a FERC certificate seeking to initiate eminent domain proceedings. This Court agrees with that Court when it wrote:: "if Constitution were not allowed to exercise eminent domain authority until it had satisfied all the conditions in the FERC Order, the project could never be constructed [....] the FERC Order cannot reasonably be read to prohibit Constitution from exercising eminent domain authority until it has complied with all of the conditions set forth in the Appendix [*Id.*].

The Court agrees with the decision in *Tennessee Gas Pipeline v. 104 Acres of Land*, 749 F. Supp. 427 (D. R.I. 1990) that "the requirements in the FERC order arise after ownership of the rights of way are obtained and do not operate as a "shield" against the exercise of eminent domain power [...] Thus, while failure to comply with the terms of the order may delay or prevent construction of the pipeline, absent a stay of the FERC order by the Commission the lack of a required permit does not prevent condemnation of land in preparation for construction" [*Id.* at 433].

Because the Court concludes that petitioner's certificate is unconditional as regards its right to initiate eminent domain proceedings, it must hold that respondents' first affirmative defense is without merit.

Respondents' second affirmative defense is that the taking does not serve a public purpose.

As previously noted, FERC's certificate of public convenience and necessity exempts its holder from the requirements of Article 2 of the EDPL, one of which is to specify the public use, benefit or purpose to be served by the proposed public project[6]. As pointed out by petitioner in its memorandum of law, the FERC order made a specific finding that the proposed project satisfied criteria that it would serve the public interest. In asserting this defense, respondents are asking this Court to allow a collateral attack on the certificate. This the Court cannot do; it must regard the findings underlying the certificate as conclusive [*Stanley v. Jay St. Commecting R.R.*, 182 A.D. 399 (2nd Dept. 1918)]. The Court must therefore conclude that respondents' second affirmative defense is without merit.

Respondents' third affirmative defense is that the certificate has been invalidated by the New York State Department of Environmental Conservation's denial of National Fuel's application for a water quality certification. This issue was considered in *Constitution Pipeline Co. LLC v. A Permanent Easement for 0.81 Acres, 2015 WL 12556143 _____ F.Supp. ____ (N.D.N.Y 2015)*, where the defendants argued that plaintiff's FERC order was conditioned upon the granting of a certificate under section 401 of the Clean Water Act. There, the Court concluded, as does this Court here, that the condition applied to the construction of the pipeline and not to the initiation of eminent domain proceedings. Therefore, the Court determines that respondents' third affirmative defense is without merit.

Respondent's fourth affirmative defense is that eminent domain proceedings are premature because FERC has not yet ruled on certain requests for rehearings. In *Tennessee Gas Pipeline v. 104 Acres of Land*, 749 F. Supp. 427 (D. R.I. 1990), this very argument was considered and

[6]See EDPL section 204(B)(1).

rejected. The landowners argued that the FERC certificate was not final because the Commission had before it applications for rehearing on matters relating to the certificate. The Court rejected their arguments, noting that the Natural Gas Act provided that an application for a rehearing shall not operate as a stay of the Commission's order. The landowner's remedy was to request a stay from the Commission itself, or from the United States Court of Appeals. Here, no such stay has been issued. The Court concludes that respondents' fourth affirmative defense lacks merit.

In their memorandum of law, the Schuecklers argue that National Fuel lacks standing to maintain this action. They rely on a second case involving Constitution Pipeline Co. LLC as the petitioner, *Constitution Pipeline Co. LLC v. New York State Department of Environmental Conservation*, _____ F. Supp. _____ (N.D.N.Y. 2017)[7]. The issue in that case was whether Constitution Pipeline was entitled to a declaratory judgment that DEC was preempted from requiring Constitution Pipeline to obtain additional state water quality permits. DEC had already denied Constitution Pipeline's application for a federal Clean Waters certification, and Constitution Pipeline's appeal of that decision was pending in the United States Court of Appeals. The District Court found that Constitution Pipeline lacked standing to pursue the declaratory judgment action because it could not show that it was actually harmed by DEC's decision regarding the state water quality permits, as opposed to DEC's denial of the federal Clean Waters Certification, which had already halted its pipeline project.

Here, the issue is not whether National Fuel has or will be able to obtain the necessary water quality permits from DEC, but whether it may initiate eminent domain proceedings. As previously noted, water quality permits may be a precondition to pipeline construction, but not to

[7]Attached as Exhibit C to respondents' memorandum of law

the initiation of eminent domain proceedings. As the holder of an order granting a FERC certificate, National Fuel is in a position to assert the threat of an actual or imminent injury because respondents deny it has the right to initiate such proceedings. Therefore, a real case and controversy exists in which National Fuel has standing to petition this Court for an order granting the disputed right to the easements.

Respondents next argument is that National Fuel's inability to satisfy the conditions in the FERC order renders this case moot. Respondents claim that DEC's denial of petitioner's permit applications "makes National Fuel's ability to save the project as proposed improbable" and that it is "likely the pipeline alignment will change and there will be no need to cross the Schuecklers' land." Petitioner admits that its application for a water quality certificate was "purportedly denied by NYSDEC on April 14, 2017" and states that it has filed a petition for reviewing that determination with the United States Court of Appeals.

Even so, the issue in this case is not the probabilities of petitioner being able to commence or complete construction of the pipeline. In its petition, petitioner requests only an order directing that title to easements will vest in petitioner upon its filing of acquisitions maps in the Allegany County Clerk's Office. Therefore, this case cannot be considered moot, even assuming as true respondent's statement that completion of the project is "improbable," because petitioner's ability or inability to complete the project is not relevant to the determination of whether it has the legal right to condemnation, which is all that is at issue in this case. In fact, the only way to learn, as opposed to guess, whether petitioner will be able to complete the project is by granting the relief it seeks in this action - title to the easements. The Court concludes that this case is not moot.

Finally, respondents argue that Rule 71(A), F.R.Civ.P. provides the exclusive forum for all cases of condemnation involving the national power of eminent domain. Respondents argue that this Court consequentially lacks jurisdiction to consider the petition.

Respondents' arguments rely heavily on *National Fuel Gas Supply Corporation v. 138 Acres of Land in the Village of Springville*, 84 F. Supp.2d 405 (W.D.N.Y. 2000). In that case, Judge John T. Curtin held that federal civil procedure applied to condemnation cases brought in federal court, notwithstanding the provisions of 15 U.S.C. 717f(h), which provide that the practice and procedure in federal courts should conform to that of similar proceedings brought in the state courts. The decision did not overturn that part of the same statute that provided that pipeline companies could proceed in state courts as well as in federal courts. Neither did the decision hold that States must apply the Federal Rules of Civil Procedure to condemnation cases brought in their own courts. To the extent that respondents argue otherwise, the Court believes they have misread the case. If respondents were correct, the Appellate Division would have had to dismiss the appeal in *Matter of National Fuel Gas Supply Corp. v. Town of Concord*, 299 A.D.2d 898 (4th Dept. 2002) for lack of subject matter jurisdiction, instead of affirming the trial court's order granting natural gas storage easements.

Having concluded that petitioner has made a *prima facie* showing, and that all of respondent's objections and affirmative defenses lack merit, the Court concludes that petitioner is entitled as a matter of law to the relief requested.

Petitioner shall submit a proposed order on notice to counsel for respondents within twenty (20) days of the date of this decision, and the order shall state a fair and adequate amount for a bond to be posted by petitioner upon the granting and entry of the order.

Dated: May 26, 2017
Belmont, New York

HONORABLE THOMAS P. BROWN
ACTING JUSTICE OF THE SUPREME COURT

ORDER TO SHOW CAUSE, GRANTED MARCH 28, 2017 [43-45]

At a Term of the Supreme Court, held in and for the County of Allegany, at the Allegany County Court, 7 Court Street, Belmont, New York on the 28th day of March, 2017.

PRESENT: HON. THOMAS P. BROWN
Acting Justice Presiding

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

ORDER TO SHOW CAUSE

Index No.: 45092

3/28/17
No fee

Upon review of the Verified Petition in the proceeding identified above, filed in the Allegany County Clerk's Office on March 28, 2017, the supporting affidavit of Craig A. Leslie, sworn to March 27, 2017, with exhibits, and the supporting affidavit of Julie A. Bachan, sworn to March 27, 2017, with exhibits, and after hearing Phillips Lytle LLP (Joanna Dickinson, of counsel), attorneys for petitioner National Fuel Gas Supply Corporation ("National Fuel"), it is hereby

ORDERED that respondents show cause before this court on the 19th day of April, 2017 at the Allegany County Court, 7 Court Street, Belmont, New York, Part 1, at 9:30

a.m./~~p.m.~~, or as soon thereafter has counsel may be heard, why an order should not be made and entered:

1. Authorizing petitioner to acquire by eminent domain the easements described in the Verified Petition (the "Easements");

2. Authorizing petitioner to file the Acquisition Map relative to the Easements in the Allegany County Clerk's Office, and to serve the taking Order, and Notice of Acquisition and Acquisition Map, by certified mail, return receipt requested, upon all respondents, pursuant to CPLR 308(5) and New York Eminent Domain Procedure Law § 402(B)(1);

3. Directing that title to the real property described in the Verified Petition shall vest in petitioner upon the filing of: (a) any bond(s) that may be required by the Court; and (b) the Acquisition Map; and it is further

ORDERED that service of a copy of this Order to Show Cause, the supporting affidavit of Craig A. Leslie, with exhibits, sworn to March 27, 2017, the supporting affidavit of Julie A. Bachan, with exhibits, sworn to March __, 2017, and the Verified Petition including the Notice of Pendency in this proceeding, shall be deemed sufficient service on respondents if National Fuel: (a) mails them by certified mail, return receipt requested, to all respondents at the addresses listed in the Verified Petition, on or before April 7, 2017; and (b) publishes a Notice of Proposed Acquisition and Commencement of Proceedings in ten (10) consecutive editions of the Olean Times Herald, Olean, New York, using the form attached to the affidavit of Craig A. Leslie as Exhibit A; and it is further

ORDERED that any answering papers and cross-motions, if any, by respondents shall be served, by overnight delivery, on or before April 11, 2017, to the Court at the above address, and to National Fuel's attorneys at the address indicated in the Verified Petition; and it is further

ORDERED that any reply papers by National Fuel shall be served, by overnight mail delivery, on or before April 14, 2017, to the Court at the above address, and to respondents who have submitted answering papers, or their attorneys, at the address(es) indicated in the answering papers.

ENTER:

HON. THOMAS P. BROWN, A.J.S.C.

GRANTED

GRANTED
March 28, 2017
COURT CLERK

Doc #01-3022716.1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION
6363 Main Street
Williamsville, New York 14221,

Petitioner,

v.

JOSEPH A. SCHUECKLER,
THERESA F. SCHUECKLER
[redacted] Hewitt Road
Cuba, New York 14727,

EUGENE HEWITT
Hubbard Road (no number)
Clarksville, New York 14786,

WILLIAM BENTLEY
[redacted] Davis Street
Bradford, Pennsylvania 16701,

Respondents.

VERIFIED PETITION

Index No.: 45092

Basis of venue: location of property in Allegany County, New York

Petitioner National Fuel Gas Supply Corporation ("National Fuel"), by its attorneys, Phillips Lytle LLP, for its Verified Petition, alleges upon information and belief as follows:

1. National Fuel is a Pennsylvania corporation, is authorized to do business in New York, and has a principal place of business at 6363 Main Street, Williamsville, County of Erie, New York.

2. Pursuant to Section 717f of the Natural Gas Act (15 U.S.C. § 717f), as well as Section 11 of the New York Transportation Corporations Law, National Fuel has the power of eminent domain.

3. National Fuel seeks to acquire by eminent domain an interest in the real property described in the annexed Exhibit A (the "Property"), which is located in Allegany County, New York.

4. The interest to be acquired in the Property is a permanent easement and temporary construction easements, as described in the attached Exhibit B (collectively, the "Easements").

5. Copies of the proposed Acquisition Map and Notice of Pendency concerning the Easements to be acquired are attached as Exhibits C and D, respectively.

6. The public use, benefit, or purpose for which the Easements are required is to construct, install, own, operate, and maintain approximately 96.49 miles of new 24-inch diameter natural gas pipeline, and related facilities, as part of the Northern Access 2016 Project (the "Project").

7. The names of the owners of the Property over which the Easements are to be acquired are Joseph A. Schueckler and Theresa F. Schueckler, and his last known, diligently obtainable addresses of the owners are as noted in the caption.

8. The name and diligently obtainable address of any others purportedly having interests in the Property, if any, are set forth in the attached Exhibit E, together with a description of each person's or entity's reputed interest in the Property, and their last known diligently obtainable address is noted in the caption.

9. National Fuel is exempt from the requirements of Article 2 of the New York Eminent Domain Procedure Law ("EDPL") because National Fuel previously applied to the Federal Energy Regulatory Commission ("FERC") for a Certificate of Public Convenience and Necessity for the Project, in accordance with the requirements of the

Natural Gas Act, and was granted such a certificate on February 3, 2017 (the "FERC Certificate"). A copy of the FERC Certificate is attached as Exhibit F and is available online via FERC's eLibrary (http://elibrary.ferc.gov/idmws/search/fercgensearch.asp) under Docket Nos. CP15-115-000 and CP15-115-001.

10. Specifically, the proceedings held before FERC in connection with its review of National Fuel's application for a Certificate of Public Convenience and Necessity for the Project, and the issuance of the FERC Certificate, satisfy the requirements for an exemption under New York EDPL § 206.

11. The complete docket for the proceedings held before the FERC may be viewed online via FERC's eLibrary under Docket Nos. CP15-115-000 and CP15-115-001 (http://elibrary.ferc.gov/idmws/search/fercgensearch.asp).

12. The FERC Certificate also satisfies and supplants the requirement of obtaining a certificate of environmental compatibility and public need under the New York Public Service Law and/or EDPL.

13. The FERC Certificate covers the activity at issue here, is in full force and effect, and is incorporated by reference.

14. If required by the Court, prior to the vesting of title to the Easements, as described in this petition, National Fuel will deposit a bond or undertaking with the Clerk of the Court, in an amount to be fixed by the Court in accordance with the EDPL, on the return date of this petition.

WHEREFORE, National Fuel respectfully requests that the Court direct the entry of an Order:

a. Authorizing National Fuel to acquire the Easements, as described in and upon the attached Exhibit B;

b. Authorizing National Fuel to file the Acquisition Map in the Allegany County Clerk's Office;

c. Directing that title to the Easements described in and upon the attached Exhibit B, shall vest in National Fuel upon the filing of any required bond and the Acquisition Map;

d. Authorizing National Fuel to serve the order granting National Fuel's request to acquire the Easements, as described in and upon the attached Exhibit B, and Notice of Acquisition and Acquisition Maps, by certified mail, return receipt requested, upon all respondents; and

e. Granting such other relief as the Court deems just and proper.

Dated: Buffalo, New York
March 24, 2017

PHILLIPS LYTLE LLP

By _____
Paul Morrison-Taylor
Craig A. Leslie
Attorneys for Petitioner
National Fuel Gas Supply Corporation
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

TO: JOSEPH A. SCHUECKLER
THERESA F. SCHUECKLER
[redacted] Hewitt Road
Cuba, New York 14727

EUGENE HEWITT
Hubbard Road (no number)
Clarksville, New York 14786

WILLIAM BENTLEY
[redacted] Davis Street
Bradford, Pennsylvania 16701

ENDORSED
2017 MAR 23 AM 11:54
ROBERT L. CHRISTMAN
CLERK
ALLEGANY COUNTY

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

RONALD C. KRAEMER, being duly sworn, deposes and says that he is a Senior Vice President for National Fuel Gas Supply Corporation, the petitioner in this proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes them to be true.

Ronald C. Kraemer

Sworn to before me this
27th day of March, 2017.

Stacey A Fonagy
Notary Public

STACEY A. FONAGY
Notary Public-State of New York
No. 01FO6193472
Qualified in Erie County
Commission Expires September 22, 2020

Doc #01-3022728

EXHIBIT A TO VERIFIED PETITION – DEED, DATED NOVEMBER 4, 2008 [51-53]

BK: 1809 PG: 20 02/23/2009 DEED Image: 1 of 3

COPY

ALLEGANY COUNTY CLERK'S OFFICE RECORDING PAGE

Robert L. Christman, County Clerk
7 Court St., Belmont, NY 14813
Phone: (585) 268-9270 Fax: (585)-268-9659

Doc#: 00035931
Bk: 1809 Pg: 20

THIS SPACE RESERVED FOR COUNTY CLERK

2009 FEB 23 AM 11:06
ROBERT L. CHRISTMAN
CLERK
ALLEGANY COUNTY
ENDORSED

After Recording Return To: (PLEASE TYPE OR PRINT)
CASH, LIPPERT & LORD
P.O. Box 185
Franklinville, NY 14737

Parties: (PRINT OR TYPE NAMES IN FULL)
(Only one 1st party and one 2nd party name required)

1st Party Joseph A. Schueckler

2nd Party Joseph A. Schueckler and Theresa F. Schueckler

TITLE COMPANY NAME

COUNTY CLERK'S USE ONLY – DO NOT WRITE BELOW THIS LINE

INSTRUMENT # _____

DOCUMENT TYPE Deed

TOWNSHIP(S) Clarksville

NUMBER OF PAGES 3
(INCLUDING THIS PG.)

NUMBER OF PAGES SCANNED 3

MORTGAGE RECORDING TAX RECEIPT

Amount secured by mortgage $ _____

Mortgage Tax Serial # _____

Check any of the following that apply:

( ) 1-2 Family Dwelling Exemption
( ) Mortgage Tax Affidavit Attached
( ) To Be Apportioned
( ) Special Additional Tax Exempt

I do hereby certify that I have received on the within mortgage:

$ _____ Basic Tax

$ _____ Additional Tax

$ _____ Special Additional Tax

$ _____ Total
being the amount of the recording tax imposed.

_____
(Recording Officer of Allegany County)

AMOUNT OF CONSIDERATION $ -0-

RECEIVED
$ 1.00
FEB 23 2009
REAL ESTATE
TRANSFER TAX
ALLEGANY COUNTY
0001192

State of New York }
County of Allegany } S.S.

Recorded on the 23rd day of Feb, 20 09
at 11:06 o'clock A M. in Liber 1809
of Index at Page 20 and examined.

Robert L. Christman Clerk

ENDORSED

THIS SHEET CONSTITUTES THE CLERK'S ENDORSEMENT REQUIRED BY SECTION 316 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK

Clerk's Initials BG

DO NOT DETACH

BK: 1809 PG: 20 02/23/2009 DEED Image: 2 of 3

This Indenture, Made the 4th day of November, 2008.

Between **JOSEPH A. SCHUECKLER,** [redacted] Hewitt Road, Cuba, NY 14727, party of the first part, and

JOSEPH A. SCHUECKLER (grantor herein) and **THERESA F. SCHUECKLER**, his wife, as tenants by the entirety, [redacted] Hewitt Road, Cuba, NY 14727, parties of the second part,

Witnesseth that the party of the first part, in consideration of One and more Dollars ($1.00 &c) lawful money of the United States, paid by the parties of the second part, does hereby grant and release unto the parties of the second part, their heirs and assigns forever, ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Clarksville, County of Allegany and State of New York, being part of Lot No. 58, township No. 2, Range 2 of the Holland Land Company's Survey, bounded as follows: Beginning in the south line of said Lot No. 58 at the distance of 19 chains 98 links easterly from the south west corner thereof; thence northerly parallel to the west line of said Lot, 62 chains 51 links to the north line of said lot; thence easterly along the said north line 20 chains 81 links; thence southerly parallel to the west line of said Lot No. 58, sixty-two chains, forty-one links, to the south line of said lot; thence westerly along the said south line 20 chains 81 links to the place of beginning, containing One Hundred Thirty Acres of land be the same more or less.

ALSO ALL THAT OTHER CERTAIN PIECE OR PARCEL OF LAND, situate in the Town of Clarksville, Allegany County, N.Y., bounded and described as follows: being the south west part of Lot No. 58, Township No. 2, Range 2, of the Holland Land Company's Survey, bounded as follows: Beginning at the south west corner of Lot No. 58 in said town, running thence north along the west line of said lot, 25 chains; thence east and parallel to the south line of said Lot No. 58, twenty chains; thence south and parallel to the west line of said Lot No. 58, twenty-five chains to the south line of said lot; thence west along the south side of Lot No. 58 to the place of beginning, containing fifty acres of land be the same more or less.

ALSO CONVEYING the right to use a Right of Way reserved in a deed, Eugene Hewitt to Leon W. Bump and Harold H. Steiner, recorded in Allegany County Clerk's Office in Liber 543 of Deeds at Page 499.

ALSO ALL THAT OTHER TRACT OR PARCEL OF LAND, situate in the Town of Clarksville, County of Allegany, State of New York, and being the 20 acres reserved to Eugene Hewitt and Violet E. Hewitt, his wife, in a certain deed to Paul L. Hitchcock dated November 10, 1960, recorded November 10, 1960 in Liber 540 of Deeds at page 145, Allegany County Clerk's Office.

This Deed was prepared without benefit of an examination of a currently dated abstract of title or a survey prepared by a licensed surveyor.

THE TRANSFERORS HEREIN CERTIFY THAT THE WITHIN DESCRIPTION DOES NOT SPLIT OR COMBINE ASSESSMENT PARCELS AND THAT THE RECORDING OF THIS DEED WILL NOT RESULT IN THE ALTERATION OR CHANGE TO OR AMENDMENT OF AN EXISTING TAX MAP.

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the parties of the second part, their heirs and assigns forever.

BK: 1809 PG: 20 02/23/2009 DEED Image: 3 of 3

And said party of the first part covenants as follows:

First, that the parties of the second part shall quietly enjoy the said premises;

Second, That said party of the first part will forever Warrant the title to said premises.

Third, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set his hands and seals the day and year first above written.

IN PRESENCE OF

Joseph A. Schueckler

State of New York)

SS:

County of Cattaraugus)

On this 4th day of November, 2008, before me, the undersigned, a notary public in and for said state, personally appeared **JOSEPH A. SCHUECKLER**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual executed the instrument.

Clarksville
S ✓ S ✓

38.00
.00

JANICE A. SNYDER
Notary Public, State of New York
Qualified in Cattaraugus County
My Commission Expires May. 31, 2010

EASEMENT

NATIONAL FUEL GAS SUPPLY CORPORATION ("National Fuel") its successors and assigns, are hereby granted a permanent easement, and temporary construction easements, for the laying, maintaining, operating, extending, replacing, repairing and/or removing a 24-inch diameter, natural gas transmission pipeline, and other equipment and appurtenances over, through, across, above and under the permanent easement as may be necessary in connection therewith; together with the right of unimpaired access to said pipeline and equipment, and the right of ingress and egress on, over and through the real property described in the attached Exhibit A, which is situated in the Town of Cuba, County of Allegany, State of New York, and is identified by SBL #[redacted] (the "Property"), for any and all purposes necessary and incident to the exercise of all rights granted hereunder; and while Respondent property owner shall have the right to enjoy the surface of said permanent easements, he or she shall not interfere with the use of same by National Fuel, and shall not construct any building, structure, improvement, or obstruction on or over the permanent easements; and National Fuel shall have the further right to maintain said permanent easements herein granted clear of trees, undergrowth, brush, and other obstructions and to enter upon the Property at such times as may be necessary or convenient for such installation, construction, operation, inspection, maintenance, repair and/or replacement; and the location of the easement is more particularly described as follows:

A 50-foot wide permanent easement, and temporary construction easements over the Property, as shown on the map attached as Exhibit B, and further described as follows:

PROPERTY OWNER(S)	SBL(S)	APPROXIMATE ACREAGE SUBJECT TO TEMPORARY EASEMENT	APPROXIMATE ACREAGE SUBJECT TO PERMANENT EASEMENT
Joseph A. Schueckler and Theresa F. Schueckler	[redacted]	Approximately 1.57 acres	2.02 acres

This Easement shall be binding on the property owner(s), it(s) heirs, successors and assigns, and shall inure to the benefit of National Fuel, its successors and assigns, forever or until sooner terminated by National Fuel, its successors or assigns.

EXHIBIT A TO EASEMENT – DEED, DATED NOVEMBER 4, 2008 [56-58]

BK: 1809 PG: 20 02/23/2009 DEED Image: 1 of 3

COPY

ALLEGANY COUNTY CLERK'S OFFICE RECORDING PAGE

Robert L. Christman, County Clerk
7 Court St., Belmont, NY 14813
Phone: (585) 268-9270 Fax: (585)-268-9659

Doc#: 00035931
Bk: 1809 Pg: 20

THIS SPACE RESERVED FOR COUNTY CLERK

2009 FEB 23 AM 11:06
ROBERT L. CHRISTMAN
CLERK
ALLEGANY COUNTY
ENDORSED

After Recording Return To: (PLEASE TYPE OR PRINT)
CASH, LIPPERT & LORD
P.O. Box 185
Franklinville, NY 14737

Parties: (PRINT OR TYPE NAMES IN FULL)
(Only one 1st party and one 2nd party name required)

1st Party Joseph A. Schueckler

2nd Party Joseph A. Schueckler and Theresa E. Schueckler

TITLE COMPANY NAME

COUNTY CLERK'S USE ONLY – DO NOT WRITE BELOW THIS LINE

INSTRUMENT # _____

DOCUMENT TYPE Deed

TOWNSHIP(S) Clarksville

NUMBER OF PAGES 3
(INCLUDING THIS PG.)

NUMBER OF PAGES SCANNED 3

MORTGAGE RECORDING TAX RECEIPT

Amount secured by mortgage $_____

Mortgage Tax Serial # _____

Check any of the following that apply:

( ) 1-2 Family Dwelling Exemption
( ) Mortgage Tax Affidavit Attached
( ) To Be Apportioned
( ) Special Additional Tax Exempt

I do hereby certify that I have received on the within mortgage:

$ _____ Basic Tax

$ _____ Additional Tax

$ _____ Special Additional Tax

$ _____ Total
being the amount of the recording tax imposed.

_____
(Recording Officer of Allegany County)

AMOUNT OF CONSIDERATION $ -0-

RECEIVED
$ 1.00
FEB 23 2009
REAL ESTATE
TRANSFER TAX
ALLEGANY COUNTY
0001192 cf

State of New York }
County of Allegany } S.S.

Recorded on the 23rd day of Feb, 20 09
at 11:06 o'clock A M. in Liber 1809
of Index at Page 20 and examined.

Robert L. Christman Clerk

ENDORSED

THIS SHEET CONSTITUTES THE CLERK'S ENDORSEMENT REQUIRED BY SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK

Clerk's Initials BG

DO NOT DETACH

BK: 1809 PG: 20 02/23/2009 DEED Image: 2 of 3

This Indenture, Made the 4th day of November, 2008.

Between **JOSEPH A. SCHUECKLER,** [redacted] Hewitt Road, Cuba, NY 14727, party of the first part, and

JOSEPH A. SCHUECKLER (grantor herein) and **THERESA F. SCHUECKLER,** his wife, as tenants by the entirety, [redacted] Hewitt Road, Cuba, NY 14727, parties of the second part,

Witnesseth that the party of the first part, in consideration of One and more Dollars ($1.00 &c) lawful money of the United States, paid by the parties of the second part, does hereby grant and release unto the parties of the second part, their heirs and assigns forever, ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Clarksville, County of Allegany and State of New York, being part of Lot No. 58, township No. 2, Range 2 of the Holland Land Company's Survey, bounded as follows: Beginning in the south line of said Lot No. 58 at the distance of 19 chains 98 links easterly from the south west corner thereof; thence northerly parallel to the west line of said Lot, 62 chains 51 links to the north line of said lot; thence easterly along the said north line 20 chains 81 links; thence southerly parallel to the west line of said Lot No. 58, sixty-two chains, forty-one links, to the south line of said lot; thence westerly along the said south line 20 chains 81 links to the place of beginning, containing One Hundred Thirty Acres of land be the same more or less.

ALSO ALL THAT OTHER CERTAIN PIECE OR PARCEL OF LAND, situate in the Town of Clarksville, Allegany County, N.Y., bounded and described as follows: being the south west part of Lot No. 58, Township No. 2, Range 2, of the Holland Land Company's Survey, bounded as follows: Beginning at the south west corner of Lot No. 58 in said town, running thence north along the west line of said lot, 25 chains; thence east and parallel to the south line of said Lot No. 58, twenty chains; thence south and parallel to the west line of said Lot No. 58, twenty-five chains to the south line of said lot; thence west along the south side of Lot No. 58 to the place of beginning, containing fifty acres of land be the same more or less.

ALSO CONVEYING the right to use a Right of Way reserved in a deed, Eugene Hewitt to Leon W. Bump and Harold H. Steiner, recorded in Allegany County Clerk's Office in Liber 543 of Deeds at Page 499.

ALSO ALL THAT OTHER TRACT OR PARCEL OF LAND, situate in the Town of Clarksville, County of Allegany, State of New York, and being the 20 acres reserved to Eugene Hewitt and Violet E. Hewitt, his wife, in a certain deed to Paul L. Hitchcock dated November 10, 1960, recorded November 10, 1960 in Liber 540 of Deeds at page 145, Allegany County Clerk's Office.

This Deed was prepared without benefit of an examination of a currently dated abstract of title or a survey prepared by a licensed surveyor.

THE TRANSFERORS HEREIN CERTIFY THAT THE WITHIN DESCRIPTION DOES NOT SPLIT OR COMBINE ASSESSMENT PARCELS AND THAT THE RECORDING OF THIS DEED WILL NOT RESULT IN THE ALTERATION OR CHANGE TO OR AMENDMENT OF AN EXISTING TAX MAP.

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the parties of the second part, their heirs and assigns forever.

BK: 1809 PG: 20 02/23/2009 DEED Image: 3 of 3

And said party of the first part covenants as follows:

First, that the parties of the second part shall quietly enjoy the said premises;

Second, That said party of the first part will forever Warrant the title to said premises.

Third, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set his hands and seals the day and year first above written.

IN PRESENCE OF

Joseph A. Schueckler

State of New York)

SS:

County of Cattaraugus)

On this 4th day of November, 2008, before me, the undersigned, a notary public in and for said state, personally appeared **JOSEPH A. SCHUECKLER**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual executed the instrument.

Clarksville
S S

38.00
.00

JANICE A. SNYDER
Notary Public, State of New York
Qualified in Cattaraugus County
My Commission Expires May. 31, 2010

EXHIBIT B TO EASEMENT – MAP

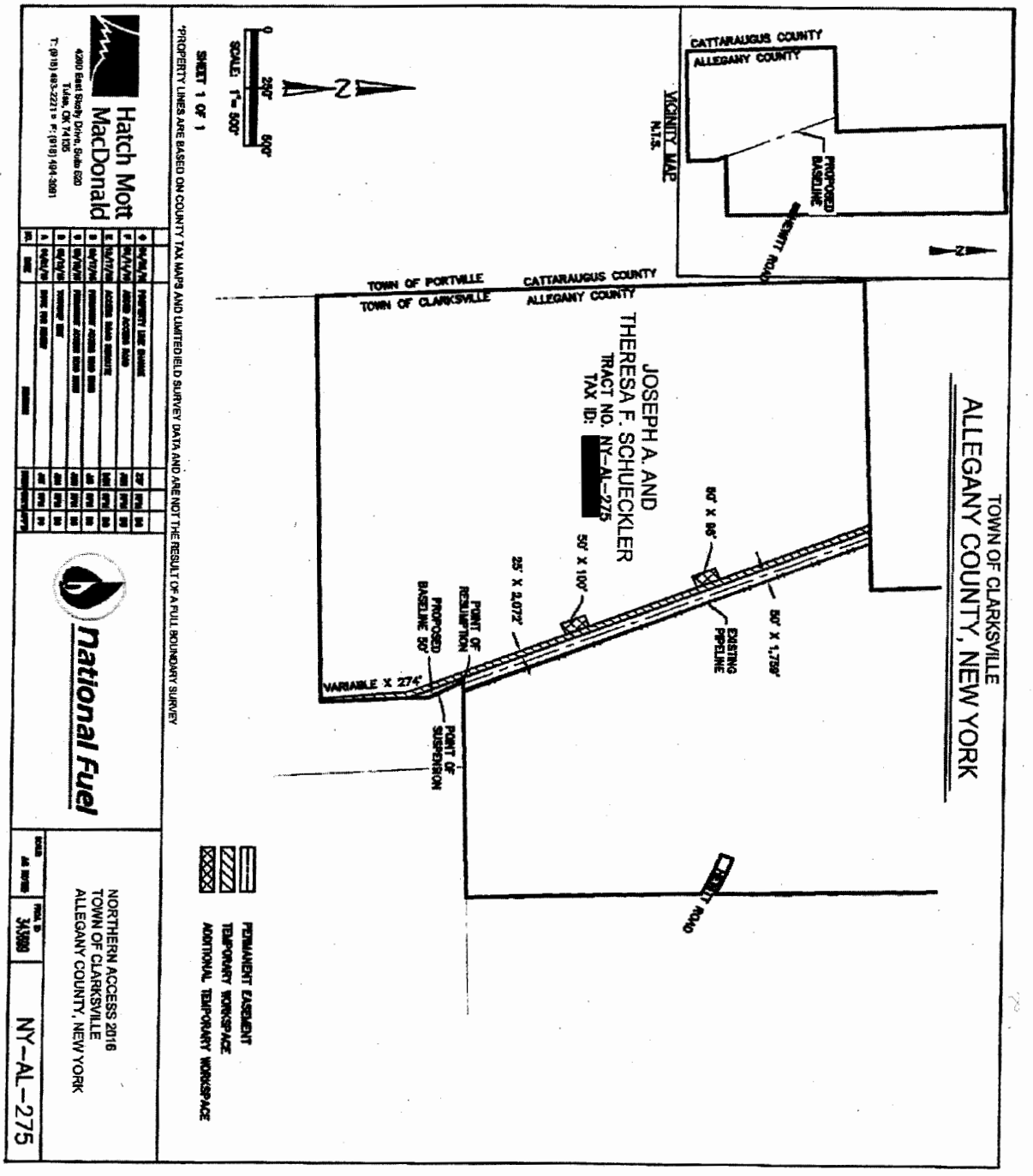

EXHIBIT C TO VERIFIED PETITION – ACQUISITION MAP WITH EASEMENT [60- 62]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND
THERESA F. SCHUECKLER, EUGENE HEWITT,
and WILLIAM BENTLEY,

Respondents.

ACQUISITION MAP

Index No.:

PHILLIPS LYTLE LLP

By _____
Paul Morrison-Taylor
Craig A. Leslie
Attorneys for Petitioner
National Fuel Gas Supply Corporation
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

EASEMENT

NATIONAL FUEL GAS SUPPLY CORPORATION ("National Fuel") its successors and assigns, are hereby granted a permanent easement, and temporary construction easements, for the laying, maintaining, operating, extending, replacing, repairing and/or removing a 24-inch diameter, natural gas transmission pipeline, and other equipment and appurtenances over, through, across, above and under the permanent easement as may be necessary in connection therewith; together with the right of unimpaired access to said pipeline and equipment, and the right of ingress and egress on, over and through the real property described in the attached Exhibit A, which is situated in the Town of Cuba, County of Allegany, State of New York, and is identified by SBL #[redacted] (the "Property"), for any and all purposes necessary and incident to the exercise of all rights granted hereunder; and while Respondent property owner shall have the right to enjoy the surface of said permanent easements, he or she shall not interfere with the use of same by National Fuel, and shall not construct any building, structure, improvement, or obstruction on or over the permanent easements; and National Fuel shall have the further right to maintain said permanent easements herein granted clear of trees, undergrowth, brush, and other obstructions and to enter upon the Property at such times as may be necessary or convenient for such installation, construction, operation, inspection, maintenance, repair and/or replacement; and the location of the easement is more particularly described as follows:

A 50-foot wide permanent easement, and temporary construction easements over the Property, as shown on the map attached as Exhibit B, and further described as follows:

PROPERTY OWNER(S)	SBL(S)	APPROXIMATE ACREAGE SUBJECT TO TEMPORARY EASEMENT	APPROXIMATE ACREAGE SUBJECT TO PERMANENT EASEMENT
Joseph A. Schueckler and Theresa F. Schueckler	[redacted]	Approximately 1.57 acres	2.02 acres

This Easement shall be binding on the property owner(s), it(s) heirs, successors and assigns, and shall inure to the benefit of National Fuel, its successors and assigns, forever or until sooner terminated by National Fuel, its successors or assigns.

EXHIBIT A TO ACQUISITION MAP WITH EASEMENT –
DEED, DATED NOVEMBER 4, 2008
(REPRODUCED HEREIN AT PP. 56-58)

EXHIBIT B TO ACQUISITION MAP WITH EASEMENT –
MAP (REPRODUCED HEREIN AT P. 59)

EXHIBIT D TO VERIFIED PETITION – NOTICE OF PENDENCY, DATED MARCH 28, 2017 [64-66]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

NOTICE OF PENDENCY

Index No.:

NOTICE IS HEREBY GIVEN that a proceeding has been commenced, upon the Verified Petition of National Fuel Gas Supply Corporation, and is now pending in New York State Supreme Court, Allegany County, for the acquisition by eminent domain of easements over the real property described in the attached Exhibit A, which is situated in Allegany County, New York. The easements being sought are shown on the map attached as a part of Exhibit B, and are further described therein.

The name of the owners of the real property described in the attached Exhibit A are Joseph A. Schueckler and Theresa F. Schueckler. The other respondents with reputed interests in the subject property are: Eugene Hewitt and William Bentley.

Dated: Buffalo, New York
March 28, 2017

PHILLIPS LYTLE LLP

By _____
Paul Morrison-Taylor
Craig A. Leslie
Attorneys for Petitioner
National Fuel Gas Supply Corporation
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

TO: JOSEPH A. SCHUECKLER
AND THERESA F. SCHUECKLER
[redacted] Hewitt Road
Cuba, New York 14727

EUGENE HEWITT
Hubbard Road (no number)
Clarksville, New York 14786

WILLIAM BENTLEY
[redacted] Davis Street
Bradford, Pennsylvania 16701

TO THE CLERK OF THE COUNTY OF ALLEGANY, NEW YORK:

You are hereby directed to record the foregoing notice and to index it against the names of the following respondents: Joseph A. Schueckler, Theresa F. Schueckler, Eugene Hewitt, and William Bentley.

Dated: Buffalo, New York
March 28, 2017

PHILLIPS LYTLE LLP

By _____
Paul Morrison-Taylor
Craig A. Leslie
Attorneys for Petitioner
National Fuel Gas Supply Corporation
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

Doc #01-3022715.1

EXHIBIT A TO NOTICE OF PENDENCY –
DEED, DATED NOVEMBER 4, 2008
(REPRODUCED HEREIN AT PP. 56-58)

EXHIBIT B TO NOTICE OF PENDENCY –
EASEMENT
(REPRODUCED HEREIN AT PP. 54-55)

EXHIBIT A TO EASEMENT –
DEED, DATED NOVEMBER 4, 2008
(REPRODUCED HEREIN AT PP. 56-58)

EXHIBIT B TO EASEMENT –
MAP
(REPRODUCED HEREIN AT P. 59)

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

Index No.:

JOSEPH A. SCHUECKLER AND
THERESA F. SCHUECKLER, EUGENE HEWITT,
and WILLIAM BENTLEY,

Respondents.

Other Respondents/Possible Interest Holders

Name	Purported Interest
EUGENE HEWITT	Reservation of oil, gas, and minerals in Warranty Deed recorded March 1, 1963 in Liber 549 at Page 926
WILLIAM BENTLEY	Oil and gas leases recorded April 8, 1964 in Liber 555 at Page 690 and November 12, 1964 in Liber 557 at Page 718

EXHIBIT F TO VERIFIED PETITION – FEDERAL ENERGY REGULATORY COMMISSION ("FERC") CERTIFICATE (ISSUED FEBRUARY 3, 2017) [69-163]

158 FERC ¶ 61,145
UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

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

National Fuel Gas Supply Corporation
Empire Pipeline, Inc.

Docket Nos. CP15-115-000
CP15-115-001

ORDER GRANTING ABANDONMENT AND ISSUING CERTIFICATES

(Issued February 3, 2017)

1. Pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations,[2] on March 17, 2015, National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (Empire), filed a joint application for a certificate of public convenience and necessity to construct and operate approximately 99 miles of pipeline, new and modified compression facilities, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York.[3] National Fuel Supply Corporation also proposes to abandon 3.09 miles of pipeline by sale to Empire. These proposals compose the Northern Access 2016 Project. The purpose of the project is to expand firm service on National Fuel Supply Corporation's system by 497,000 dekatherms (Dth) per day and to expand firm service on Empire's system by 350,000 Dth per day.

2. For the reasons discussed below, the Commission will grant the requested certificate authorizations, subject to the conditions described herein.

---

[1] 15 U.S.C. § 717f(b), (c) (2012).

[2] 18 C.F.R. pt. 157 (2016).

[3] On November 2, 2015, National Fuel Supply Corporation and Empire amended the application to propose a different site for a new compressor station as further discussed herein.

I. Background

3. National Fuel Gas Company is a vertically integrated company with several subsidiaries. These include transporters National Fuel Supply Corporation (National Fuel) and Empire, producer Seneca Resources Corporation (Seneca Resources), and gatherer NFG Midstream Clermont, L.L.C. (NGF Midstream).

4. National Fuel, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is a natural gas company as defined by section 2(6) of the NGA.[4] National Fuel transports and stores natural gas in New York and Pennsylvania.

5. Empire, a corporation organized and existing under the laws of the State of New York, is a natural gas company as defined by section 2(6) of the NGA.[5] Empire owns a pipeline system extending from near Syracuse, New York, in the east to the United States-Canada border at Grand Island, New York, in the west, with an arm extending south from near Rochester, New York, into north central Pennsylvania.[6]

A. National Fuel's Proposal

6. National Fuel proposes to construct and operate new pipeline, compression, and appurtenant facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York. The proposed facilities will enable National Fuel to provide 497,000 Dth per day of new firm transportation service from a new receipt point in Sergeant Township, McKean County, Pennsylvania, to interconnections with Empire and Tennessee Gas Pipeline Company (Tennessee) to the north and to an interconnection with Transcontinental Gas Pipe Line Company, LLC, (Transco) to the south.

7. To provide the incremental service, National Fuel proposes to construct and operate the following facilities:

- an interconnection with NFG Midstream, in McKean County, Pennsylvania;
- a 96.49-mile, 24-inch-diameter pipeline extending from the new

---

[4] 15 U.S.C. § 717a(6) (2012).

[5] *Id.* § 717a(6).

[6] Empire has no employees of its own. National Fuel operates Empire's pipeline system pursuant to an Operating and Maintenance Agreement dated February 6, 2003.

interconnection with NFG Midstream and crossing McKean County, Pennsylvania, and Alleghany, Cattaraugus, and Erie Counties, New York (Mainline pipeline) to reach a new metering and regulation station and tie-in at Tennessee's 200 Line in the town of Wales, Erie County, New York;

- a metering and regulation station and tie-in along the Mainline pipeline at National Fuel's existing Hinsdale Compressor Station in Cattaraugus County, New York;
- two additional reciprocating gas-fired compressor units rated at a combined 5,350 horsepower (hp) at National Fuel's existing 600-hp Porterville Compressor Station in the town of Elma, Erie County, New York;
- a meter and regulator/pressure reduction station on the Mainline pipeline within the site of the Porterville Compressor Station;
- a tie-in between the Mainline pipeline and National Fuel's existing Line X-North within the site of the Porterville Compressor Station; and
- 13 mainline valve sites, cathodic protection, and other auxiliary facilities to be constructed under section 2.55(a) of the Commission's regulations.[7]

National Fuel estimates the total cost of its proposed facilities to be $376,670,388.

8. National Fuel proposes to abandon 1.08 miles of its existing Line XM-10 pipeline in Niagara County, New York, by sale to Empire. This pipeline will be renamed Line EMP-03. National Fuel and Empire both propose to abandon their existing Pendleton Meter and Regulator Station on the existing Line XM-10 pipeline. They propose to remove all existing aboveground facilities and to restore the meter station site.

9. In addition, National Fuel has reserved 86,936 Dth per day of capacity on its existing Line X system from the Hinsdale Compressor Station to its Leidy Interconnection with Transco for Northern Access 2016 Project service that would begin on November 1, 2018.

10. Prior to holding an open season for the project, National Fuel executed a precedent agreement with its producer affiliate Seneca Resources for the entire 497,000 Dth per day of firm transportation service. Based on this precedent agreement, National Fuel held a binding open season for the Northern Access 2016 Project from June 3 to June 26, 2014. National Fuel offered south-to-north expansion service for a minimum term of 15 years from McKean County, Pennsylvania, to Empire's system at the Pendleton Compressor Station. National Fuel also solicited offers to turn back firm capacity. National Fuel

[7] 18 C.F.R. § 2.55(a) (2016).

received no additional bids for transportation service and no offers to turn back existing firm capacity.

11. National Fuel and Seneca Resources subsequently entered into an Amended and Restated Precedent Agreement under which National Fuel will receive gas from Seneca Resources at a new receipt point with NFG Midstream, in McKean County, Pennsylvania, and will deliver the gas to three delivery points. The primary delivery point for 357,000 Dth per day of firm transportation service will be the proposed interconnection with Empire at the Pendleton Compressor Station in Niagara County, New York. The primary delivery point for the remaining 140,000 Dth per day of firm transportation service will be the proposed interconnection with Tennessee's 200 Line in Erie County, New York.

12. Seneca Resources has also requested that the latter delivery point be moved on November 1, 2018, from Tennessee's 200 Line to National Fuel's existing interconnection with Transco's pipeline system at Leidy in Potter County, Pennsylvania.

13. National Fuel proposes to establish incremental recourse rates under its Rate Schedules FT/FT-S, EFT, and FST for firm service using the project's expansion capacity.

B. Empire's Proposal

14. Empire proposes to construct and operate new pipeline, compression, and appurtenant facilities in Niagara County, New York. The proposed facilities will enable Empire to provide 350,000 Dth per day of new firm transportation service from a new interconnection with National Fuel in the Town of Wheatfield, Niagara County, New York, to a delivery point with TransCanada Pipelines Limited (TransCanada) in Chippawa, Ontario (across from Grand Island, New York), or to Empire's local distribution market in upstate New York.

15. To provide the new service, Empire proposes to acquire from National Fuel the 1.08 miles of Line XM-10 mentioned above, to be renamed Line EMP-03. Empire further proposes to construct and operate the following facilities:

- the 22,214-hp Pendleton Compressor Station in Niagara County, New York, composed of two 11,107-hp gas-fired, turbine-powered centrifugal compressor packages, with odorization, metering, and other appurtenant facilities;
- a tie-in and 1.17-mile, 24-inch-diameter pipeline (added to Empire's acquired line EMP-03) extending from National Fuel's existing Line X-North into Empire's proposed Pendleton Compressor Station, all in Niagara County, New York;
- a 0.90-mile, 16-inch-diameter pipeline (also added to line EMP-03) extending from Empire's proposed Pendleton Compressor Station to a modified tie-in with Empire's existing mainline, all in Niagara County, New York;
- various appurtenant facilities to be installed under section 2.55(a) of the Commission's regulations at the proposed Pendleton Compressor Station;
- the Wheatfield Dehydration Facility in Niagara County, New York composed of triethylene glycol dehydrators and approximately 400 feet of 24-inch-diameter inlet pipeline and a mainline valve;

Empire estimates the total cost of its proposed facilities to be $78,710,359.

16. Prior to holding an open season for the project, Empire executed a precedent agreement with Seneca Resources for the entire 350,000 Dth per day of firm transportation service from the Wheatfield Interconnection with National Fuel to the interconnection with TransCanada at Chippawa, Ontario. Based on this precedent agreement, Empire held a binding open season from June 3 to June 26, 2014. Empire offered south-to-north expansion service for a minimum term of 15 years from near Pendleton in Niagara County, New York, to TransCanada at Chippawa, Ontario. Empire determined that no currently contracted firm transportation capacity could be turned back to eliminate the need for portions of the proposed project facilities. Empire received no additional bids for service.

17. Empire proposes to use its existing rates under Rate Schedule "FT – Original Empire Pipeline" as the recourse rates for firm service using the project facilities. Empire also proposes to revise its tariff to ensure that fuel consumed at the Pendleton Compressor Station will be allocated to shippers in proportion to the quantities scheduled for receipt at the Wheatfield Interconnection with National Fuel or any interconnection along acquired Line EMP-03. Empire requests a finding supporting a presumption of rolled-in rate treatment in a future section 4 rate proceeding for the costs of constructing and operating the proposed facilities.

II. Procedural Matters

18. Notice of the joint application was issued on March 27, 2015, with interventions, protests, and comments due April 17, 2015.[8] The parties listed in Appendix A filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's rules of Practice and Procedure.[9] On May 4, 2015, National Fuel and Empire filed a motion for leave to answer protests by intervenors Allegheny Defense Project and Pennsylvania Alliance for Clean Water and Air. The Commission's Rules of Practice and Procedure do not permit answers to protests unless otherwise ordered by the decisional authority.[10] Because the answer does not provide information that will assist the Commission in addressing the issues in this proceeding, the motion is rejected.

19. On November 2, 2015, National Fuel and Empire filed an amendment to their application to describe the revised preferred location for the Pendleton Compressor Station at the Killian Road site in the Town of Pendleton, Niagara County, New York. The amendment also revised the lengths of inlet and outlet pipelines at the Pendleton Compressor Station and reduced the length of abandoned Line XM-10, as reflected in the description of facilities above. Notice of the amendment was issued on November 4, 2015, with interventions, protests, and comments due November 25, 2015.[11] The parties listed in Appendix A filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's rules of Practice and Procedure.[12]

20. Kim Alianello, Michael Alianello, Buffalo Niagara Riverkeeper, David A. Byers, Sue Chris Carillo, Monica Daigler, Gina Darlak, the Sierra Club, Betty C. Skrzypek, Diana Strablow, J. Whittington, and L. Whittington filed untimely motions to intervene. On October 11, 2016, National Fuel and Empire filed an answer opposing Sierra Club's untimely motion to intervene. We will grant the untimely motions to intervene.[13]

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[8] 80 Fed. Reg. 18,392 (Apr. 6, 2015).

[9] 18 C.F.R. § 385.214(c) (2016).

[10] *Id.* § 385.213(a)(2).

[11] 80 Fed. Reg. 69,958 (Nov. 12, 2015).

[12] 18 C.F.R. § 385.214(c) (2016).

[13] *Id.* § 385.214(d).

III. Discussion

21. Since National Fuel's and Empire's proposal includes the abandonment of existing facilities and the construction and operation of new facilities to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the proposal is subject to the requirements of subsections (b), (c), and (e) of section 7 of the NGA.[14]

A. Abandonment

22. Section 7(b) of the NGA allows a natural gas pipeline company to abandon jurisdictional facilities or services only if the abandonment is permitted by the "present or future public convenience or necessity."[15] In deciding whether a proposed abandonment is warranted, the Commission considers all relevant factors, but the criteria vary as the circumstances of the abandonment proposal vary. When a pipeline proposes to abandon facilities, the continuity and stability of existing services are the primary considerations in assessing whether the public convenience or necessity permit the abandonment.[16] If the Commission finds that a pipeline's proposed abandonment will not jeopardize continuity of existing gas transportation services, it will defer to the pipeline's business judgment.[17]

23. The applicants explain that National Fuel's proposed abandonment of 1.08 miles of its Line XM-10 by sale to Empire, as well as both applicants' proposal to abandon and remove their existing Pendleton Meter and Regulator Station on Line XM-10, will have no impact on the services provided to existing National Fuel or Empire customers because the applicants are simply moving the point at which National Fuel and Empire's facilities interconnect.[18] Thus, we conclude that the proposed abandonment is permitted by the public convenience or necessity.

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[14] 15 U.S.C. § 717f(b), (c), (e) (2012).

[15] *Id.* § 717f(b).

[16] *See, e.g., El Paso Natural Gas Co.*, 148 FERC ¶ 61,226, at P 12 (2014) (citations omitted).

[17] *See, e.g., Transwestern Pipeline Co., L.L.C.*, 140 FERC ¶ 61,147, at P13 (2012) (citing *Trunkline Gas Co.*, 94 FERC ¶ 61,381, at 62,420 (2001)).

[18] March 17, 2015 Application at 8-9. The November 11, 2015 amended application reduced the scope of the abandonment as a result of the new location for the Pendleton Compressor Station. *See* November 11, 2015 Amended Application at 11-12.

B. Certificate Policy Statement

24. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[19] 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 the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain.

25. Under this policy, the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially 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 effects the project might have on the applicant's existing customers, identify any adverse impacts the applicant's proposal might have on other existing pipelines in the market and their captive customers, and consider whether the applicant's proposal would result in the unnecessary exercise of eminent domain or have other adverse economic impacts on landowners and communities affected by the route 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.

26. As discussed above, the threshold requirement for companies proposing new projects is that the company must be prepared to financially support the project without relying on subsidization from its existing customers. The Commission has determined, in general, that where a company proposes to charge incremental rates for new construction, the company satisfies the threshold requirement that the project will not be subsidized by existing shippers. National Fuel proposes an incremental recourse reservation rate for firm service using the capacity created by its proposed facilities as part of the

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

Northern Access 2016 Project. Its proposed incremental rate is designed to recover the full cost of the expansion and is higher than the applicable system rate. Therefore, we find that National Fuel's existing shippers will not subsidize the expansion project.

27. Empire proposes to use its existing system rates as recourse rates for firm service using the capacity created by its proposed facilities as part of the Northern Access 2016 project. As discussed below, Empire has shown that the incremental revenue from Seneca Resources from firm service under negotiated rates would exceed the incremental cost of constructing and operating these proposed facilities. Accordingly, we find that Empire's existing customers will not subsidize the project.

28. Next, we find that the project will not adversely affect National Fuel's or Empire's existing customers, or other pipelines and their customers. The proposed expansion facilities are designed to provide incremental service without degradation of service to National Fuel's or Empire's existing firm customers.

29. In addition, the project is designed to meet new demand, and there is no evidence that service on other pipelines will be displaced. No pipeline companies or their customers have objected to the project.

30. We also find that the Northern Access 2016 Project will have limited impacts on landowners and surrounding communities. Approximately 69 percent of the proposed 96.5-mile mainline pipeline will be co-located with existing pipeline and powerline rights-of-way. Maximizing the use of these previously disturbed rights-of-way will minimize both the number of landowners from which new right-of-way will need to be acquired and the potential need for reliance on eminent domain. Also, Empire responded to concerns raised by community stakeholders about the initial preferred location for the proposed Pendleton Compressor Station by later securing an option to purchase an alternative parcel within an industrially zoned area of the Town of Pendleton, New York. In view of these considerations, we find that the proposed project has been designed to minimize the impacts on landowners and communities.

31. Commenters question the need for the Northern Access 2016 Project because much of the project's incremental firm service will be used to transport gas to Canada. Commenters state that the project is calculated only to benefit Seneca Resources' shareholders and that the project imposes burdens on the U.S. public without providing proportional benefits to U.S. consumers.

32. All of the proposed project capacity has been subscribed under a long-term contract with Seneca Resources, demonstrating the existence of market demand for the

project.[20] Of the total incremental firm service, 140,000 Dth per day (28 percent) will be delivered into Tennessee's system for delivery into markets in the northeastern U.S. The remaining 357,000 will be carried over Empire's system for intended delivery into Canada, but with the option for delivery along Empire's system in northern and central New York. The Commission does not have jurisdiction over the exportation or importation of natural gas. Such jurisdiction resides with the U.S. Department of Energy (DOE), which must act on any applications for natural gas export or import authority.[21] We note that there is no proposal before us to increase the export capacity of Empire's facilities. The Commission's public convenience and necessity standard includes all

[20] The Commission has stated that service commitments for new capacity constitute important evidence of demand for a project. Certificate Policy Statement, 88 FERC at 61,748. *See, e.g., Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61,233, at P 33 (2011), which found that the applicant had not sufficiently demonstrated the need for its particular project where the applicant did not conduct an open season or submit precedent or service agreements for the project's capacity and provided only vague and generalized evidence of need for natural gas at the regional and national level.

[21] Section 3(a) of the NGA provides, in part, that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." 15 U.S.C. § 717b(a) (2012). In 1977, the Department of Energy Organization Act transferred the regulatory functions of section 3 of the NGA to the Secretary of Energy. 42 U.S.C. § 7151(b) (2012). Subsequently, the Secretary of Energy delegated to the Commission authority to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports." DOE Delegation Order No. 00-004.00A (effective May 16, 2006). The proposed facilities are not located at a potential site of exit for natural gas exports. Moreover, the Secretary of Energy has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity itself, or to consider whether the exportation or importation of natural gas is consistent with the public interest. *See Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at P 20 (2014) (*Corpus Christi*). *See also National Steel Corp.*, 45 FERC ¶ 61,100, at 61,332-33 (1988) (observing that DOE, "pursuant to its exclusive jurisdiction, has approved the importation with respect to every aspect of it except the point of importation" and that the "Commission's authority in this matter is limited to consideration of the place of importation, which necessarily includes the technical and environmental aspects of any related facilities").

factors bearing on the public interest.[22] The Northern Access 2016 Project will provide benefits to all sectors of the natural gas market by providing producers access to multiple markets throughout the United States and Canada and increasing the diversity of supply to consumers in those markets. Based on the benefits that the proposed Northern Access 2016 Project will provide; the lack of adverse effects on existing customers, other pipelines, and their captive customers; and the minimal adverse effects on landowners or communities, we find that National Fuel's and Empire's proposed project is consistent with the Certificate Policy Statement. Based on this finding and the environmental review for the proposed project, as discussed below, we further find that the public convenience and necessity require approval and certification of the project under section 7 of the NGA, subject to the environmental and other conditions in this order.

C. Rates and Tariff Provisions

33. National Fuel proposes to charge an initial incremental recourse rate under Rate Schedules FT/FT-S,[23] FST, and EFT for service using incremental capacity created by the Northern Access 2016 Project. Empire proposes to charge as its initial recourse rate the existing system rate under its Rate Schedule "FT-Original Empire Pipeline." Empire requests a pre-determination to roll-in the costs associated with its portion of the project in its next NGA section 4 general rate proceeding.

34. National Fuel and Empire entered into long-term firm transportation service agreements with Seneca Resources for the maximum daily transportation quantities of 497,000 and 350,000 Dth per day, respectively. Under its agreement with National Fuel, Seneca Resources will pay the incremental recourse rates. Under its agreement with Empire, Seneca Resources will pay negotiated rates.

35. National Fuel and Empire propose various conforming revisions to their *pro forma* tariffs. Additionally, National Fuel requests a limited waiver of GT&C section 31.1 of its tariff so that National Fuel can accept a request from Seneca Resources to change the primary delivery point for a portion of its subscribed capacity two years after the proposed in-service date of the project.

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[22] *Atlantic Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

[23] Rate Schedule FT-S applies to seasonal point-to-point firm transportation using capacity that is available only during certain months of the year or that varies in available amount from month-to-month during the requested term.

1. **National Fuel**

a. **Initial Rates**

36. National Fuel proposes an incremental recourse rate under Rate Schedules FT/FT-S, EFT, and FST[24] based on a three-year levelized incremental cost of service of approximately $67,960,440 and a design capacity of 497,000 Dth per day. The proposed cost of service is based on a depreciation rate of 1.79 percent, along with interest expenses, capital structure, return on equity, and income taxes as provided in National Fuel's last approved rate case settlement in Docket No. RP12-88-000.[25] National Fuel proposes an initial monthly reservation rate of $11.3951 per Dth and proposes to charge no initial commodity rate.

37. The process of ratemaking occurs in several steps: functionalizing the cost of service; classifying the cost of service between fixed and variable costs; allocating costs to customer classes and/or zones; and finally designing the rate.[26]

[24] While individual service agreements for project service will reflect one of three rate schedule designations (FT/FTS-NA2016, EFT-NA2016, or FST-NA2016), National Fuel states that the same incremental recourse rates will apply to service under each of these rate schedules. National Fuel November 2, 2015 Amendment to Joint Abbreviated Application, Revised Ex. P, pt. 1.

[25] *National Fuel Gas Supply Corporation,* 140 FERC ¶ 61,114 (2012).

[26] *See e.g., Interstate Natural Gas Pipeline Rate Design,* 47 FERC ¶ 61,295, at 62,052 n.14 (1989), describing the Commission's "rate design process" as including four steps and stating that the last step, determining unit rates for each service, "is also known as rate design."

i. Classifying the Cost of Service

38. As stated in its application, National Fuel's first-year cost of service includes $1,012,064 in Operation & Maintenance (O&M) expenses.[27] Included in this figure are $151,302 in non-labor O&M expenses recorded in FERC account numbers 853 and 864.[28] Consistent with the Commission's regulations requiring the use of straight fixed-variable rate design, these costs are classified as variable costs and should be recovered through a usage charge, not through the reservation charge as proposed. National Fuel states that these variable costs are *de minimus*—yielding an incremental commodity rate of only $0.0008 per Dth—and thus, nevertheless, proposes to recover them through the proposed reservation charge. We deny this proposal.

39. Section 284.7(e) of the Commission's regulations does not allow the recovery of variable costs in the reservation charge.[29] There is no exception for *de minimis* costs.[30] Section 284.10(c)(2) states that variable costs should be used to determine the volumetric rate.[31] Misclassifying variable costs as fixed costs undermines the Commission's objectives in requiring straight fixed-variable rate design to facilitate transparent pricing and promote competition in the marketplace. Further, recovering variable costs (which the pipeline only incurs if shippers actually move gas over the pipeline) through the reservation charge (which firm shippers pay regardless whether they actually move gas over the pipeline) may result in the pipeline over-recovering its cost of service during

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[27] National Fuel March 17, 2015 Application, Ex. N, pt. 1 at 3.

[28] National Fuel July 16, 2015 Response to Commission Staff's July 7, 2015 Data Request, attach. at 1. The attached table separates the Operation and Maintenance (O&M) expenses by account and by labor versus non-labor costs. National Fuel identified $98,312 of variable costs in Account 853 (Compressor Station Labor & Expenses – Other) and $52,990 of variable costs in Account 864 (Maintenance – Compressor Station Equipment – Other) for a total of $151,302.

[29] 18 C.F.R. § 284.7(e) (2016).

[30] *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 34 (2015); *Algonquin Gas Transmission, LLC* 151 FERC ¶ 61,118, at P 22 (2015).

[31] 18 C.F.R. § 284.10(c)(2) (2016).

times that shippers do not use 100 percent of their firm capacity and thus pay through the reservation charge for variable costs that the pipeline did not actually incur.[32]

40. Therefore, consistent with prior Commission orders[33] and sections 284.7(e) and 284.10(c)(2) of the Commission's regulations, we direct National Fuel to reclassify Account Nos. 853 and 864 non-labor costs as variable costs and to recalculate its incremental base reservation charge to omit the $151,302 in variable costs and recover only fixed costs when National Fuel files actual tariff records.

41. We approve, subject to the conditions below, National Fuel's proposed incremental reservation charge for firm transportation services, as the initial recourse rates for service on the project.

ii. Rate Design

42. National Fuel's proposed incremental recourse rate for Rate Schedule FT/FT-S – NA2016 is based on a three-year levelized cost of service equal to $67,960,440. In response to a request from Commission staff, National Fuel explained its use of a levelized cost of service, including support for its methodology and the detailed calculations used to derive its reservation charge.[34] National Fuel explains that this method of levelization will under-recover the cost of service in the first year and over-recover the cost of service in later years. In the past the Commission has approved levelized cost-of-service rate designs, finding that they provided just and reasonable rates.[35] Given our previous approval of levelized annuity rate approaches and the lack of objections from other participants regarding the derivation of the rates, we will approve National Fuel's proposed recourse rates subject to their recalculation as described in the preceding section.

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[32] *See, e.g., Northwest Pipeline Corp.*, 71 FERC ¶ 61,253, at 61,997-99 (1995) (finding that Northwest's proposed non-conforming cost classification methodology was unsupported).

[33] *Columbia Gulf Transmission, LLC,* 152 FERC ¶ 61,214, at P 21 (2015).

[34] National Fuel September 21, 2015 Response to Commission Staff's September 10, 2015 Data Request, response to question 1.

[35] *See, e.g., Cheniere Creole Trail Pipeline, L.P.*, 121 FERC ¶ 61,071, at PP 17-20 (2007); *Dominion Cove Point*, 115 FERC ¶ 61,337, at P 138 (2006).

43. Under the Certificate Policy Statement, there is a presumption that the incremental rates should be charged for the proposed expansion capacity if the incremental rates would exceed the existing maximum system-wide rates. National Fuel's proposes a monthly reservation charge of $11.3951 per Dth for Rate Schedule FT/FT-S – NA2016 service. National Fuel's currently effective maximum monthly reservation charges for Rate Schedules FT/FT-S and FST services are $3.7805 per Dth and for Rate Schedule EFT service is $3.9653 per Dth.[36] While the Commission has not recalculated the reservation charge, it appears that National Fuel's incremental recourse reservation rate will remain higher than National Fuel's currently effective reservation charges even after National Fuel removes the improperly classified variable costs from the costs recoverable through the incremental reservation charge.

44. However, when National Fuel files an incremental commodity charge for Rate Schedule FT/FT-S – NA2016 service, which National Fuel informally calculated as $0.0008 per Dth per day,[37] this commodity charge will likely be lower than National Fuel's currently effective maximum commodity charges of $0.0135 per Dth for Rate Schedules FT/FT-S and FST services and $0.0148 per Dth for Rate Schedule EFT service.[38] Therefore, we direct National Fuel to use its currently effective commodity charges for service using the project expansion capacity.

45. National Fuel did not propose a rate for interruptible service using the project expansion capacity. Therefore, National Fuel is directed to use its existing interruptible rate consistent with Commission policy requiring a pipeline to charge its currently effective system IT rates[39] for any interruptible service rendered on additional capacity

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[36] National Fuel's currently effective maximum monthly reservation charges for Rate Schedules FT/FT-S and FST services are $3.7805 per Dth and for Rate Schedule EFT service is $3.9653 per Dth. National Fuel Gas Supply Corp., FERC NGA Gas Tariff, National Fuel Tariff, 4 - Applicable Rates, 4.010 – Transportation Rates, 12.0.0.

[37] The informal calculation is based on total variable costs of $151,302 divided by 181,405,000 (the product of 497,000 Dth multiplied by 365 days).

[38] National Fuel Gas Supply Corp., FERC NGA Gas Tariff, National Fuel Tariff, 4 - Applicable Rates, 4.010 – Transportation Rates, 12.0.0.

[39] National Fuel's currently effective Rate Schedule IT charge is $0.1378 per Dth. National Fuel Gas Supply Corporation FERC NGA Gas Tariff, 4 - Applicable Rates, 4.010 – Transportation Rates, 12.0.0.

made available as a result of an expansion that is integrated with existing pipeline facilities.[40]

46. Consistent with the Certificate Policy Statement and with Order No. 710 as it applies to incremental facilities,[41] the Commission directs National Fuel to keep separate books and accounting of costs attributable to the project. National Fuel is required to file tariff records between 30 to 60 days prior to the date that the project facilities go into service reflecting the Rate Schedule FT/FT-S – NA2016 incremental rates. The books should be maintained with applicable cross-references, as required by section 154.309 of the Commission's regulations.[42] This information must be sufficiently detailed so that the data can be identified in Statements G, I, and J in any future rate case under NGA section 4 or 5, and the information must be provided consistent with Order No. 710.[43] Such measures protect existing customers from cost overruns and from subsidization that might result from under-collection of the project's incremental cost of service, as well as assist the Commission and parties to determine the costs of the project in later rate proceedings.

iii. Fuel Retention

47. In its application, National Fuel stated that it intends to charge customers of the project the maximum fuel retention rates set forth in its existing FERC Gas Tariff. The currently-effective Transportation Fuel and Company Use Retention rate is 0.54 percent and the currently-effective Transportation Lost and Unaccounted For (LAUF) Retention rate is 0.42 percent.[44] Commission staff asked National Fuel to clarify what fuel rate it intends to charge customers of the project and further requested that National Fuel provide a fuel study with work papers demonstrating the impact that the Northern Access

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[40] *See, e.g., Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138, at P 31 (2012); and *Gulf South Pipeline Co., LP,* 130 FERC ¶ 61,015, at P 23 (2010).

[41] *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats & Regs. ¶ 31,367, at P 23 (2008).

[42] 18 C.F.R. § 154.309 (2016).

[43] *See* Order No. 710, FERC Stats ¶ Regs. ¶ 31,207.

[44] August 18th Response, National Fuel Response 3.

2016 Project will have on National Fuel's current fuel rates to enable the Commission to make a fuel rate determination.[45]

48. National Fuel restated that it intends to charge the current Transportation Fuel and Company Use Retention rate and the current LAUF Retention rate for a combined transportation fuel retention rate of 0.96 percent.[46] By contrast, National Fuel estimates that under a 100 percent load factor the proposed two new compressor engines at the Porterville Compressor Station, each rated at 2,675 HP, would consume incremental fuel equal to approximately 862 Dth per day. When divided by the project's design capability of 497,000 Dth per day, this results in a maximum fuel usage of 0.17 percent.

49. When deciding whether to grant a pre-determination of a rolled-in fuel rate, the Commission compares the pipeline's estimated incremental fuel rate to the pipeline's existing system-wide fuel rate. If the estimated incremental fuel rate for the project is higher than the existing system-wide fuel rate, National Fuel would be required to charge the incremental fuel rate for project services and separately identify the incremental fuel associated with its project. Because the estimated maximum project fuel rate of 0.17 percent is substantially less than the system fuel rate of 0.54 percent, it is appropriate for National Fuel to charge the system fuel rate for its project.

b. Tariff Provisions

i. Limited Waiver Request

50. National Fuel requests a limited waiver of GT&C section 31.1 of its tariff so that National Fuel can accept a request from Seneca Resources to change the primary delivery point for a portion of its subscribed capacity two years after the proposed in-service date of the project. National Fuel and Seneca Resources entered into a precedent agreement for the full design capability of the project. Of the total 497,000 Dth per day, 140,000 Dth per day will have a primary delivery point at an interconnection with Tennessee's 200 Line in Erie County, New York. Seneca Resources has requested that the delivery point be moved on November 1, 2018, to National Fuel's existing interconnection with Transco's pipeline system at Leidy in Potter County, Pennsylvania.

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[45] Commission Staff July 7, 2015 Data Request.

[46] National Fuel August 18, 2015 Response to Commission Staff's July 7, 2015 Data Request, response to question 3.

51. Under the Commission's standard policy, a request for service cannot be submitted more than 90 days prior to the proposed commencement date of service unless some exception applies, for example if the construction of new facilities is required. National Fuel requests a limited waiver of General Terms & Conditions (GT&C) section 31.1 of its tariff, which incorporates the Commission's prohibition:

> A "Service Request Form" shall be tendered no earlier than ninety days prior to the proposed commencement date of service, unless the construction of new facilities is required, unless the request is for capacity that will not be available until the proposed commencement date or unless the request is for capacity posted by Transporter pursuant to Section 26 of the General Terms and Conditions of this tariff.[47]

52. We will reject National Fuel's request for a limited waiver of GT&C section 31.1. In previous orders the Commission has emphasized that the 90-day rule is "standard Commission policy" and that it provides the "appropriate time limit for commencement of service."[48] The Commission intends that the 90-day rule prohibits shippers from unreasonably tying-up capacity. These concerns apply to existing shippers switching primary delivery points, despite the fact that these shippers are currently paying a reservation charge for their existing service. Commission policy does allow certain exceptions to the 90-day rule, such as for the construction of facilities that will result in a material increase in gas usage or production. The Commission has held that a special provision allowing shippers to change a primary point without following the regular procedures in the pipeline company's tariff could adversely affect other shippers seeking primary point capacity from the pipeline. That is because the shipper with the special provision would have a priority not otherwise provided for in the generally applicable tariff for obtaining the primary capacity. Therefore, such a special right is contrary to Commission policy.[49]

53. As National Fuel noted in its application, Seneca Resources' requested delivery point change is irrespective of the Northern Access 2016 Project's expansion capacity. Therefore, the exceptions to the 90-day rule, such as for the construction of facilities that

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[47] National Fuel Gas Supply Corporation FERC NGA Gas Tariff, 4 - Applicable Rates, 4.010 – Transportation Rates, 12.0.0.

[48] *Northern Natural Gas Co.*, 52 FERC ¶ 61,047, at 61,211-12 (1990).

[49] *Columbia Gas Transmission, LLC,* 153 FERC ¶ 61,098, at P 42 (2015), *ANR Pipeline Co.*, 103 FERC ¶ 61,223 at PP 24-26 (2003), *reh'g denied*, 105 FERC ¶ 61,112 at P 22 (2003).

will result in a material increase in gas usage or production, do not apply. The requested waiver would give Seneca a special priority right to shift primary delivery point capacity outside the procedures of National Fuel's generally applicable tariff for approximately two years beyond the issuance of this certificate for the project. While we have approved pipelines offering special contractual provisions in open seasons that are directly related to the new service to be provided by the expansion and do not adversely affect the rights of existing shippers, such as contract demand reduction or contract extension provision, the limited waiver requested here—which was not offered in the Open Season Notice—does not satisfy either criterion.

54. In addition, National Fuel has agreed to reserve capacity associated with the requested delivery point change until November 1, 2018. National Fuel states that it has reserved capacity in accordance with GT&C section 36 of its tariff. But GT&C section 36 explicitly limits the time period of such a reservation:

> If Transporter elects to reserve capacity for future expansion projects under this Section, such capacity may be reserved for *up to one year prior to* Transporter filing for certificate approval for the proposed expansion under Section 7(c) of the Natural Gas Act, *and thereafter until such expansion is placed into service.*[50]

National Fuel has not shown that such reserved capacity for the proposed expansion project will be used when the expansion project is placed into service. To the contrary, National Fuel has indicated that the reserved capacity would be used beginning November 1, 2018, which will likely be more than one year after the in-service date of the project. National Fuel's reservation of capacity conveys a special right to Seneca Resources and is contrary to National Fuel's tariff.

55. At least 30 days, but not more than 60 days, before providing service to any project shipper under a non-conforming agreement, National Fuel must file an executed copy of the non-conforming agreement disclosing and reflecting all non-conforming language as part of National Fuel's tariff and a tariff record identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations.[51]

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[50] National Fuel Gas Supply Corporation FERC NGA Gas Tariff, 4 - Applicable Rates, 4.010 – Transportation Rates, 12.0.0 (emphasis added).

[51] 18 C.F.R. § 154.112 (2016).

ii. **Tariff Revisions**

56. National Fuel proposes to add separate charts in section 4.010 its tariff to show each rate schedule that will apply to shippers using the capacity created by the project. These charts are designated "FT/FT-S – NA2016," "EFT – NA2016," and "FST – NA2016," though the rates are identical. Additionally, National Fuel proposes to add language to section 3.1 of each Rate Schedule FT, FT-S, EFT, and FST[52] to clarify how the incremental rates will apply to National Fuel's shippers. To the same purpose, National Fuel proposes to add two check boxes to Exhibit A of the Form of Service Agreement for each Rate Schedule[53] to indicate whether the service is or is not subject to the incremental rate.

57. We accept National Fuel's revised *pro forma* tariff language. We direct National Fuel to file actual tariff records with its proposed revisions between 30 and 60 days prior to the date that the project facilities go into service.

2. **Empire**

a. **Initial Rates**

58. Empire proposes to charge its existing system rates under Rate Schedule "FT – Original Empire Pipeline," as the applicable recourse rates for the project.[54] The current year-round Rate Schedule FT – Original Empire Pipeline applies a reservation rate of $5.1827 per Dth per month and applies no commodity rate.[55] Empire's first-year incremental cost of service is approximately $15,664,865.[56] Based on the maximum incremental daily firm transportation service quantity of 350,000 Dth, the Commission calculates an initial incremental reservation rate of approximately $3.7297 per Dth per

[52] In the *pro forma* tariff these are designated "Schedule 6.010: FT Rate Schedule," "Schedule 6.020: FT-S Rate Schedule," "Schedule 6.030: EFT Rate Schedule," and "Schedule 6.040: FST Rate Schedule."

[53] In the pro forma tariff these are designated "Form 8.010 – FT Form of Service Agreement," "Form 8.020 – FT-S Form of Service Agreement," "Form 8.030 – EFT Form of Service Agreement," and "Form 8.040 – FST Form of Service Agreement."

[54] March 17, 2015 Application at 19.

[55] Empire Pipeline, Inc. FERC NGA Gas Tariff, 4 – Applicable Rates, 4 – Applicable Rates, 8.0.0.

[56] Amended Application, Revised Exhibit N, Part 2, Page 1 of 2.

month. Because the existing system rates exceed the incremental reservation rate, we find that Empire's proposal to apply its Rate Schedule FT – Original Empire Pipeline rate as the maximum initial recourse rate for the project is reasonable. We accept this proposal.

59. Empire requests a pre-determination that the project costs qualify for rolled-in rate treatment into its existing Rate Schedule FT – Original Empire Pipeline rates in its next general section 4 rate case. As discussed below, the Commission will deny Empire's request for a pre-determination based on its ten-year cost of service analysis provided in the application.[57]

i. Pre-Determination of Rolled-In Rate Treatment

60. Empire and Seneca Resources have agreed to negotiated rates for the proposed services. Empire calculates annual revenue of $15.1 million under the negotiated rate.[58] Empire calculates that annual revenue will exceed later years' costs of service, with total revenue over ten years exceeding total costs of service by approximately $16.1 million. However, Empire also calculates that operating expenses will exceed revenues for the project's entire first year and for most of the second year before breaking even in the fourth quarter of the second year.[59]

61. Were Empire to seek to increase its base tariff rates within the first couple of years after the project goes into service, then test period data may reflect that revenues for the project were not exceeding costs; thus, rolling in the project's costs could result in FT customers subsidizing the project from the date that the new base rates become effective until Empire files a new rate proceeding. Because Empire could file its next rate case before project revenues exceed costs on an annual basis, the Commission believes it is premature to make a pre-determination on rolling in the proposed project's costs

62. We do not preclude Empire from seeking to roll project costs into its FT system FT rates in its next section 4 rate case and demonstrating that the costs associated with the project can be rolled in without existing customers subsidizing the project. Empire

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[57] Amended Application, Empire Exhibit N, Part 2, Page 1of 2.

[58] National Fuel November 11, 2015 Amendment to Joint Abbreviated Application, Ex. N, pt. 2 at 2.

[59] The projected annual revenue shortfall for the first year is $503,705 and the projected annual revenue surplus for the second year is $47,291. National Fuel November 11, 2015 Amendment to Joint Abbreviated Application, Ex. N, pt. 2 at 1–2.

will bear the burden of proof to demonstrate that rolled-in rate treatment is just and reasonable. This holding is consistent with previous section 7 expansion projects in which the Commission denied a pre-determination of rolled-in rate treatment due to costs exceeding revenues in the first few years.[60]

63. Consistent with the Certificate Policy Statement and consistent with Order No. 710[61] as it applies to incremental facilities, the Commission directs Empire to keep separate books and accounting of costs attributable to the project. Empire is required to file tariff records between 30 to 60 days prior to the date that the Project facilities go into service reflecting the appropriate Rate Schedule FT incremental rates.

ii. Fuel Retention

64. Commission staff requested that Empire provide an analysis to support its proposed use of the 0.90 percent Pendleton Compressor Fuel Factor to also recover fuel and company use associated with the operation of the project compressors.[62] The Commission further requested that Empire provide a fuel study with work papers demonstrating the impact that the project will have on Empire's current fuel consumption so that the Commission can make a determination about fuel retention rates. In its response, Empire states that it cannot predict or determine how the project will affect the fuel consumption along its system, given the dynamic nature of the nominations and the choices of its shippers for transportation and Empire's lack of historical information on the planned use of the capacity that the Northern Access 2016 Project will create for Empire. Empire proposes to establish a separate fuel tracker for the Pendleton Compressor Station to determine the fuel percentage rate that Empire will charge shippers each month, at least until Empire obtains sufficient historical usage data.[63] Empire asserts that a comprehensive fuel study would be appropriate once operating

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[60] *See Southern Natural Gas Co.*, 115 FERC ¶ 61,328, at P 39 (2006); *Eastern Shore Natural Gas Co.*, 111 FERC ¶ 61,479, at P 22 (2005).

[61] Order No. 710, FERC Stats. & Regs ¶ 31,207, at P 23.

[62] Commission Staff July 7, 2015 Data Request.

[63] Empire August 18, 2015 Response to July 7, 2015 Data Request, response 3(a). *See, e.g., Millennium Pipeline Co. L.L.C.*, 117 FERC ¶ 61,319, at P 196 (2006) (granting Empire's request for clarification that compressor fuel at the Oakfield Compressor Station will be recovered via a compressor fuel factor posted on its website on a monthly basis).

history is better known, suggesting a fuel study should not be required sooner than 18 months from the in-service date of project.[64]

65. The Commission will approve the 0.90 percent initial Pendleton Compressor Fuel factor. Empire's fuel tracker true-up relieves both the pipeline and the shippers from the risks of over- and under-recoveries by ensuring that all parties are kept whole. The Commission will require Empire to file between 60 and 30 days before the in-service date, the initial fuel factor of 0.90 percent associated with the fuel requirements resulting from the project. The Commission will also require Empire to track initial fuel use associated with the project pursuant to GT&C section 23.

b. Tariff Provisions

66. Empire proposes to revise the definition of "Compressor Fuel" in GT&C section 1.9 of its tariff to include the new Pendleton, New York, compressor station. Empire also proposes to revise the definition of "Original Empire Pipeline" in GT&C section 1.36 of its tariff to include Line EMP-03 and new facilities in Niagara County, New York. Further, Empire proposes to revise GT&C sections 23.2 to 23.6 to define those shippers subject to Empire's proposed Pendleton Compressor Fuel factor and to separately identify the two compressor stations, Oakfield and Pendleton. Lastly, Empire proposes to modify sections 2.3(a) and 2.3(b) of its Rate Schedule FT to refer to the revised GT&C section 23.

67. We accept Empire's revised *pro forma* tariff language. We direct Empire to file actual tariff records with its proposed revisions between 30 and 60 days prior to the date that the project facilities go into service.

D. Environmental Analysis

68. On July 24, 2014, the Commission staff began its environmental review of the Northern Access 2016 Project by granting National Fuel's and Empire's request to use the pre-filing process. See Docket No. PF14-18-000. As part of the pre-filing review, staff participated in open house informational meetings sponsored by National Fuel and Empire in the towns of Olean, Sardinia, and North Tonawanda, New York, on August 26, 27, and 28, 2014, to explain the Commission's environmental review process to interested stakeholders.

69. On October 22, 2014, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned Northern Access 2016 Project, Request for*

[64] Empire August 18, 2015 Response to July 7, 2015 Data Request, response 3(a).

Comments on Environmental Issues, and Notice of Public Scoping Meetings (NOI).[65] The NOI was mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners. On November 3 and 5, 2014, the Commission held scoping meetings in the towns of St. Bonaventure and Springville, New York. In total, two people provided verbal comments at the meetings. Transcripts were entered into the public record in Docket No. PF14-18-000.

70. Commission staff's pre-filing review ended on March 17, 2015, when National Fuel and Empire filed the project application. On April 29, 2015, the Commission issued a *Supplemental Notice of Intent to Prepare an Environmental Assessment for the Proposed Northern Access 2016 Project, Request for Comments on Environmental Issues, Notice of Environmental Site Review, and Notice of Public Scoping Meeting* (supplemental NOI) to seek comments on the locations proposed by National Fuel for one new compressor station and one natural gas dehydration facility in Niagara County, New York.[66] On May 20, 2015, the Commission held an additional scoping meeting in the town of North Tonawanda, New York. Forty people provided verbal comments. The transcript was entered into the public record in Docket No. CP15-115-000.

71. Based on public input received throughout the scoping process, National Fuel filed an amendment to its application on November 2, 2015, to propose a new location for its Pendleton Compressor Station and to make other modifications to its proposed facilities. On November 22, 2015, the Commission issued another *Supplemental Notice of Intent to Prepare an Environmental Assessment for the Proposed Northern Access 2016 Project and Request for Comments on Environmental Issues* to solicit input on the revised location of the new (Pendleton) Compressor Station.[67] In total, Commission staff received 170 separate written comments in response to the second supplemental NOI. Comments were entered into the public record for National Fuel's amended application in Docket No. CP15-115-001.

72. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), our staff prepared an environmental assessment (EA) for National Fuel's proposal. 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, socioeconomics, air quality, noise, safety, cumulative

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[65] 79 Fed. Reg. 64,379 (Oct. 29, 2014).

[66] 80 Fed. Reg. 26,015 (May 6, 2015).

[67] 80 Fed. Reg. 75,088 (Dec. 1, 2015).

impacts, and alternatives. All substantive comments received in response to the NOIs were addressed in the EA.[68]

73. The EA reflects modifications that National Fuel incorporated into its project design during the pre-filing process. A number of the adopted design modifications and alternatives address stakeholder concerns and/or avoid or minimize environmental impacts. National Fuel adopted these modifications and made them part of the project when National Fuel filed its original and amended applications.

74. Specifically, National Fuel considered 36 route variations along the originally considered pipeline route during pre-filing, based on landowner and agency input as well as resources identified during the preliminary route design. Many of these route variations, each less than 4 miles long, were incorporated into the proposed route to address specific environmental, landowner, or construction issues without unnecessarily encumbering additional landowners. National Fuel also modified the locations and methods of several waterbody crossings to accommodate comments and concerns raised by federal and state agencies.

75. Additionally, the EA evaluated several alternative compressor station sites due to numerous stakeholder comments. Many of the alternative sites were eliminated due to environmental or land use constraints. Further, due to many stakeholder objections to the originally-proposed compressor station site along Aiken Road (Alternative Site #1 in the EA) and a landowner's unwillingness to sell the property, National Fuel proposed a new site for the Pendleton Compressor Station (i.e., the location on Killian Road, which is analyzed as the proposed action in the EA). This change in the proposed location of the compressor station site was the most significant change to the project proposal from the original pre-filing project.

76. The EA was issued on July 27, 2016, opening a 30-day comment period.[69] In response to the EA, National Fuel filed several clarifications and project design changes. These are discussed below. We also received comments on the EA from the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), the New York State Department of Environmental Conservation (NYSDEC), the Town of Pendleton, several non-governmental organizations, and many individuals, including several who submitted multiple comments. Several commenters requested that the Commission extend the public comment period. The commenters raised the following

[68] The EA provides a summary of commenters and comments received during the scoping period. EA at 3 tbl.A.3-1, 4.

[69] 81 Fed Reg. 51,873 (Aug. 5, 2016).

concerns: the need to develop a programmatic NEPA review of the Commission's NGA jurisdiction over proposed projects; the need to develop an Environmental Impact Statement for the Northern Access 2016 Project; the purpose and need for the project; the EA's considered alternatives; the direct impact of the project on water resources and wetlands, biological resources, socioeconomics and visual resources, noise, air quality, historic and archaeological resources, and greenhouse gases; indirect impacts from induced natural gas development; and cumulative impacts.

1. Clarifications and corrections

77. On August 24, 2016, National Fuel submitted several clarifications or modifications of the proposed project in response to the EA. Unless noted below, these clarifications and modifications have been reviewed, found to be consistent with the discussion of potential impacts presented in the EA, and do not change the EA's conclusion that the project is not expected to have significant impacts on environmental resources.

78. National Fuel noted that the proposed tie-in and metering and regulation station at the Hinsdale Compressor Station, which was constructed as part of the Northern Access 2015 Project, will be located within the laydown area used during construction of the station. National Fuel recommended that the Commission make a conforming revision to environmental recommendation 14 of the EA, which would require that National Fuel file a geotechnical exploration report that evaluates slope configurations and stability for the Hinsdale and Pendleton Compressor Stations, meter and regulator station, and interconnect with Tennessee. We have reviewed this request and agree with the revision. Environmental Condition 14, included in Appendix B of this order, incorporates this clarification.

79. National Fuel contends that it is not likely that karst topography will be encountered during construction. National Fuel requests removal of environmental recommendation 15 of the EA, which would require that National Fuel file a desktop evaluation of karst development in all work areas, a geotechnical investigation of karst development at the Pendleton Compressor Station and two other sites (plus additional sites if necessary); and a karst mitigation plan. We disagree. As stated in the EA, several project facilities sit in areas that have the potential for karst features. These include the EMP-03 Pipeline, Wheatfield Dehydration Facility, and Pendleton Compressor Station.[70] However, Environmental Condition 15, included in Appendix B of this order, eliminates the Pendleton Compressor Station site from a karst evaluation because the borings completed for that site do not imply karst conditions. EPA states that the information in

[70] EA at 25.

the future karst mitigation plan should have been included in the EA for public review and comment. We disagree. Both the EA's description of karst terrain as a geologic hazard and the EA's description of the construction-related mitigation measures that must be included in the karst mitigation plan put interested parties on notice of the types of activities contemplated, their potential impacts, and likely mitigation measures.[71] In addition, this order responds to substantive comments filed in response to the EA. Also, the karst mitigation plan, like any information filed after the issuance of the EA, will be accessible to the public in the Commission's electronic database, eLibrary.[72]

80. National Fuel now proposes to cross Buffalo Creek using the horizontal directional drill method rather than the wet open-cut method discussed in the EA.[73] This change in crossing method would result in a reduction of environmental impacts at this location.[74] National Fuel also clarified that one proposed contractor yard is no longer needed and that several additional yards do not appear on maps included with the EA. We incorporate these clarifications by reference. We have reviewed the sites and conclude that impacts from these areas will not be significant.

81. One commenter notes that the EA incorrectly referenced section 306(b) of the Commission's regulations to determine whether an EA or EIS is necessary.[75] The proper citation is to section 380.6.[76] Additionally, several commenters noted that the EA's alternatives discussion inconsistently stated that the objective of the Northern Access 2016 Project is "to provide transportation of 847,000 Dth per day of natural gas capacity . . . ."[77] The correct description of the objective is to provide 497,000 Dth per day of incremental firm transportation service.

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[71] EA at 25, 28-29.

[72] The eLibrary system offers interested parties the option of receiving automatic notification of new filings.

[73] EA at 42.

[74] EA at 42-45.

[75] EA at 4 (citing 18 C.F.R. § 306(b) (2016)).

[76] 18 C.F.R. § 380.6 (2016) (identifying actions that require an EIS).

[77] EA at 161.

2. The need for a programmatic environmental review

82. Council on Environmental Quality (CEQ) regulations do not require broad or "programmatic" NEPA reviews. CEQ has stated, however, that such a review may be appropriate where an agency: (1) is adopting official policy; (2) is adopting a formal plan; (3) is adopting an agency program; or (4) is proceeding with multiple projects that are temporally and spatially connected.[78] 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 this region.[79] Moreover, 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.[80]

83. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.[81] 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."[82] What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. As to projects that have a clear physical, functional, and temporal nexus such that they are connected or cumulative actions,[83] the Commission will prepare a multiple-project environmental document.[84]

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[78] *See* Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* at 13-15 (Dec. 18, 2014) (citing 40 C.F.R. § 1508.18(b)) (CEQ 2014 Programmatic Guidance).

[79] *Kleppe v. Sierra Club,* 427 U.S. 390 (1976) (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

[80] *See Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 316-317 (4th Cir. 2009) (*Piedmont*).

[81] *See, e.g., National Fuel Gas Supply Corp.*, 154 FERC ¶ 61,180, at P 13 (2016); *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014).

[82] 15 U.S.C. § 717f(e) (2012).

[83] 40 C.F.R. § 1508.25(a)(1)-(2) (2016) (defining connected and cumulative

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84. The organizations Allegheny Defense Project, Appalachian Mountain Advocates, Heartwood, and Pennsylvania Alliance for Clean Water and Air (Conservation Groups) contend that the Commission violated NEPA by failing to prepare a programmatic EIS for natural gas infrastructure projects related to natural gas development in the Appalachian Basin region.[85] The groups point to a number of gas infrastructure projects in various stages of planning in the Appalachian Basin, claiming that they will collectively "have cumulative or synergistic environmental impacts upon a region."[86] Further, the groups claim that even if future pipeline projects may be theoretical, this does not mean that the Commission would not be able to "establish parameters for subsequent analysis."[87] The Conservation Groups claim that a programmatic EIS may aid the Commission's and the public's understanding of broadly foreseeable consequences of NGA-jurisdictional projects and non-jurisdictional shale gas production in the Appalachian Basin.

85. The Conservation Groups also argue that CEQ's 2014 Programmatic Guidance recommends a programmatic EIS when "several energy development programs proposed in the same region of the country . . . [have] similar proposed methods of implementation and similar best practice and mitigation measures that can be analyzed in the same document."[88] In support, the Conservation Groups point to a Programmatic EIS developed by the DOE and U.S. Bureau of Land Management to consider the environmental impacts of solar energy development in six southwestern states.[89] The Conservation Groups urge the Commission to adopt a similar approach for natural gas development in the Appalachian Basin.

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actions).

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

[85] Conservation Groups August 29, 2016 Comments on the EA at 57-5.

[86] *Id.* at 58-59 (citing *Kleppe*, 427 U.S. at 409-410).

[87] *Id.* at 59 (citing CEQ 2014 Programmatic Guidance at 11).

[88] *Id.* (citing CEQ 2014 Programmatic Guidance at 11).

[89] *Id.* at 61.

86. The fact that a number of individual pipeline companies have planned or proposed infrastructure projects to increase capacity to transport natural gas throughout the Appalachian Basin and elsewhere in the country does not establish that the Commission is engaged in regional development or planning.[90] Rather, this information confirms that pipeline projects to transport natural gas are initiated solely by private industry. As we have noted previously, a programmatic EIS is not required to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, a federal plan or program in that region.[91]

87. The Commission's siting decisions regarding pending and future natural gas pipeline facilities are only in response to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the type of facilities that will be proposed.[92] In these circumstances, the Commission's longstanding practice to conduct an environmental review for each proposed project, or a number of proposed projects that are interdependent or otherwise interrelated or connected, "should facilitate, not impede, adequate environmental assessment."[93] Thus, here the Commission's environmental review of National Fuel's and Empire's actual proposed project in a discrete EA is appropriate under NEPA.

88. In sum, CEQ states that 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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[90] *See, e.g., Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016) (*Freeport LNG*) (rejecting claim that NEPA requires FERC to undertake a nationwide analysis of all applications for liquefied natural gas export facilities); *cf. Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1326-27 (D.C. Cir. 2015) (*Myersville*) (upholding FERC determination that, although a Dominion Transmission Inc.-owned pipeline project's excess capacity may be used to move gas to the Cove Point terminal for export, the projects are "unrelated" for purposes of NEPA).

[91] *See, e.g., Kleppe*, 427 U.S. at 401-02.

[92] Lack of jurisdiction over an action does not necessarily preclude an agency from considering the potential impacts. However, as explained in the cumulative impacts section of this order, it reinforces our finding that because states, and not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting), the location, scale, timing, and potential impacts from such development are even more speculative.

[93] *Id.*

"provide information and analyses that can be incorporated by reference in future NEPA reviews."[94] The Commission does not believe these benefits can be realized by a programmatic review of natural gas infrastructure projects 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. Thus, we find a programmatic EIS is neither required nor useful under the circumstances here.

3. The Commission's choice to compose an Environmental Assessment

89. The Conservation Groups argue that the Commission's EA, at 199 pages, exceeds both the length recommended by the Council on Environmental Quality (CEQ) and the length logically necessary to determine whether the project's environmental impacts would be significant.[95] The groups assert that the EA's length proves that an Environmental Impact Statement (EIS) is necessary to analyze the project's potential impacts.

90. The CEQ's advisory memorandum is general guidance to agencies and is not binding. While the advisory memorandum urges brevity in the preparation of an EA, it does not require an agency to prepare an EIS if it issues an EA larger than the CEQ's recommended 15 pages. The CEQ's guidance recognizes that a lengthy EA may be appropriate in cases of complexity, and while a lengthy EA sometimes may suggest the need for an EIS, the CEQ's guidance does not establish a blanket requirement. Here, the 199-page length of the EA was the product of a broad range of environmental issues in the resource reports, each of which was capable of being addressed through required mitigation to reduce the project's effects below the level of significance to warrant an EIS. The mere volume of these otherwise relatively non-complex environmental issues does not warrant further analysis in an EIS. The EA adequately addresses the numerous issues as concisely and briefly as possible, as Commission and CEQ regulations require. The EA also describes measures to mitigate anticipated environmental impacts—enabling public review and comment—and recommends that many such measures be incorporated as conditions if the Commission issues a certificate for the project.[96] And in any case,

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[94] CEQ 2014 Programmatic Guidance at 13.

[95] Conservation Groups August 29, 2016 Comments on the EA at 8-9. (citing *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (Mar. 23, 1981)).

[96] *Nat'l Parks Ass'n v. Babbitt*, 241 F.3d 722, 735 (9th Cir. 2001) (citing *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000) (mitigation measures deemed sufficient to justify an agency's decision to forego issuing

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courts have held that the length of an EA "has no bearing on the necessity of an EIS."[97] "What ultimately determines whether an EIS rather than an EA is required is the scope of the project itself, not the length of the agency's report."[98] A rule requiring an EIS for any EA over a certain number of pages would create a perverse incentive for agencies to produce bare-bones EAs.[99]

91. Furthermore, as the EA explains, the Commission's regulations implementing NEPA provide that "[i]f the Commission believes that a proposed action . . . may not be a major federal action significantly affecting the quality of the human environment, an EA, rather than an EIS, will be prepared first. Depending on the outcome of the EA, an EIS may or may not be prepared."[100] National Fuel proposes to construct a new pipeline with 69 percent of its length located along existing pipeline or utility rights-of-way,[101] as well as one new and one modified gas-fired compressor station and one new dehydration facility, with related smaller facilities. The Commission's decades of experience implementing NEPA for pipeline projects indicates that such a project normally would not fall under the "major" category for which an EIS is automatically prepared.[102] This

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an EIS)); *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1555 (2d Cir. 1992) (the Commission's consideration of mitigation measures is a rational basis for a finding of no significant impact).

[97] *Tomac v. Norton*, 433 F.3d 852, 862 (D.C. Cir. 2005) (citing *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985)).

[98] *Id.* (quoting *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 434 (8th Cir. 2004)).

[99] *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 434 (8th Cir. 2004).

[100] EA at 4 (quoting 18 C.F.R. § 380.6(b) (2016)).

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

[102] *See* 18 C.F.R. § 380.6(b) (2016) (giving the Commission discretion to prepare an EA in lieu of an EIS if the Commission believes that a proposed action may not be a major action significantly affecting the quality of the human environment); *see also* 18 C.F.R. § 380.6(a)(3) (2016) (with respect to pipeline projects, actions that require an EIS are major pipeline construction projects using rights-of-way in which there is no existing natural gas pipeline); *see, e.g., Tenn. Gas Pipeline Co.*, 131 FERC ¶ 61,140 (2010) (EA issued for a project consisting of 127.4 miles of 30-inch-diameter pipeline loops in Pennsylvania and New Jersey); *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197 (2011) (EA issued for a project which included a gas storage field on 2,050-acre site and

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category emphasizes construction and operation of projects of greater scope and complexity than the one proposed here. As explained below, based on the EA's analysis and staff's recommended mitigation measures, the EA concludes, and we agree, that approval of the Northern Access 2016 Project would not constitute a major federal action significantly affecting the quality of the human environment.[103] Thus, an EIS is not required.[104]

4. Purpose and Need

92. An agency's environmental document must include a brief statement of the purpose and need to which the proposed action is responding.[105] An agency uses the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives.[106] The Council on Environmental Quality has explained that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."[107]

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associated 61.6-mile, 36-inch-diameter pipeline in Utah); *Colo. Interstate Gas Co.*, 131 FERC ¶ 61,086 (2010) (EA issued for a project which included two new 16-inch-diameter pipeline laterals totaling 118 miles in length in Colorado); *Equitrans, L.P.*, 117 FERC ¶ 61,184 (2006) (EA issued for a project which included 68 miles of new 20-inch-diameter pipeline in Kentucky).

[103] EA at 177. Under section 1508.18 of CEQ's regulations, "a 'major federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18 (2016) "Significantly" requires consideration of both the context and intensity of the project. *Id.* § 1508.27.

[104] CEQ regulations state that, where an EA results in a finding of no significant impact, an agency may proceed without preparing an EIS. 40 C.F.R. §§ 1501.4(e), 1508.13 (2016).

[105] *See* 40 C.F.R. § 1508.9 (2016) (for an Environmental Assessment); *id.* § 1502.13 (for an Environmental Impact Statement).

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

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

93. The EA for the Northern Access 2016 Project accepts National Fuel and Empire's articulation of the purpose and need to provide 350,000 Dth per day of "incremental firm transportation service to markets in the northeastern United States and Canada . . . as well as markets on the Tennessee Gas 200 Line in Erie County, New York, and other interconnections with local gas distribution companies, power generators, and other interstate pipelines available on both the National Fuel and Empire systems."[108] The EA also notes that "market demand" is one of several factors upon which the Commission makes a separate conclusion under section 7 of the NGA, to be articulated in the later order to issue or deny a certificate, of whether a proposed project "is or will be required by the present or future public convenience and necessity."[109] This standard includes economic need and other factors bearing on the public interest.[110]

94. Several commenters dispute the statements in National Fuel's application about the market need for the project, and they object to the EA's acceptance of National Fuel's statements as the "purpose and need" for NEPA analysis. They also perceive the EA's cross-reference to the later NGA section 7 analysis as an improper deferral of an independent "purpose and need" analysis. They argue that this deferral denies the public's right under NEPA to comment on all aspects of the EA, including the statement of "purpose and need" and the resulting alternatives analysis.

95. The EA's statement of purpose and need satisfied NEPA. An agency's definition of purpose and need, its choice of alternatives, and the depth of discussion of those alternatives must be reasonable.[111] Courts have upheld federal agencies use of applicants' identified project purpose and need as the basis for evaluating alternatives.[112] Where an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application.[113] We acknowledge that a project's purpose and need may not be so narrowly defined as to preclude consideration

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[108] EA at 2.

[109] EA at 2; 15 U.S.C. § 717f(e) (2012).

[110] *Atlantic Refining Co. v. Pub. Serv. Comm'n of NY*, 360 U.S. 378, 391 (1959).

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

[112] *E.g., City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

[113] *Busey*, 938 F.2d at 199.

of what may actually be reasonable choices.[114] But an agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is shaped by the application at issue and by the function that the agency plays in the decisional process.[115]

96. Here the EA's reliance on National Fuel's and Empire's statements about purpose and need was reasonable given the content of their application and the Commission's position in the decisional process. The commenters argue, in effect, that the Commission should analyze broad economic need, for example across the entire Northeast region, and should effectively plan the way that alternative natural gas projects, other energy sources, or energy conservation could satisfy that broad economic need. Though the NGA's public convenience and necessity standard is broad, the Commission's powers under section 7 are limited. The Commission can issue a certificate for a proposed project subject to "such reasonable terms and conditions as the public convenience and necessity may require," but the Commission cannot order, for example, that a natural gas company carry gas from or to Commission-favored producers or users. Similarly, the Commission can exercise a veto power over the proposed project if, and only if, a balance of all the circumstances weighs against certification.[116]

5. Alternatives Analysis

97. Based on the statement of purpose and need, the EA evaluated a no-action alternative, system alternatives using two existing pipeline systems in the project area, two major route alternatives, 36 potential variations to National Fuel's original proposed route, and alternative sites for the aboveground facilities.

98. Commenters contend that the EA's alternatives analysis is inadequate. Commenters allege that the EA incorrectly dismisses the no-action alternative and alternative locations for the new Pendleton Compressor Station and Wheatfield Dehydration Facility, fails to analyze alternative dehydration technologies at the Wheatfield Dehydration Facility, and fails to assess renewable energy alternatives or increased energy efficiency.

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

[115] *Busey*, 938 F.2d at 1991.

[116] *E.g., Fed. Power Comm'n v. Transcont'l Gas Pipe Line Corp.*, 365 U.S. at 17; *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at PP 28-42 (2016).

99. As stated above, an agency's definition of purpose and need, its choice of alternatives, and the depth of discussion of those alternatives must be reasonable.[117] NEPA does not define what constitute "reasonable alternatives"; however, CEQ guidance provides that "a reasonable range of alternatives depends on the nature of the proposal and the facts in each case."[118] An agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is shaped by the application at issue and by the function that the agency plays in the decisional process.[119] Alternatives that are remote, conjectural, or do not meet the purpose or need of the proposed action may be eliminated so long as the agency briefly discusses the reasons for the elimination.[120] An agency's specification of the range of reasonable alternatives is entitled to deference.[121]

100. The EA adequately discusses the reasons for eliminating each alternative from further consideration. The EA acknowledges that under a no-action alternative the environmental impacts identified in the EA would not occur,[122] but it explains that the no-action alternative would not satisfy the purpose and need for the proposed project to deliver natural gas to markets in the northeastern United States and Canada and would result in customers in these regions seeking to construct alternative transportation facilities that may cause similar or greater environmental impacts than the Northern Access 2016 Project without achieving the purpose and need within the same timeframe as the Northern Access 2016 Project. For these reasons, the EA did not recommend the no-action alternative. This discussion satisfied NEPA; we affirm the EA's conclusion.

101. Commission staff evaluated several preliminary sites for the new Pendleton Compressor Station that National Fuel identified in its environmental resource reports. As noted in the EA, many of these sites were eliminated because they were more severely constrained for space or had considerable additional resource impacts, including

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[117] *E.g.*, *Busey*, 938 F.2d at 196.

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

[119] *Busey*, 938 F.2d at 195, 199.

[120] 40 C.F.R. § 1502.14(a) (2016).

[121] *Busey*, 938 F.2d at 196.

[122] EA at 162.

proximity to residences, wetland impacts, and forest-clearing.[123] National Fuel's most significant change from the original pre-filing proposal was to propose a new site along Killian Road for the new Pendleton Compressor Station. The EA eliminates the originally proposed site along Aiken Road (Alternative Site #1) because it would require the replacement of 3.05 miles of pipeline adjacent to a hazardous waste site, would sit closer than any other alternative site to nearby noise-sensitive areas, has 80 parcels with houses within 0.5 mile, is zoned residential, would affect more wetlands than the preferred Killian Road site, and would require the use of eminent domain to take the property rights.[124] This discussion satisfied NEPA.[125]

102. Numerous commenters question why the EA rejects the site in the Town of Cambria, in Niagara County (Alternative Site #2). They suggest that the Cambria Site's proximity to an existing compressor station and its distance from existing homes make the Cambria Site preferable. However, as stated in the EA, the additional 5.5 miles of new pipeline right-of-way required to reach that site would disturb an additional 78.2 acres including wetlands and would cross more than 50 additional parcels.[126] Further, as noted in the EA, the nearby existing compressor station and related pipeline, among other existing infrastructure, would act as an engineering barrier to much of the Cambria Site.[127] For these reasons, EA concludes that the Cambria Site offers no environmental benefit over the proposed Killian Road site. This discussion satisfied NEPA.[128]

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[123] EA at 167.

[124] EA at 172.

[125] *See Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 102 (D.C. Cir. 2014) (quoting *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000)). The Commission's NEPA obligation requires that it identify the reasonably alternatives to the contemplated action and look hard at the environmental effects of its decision.

[126] EA at 172-173.

[127] *Id.*

[128] *See Midcoast Interstate Transmission*, 198 F.3d at 967-68 (the Commission must carefully consider alternatives, but even in the face of a preferable alternative, the Commission may reasonably find that the proposed project is required by the public convenience and necessity).

103. A third alternative site was examined as a location for both the new Pendleton Compressor Station and the Wheatfield Dehydration Facility. The EA eliminated this site as an alternative for the new Pendleton Compressor Station because it would require 3.3 miles of additional pipeline that would cross 17 acres of wetlands and require some permanent wetland fill, would have 390 parcels with houses within 0.5 mile (many more than other alternatives), and would raise special concerns about safety, noise, and construction given that the area around the site is heavily populated.[129] But the EA recommends the site as the location for the Wheatfield Dehydration Facility because this facility will not require new pipeline construction, this facility's smaller footprint will not affect wetlands, no air quality or noise impacts are expected from the facility, and because the site's proximity to the existing Oakfield Compressor Station (not part of this project) and the new Pendleton Compressor Station would improve the performance of the dehydration facilities. By contrast, the EA eliminates the originally-proposed site for the Wheatfield Dehydration Facility because its proximity to the Niagara Falls Air Reserve Station raised safety concerns, eliminates a site on Grand Island, New York, because its position farther from the compressor stations impairs the performance of the dehydration facilities, and eliminates a site in Canada because the Commission must place facilities necessary for the operation of a certificated project within United States territory. The EA's discussion satisfied NEPA.

104. The EA also briefly discusses its reasons for eliminating two alternative dehydration technologies suggested by commenters. The EA explains that "methanol injection" is not a dehydration process and that "dessicant dehydration systems" are not feasible because they are better suited for treating low-volume gas streams or for use within facility systems rather than in large-volume pipelines like the proposed project. This discussion satisfied NEPA.[130]

105. As stated in the discussion of purpose and need above, the Commission does not have the responsibility to analyze broad economic need, for example across the entire Northeast region, and to plan the way that alternative natural gas projects, other energy sources, or energy conservation could satisfy that broad economic need. Further, the Commission cannot require individual energy users to use different or specific energy sources. The EA appropriately described the purpose and need to deliver natural gas to markets in the northeastern United States and Canada. The omission of renewable energy

[129] EA at 173-174.

[130] *See, e.g., Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2009) (reasoned decision-making requires the Commission to consider alternatives raised by parties or give some reason "within its broad discretion" for declining to do so).

or increased energy efficiency, which cannot meet this purpose and need, from the EA's alternatives analysis was reasonable. This discussion also satisfied NEPA.

6. Incomplete Information in the EA

106. The EA notes that information about several topics, such as waterbody crossings, geology, and construction plans is incomplete or forthcoming. Several of the EA's recommended conditions address this outstanding information. Commenters claim that this information should have been included in the EA to inform the Commission's analysis and to enable public review. The Conservation Groups contend that without this information the Commission could not adequately analyze project alternatives and could not make a determination whether the project will significantly impact the environment. The groups claim that the missing information also denied the public's opportunity to meaningfully participate in the NEPA process.

107. We find that the groups' claims are unsupported. The fact that some analyses, reports, or plans required for the Northern Access 2016 Project have been or will be filed after the issuance of the EA does not undermine the EA's conclusions or deny meaningful public participation. The EA contains ample information for the Commission to fully consider and address the environmental impacts associated with the Northern Access 2016 Project, including extensive consideration of the potential impacts to water resources. There were numerous opportunities or the public to comment on the projects' potential impacts. National Fuel and Empire began the pre-filing process to get early stakeholder involvement more than seven months before filing their application. Early opportunities for public involvement included company-sponsored open house meetings, public scoping meetings, and three separate comment periods.[131] Both the environmental resource reports filed with National Fuel's and Empire's application as well as the EA put interested parties on notice of the types of activities contemplated and of their potential impacts. Moreover, this order responds to substantive comments filed in response to the EA. Any information that has been for will be filed after the issuance of the EA is accessible to the public in the Commission's electronic database, eLibrary.[132] Moreover, Environmental Condition 2 in Appendix B to this order delegates authority to the Director of the Office of Energy Projects (OEP) to design and implement any additional measures deemed necessary to ensure continued compliance with the intent of the

[131] *See* EA at 2-3.

[132] The eLibrary system offers interested parties the option of receiving automatic notification of new filings.

environmental conditions as well as the avoidance or mitigation of adverse environmental impacts resulting from construction and operation of the projects.[133]

7. Direct Impacts

a. Water Resources and Wetlands

108. The NYSDEC claims that it is important to address numerous deficiencies in the EA so that the NYSDEC may confidently rely on the EA to inform the agency's evaluation of National Fuel's state-level applications, specifically those for a Water Quality Certification under the Clean Water Act and permits under state law to cross or alter streams (Article 15) and wetlands (Article 24) and to withdraw hydrostatic test water. In a letter September 8, 2016, National Fuel submitted a supplement to its joint application to the NYSDEC for these permits.[134] We have reviewed this letter and conclude that its content addresses all of the NYSDEC's questions and comments about both National Fuel's application and the Commission's EA.

109. The FWS recommends the use of trenchless crossing methods for all waterbodies classified as fisheries of special concern. As part of National Fuel's September 8, 2016 supplement to its joint application for permits submitted to the NYSDEC, National Fuel included a "Trenchless Feasibility Assessment" (Appendix F to that supplement) assessing the possibility of using a trenchless method more broadly across the project. This feasibility assessment documents the criteria considered in evaluating each waterbody and the rationale for why waterbody would or would not be crossed by a trenchless method. We have reviewed this assessment and agree with its conclusions and justifications relating to locations where use of a trenchless crossing method is and is not feasible.

110. The FWS also recommends that alternate crossing methods be developed for each waterbody with a planned horizontal directional drill crossing and that details of those alternate methods be provided to the FWS. We note that the EA includes a recommendation that requires National Fuel to develop alternate crossing plans for waterbodies where a directional drill crossing fails.[135] We have adopted this

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[133] *See Transcontinental Gas Pipe Line Corp.*, 126 FERC ¶ 61,097, at P 29 (2009) (noting that Environmental Condition 2 includes authority to impose additional mitigation measures).

[134] This letter and public attachments were filed in eLibrary on September 13, 2016, with the NYSDEC listed in the description rather than National Fuel.

[135] EA at 43.

recommendation as Environmental Condition 17 in Appendix B to this order. It requires National Fuel to develop these alternate crossing plans in consultation with the U.S. Army Corps of Engineers (Corps) and the FWS. These plans must include mitigation measures to minimize effects on water quality and in-stream resources.

111. The FWS and the NYSDEC express concern about an open-cut crossing of Buffalo Creek. As previously noted, National Fuel has amended its crossing plans and will use the horizontal directional drill method to cross Buffalo Creek. No wet open-cut crossings are proposed for any of the waterbodies crossed by the project.

112. The NYSDEC comments that not all of the wetlands associated with the EMP-03 pipeline were accounted for in the EA, and it suggests that the EA be revised to analyze additional potential impacts. We have evaluated National Fuel's updated information included in its September 8, 2016 supplement to the joint application to the NYSDEC and the Corps. We acknowledge that additional construction and/or operational impacts are likely for emergent wetlands (increase in construction impacts), scrub-shrub wetlands (increase in operational impacts), and forested wetlands (increase in construction and operational impacts). However, the minor increases in impacts on wetlands along the EMP-03 line do not change the conclusion in the EA that the project will not have significant impacts on wetland resources.

113. The NYSDEC and the FWS express multiple concerns about hydrostatic test water withdrawals. The NYSDEC comments that a water withdrawal permit would be needed and that after testing the water would need to be suitably disposed of.[136] The NYSDEC requests additional information on the impact of withdrawals, flow volumes, and pass-by flows. The FWS comments that the timing and location of water withdrawals could affect rare mussels. In the Erosion and Sediment Control & Agricultural Mitigation Plan (ESCAMP) that National Fuel included with the September 8, 2016 supplement, and in National Fuel's comments on the EA, National Fuel describes measures it will implement during hydrostatic test water withdrawal and discharge. These measures include screening intakes to avoid fish entrainment, maintaining adequate flow rates to avoid impacts on aquatic life and downstream water use, attaching the intake to a float to avoid stream bed disturbance, and discharging using energy dissipation devices and/or a filter bag (no water would be discharged directly to a waterbody). In response to several comments about the risks of using polluted water for hydrostatic testing, National Fuel no longer proposes to use water from the impaired Bull Creek for testing the EMP-03 pipeline, choosing a municipal water source instead. We have considered National Fuel's

[136] The EA is intended to disclose potential impacts resulting from the project but is not intended to replace the Clean Water Act air permitting process.

updated information and conclude that the proposed measures will sufficiently protect in-stream resources, including rare mussels, during withdrawal and discharge.[137]

114. The FWS and the NYSDEC comment that at least a conceptual wetland mitigation plan should be provided for public review and that a conclusion related to wetland impacts without such a plan is premature. The EA's conclusion that wetland impacts would not be significant is based on demonstrated history that pipeline construction rarely results in permanent loss of wetland function and instead more typically only results in minor and temporary impacts. The EA finds that the project may change wetland type from woody vegetation to a more emergent condition. Given that agencies such as the Corps and the NYSDEC regulate wetlands, we defer to those agencies to establish through their permitting mechanisms, to the extent they deem necessary, further mitigation measures that will complement the measures of National Fuel's ESCAMP and the Commission's *Wetland and Waterbody Construction and Mitigation Procedures* (*Procedures*). To that end, National Fuel provided a detailed conceptual mitigation plan in its September 8, 2016 supplement, which is available for public review in the Commission's elibrary system.[138] Accordingly, we agree with the EA's conclusion that the Northern Access 2016 Project is not anticipated to result in significant impacts on wetlands.

115. The NYSDEC comments that the EA lacks reference to the landscape-level avoidance and minimization of wetland impacts achieved through National Fuel's siting process. The FWS comments that the EA did not "demonstrate a need for the loss of wetlands," implying that the mitigation hierarchy of avoid, minimize, restore, then compensate was not adequately supported. The FWS further requests that "an adequate alternatives analysis" be provided prior to project approval. We disagree and note that the EPA stated in comments on the EA that the collocation of 69 percent of the project with existing rights-of-way "has minimized the environmental impacts of the project on several resources."[139] Further discussion regarding the mitigation hierarchy and how National Fuel implemented it was included in National Fuel's September 8, 2016 supplement. We have reviewed this discussion and find it acceptable.

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[137] Impacts specific to federally listed species are being considered in our ESA section 7 consultation with the FWS.

[138] *See* the September 13, 2016 filing, Supplement to Joint Application at 5-22 to 5-34 (Section 5.6 Compensatory Mitigation Conceptual Plan).

[139] EPA August 29, 2016 Comments on the EA at 1.

116. Some commenters, including the Town of Pendleton, expressed concerns regarding impacts on wetlands, most often referencing impacts from construction and operation of the Pendleton Compressor Station. However, both the NYSDEC (in its comments on the EA filed August 26, 2016) and the Corps (in its July 19, 2016 preliminary jurisdictional determination[140]) conclude that no state freshwater or federally regulated wetlands will be impacted at the Pendleton Compressor Station site.

b. Biological Resources

117. The FWS recommends that National Fuel take additional precautions in waterbodies where dry crossing methods will be implemented and suggests that fish, amphibians, and reptiles be removed from work areas ahead of construction, that flow rates from upstream to downstream of the crossing be maintained at all times, and that National Fuel ensure a slow release of water into the stream behind temporary dams upon completion of work. As discussed in the EA, a dry-ditch crossing does maintain some level of water transport across the crossing location, either via a flume pipe or by using pumps. Larger mobile organisms such as fish, amphibians, and reptiles are generally able to avoid the work area at the onset of construction. Pump intakes are screened to prevent entrainment of smaller, less mobile organisms. As described in its ESCAMP, National Fuel will use pumps to maintain minimal low flow in waterbodies during construction, to the extent practicable.[141] In a configuration using two dams upstream of the crossing site, National Fuel will release water from the downstream temporary dam first to allow water to slowly be reintroduced to the work area before National Fuel removes the upstream dam. We believe these measures are sufficient to protect aquatic resources where dry crossings occur.

118. The FWS indicates that control of invasive non-native plant species is not addressed in the EA and should be required. The FWS further states that invasive plants close to project-disturbed areas should be removed prior to project construction. We clarify here that construction activities, including removal of invasive plants, are not allowed outside of the approved work areas. We note that the EA discusses invasive and noxious weeds, and recommends that National Fuel develop an invasive plant species plan in coordination with the NYSDEC and the Pennsylvania Department of Conservation and Natural Resources.[142] We have added this recommendation as

[140] National Fuel August 12, 2016 Supplement to Environmental Information (reproducing the Corps's July 19, 2016 preliminary jurisdictional determination).

[141] EA at App. D, Erosion and Sediment Control & Agricultural Mitigation Plan at 23 and Drawing Number 21.

[142] EA at 57-58.

Environmental Condition 21 in Appendix B to this order. We conclude that this requirement will suitably minimize the spread of invasive and noxious plant species.

119. The FWS requests a thorough analysis of potential fragmentation of interior forest to aid in its analysis of impacts on migratory birds. The FWS specifically notes that the EA included an assessment of such impacts for Pennsylvania but not for New York,[143] resulting in the EA underestimating the level of impact. We disagree. National Fuel proposed a route that is approximately 69 percent collocated with existing linear infrastructure. Collocating with existing rights-of-way may result in a change in edge location, but would not result in new fragmentation of interior forest. The EA shows collocation length by county and finds that approximately 50 percent of the route in Pennsylvania is collocated, whereas almost 80 percent of the mainline route in New York is collocated.[144] Forested lands impacted by the project in New York are either adjacent to existing rights-of-way or are within 300 feet of existing cleared or open areas, thus avoiding new fragmentation of interior forest.

120. More specifically, the mainline route in Allegany and Cattaraugus Counties is approximately 87 and 88 percent collocated, respectively. Only in Erie County does collocation drop below two-thirds of the route (62 percent). When evaluated specifically, the route segments in Erie County that deviate from the existing right-of-way (i.e., are not collocated) are primarily in active agricultural or developed residential lands. Therefore, we conclude that information about interior forest impacts would not materially change with additional analysis in New York. Also, the measures proposed by National Fuel would further minimize impacts in areas where forest lands are crossed.[145] Nonetheless, National Fuel has indicated that it is developing an analysis that it will submit to the FWS to further address the agency's concerns.

121. The FWS states that no mitigation was provided for loss of migratory bird habitat, disagrees with the EA's conclusion that impacts on migratory birds will be minor,[146] and recommends that we require National Fuel to provide adequate compensatory mitigation for this loss. The EA provides a robust analysis of potential impacts on migratory birds and discusses mitigation measures that National Fuel would implement to avoid and minimize impacts on this resource, including measures in its *Migratory Bird Habitat*

[143] EA at 57.

[144] EA at 7.

[145] EA at 57.

[146] EA at 72.

Conservation Plan. The primary measure that National Fuel commits to implement is to focus its clearing activities outside of the primary nesting season. By avoiding direct impacts on active nests, National Fuel will maintain its compliance with the Migratory Bird Treaty Act's prohibition on take. National Fuel is also currently consulting with the FWS on what additional measures the FWS sees as necessary for protection of this resource.

122. The FWS recommends that we document how facilities change noise levels over current background levels to determine the significance of increased noise affecting wildlife. Although we note that an increase in noise during construction may be disruptive to wildlife occupying habitats near the project, noise levels in those areas will return to background levels during project operation. We do not expect the disruption to have noticeable impacts on resident or migratory wildlife populations. Further, as stated in the EA, National Fuel will design aboveground facilities and use equipment that minimizes potential noise impacts on migratory birds, which would also benefit other local wildlife.[147]

123. Pursuant to section 7(a)(2) of the Endangered Species Act,[148] on July 27, 2016, Commission staff requested concurrence from the FWS on staff's determinations that the Northern Access 2016 Project may affect, but is not likely to adversely affect, the federally threatened northern long-eared bat and rabbitsfoot mussel and the federally endangered rayed bean and clubshell mussels. The FWS's New York Field Office committed to further coordination with the Commission regarding these species. The FWS did not identify what specific additional information it required to complete consultation, although the FWS did request information related to water withdrawals.[149] In a letter filed November 2, 2016, the Pennsylvania Field Office of the FWS did concur with the Commission's "may affect, but is not likely to adversely affect" determination for the rayed bean, clubshell, and rabbitsfoot mussels. The agency did not concur, however, with the Commission's determination that the project "may affect, but is not likely to adversely affect" the northern long-eared bat. Formal consultation with the FWS will proceed and will result in a Biological Opinion to address the project's potential impact on the northern long-eared bat. As specified in Environmental

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[147] EA at 71.

[148] 16 U.S.C. § 1536(a)(2) (2012).

[149] In a letter dated June 16, 2016, the FWS's Pennsylvania Field Office concurred that the Pennsylvania portion of the project is not likely to adversely affect the rabbitsfoot mussel.

Condition 22 in Appendix B to this order, National Fuel will not be authorized to begin construction until our staff completes section 7 consultation responsibilities with the FWS.

c. Socioeconomics and Visual Resources

124. Some commenters contend that property values could decrease in areas next to or near the Pendleton Compressor Station and Wheatfield Dehydration Facility. The installation of these facilities will require temporary workspaces for construction and permanent modifications to property that National Fuel currently owns or will own within the boundaries of each station's property. Modifications to the Porterville Compressor Station will occur within existing facilities owned by National Fuel.

125. National Fuel's new Pendleton Compressor Station and Wheatfield Dehydration Facility will, however, introduce new industrial facilities into areas classified as agricultural, rural residential, and urban residential, though these areas are zoned to facilitate industrial development of this kind. As stated in the EA, National Fuel proposes to reduce the impacts on the surrounding properties near the Pendleton Compressor Station by siting the aboveground facilities to make them less conspicuous, developing visual screening, incorporating lighting solutions to reduce nighttime light pollution, planting trees to buffer the compressor station, and installing the facilities within buildings designed to mimic rural farm buildings to blend into the existing surrounding.[150] We note that the EA recommends a condition that we have adopted as Environmental Condition 24 in Appendix B to this order. National Fuel must file its final visual screening plan for the Pendleton Compressor Station, showing the locations of facility components, describing the types and quantities of vegetation screening to be planted, and demonstrating how National Fuel's building design is consistent with the existing landscape.

126. The EA explains that the potential impact of a pipeline on property values, if any, would be related to many property-specific variables such as the size of the parcel, the parcel's current value and land use, the value of nearby properties, and would be related to a potential buyer's specific planned use of the property.[151] As noted in the EA, the Wheatfield Dehydration Facility would be located in an industrial area with ample visual screening from residences to the north of the site.[152] National Fuel's proposed mitigation

[150] EA at 91-92.

[151] EA at 100-101.

[152] EA at 91.

will substantially reduce the visual impacts of the Pendleton Compressor Station, thereby minimizing these potential property value impacts.

d. Noise

127. The Town of Pendleton suggests that there may be errors in the noise assessment methodologies referenced in the EA that could affect the EA's conclusions regarding noise impacts and the potential need for noise mitigation at the Pendleton Compressor Station. The town claims that the EA failed to calculate noise impacts on the nearest noise sensitive area and suggests that the nearest noise sensitive area was 538 feet from the proposed Pendleton Compressor Station site. We have reviewed the proximity of noise sensitive areas to the proposed site but have not located the noise sensitive area that the town cites. In fact, the Town of Pendleton's concern appears to be about an unconstructed residence that would be part of a residential development not yet under official consideration by the town as a land use action, thereby not warranting consideration during our review of National Fuel's project.

128. The Town of Pendleton further asserts that the background sound study "departs from applicable methods for evaluating long-term background sound levels published by the Acoustical Society of America (ASA) and the American Natural Standards Institute (ANSI)." We disagree with this assertion. The noise analysis provided in the project application used proper engineering practice and followed applicable standards for a study of this type. As discussed in the EA, we require that noise levels generated by a proposed new compressor station or by the combination of an existing station and expansion facilities may not exceed a day-night sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at any pre-existing noise sensitive area.[153] The analysis discussed in the EA demonstrates that the Pendleton Compressor Station would meet this requirement.

129. In order to ensure noise impacts remain below threshold levels, we are including a recommendation from the EA as Environmental Condition 27 in Appendix B of this order to require that National Fuel perform noise surveys within 60 days of startup for its new and modified stations. The condition further requires National Fuel to demonstrate compliance with the L_{dn} of 55 dBA noise criterion by taking noise measurements at a point near the identified nearest noise sensitive areas. Commission staff will review the results of all such surveys to ensure their adequacy, including the chosen measurement locations and methodology. This will ensure that there is no significant impact on the environment from project-related noise.

[153] EA at 118.

e. **Air Quality**

130. National Fuel suggests that the project's aboveground facilities would not require certain air permits, given the design, emissions, and NGA-jurisdictional status of the project. The NYSDEC disagreed. As discussed in the EA, the project is subject to the NYSDEC's facility air regulations.[154] The NYSDEC has the authority to review and approve all design, permitting, and pollution control aspects of the compressor units at the Porterville and Pendleton Compressor Stations, independent of the Commission's review.[155] The air quality analysis in the EA went further than the NYSDEC's permit review requires. For example, National Fuel conducted air quality impact modeling for the project, although this modeling is not required where a project sponsor will install the controls that National Fuel has committed to install. The modeling for the Northern Access 2016 Project compressor stations indicates that the conservatively modeled impacts attributable to the compressor stations would remain well below (less than half of) the National Ambient Air Quality Standards (NAAQS) for regulated pollutants, and air impacts would decrease in relation to the distance from the compressor stations.[156] Regardless, under Environmental Condition 22 in Appendix B to this order National Fuel must obtain all federally delegated state permits before it can construct and operate the project. These may include Minor Facility Registrations or State Facility Permits and authorizations.

131. Some commenters suggest that certain potential air quality control measures were not considered for the project and that values in the EA underestimate potential impacts on air quality. The EA disclosed potential air quality impacts associated with the project as proposed. Based upon the air quality analysis completed for the project, the impacts were determined to be within safe levels and below EPA-established benchmarks.

132. The EA is intended to disclose potential impacts resulting from the project but is not intended to replace the Clean Air Act air permitting process. The methodology to calculate emissions is established by the air permitting authority, which, in the case of the new Pendleton Compressor Station, is the NYSDEC. We find that the EA appropriately disclosed potential impacts associated with the operational emissions from the project, including the Pendleton Compressor Station.

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[154] EA at 21.

[155] N.Y. Comp. Codes R. & Regs. tit. 6, pt. 201 (2016) (Permits and Registrations).

[156] *See* National Fuel Nov. 19, 2015 Ambient Sound Survey.

133. Several commenters imply that the EA failed to consider numerous public comments alleging that the project's air emissions would harm human health. Other commenters express concern that the health impacts attributable to the project, though identified within the EA, were not adequately assessed. The EA concludes that the modeled emissions from normal operations and blowdown events from the new Pendleton Compressor Station and Wheatfield Dehydration Facility, as well as the modified Porterville Compressor Station, would be below a level that could present health concerns.[157] We agree.

8. Historic and Archaeological Resources

134. Several commenters raise concerns about project construction potentially affecting historic and archaeological resources. The EA summarizes the efforts undertaken to identify such resources within an area of potential effect that includes and surrounds the project construction area.[158] These efforts were consistent with state and federal regulations and were reviewed by both Commission staff and the state historic preservation offices for Pennsylvania and New York. Through these reviews, measures necessary to protect historic and archaeological resources were identified, including route adjustments, such that significant impacts on these resources are not expected. Further, National Fuel developed *Unanticipated Discovery Plans* to address resources found during construction that have not been previously identified. The EA reviewed these plans and found them acceptable.[159] We agree.

9. Greenhouse Gases

135. The EA broadly discusses how climate change might affect the Northern Access 2016 Project and acknowledges that the project's greenhouse gas emissions would contribute to climate change.[160] The EA quantifies the project's direct greenhouse gas (GHG) emissions during construction to be 2,530 metric tons per year of carbon dioxide equivalents (tpy CO_2e).[161] The EA also quantifies the project's direct GHG emissions

[157] EA at 112-118.

[158] EA at 92-97.

[159] EA at 95.

[160] EA at 109-110.

[161] EA at 110, 112 tbl.B.8.a-4.

during operation, including: 7,097 and 6,450 tpy CO_2e from pipeline equipment,[162] 22,480 tpy CO_2e from the modified Porterville Compressor Station,[163] 97,668 tpy CO_2e from the new Pendleton Compressor Station,[164] and 4,426 tpy CO_2e from the new Wheatfield Dehydration Facility.[165]

136. Commenters oppose the project on the basis that its operation would produce GHG emissions and result in irreversible impacts on the global climate. We acknowledge that construction and operation of the project will result in both short- and long-term GHG emissions over the project's lifetime.

137. On August 8, 2016, Oil Change International[166] filed comments, consisting of one paragraph and an attached 32-page report, in 11 pipeline certificate proceedings, including this proceeding. Oil Change International asserts that there should be a climate test for all natural gas infrastructure, that, in light of CEQ's 2016 GHG Guidance, "the alignment of natural gas infrastructure permitting with national climate goals and plans should become a priority for FERC and other federal government agencies," and that the Commission should "conduct full Greenhouse Gas impact analysis as part of the NEPA process for all listed projects."[167] The report asserts generally that increased U.S. natural gas production in the Appalachian Basin is not consistent with safe climate goals, and that proposed pipeline projects will increase takeaway capacity from the basin and provide long term financial incentives for increased production and consumption of natural gas.

138. The comments and study filed by Oil Change International provide no specific information about the Northern Access 2016 Project and thus do not assist us in our

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[162] EA at 115 tbl.B.8.a-7 and tbl.B.8.a-8.

[163] EA at 114 tbl.B.8.a-5.

[164] EA at 114 tbl.B.8.a-6.

[165] *Id.*

[166] Oil Change International filed comments on behalf of the Sierra Club, Earthworks, Appalachian Voices, Chesapeake Climate Action, 350.org, Bold Alliance, Environmental Action, Blue Ridge Environmental Defense League, Protect Our Water, Heritage and Rights (Virginia & West Virginia), Friends of Water, Mountain Lakes Preservation Alliance, Sierra Club West Virginia, and Sierra Club Virginia.

[167] Oil Change International August 8, 2016 Comments on the EA at 1.

analysis. As discussed above, we indeed do analyze the greenhouse gas impacts of proposed projects as part of our NEPA and NGA review.

139. As to the more global issues raised, while the Commission does not utilize a specific "climate test," we do examine the impacts of the projects before us, including impacts on climate change. Under NEPA, we are required to take a "hard look" at the environmental impacts of the proposed project and we have done so. To the extent that Oil Change International suggests an alignment of project permitting with national climate change goals, we note that it is for Congress, the Executive Branch, and agencies with jurisdiction over broad environmental issues to establish such goals; our role under the NGA is considerably more limited, and we have no authority to establish national environmental policy.

140. The EPA suggests that the Council on Environmental Quality's (CEQ) August 1, 2016 *Final Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews* be used to better understand GHG emissions from the project. The EPA further recommends that the EA estimate emissions from methane leakage and indirect emissions associated with production and combustion of natural gas brought into production as an indirect effect of the project. The EPA also comments that the EA did not disclose measures considered to avoid, minimize, or mitigate for GHG emissions.

141. We note that the CEQ guidance on GHG emissions and climate change, published on August 1, 2016, was not available for reference when Commission staff released the EA for the Northern Access 2016 Project on July 27, 2016. In general, the CEQ guidance recommends that an agency quantify a project's direct and indirect GHG emissions, consider GHG emissions in the alternatives analysis, and propose reasonable mitigation measures related to climate change in line with the project need.

142. We quantify the project's emissions above. With the exception of the no-action alternative, the reasonable alternatives identified in the EA would not generate a significantly different amount of GHG emissions compared to the proposed project. The level of analysis completed in the EA is sufficient given the scope of the project. Neither the no-action alternative nor any system alternative was found to have a significant environmental advantage over the project while also meeting National Fuel's stated purpose.[168] We confirm these findings. Further, the EA does identify mitigation measures to be implemented at project facilities.

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[168] EA at 162.

143. Commenters, including the NYSDEC, suggest that a gas recapture system should be considered to reuse gas released during blowdowns of the new Pendleton Compressor Station. Subpart OOOOa of the recently revised New Source Performance Standards for certain new and modified sources in the oil and natural gas industries already regulates emissions of GHGs and volatile organic compounds (VOC).[169] Subpart OOOOa requires implementation of leak detection and repair programs at applicable natural gas compressor stations, requirements to limit GHG and VOC emissions from compressors and pneumatic controllers used at compressor stations, and includes requirements for recordkeeping and annual reporting. National Fuel is required to comply with the applicable portions of Subpart OOOOa by installing compliant equipment at the new and modified compressor stations and by implementing leak detection and repair programs. These controls obviate the need for an additional gas recapture system to mitigate blowdowns.

10. Indirect Impacts of Natural Gas Production

144. The Conservation Groups and Sierra Club broadly criticize the EA for failing to consider the indirect effects of shale gas development to supply the Northern Access 2016 Project. The Commission addressed very similar objections to the Niagara Expansion Project and Northern Access 2015 Project in Docket Nos. CP14-88-001 and CP14-100-001.[170] For the same reasons, we again reject these arguments as detailed below.

145. The CEQ regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.[171] Indirect impacts are defined as those:

> . . . which are caused by the action and are later in time or farther removed in distance [than direct impacts], 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,

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[169] *Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources*, 81 Fed. Reg. 35,824 (June 3, 2016) (amending standards at 40 C.F.R. pt. 60, subpt. OOOO, and establishing new standards to be codified at 40 C.F.R. pt. 60, subpt. OOOOa).

[170] *See Tennessee Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,184, at PP 54-73 (2016).

[171] 40 C.F.R. § 1508.25(c) (2016).

> and related effects on air and water and other natural systems, including ecosystems.[172]

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

146. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"[173] in order "to make an agency responsible for a particular effect under NEPA."[174] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."[175] 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.[176] 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."[177]

147. 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."[178] NEPA

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[172] *Id.* § 1508.8(b).

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

[174] *Id.*

[175] *Id.*; *see also Freeport LNG*, 827 F.3d at 46 (FERC need not examine everything that could conceivably be a but-for cause of the project at issue); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (*Sabine Pass LNG*) (FERC order authorizing construction of liquefied natural gas export facilities is not the legally relevant cause of increased production of natural gas).

[176] *Metro. Edison Co.*, 460 U.S. at 774.

[177] *Pub. Citizen*, 541 U.S. at 770; *see also Freeport LNG*, 827 F.3d at 49 (affirming that *Public Citizen* is explicit that FERC, in authorizing liquefied natural gas facilities, need not consider effects, including induced production, that could only occur after intervening action by the DOE); *Sabine Pass LNG*, 827 F.3d at 68 (same); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955-56 (D.C. Cir. 2016) (same).

[178] *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). *See also City of*

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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."[179]

148. We have previously concluded in natural gas infrastructure proceedings, based on the specifics of the project being proposed in each proceeding, that the environmental effects resulting from natural gas production are generally neither sufficiently causally related to specific natural gas infrastructure projects nor are the potential impacts from gas production reasonably foreseeable such that the Commission could undertake a meaningful analysis that would aid our determination.[180]

i. Causation

149. The Conservation Groups and Sierra Club argue that the Commission has specific information in this proceeding sufficient to show a causal link between the project and natural gas production in Seneca Resources' "Western Development Area" in Pennsylvania where the project will receive gas.[181] Generally, the Conservation Groups cite statements by a trade association, business executives, a town newspaper, and the Energy Information Administration suggesting both that insufficient transportation infrastructure can limit production growth and that additional transportation infrastructure spurs production growth. Specifically, the Conservation Groups cite statements by National Fuel in its application for the project, in press releases from 2014 and 2016, and in a PowerPoint presentation to investors in 2016 that they believe (a) suggest a link between Seneca Resources' future production and the transportation capacity created by the Northern Access 2015 and 2016 Projects and (b) identify a specific subset of well sites poised for development that will supply gas to be transported on the 2016 project.

Shoreacres v. Waterworth, 420 F.3d 440, 453 (5th Cir. 2005).

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

[180] *See, e.g., Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2d Cir. 2012) (unpublished opinion).

[181] Conservation Groups August 29, 2016 Comments on the EA for the Northern Access 2016 Project at 16-22.

150. National Fuel acknowledges that Seneca Resources entered into a Joint Development Agreement with another producer to develop specific shale resources in the Clermont/Rich Valley area (within Seneca Resources' Western Development Area) that will use the transportation capacity created by the Northern Access 2015 and 2016 Projects. The Conservation Groups assert that regardless of when these wells are drilled, Seneca Resources has many wells that are "drilled but uncompleted." Seneca Resources will only be induced to complete these wells and place them into production, the groups argue, if the Northern Access 2016 Project is approved. The Conservation Groups claim that the environmental impacts of this induced second-phase completion and production must be analyzed in the Commission's NEPA document.

151. In order to identify the appropriate scope of the Commission's environmental review, in June 2016, Commission staff submitted a data request to National Fuel about the wells subject to the Joint Development Agreement. National Fuel responded that the drilling of the 75 wells (with the option for one additional 7-well pad) identified in the Joint Development Agreement "is not contingent upon any milestone in the regulatory process for the Northern Access 2016 Project" and will move forward without assurance that a certificate will issue.[182] National Fuel explains that the 75 wells will be drilled from 10 well pads (plus an option to develop one additional 7-well well pad, totaling 82 wells). Of these, the closest well pad is 5.57 miles from the Northern Access 2016 Project's receipt point. As of June 23, 2016, National Fuel reported that 20 of the 75 wells (or 27 of the 82) remain to be drilled and are expected to be drilled by February 2017, 9 months before the project's anticipated in-service date.[183]

152. On September 20, 2016, National Fuel provided an update on Seneca's production activities and reported that 63 wells have been drilled under the Joint Development Agreement (i.e., only 12 of the 75 or 19 of the 82 remain to be drilled).[184] National Fuel also refutes the Conservation Groups' unsupported claim that Seneca Resources is waiting for the Northern Access 2016 Project before Seneca Resources completes and produces existing drilled wells. National Fuel notes that Seneca Resources has completed 46 of the 63 drilled wells.

153. National Fuel's response to Commission staff's data request supports the Commission's conclusion that natural gas development under the Joint Development

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[182] National Fuel June 23, 2016 Response to Environmental Data Request.

[183] *Id.*

[184] National Fuel September 20, 2016 Motion for Leave to Answer and Answer, app. B at 15-16.

Agreement will precede the Northern Access 2016 Project and does not rely on it, even if the development would benefit from the project if it goes forward. This does not show a causal connection (i.e. that the project induced Seneca to drill the wells that are the subject of the Joint Development Agreement) sufficient to require analysis of this development under NEPA as an indirect impact. But to the extent that any activities under the Joint Development Agreement have a potential cumulative impact with the Northern Access 2016 Project, that potential cumulative impact was analyzed in the EA's cumulative impact section, discussed further below.

154. As we note above, a causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if a proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).[185] Though the Conservation Groups disagree with our position, we continue to believe that the opposite causal relationship is in fact 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.

155. The evidence in the record, including the press releases and marketing statements cited by the Conservation Groups, does not demonstrate the requisite reasonably close causal relationship between the Northern Access 2016 Project and the impacts of future natural gas production to necessitate further analysis.[186]

156. National Fuel Gas Company's statements about the relationship between its production arm and its transportation arm show only that the parent company expects that its production will grow, that its transportation capacity will grow, and that growing production will benefit from growing transportation.[187] The statements do not indicate

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

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

[187] National Fuel Gas Company is the parent company of National Fuel and

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that the transportation capacity proposed in this proceeding is an essential predicate for production growth or that transportation capacity must precede production growth. The statements do not prove causation as contemplated by CEQ's regulations. Moreover, the Commission has consistently found that our knowledge that specific producers will be shippers on a proposed pipeline does not, by itself, bring the impacts of production into our NEPA review.[188]

157. The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. This does not mean, however, that the Commission's approval of this particular infrastructure project will cause or induce the effect of additional or further shale gas production. As we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs, drive new drilling.[189] If the Northern Access 2016 Project were not constructed, it is reasonable to assume that any new production spurred by such factors, including any such production by Seneca Resources, would reach intended markets through alternate pipelines or other modes of

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Seneca Resources.

[188] *See, e.g., Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 (2014); *Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138, at PP 70-73, *order on reh'g*, 141 FERC ¶ 61,043, at PP 37-41 (2012); *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161, at PP 178-200, *order on reh'g*, 142 FERC ¶ 61,025, at PP 72-87 (2012), *rev'd on other grounds, Delaware RiverKeeper Network v. FERC*, 753 F.3d 1034 (D.C. Cir., 2014); *Transcontinental Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091, at PP 127-141 (2012), *order on reh'g*, 143 FERC ¶ 61,132, at PP 49-60 (2013).

[189] *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015) (*Rockies Express*). *See also Sabine Pass LNG,* 827 F.3d at 68-69 (finding that FERC adequately explained why it was not reasonably foreseeable that its authorization of greater capacity at an LNG export terminal would induce additional domestic natural gas production); *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

transportation.[190] Again, any such production would take place pursuant to the regulatory authority of state and local governments.[191] The Northern Access 2016 Project is responding to the need for transportation, not creating it.

158. The situation here is similar to that in *Central New York Oil and Gas Co., LLC*.[192] There, the Commission authorized construction and operation of the 39-mile-long MARC I Hub Line Project, which traversed Northeast Pennsylvania, and was intended, in part, to "provide access to interstate markets for natural gas produced from the Marcellus [s]hale in northeast Pennsylvania . . . ."[193] The Commission concluded that the pipeline was not sufficiently causally related to upstream production, a conclusion affirmed by the Second Circuit, in part because producers or developers of gathering facilities could simply build longer gathering lines to connect wells in the three counties crossed by that project to existing interstate pipelines, with no Commission regulation or NEPA oversight.[194]

159. Here, a network of transmission facilities already exists through which Seneca Resources could arrange to move its produced gas from the Western Development Area to local users or into the interstate pipeline system. For example, as noted in the EA, the site for the Northern Access 2016 Project's southern terminus is an existing Producer Interconnect Station where the Clermont Gathering System already connects to Tennessee's 300 Line.[195] National Fuel Gas Company's 2016 Investor PowerPoint, cited by the Conservation Groups, similarly indicates that the existing Clermont Gathering System already interconnects with Tennessee's 300 Line and with National Fuel's existing pipeline system, while also crossing Dominion Transmission's existing system.

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[190] *Rockies Express*, 150 FERC ¶ 61,161 at P 39.

[191] *See N.J. Dep't of Envtl. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 139 (3d Cir. 2009) (NEPA does not require consideration of foreseeable effects that are not potentially subject to the control of the federal agency doing the evaluation).

[192] *Central New York Oil & Gas Co.*, 137 FERC ¶ 61,121, *order on reh'g*, 138 FERC ¶ 61,104 (2012), *aff'd sub nom. Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472 (2d Cir. 2012) (unpublished opinion).

[193] *Central New York Oil & Gas Co.*, 138 FERC ¶ 61,104 at P 5.

[194] *Central New York Oil & Gas Co.*, 137 FERC ¶ 61,121, at P 91; *see also Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x at 474 (unpublished opinion).

[195] EA at 9.

National Fuel's system more broadly interconnects with Tennessee's 200 Line and the existing systems of Empire Pipeline and Millennium Pipeline. The PowerPoint also indicates that National Fuel Gas Company's gathering subsidiary already intends to expand its Clermont Gathering System from 66 miles of existing pipeline and 26,220 horsepower of compression to more than 300 miles of pipeline and more than 60,000 horsepower of compression.[196] This shows yet another way that Seneca Resources could move its gas to market without the construction of the Northern Access 2016 Project, which underscores that the project is not an essential predicate for any additional natural gas production activities.

ii. Reasonable Foreseeability

160. The Conservation Groups incorrectly assert that the Commission has found incremental natural gas *production* to be unforeseeable.[197] Rather, the Commission has found that the potential environmental *impacts* resulting from such production are generally not reasonably foreseeable. Because production-related impacts are highly localized, 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 by producer and which depend on the applicable regulations in the various states. Accordingly, to date, the impacts of natural gas production are not reasonably foreseeable because they are "so nebulous" that we "cannot forecast [their] likely effects" in the context of an environmental analysis of the impacts related to construction and modification of natural gas pipeline facilities.[198]

161. The Conservation Groups contend that the impacts of shale gas development induced by the project is reasonably foreseeable because National Fuel Gas Company has admitted that gas for the Northern Access 2016 Project will originate from the Clermont/Rich Valley area in northeastern part of Seneca Resources Western Development Area in Cameron, Elk, and McKean Counties, Pennsylvania and because the 75 wells identified for development under the Joint Agreement provide a targeted subset of development activities for analysis.

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[196] National Fuel Gas Company 2016 Investor PowerPoint at 13.

[197] Conservation Groups Comments on the EA at 27-28.

[198] *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) (agency need not discuss projects too speculative for meaningful discussion).

162. The groups emphasize that speculation is implicit in NEPA, there is no need to know the precise location, scale, scope, and timing of shale gas drilling.[199] As evidence of reasonably foreseeable production impacts, the Conservation Groups cite reports by the U.S. Geological Survey (USGS) and by the Nature Conservancy extrapolating environmental impacts of continuing shale gas development.[200]

163. We disagree. Even accepting, *arguendo*, that the project would induce gas production in addition to the wells already drilled under the Joint Development Agreement, the impacts are still not reasonably foreseeable. Even knowing, as here, the identity of a producer of gas to be shipped on a pipeline, and the general area where that producer's existing wells are located, does not alter the fact that the number and location of any induced *additional* wells are matters of speculation. The Conservation Groups acknowledge this uncertainty in their argument that regardless when Seneca Resources drills a well, the completion and production of that well may occur much later in the future. Given that factors such as market prices and production costs, among others, drive new drilling, combined with the highly localized impacts of production, any forecasting can only be a general estimate. A broad analysis, based on generalized assumptions rather than reasonably specific information of this type, will not meaningfully assist the Commission in its decision making, e.g., evaluating potential alternatives.[201] We have previously rejected the Conservation Groups' cited reports from the USGS and the Nature Conservancy for this reason.[202] While *Northern Plains Resource Council v. Surface Transportation Board* states that speculation is implicit in NEPA, it also states that agencies are not required "to do the impractical, if not enough information is available to permit meaningful consideration."[203]

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[199] Conservation Groups Comments on the EA at 36-40.

[200] *Id.* at 28.

[201] *See, e.g., Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897 (7th Cir. 2010) (holding that an agency does not fail to give a project a "hard look" for purposes of NEPA simply because it omits from discussion a future project so speculative that the agency can say nothing meaningful about its cumulative effects).

[202] *E.g., Empire Pipeline, Inc.*, 153 FERC ¶ 61,379, at PP 67 n.108, 73 n.126 (2015).

[203] *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d at 1078 (citing *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)). *See also The Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008) (speculation in an EIS is not precluded, but the agency is not obliged to engage in endless

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164. The potential impacts of natural gas production, with the exception of greenhouse gases and climate change, are localized. We are aware of no forecasts by states, in particular Pennsylvania where the project is located, or other entities, which would enable the Commission to meaningfully predict the highly localized production-related impacts. Each locale includes unique conditions and environmental resources. Production activities are thus regulated at a state and local level. It is the states, rather than the Commission, who would be most likely to have specific information regarding future production. PA Department of Environmental Protection, for example, has developed best management practices for the construction and operation of upstream oil and gas production facilities in Pennsylvania. PA Department of Environmental Protection and the Susquehanna River Basin Commission have also enacted regulations to specifically protect water resources from potential impacts associated with the development of the Marcellus Shale region. In addition, certain activities are subject to federal regulation. For example, deep underground injection and disposal of wastewaters and liquids are subject to regulation by the EPA under the Safe Drinking Water Act. The EPA also regulates 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.

165. Nonetheless, we note that although not required by NEPA, a number of federal agencies have generally 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 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 on water resources.[204] EPA has concluded that hydraulic fracturing can impact drinking water resources under some circumstances and identified conditions under which impacts from hydraulic fracturing activities can be more frequent or severe.[205] With respect to air quality, the DOE found that natural gas development

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hypothesizing as to remote possibilities).

[204] U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States* (Aug. 2014) (DOE Addendum), http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf. *See also Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128, 16,130 (Mar. 26, 2015) (U.S. Bureau of Land Management promulgated regulations for hydraulic fracturing on federal and Indian lands to "provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health").

[205] *See* U.S. EPA, *Hydraulic Fracturing for Oil and Gas: Impacts from the*

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leads to both short- and long-term increases in local and regional air emissions.[206] It also found that such emissions may contribute to climate change.[207] But to the extent that natural gas production replaces the use of other carbon-based energy sources, the DOE found that there may be a net positive impact in terms of climate change.[208]

166. The Conservation Groups cite *Mid States Coalition for Progress v. Surface Transportation Board,*[209] in which the Eighth Circuit Court of Appeals stated that, "when the nature of the effect is reasonably foreseeable but its extent is not, [an] agency may not simply ignore the effect."[210] The groups' reliance on *Mid States* is unavailing. The EA did not ignore the effects of natural gas development. The cumulative impact analysis considered the nature of impacts from this development within McKean County, Pennsylvania, where the project's southern terminus and 27 miles of pipeline are located.[211] New York has a moratorium on shale gas development. Specifically, the EA considered the potential cumulative impacts of natural gas development on soil and geology, water resources, land use and visual resources, and air quality, climate change, and noise.[212]

167. In the *Mid States* case, the agency acknowledged that a particular outcome was reasonably foreseeable—increased usage of 100 million tons of coal at coal-burning

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Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States, at ES3-4 (Dec. 2016) (final report), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=529930 (finding significant data gaps and uncertainties in the available data prevented EPA from calculating or estimating the national frequency of impacts on drinking water resources from activities in the hydraulic fracturing water cycle).

[206] DOE Addendum at 32.

[207] *Id.* at 44.

[208] *Id.*

[209] 345 F.3d 520 (8th Cir. 2003) (*Mid States*).

[210] *Mid States*, 345 F.3d. at 549.

[211] EA at app. G, G-5 tbl.G-2 (see row for "Oil and Natural Gas Wells and gathering lines").

[212] EA at 139-160.

electric generation plants resulting from the availability of cheaper coal after the new rail lines were built—but then failed to consider its impact.[213] In particular, the court in *Mid States* faulted the agency for failing to consider the environmental effects of the known increase in coal usage where the agency had already identified the nature of the ensuing environmental effects.[214] Here, we do not concede the causal relationship, and even if we were to assume a causal relationship for argument, the EA did analyze the nature of effects from natural gas development near the project area even though the extent of the effect is not reasonably foreseeable.[215] Specifically, even if additional gas were induced, the amount, timing, and specific location of such development activity is speculative.[216] Thus, unlike the agency in *Mid States*, here we are not "simply ignor[ing]" the impacts of future gas development; rather, there are no identified "specific and causally linear indirect consequences that could reasonably be foreseen and factored into the Commission's environmental analysis."[217]

11. Cumulative Impacts

168. CEQ defines cumulative impacts as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[218] The requirement that an impact must be "reasonably foreseeable" to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

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[213] *Mid States*, 345 F.3d. at 549-50; *see also Freeport LNG*, 827 F.3d at 48 (finding that *Mid States* "looks nothing like" challenge that FERC failed to consider indirect impacts claimed increased natural gas production stemming FERC's authorization of liquefied natural gas export facilities).

[214] *Id.* at 549.

[215] EA at 139-160.

[216] *See generally Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (holding that an agency need not "consider other projects so far removed in time or distance from its own that the interrelationship, if any, between them is unknown or speculative").

[217] *Freeport LNG*, 827 F.3d at 47.

[218] 40 C.F.R. § 1508.7 (2016).

169. 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."[219] CEQ has explained that "it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful."[220] 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."[221] 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.[222]

170. The Conservation Groups, the Niagara Chapter of the Sierra Club, and EPA raise related claims that the EA fails to take a hard look at the cumulative impact resulting from the Northern Access 2016 Project because the EA uses arbitrarily narrow geographic boundaries for analysis of potential cumulative impacts to several affected resources. The Conservation Groups object to the EA's assumptions that the impacts of other past, present, and reasonably foreseeable actions will be reduced through measures required under applicable federal and state permits. The Conservation Groups also claim that the EA's analysis of shale gas development's potential cumulative impacts omits reasonably foreseeable impacts on a variety of resources.

171. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects associated with a proposed action.[223] The agency should

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[219] *Kleppe*, 427 U.S. at 413.

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

[221] *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d at 88.

[222] *See* CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005) (2005 CEQ Guidance), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

[223] 1997 CEQ Cumulative Effects Guidance at 11.

then establish the geographic scope for analysis.[224] Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts.[225] Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.[226] 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.[227]

172. The cumulative effects analysis in the EA comports with CEQ guidance.[228] The EA acknowledged that the Northern Access 2016 Project's temporary and permanent impacts have the potential to cumulatively affect geology and soils; water resources; vegetation, fisheries, and wildlife; land use and visual resources; socioeconomics; cultural resources; air quality; noise; and climate change.[229] The EA fully explained that the chosen geographic scopes of the cumulative impact analysis were informed by several factors: the EA's analysis of the project's direct and indirect impacts had concluded that they would not be significant, the project's impacts would almost all be contained within or be adjacent to the temporary construction right-of-way and alternative temporary workspaces; project-disturbed ecosystems would be restored or would otherwise recover; the mainline pipeline and Wheatfield Dehydration Facility would be co-located with existing facilities; and National Fuel would implement mitigation measures described in

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[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *See* 2005 CEQ Guidance at 2-3, n.89, 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 of the environmental impacts of the proposed action. Further, the Supreme Court held that determining 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 agenc[y]," and is overturned only if arbitrary and capricious. *See Kleppe*, 427 U.S. at 414-15.

[228] *See* EA at 139-141. We also note that the 1997 CEQ Cumulative Effects Guidance states that the "applicable geographic scope needs to be defined case by case." 1997 CEQ Cumulative Effects Guidance at 15.

[229] EA at 139, 141.

its own plans and in the EA's recommendations.[230] The chosen geographic scopes of analysis range from the project's direct footprint for impacts on geologic and soil resources to four project-crossed watershed subbasins for impacts on water resources.[231] The EA identifies 75 actions affecting resources within these geographic areas in addition to the oil and natural gas wells and gathering lines that are "present throughout the region."[232]

173. The Conservation Groups object to the use of a 0.5-mile geographic scope for potential cumulative impacts to vegetation, wildlife, and land use. The groups assert that a 0.5-mile geographic scope conflicts with guidance from the CEQ and EPA stating that an agency's cumulative impact analysis should use broader geographic boundaries like human communities, landscapes, watersheds, airsheds, and natural ecological boundaries.[233] The EA's introduction misstates the geographic scope as 0.5 mile. The EA actually uses the watershed subbasin to analyze potential cumulative impacts to vegetation, fisheries, and wildlife species because these resources can be specialized within a watershed.[234] The USGS estimates the smallest of these subbasins to have a surface area of 560 square miles.[235] The EA uses a 5-mile area to analyze potential cumulative impacts to threatened and endangered species, explaining that this smaller

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[230] Conservation Groups Comments on the EA at 38-39.

[231] EA at 141, 142, 143. The USGS estimates the surface area of these four "Hydrologic Unit Code 8" subbasins to total 4,667 square miles: 799 for Niagara, 717 for Buffalo-Eighteenmile, 560 for Cattaraugus, and 2591 for Upper Allegheny. *See* USGS, *Watershed Boundary Dataset* (last visited Dec. 8, 2016), http://water.usgs.gov/GIS/wbd_huc8.pdf. The EA's other choices of geographic scope include: watershed subbasin for vegetation, wildlife, and land use; 5 miles for threatened and endangered species; affected counties for socioeconomic conditions; 0.25 mile for short-term air impacts; 31 miles for long-term air impacts; 0.25 mile for short-term noise impacts; and 1 mile for long-term noise impacts. EA at 141.

[232] EA at 141; *id.* app. G, tbls.G-1, G-2 (identifying existing and future actions considered for potential cumulative impacts).

[233] Conservation Groups Comments on the EA at 38-39 (citing CEQ, Considering Cumulative Effects under the NEPA at 12 (1997), EPA, Consideration of Cumulative Impacts in EPA Review of NEPA Documents at 8 (1999)).

[234] EA at 146.

[235] *Supra* note 202.

area reflects the localized nature of impacts, particularly for less mobile species.[236] The EA emphasizes that the project's own impacts on vegetation, wildlife, and land use will be reduced through co-location with existing facilities, post-construction revegetation and restoration, and limited right-of-way maintenance.[237] The EA appropriately related the geographic scopes of analysis to the limited magnitude of the proposed action's environmental impacts. The Conservation Groups offer no rationale that would delineate a broader geographic scope.

174. Also addressing vegetation, EPA claims that the EA should include a table detailing the total loss of trees from forest edges and forest interior resulting from pipelines within the affected counties. The EA notes that the project will permanently disturb 338.7 acres of forested lands and acknowledges that all projects constructed in the same general location and timeframe could result in additional habitat fragmentation where vegetation is modified from forest to scrub-shrub or herbaceous classes.[238] Though the precise impacts on vegetation from most of the 77 identified other actions within the geographic area cannot be known, the EA does quantify the reasonably foreseeable acreage of forested lands disturbed by ten other Commission-jurisdictional projects,[239] equal to 1109 combined acres (of which 233 were or will be permanently disturbed). Added to the Northern Access 2016 Project, the total acreage of permanently disturbed forested lands will be 561.7 acres.

175. Regarding land use, recreation, special interest areas, and visual resources, the Conservation Groups argue that the 10-mile geographic scope is too narrow. The groups claim that because National Fuel's parent company identified Seneca Resources' Western Development Area as the source of supply for the Northern Access 2016 Project, and because Seneca Resources will expand its shale gas development activities within its Western Development Area over time, the EA should have analyzed the cumulative impact on state and federal public lands, including the Allegheny National forest and Pennsylvania State Forest Lands, that are in "very close proximity" to the Northern Access 2016 Project and expanding shale gas development.

176. The Conservation Groups do not specify how "very close proximity" should differ from the EA's 10-mile area and they do not specify the distances from the project to any

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[236] EA at 146.

[237] EA at 147 (vegetation), 149 (wildlife), 151 (land use).

[238] EA at 147.

[239] EA at 147.

public lands. As we concluded in the discussion of indirect impacts above, the groups' purported evidence of Seneca Resources' future development does not provide enough detail to make the potential impacts from such development reasonably foreseeable and does not alter the geographic scope for the EA's cumulative impact analysis for land use, recreation, special interest areas, and visual resources.

177. The Conservation Groups also assert that the EA fails to independently analyze the potential cumulative impact because the EA states that the impacts of the project and other actions will be reduced or eliminated through mitigation measures required under other federal and state permits. This assumption influences the EA's conclusions about cumulative impacts on wetlands, surface waters, vegetation, water resources, fisheries and aquatic resources, and special status species.[240] The groups liken the EA's analysis to those invalidated in *Idaho v. Interstate Commerce Commission*,[241] *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission*,[242] and *Wildearth Guardians v. U.S. office of Surface Mining, Reclamation and Enforcement.*[243]

178. The EA does not defer our NEPA responsibilities to other agencies; rather it explains that one factor in the EA's cumulative impact conclusion for each affected resource is the anticipated compliance of the Northern Access 2016 Project and other actions with mitigation required by the Commission and other agencies under applicable laws. This assumption is reasonable. The Commission is not abdicating its responsibility nor are we deferring our analysis; rather, we are looking at the potential cumulative impacts in context. The EA quantifies other action's potential cumulative impacts where practical,[244] and otherwise qualitatively describes those impacts, as CEQ recommends. The EA anticipates compliance with other agencies' required measures as part of a complete picture both of the generally-described potential cumulative impacts and the generally-described mitigation of those impacts. By contrast, the Conservation Groups'

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[240] EA at 145 (wetlands), 146 (surface waters), 147-148 (vegetation), 148 (fisheries and aquatic resources), 150 (special status species).

[241] 35 F.3d 585, 595 (D.C. Cir. 1994).

[242] 449 F.2d 1109, 1123 (D.C. Cir. 1971).

[243] 104 F. Supp. 3d 1208, 1227-28 (D. Colo. 2015).

[244] For example, the EA identifies all vegetation losses from ten NGA-jurisdictional projects. EA at 147.

cited cases all show federal agencies abdicating their NEPA responsibilities to defer to the scrutiny of other agencies.[245]

179. At the core of the Conservation Groups' objections to the EA's cumulative impact analysis is the groups' concern about natural gas development throughout the Marcellus Shale region. The Conservation Groups claim that available studies identify the "substantial impact" that past, present, and future shale gas drilling activities pose throughout the Marcellus and Utica shale regions, and that the Commission must take a hard look at these impacts on a much broader scale as part of the cumulative impact analysis.[246]

180. There is a geographic limit to the scope of a cumulative impacts analysis. Courts have held that a meaningful cumulative impacts analysis must identify five things: "(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected *in that area* from the proposed project; (3) other actions-past, present, and proposed, and reasonably foreseeable-that have had or are expected to have impacts *in the same area*; (4) the impacts or expected impacts from these other actions; and (5) the

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[245] *Contra Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 589-590 (D.C. Cir. 1994) (Interstate Commerce Commission's finding of no significant impact was unsupported by independent investigation of impact to wetlands, surface waters, or protected species, relying instead on requirements that applicant later consult with other agencies to determine potential impacts and obtain permits); *Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-27 (Atomic Energy Commission's regulation prohibited agency's consideration of problems of water quality, deferring instead to states' analyses for water quality certifications); *Wildearth Guardians v. US Office of Surface Mining, Reclamation and Enforcement*, 104 F. Supp. 3d 1208, 1225-1226 (D. Colo. 2015) (Office of Surface Mining's findings of no significant impact in a pair of four-page EAs were unsupported by independent investigation, relying instead on outdated studies and on the proposed decision and findings of state's mining agency).

[246] Conservation Groups Comments on the EA at 42-55 (citing Milheim et al., U.S. Geological Survey, *Landscape Consequences of Natural Gas Extraction in Cameron, Clarion, Elk, Forest, Jefferson, McKean, Potter, and Warren Counties, Pennsylvania*, 2004-2010, Open-File Report 2014-1152 (2014) (2014 USGS Report); Brittingham, et. al., *Ecological Risks of Shale Oil and Gas Development to Wildlife, Aquatic Resources, and Their Habitats*, 48 ENVTL. SCIENCE & TECHNOLOGY 11034 (Oct. 7, 2014) (published online on Sept. 4, 2014) (2014 Brittingham study); PA Dep't of Conservation and Natural Res., *2015 Draft State Forest Management Plan* (Sept. 2015); U.S. Forest Serv., *Allegheny National Forest Roads Analysis Report* (2003).

overall impact that can be expected if the individual impacts are allowed to accumulate."[247] As explained above, we affirm the EA's chosen geographic boundaries for each affected resource. The EA appropriately quantifies the potential for cumulative impacts to the extent practicable, and otherwise describes it qualitatively.[248] The EA appropriately explains that actions outside the chosen geographic scope of analysis are in most cases not assessed because their impacts would tend to be localized and not contribute significantly to the impacts of the proposed project.[249] We believe the EA's analysis is consistent with the CEQ guidance and case law.[250]

181. The impacts from natural gas development on a broader scale are appropriately omitted from the EA. Given the large geographic scope of the Marcellus and Utica shale resources, the magnitude of the analysis requested by the Conservation Groups bears no relationship to the limited magnitude of the Northern Access 2016 Project's 27.8 miles of pipeline in McKean County, Pennsylvania, of which 14 miles are co-located with existing right-of-way.[251] The remaining 71 miles of pipeline, both compressor stations, and the dehydration facility sit in New York where shale gas development is prohibited. Moreover, even if the Commission were to vastly expand the geographic scope of the cumulative effects analysis, the impacts from such development are not reasonably foreseeable.[252] Accordingly, the EA appropriately excluded broader shale gas drilling activities in the Marcellus and Utica shale formations.

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[247] *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (quoting *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d. 852, 864 (D.C. Cir. 2006)) (emphasis added).

[248] EA at 140.

[249] EA at 140.

[250] *See* 1997 CEQ Guidance at 15.

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

[252] The studies cited by the Conservation Groups, *supra* note 242, are not specific enough to meaningfully inform the Commission's decision making. The cited 2014 USGS report provides only a retrospective analysis using aerial images to detect land use and land cover changes from natural gas development between 2004 and 2010. The 2014 Brittingham study, as well as the 2015 plan from Pennsylvania's natural resources agency and the 2003 report from the U.S. Forest Service, offer only general conclusions about the potential qualitative impacts on terrestrial and aquatic ecosystems from shale development. They do not quantify specific impacts, much less describe or quantify the

(continued...)

182. In our view, the Conservation Groups' arguments regarding the geographic scope of our cumulative impacts analysis are based on their erroneous claim, discussed above, that the Commission must conduct a regional programmatic NEPA review of natural gas development and production in the Marcellus and Utica shale formations, an area that covers potentially thousands of square miles. We decline to do so. As the Commission has previously explained, there is no Commission program or policy to promote additional natural gas development and production in shale formations.

183. The EA did identify that oil and natural gas wells and gathering lines are present throughout the region and noted that the EA would treat as one project all the oil and natural gas wells and gathering lines present within McKean County, where the project's receipt interconnection is located.[253] The EA analyzed, to the extent practical, the potential cumulative impacts from natural gas development within the selected geographic boundaries for geologic and soil resources, water resources, vegetation/fisheries/wildlife, threatened and endangered species, land use and visual resources, socioeconomics, air quality, climate change, and noise. For example, within the EA's 0.25-mile boundary for affected geologic and soil resources, the EA identified 66 active oil and gas wells, 34 plugged and abandoned wells, 13 wells of unknown status, and 6 wells proposed but never drilled.[254] Where possible, the EA quantified production-related impacts. For example, the EA used figures from the USGS that each well pad and its associated infrastructure uses 9 acres of land and indirectly affects 21 acres of land. The EA calculated that the development of the 118 wells currently drilled or proposed within 0.25 mile of the project would use 1,062 acres of land and indirectly affect 2,478 acres of land, presumed to be forested.[255]

184. As noted above, upstream and downstream impacts of the type described by commenters do not meet the CEQ definition of either indirect or cumulative impacts. Therefore, they are not mandated as part of the Commission's NEPA review. However, to provide the public additional information and to inform our public convenience and necessity determination under section 7(e) of the Natural Gas Act,[256] Commission staff,

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subset of impacts that potentially overlap with the impacts of the Northern Access 2016 Project.

[253] EA at 141; *id.* app. G at G-5.

[254] EA at 142.

[255] EA at 151.

[256] 15 U.S.C. § 717f(e) (2012).

after reviewing publicly available DOE and EPA methodologies, has prepared the following analyses regarding the potential impacts associated with unconventional gas production and downstream combustion of natural gas. As summarized below, these analyses provide only an upper-bound estimate of upstream and downstream effects. In addition, these estimates are generic in nature because no specific end uses have been identified and reflect a significant amount of uncertainty.

185. With respect to upstream impacts, Commission staff estimated the impacts associated with the production wells that would be required to provide 100 percent of the volume of natural gas to be transported by the Northern Access 2016 Project, on an annual basis for GHG, and for the life of the project for land-use and water use within the Marcellus shale basin.[257] According to a 2016 study by the DOE and the National Energy Technology Laboratory (NETL), approximately 1.48 acres of land is required for each natural gas well pad and associated infrastructure (road infrastructure, water impoundments, and pipelines).[258] Based upon the project capacity and the expected estimated ultimate recovery of Marcellus shale wells,[259] between 1,100 and 2,100 wells would be required to provide the gas over the estimated 30-year lifespan of the project. Therefore, on a normalized basis over the life of the project,[260] these assumptions lead us to estimate an upper-bound between 52 and 100 additional acres per year may be impacted for well drilling.[261] This estimate of the number of wells is imprecise and subject to a significant amount of uncertainty.

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[257] Staff assumed a 30-year life for the project.

[258] *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, DOE/NETL-2015/1714 at 22 tbl.3-6 (Aug. 30, 2016) (*2016 Life Cycle Analysis*).

[259] John Staub, Energy Information Administration, "The Growth of U.S. Natural Gas: An Uncertain Outlook for U.S. and World Supply," Presentation at 2015 EIA Energy Conference, Washington, D.C. (June 15, 2015), http://www.eia.gov/conference/2015/pdf/presentations/staub.pdf, and DOE, National Energy Technology Laboratory, *Environmental Impacts of Unconventional Natural Gas Development and Production* DOE/NETL-2014/1651 (May 29, 2014).

[260] Normalized yearly impacts are estimated based on the overall impacts for the life of the project averaged on a per year basis.

[261] *2016 Life Cycle Analysis* at 24 tbl.3-8. The *2016 Life Cycle Analysis* estimates that within the Appalachian Shale region, the affected acreage would be composed of 72.3 percent forested land, 22.4 percent agricultural land, and 5.3 percent grass or open lands.

186. We also estimated the amount of water required for the drilling and development of these wells over the 30-year period using the same assumptions. In a separate 2014 study, DOE and NETL estimated that an average Marcellus shale well requires between 3.88 and 5.69 million gallons of water for drilling and well development, depending on whether the producer uses a recycling process in the well development.[262] Therefore, the production of wells necessary to supply the project could require as much as 140 to 400 million gallons of water per year on a normalized basis over the 30 year life of the project.

187. Regarding climate change, the Conservation Groups object to the EA's comparison of potential cumulative GHG emissions (i.e., from the project and from the identified other actions) to the total annual GHG emissions in Pennsylvania and New York as a basis to conclude that GHG emissions would be minor. The groups note that CEQ guidance about greenhouse gas emissions explains that a comparison to global emissions is an inappropriate basis for (a) deciding whether or to what extent to consider climate change impacts under NEPA or (b) characterizing the potential impacts of the proposed action, reasonable alternatives, and mitigation. The groups also refute the Commission's statement that no standard methodology exists to determine how a project's contribution to GHG emissions would translate into physical effects on the environment, given that CEQ's guidance states that "[q]uantification tools are widely available and are already in broad use."[263]

188. The CEQ guidance warns that agencies should not limit themselves to calculating a proposed action's emissions as a percentage of sector, nationwide, or global emissions. The EA was not limited in this way. The CEQ guidance does not prohibit a comparison to statewide emissions as a frame of reference to better understand the magnitude of GHG emissions. The EA correctly concludes that no standard methodology exists to determine how a project's contribution to GHG emissions would translate into physical effects on the environment. Without an accepted methodology, the Commission cannot make a finding whether a particular quantity of GHG emissions poses a significant impact to the environment, whether directly or cumulatively with other sources.

189. The EA does not include upstream and downstream GHG emissions; however, Commission staff has conservatively estimated upper-bound annual upstream GHG emissions as: 410,000 tpy CO_2e from extraction, 790,000 tpy CO_2e from processing, and

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[262] DOE, NETL, *Environmental Impacts of Unconventional Natural Gas Development and Production*, DOE/NETL-2014/1651 at 76, ex.4-1 (May 29, 2014).

[263] Conservation Groups Comments on EA at 57 (quoting CEQ's GHG guidance at 12).

250,000 tpy CO_2e from the non-project pipelines (both upstream and downstream to the delivery point in Chippawa). Commission staff has conservatively estimated upper-bound annual downstream emissions as 9,200,000 tpy CO_2e from end-use combustion.[264]

190. Again, this is an upper-bound estimate that involves a significant amount of uncertainty. This is especially true for downstream end-use combustion because some of the gas may displace other fuels, which could actually lower total CO_2e emissions. It may also displace gas that otherwise would be transported via different means, resulting in no change in CO_2e emissions. This estimate also assumes the maximum capacity is transported 365 days per year, which is rarely the case because many projects are designed for peak use. Therefore, it is unlikely that this total amount of GHG emissions would occur; and emissions are likely to be significantly lower than the above estimate.

191. Oil Change International asserts that the effects of natural gas on climate change are equal to or greater than coal if the comparison uses the most recent factors for methane's global warming potential from the fifth report of the Intergovernmental Panel on Climate Change and uses gas leakage rates of up to 5.4 percent for conventional wells and 12 percent for shale wells.[265] The coalition notes that the fifth report uses a 20-year impact of methane equal to 86 times that of CO_2 and a 100-year impact equal to 36 times that of CO_2. The Commission instead relied on established methodologies used by the EPA and DOE.

192. We find that the EA appropriately evaluates the potential cumulative impacts associated with the project and other past, present, and reasonably foreseeable future projects, including natural gas development, and agree with its conclusions.

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[264] The upstream GHG emissions were estimated using methods in NETL's *2016 Life Cycle Analysis*. Generally, Commission staff used the average leak and emission rates identified in the NETL analysis for each segment of extraction, processing, and transport. The method is outlined in Section 2 of the NETL report, and the background data used for the model is outlined in Section 3.1. Staff used the results identified in Figures 4.3, 4.4, and 4.5 to look at each segment and grossly estimate GHG emission. To be conservative, staff did not account for the new New Source Performance Standards for oil and gas, or other GHG mitigation. *See Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources*, 81 Fed. Reg. 35,824 (June 3, 2016) (altering 40 C.F.R. pt. 60, subpts. OOOO and OOOOa). Additionally, staff made a conservative estimate of the length of non-jurisdictional pipeline prior to the gas reaching project components as well as the length of downstream pipeline to the delivery point in Chippawa.

[265] Oil Change International August 8, 2016 Comments on the EA at 22.

12. Other Issues

193. A commenter states that the project, specifically the Wheatfield Dehydration Facility and associated piping, is within the Niagara River Greenway. The Niagara River Greenway Plan notes that the greenway was mapped by jurisdictional boundaries (i.e., town limits) and not by sensitive resources or stretches of river.[266] Thus the proposed facility falls within the mapped greenway area. The plan also notes that the Niagara River Greenway Commission "recognizes that efforts and resources should be focused on the Niagara River and its shoreline." The Wheatfield Dehydration Facility would not impact the river or shoreline, as it is located in a previously disturbed area separated from the river by other development including industrial facilities. Therefore, we conclude that the project will not impact the greenway.

194. Commenters, including the Town of Pendleton, state that local land use laws do not allow for development of the Pendleton Compressor Station at the proposed location. We note that any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage 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.[267]

195. One commenter questions the effectiveness of having a National Fuel-employed environmental inspector monitoring compliance with permit conditions. As noted in the EA, a Commission-directed environmental compliance monitor will also oversee

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[266] Niagara River Greenway Commission, *Niagara River Greenway Plan and Final Environmental Impact Statement* at 7-9 (Apr. 4 2007), http://www.niagaragreenway.org/sites/all/themes/nrgc/FINAL%20REPORT.pdf. The plan also notes that the Niagara River Greenway Commission "recognizes that efforts and resources should be focused on the Niagara River and its shoreline." *Id.* at 7.

[267] *See* 15 U.S.C. § 717r(d) (2012) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers,* 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

National Fuel's adherence to environmental commitments and regulations.[268] If this monitor identifies issues of non-compliance, the monitor can report the issues directly to the Commission staff environmental project manager. Commission environmental staff will address any non-compliance, including by developing additional protective measures. Moreover, the costs of delays during construction that come from permit non-compliance serve as suitable incentives for companies to strictly adhere to regulations and permit stipulations.

196. The FWS recommends that an environmental monitor be on-site during in-stream construction. National Fuel has committed to having environmental inspectors on-site during all construction, including during in-stream activities. Additional monitors from either the Commission staff or regulatory agencies may also be present during those activities, offering sufficient oversight during in-stream construction.

IV. Conclusion

197. Based on the information and analysis in the EA and in this order, we conclude that if constructed and operated in accordance with National Fuel's and Empire's application and supplements, and in compliance with the environmental conditions in Appendix B of this order, our approval of this proposal will not constitute a major federal action significantly affecting the quality of the human environment.

198. The Commission on its own motion received and made part of the record in this proceeding all evidence, including the application(s), as 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 National Fuel Gas Supply Corporation authorizing it to construct and operate the Northern Access 2016 Project, as described and conditioned herein, and as more fully described in its application.

(B) A certificate of public convenience and necessity is issued to Empire Pipeline, Incorporated, authorizing it to construct and operate the Northern Access 2016 Project, as described and conditioned herein, and as more fully described in its application.

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[268] EA at 19.

(C) The certificate authority issued in Ordering Paragraphs (A) and (B) are conditioned on National Fuel's and Empire's:

(1) completing the authorized construction of the proposed facilities and making them available for service within two years of the date of this order, pursuant to section 157.20(b) of the Commission's regulations;

(2) compliance with all applicable Commission regulations 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;

(3) compliance with the environmental conditions in Appendix B to this order; and

(4) executing contracts, prior to the commencement of construction, for the firm service in accordance with the volumes and the terms of service reflected in its precedent agreements.

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

(E) Empire's incremental recourse rate for transportation service under Rate Schedule FT – Original Empire Pipeline is approved.

(F) Empire's request for a pre-determination supporting rolled-in rate treatment for the costs of the pin its next general NGA section 4 rate proceeding is denied, as described above.

(G) National Fuel's request for waiver of its GT&C section 31.1 is denied, as discussed above.

(H) Empire's request to charge an initial Pendleton Compressor fuel factor is approved.

(I) National Fuel **and** Empire shall file revised actual tariff records no earlier than 60 days and no later than 30 days, prior to the date the project facilities go into service.

(J) National Fuel **and** Empire shall keep separate books and accounts of costs attributable to the proposed incremental services, as described above.

(K) National Fuel is granted permission and approval under section 7(b) of the NGA to abandon the facilities described in this order.

(L) Empire is granted permission and approval under section 7(b) of the NGA to abandon the facilities described in this order.

(M) National Fuel **and** Empire must notify the Commission within 10 days of the abandonment of the facilities discussed in Ordering Paragraphs K and L.

(N) The untimely motions to intervene are granted.

(O) National Fuel's and Empire's motion to answer protests is rejected.

By the Commission. Commissioner Bay's separate statement is attached.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix A – Timely Intervenors

Responding to the March 27, 2015 Notice of Application

Allegheny Defense Project
Anadarko Energy Services Company
Edward J. Burger, Jr.
Jean Burger
Chevron USA Inc.
Barbara Ciepiela
ConocoPhillips Company
Consolidated Edison Company of New York, Inc.
Cross Timbers Energy Services, Inc.
Direct Energy Business Marketing, LLC
Gary Gilman
Barabara Glavin
National Grid Gas Delivery Companies
New York State Department of Environmental Conservation
New York State Electric & Gas Corporation
NiSource Distribution Companies:
    Columbia Gas of Pennsylvania
    Bay State Gas Company d/b/a Columbia Gas of Massachusetts
NJR Energy Services Company
John C. Partsch
Eugene Parzych
Town of Pendleton, New York
Pennsylvania Alliance for Clean Water and Air
Range Resources-Appalachia, LLC
Rochester Gas and Electric Corporation
Seneca Resources Corporation
Shell Energy North America (US), L.P.
SWEPI LP

Responding to the November 11, 2015 Notice of Amendment to Application

Myles S. Barraclough
Jason Brosius
Mary Bryant

Amy L. Bush
Donna Hahn
Paula J. Hargreaves
Michael Kubiak
Kimberly Lemieux
Victor Lemieux
Joel Maerten
Roy A. Mura
National Fuel Gas Distribution Corporation
Sam and Lynn Pinto
Kristen R. Sidebottom
Karen Slote
Ann Marie Paglione
Angela Passalacqua
Gino Passalacqua
Kim Zugelder

Appendix B – Environmental Conditions

1. National Fuel Gas Supply Corporation (National) and Empire Pipeline, Inc. (Empire) (collectively referred to as National Fuel) shall follow the construction procedures and mitigation measures described in its applications and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. National Fuel 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**, National Fuel shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), 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 location(s) 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**, National Fuel 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.

National Fuel'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. National Fuel'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 or facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. National Fuel 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 National Fuel's Erosion and Sediment Control and Agricultural Mitigation 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**, National Fuel shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. National Fuel must file revisions to the plan as schedules change. The plan shall identify:

   a. how National Fuel will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;

   b. how National Fuel 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 National Fuel will give to all personnel involved with construction and restoration initial and refresher training as the Project progresses and personnel change.

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

   g. the procedures (including use of contract penalties) National Fuel 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. National Fuel 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, National Fuel 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 National Fuel'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 National Fuel from other federal, state, or local permitting agencies concerning instances of noncompliance, and National Fuel's response.

9. National Fuel shall develop and implement environmental complaint resolution procedures. The procedures shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the right-of-way. **Prior to construction**, National Fuel shall mail the complaint procedures to each landowner whose property would be crossed by the project.

a. In its letter to affected landowners, National Fuel shall:

(1) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
(2) instruct the landowners that if they are not satisfied with the response, they should call National Fuel's Hotline; the letter should indicate how soon to expect a response; and
(3) instruct the landowners that if they are still not satisfied with the response from National Fuel's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.

b. In addition, National Fuel shall include in its weekly status report a copy of a table that contains the following information for each problem/concern:

(1) the identity of the caller and date of the call;
(2) the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;
(3) a description of the problem/concern; and
(4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.

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

11. National Fuel 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.

12. **Within 30 days of placing the authorized facilities in service,** National Fuel 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 National Fuel 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.

13. **Prior to construction,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP, an analysis of the direct pipe drill method as an alternate method at the two road crossings and the Allegheny River crossing.

14. **Prior to construction,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP, a geotechnical exploration report that evaluates slope configurations and stability evaluations for the Pendleton Compressor Station and interconnect with Tennessee Gas Pipeline Company, L.L.C.

15. **Prior to construction,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP:

    a. a desktop evaluation utilizing topographic maps and LiDAR imagery to assess the degree of karst development, if any, along the EMP-03 pipeline alignment and the Wheatfield Dehydration Facility in Niagara County. The evaluation shall be followed by a site reconnaissance to field verify and map karst features identified;

    b. if necessary, conduct a geotechnical investigation that identifies areas along the EMP-03 pipeline and within the Wheatfield Dehydration Facility site; and

    c. if necessary, based on the results of a and b above, prepare a karst mitigation plan that includes the specific measures that will be implemented to avoid (minor adjustment of facilities) or mitigate (properly close or protect) karst features encountered during construction. At a minimum, the construction measures in this plan shall include:

        (1) stopping work in the area until a remedial assessment is carried out;

(2) notifying the New York Geological Survey and FERC staff that karst features have been encountered;
(3) prohibiting construction equipment, vehicles, hazardous materials, chemicals fuels lubricating oils, and petroleum products from being parked, refueled, stored or serviced within a 100 foot radius of any karst feature;
(4) installing additional erosion control measures to prevent drainage toward any karst feature; and
(5) using a qualified geologist licensed in the state where the work is being performed to monitor excavation activities at high probability karst.

16. **Within 30 days of placing the facilities in service,** National Fuel shall file with the Secretary a report describing any complaints it received regarding well yield or water quality, the results of any water quality or yield testing that was performed, and how each complaint was resolved.

17. **In the event of the failure of any waterbody horizontal directional drill,** National Fuel shall file with the Secretary a site-specific open-cut or other crossing plan(s) for review and approval by the Director of OEP. National Fuel shall develop the plans in consultation with the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service and the plans shall include scaled drawings identifying all areas that will be disturbed by construction and a description of the mitigation measures that will be implemented to minimize effects on water quality and in-stream resources.

18. **Prior to construction,** National Fuel shall file with the Secretary letters of concurrence from the U.S. Fish and Wildlife Service and the New York State Department of Environmental Conservation demonstrating that water withdrawal from Oil Creek and the Allegheny River is acceptable.

19. **Prior to construction**, National Fuel shall file with the Secretary, for review and written approval from the Director of the OEP, revised project alignment sheets to clarify that the additional temporary workspace proposed in wetlands at mileposts 24.8 and 76.7 and in waterbodies at mileposts 5.0, 9.9, and 24.9 have been removed or moved to where the additional temporary workspaces will be set back at least 10 feet from the water's edge.

20. **Prior to construction**, National Fuel shall file with the Secretary, for review and written approval from the Director of OEP, a revised table B.2.c-2 that demonstrates the additional temporary workspaces will be properly set back from the feature; or National Fuel shall provide additional justification for the workspace locations.

21. **Prior to construction,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP, a final invasive plant species plan developed through coordination with the New York State Department of Environmental Conservation and Pennsylvania Department of Conservation and Natural Resources identifying the practices that will be implemented during construction and restoration activities to prevent the introduction and spread of invasive species.

22. National Fuel shall not begin construction activities **until**:

    a. freshwater mussel surveys are complete for Dodge Creek and Ischua Creek for the clubshell and the rayed bean;

    b. National Fuel submits full survey reports to the U.S. Fish and Wildlife Service's New York Field Office, the Pennsylvania Fish and Boat Commission, and the Secretary;

    c. the FERC staff completes Endangered Species Act Section 7 consultation with the U.S. Fish and Wildlife Service; and

    d. National Fuel has received written notification from the Director of OEP that construction or use of mitigation may begin.

23. **Prior to construction in the Bear Creek State Forest,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP, its final plan for construction across the state forest including any special mitigation measures, restoration measures, and any applicable agency correspondence.

24. **Prior to construction,** National Fuel shall file with the Secretary, for review and written approval of the Director of OEP, its final visual screening plan for the Pendleton Compressor Station. The plan shall, at a minimum, show the locations of facility components, roads, and parking areas, and include a description of the types and quantities of vegetation screening to be planted. The plan shall also describe how National Fuel's building design is consistent with the existing landscape.

25. National Fuel shall not begin implementation of any treatment plans/measures (including archaeological data recovery); construction of facilities; or use of any staging, storage, or temporary work areas and new or to-be-improved access roads in areas not previously evaluated or where access was denied **until**:

    a. National Fuel files with the Secretary:

        (1) all cultural resources survey reports, including evaluation reports, avoidance plans, and treatment plans;

(2) comments on survey reports, evaluation reports, avoidance plans, and treatment plans from the State Historic Preservation Office as well as any comments from federally recognized Indian tribes;
(3) comments from the Advisory Council on Historic Preservation if historic properties would be adversely affected; and

b. The FERC staff reviews and the Director of OEP approves all cultural resources survey reports and plans, and notifies National Fuel in writing that treatment plans/measures may be implemented and/or construction may proceed.

All material filed with the FERC that contains 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."**

26. **Prior to construction of the Highway 16 horizontal directional drill,** National Fuel shall file with the Secretary, for the review and written approval by the Director of OEP, an horizontal directional drill noise mitigation plan to reduce the projected noise level attributable to the drilling operations at the Highway 16 horizontal directional drill entry location. During operation of the horizontal directional drill, National Fuel shall implement the approved plan, monitor noise levels, include the noise level results in its weekly status reports, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than a day-night sound level of 55 decibels on the A-weighted scale at the closest noise sensitive areas to the horizontal directional drill entry point.

27. National Fuel shall file with the Secretary, for review and approval of the Director of OEP, a noise survey **no later than 60 days** after placing the Pendleton Compressor Station, Porterville Compressor Station, Wheatfield Dehydration Facility, X-N Pressure Reduction Station, TGP 200 Interconnect Station, and Hinsdale Meter Station into service. If a full load condition noise survey is not possible, National Fuel shall provide an interim survey at the maximum possible power load and provide the full power load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at any facility at interim or full power load conditions exceeds 55 decibels on the A-weighted scale day-night sound level at any nearby noise sensitive areas, National Fuel shall file a report on what changes are needed and shall install additional noise controls to meet the level **within 1 year** of the in-service date. National Fuel shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation
Empire Pipeline, Inc.

Docket Nos. CP15-115-000
CP15-115-001

ORDER GRANTING ABANDONMENT AND ISSUING CERTIFICATES

(Issued February 3, 2017)

BAY, Commissioner, *Separate Statement*

The shale revolution has upended U.S. energy markets. Only a decade ago, the United States was thought to be running out of oil and gas, and imports of both were growing. Today, we are the world's leading producer of oil and gas, with new production coming from shale formations across the United States.[1] To serve the new production areas and to satisfy increasing demand, the interstate pipeline industry has built and is planning to build a large amount of infrastructure. In 2016, daily gas production in the United States stood at 72.4 billion cubic feet per day (Bcfd).[2] That same year, the Commission certificated 17.6 Bcfd of pipeline capacity. This infrastructure expansion, coupled with growing production, has resulted in declining natural gas prices and a significant reduction in basis differentials – the difference in prices between Henry Hub and other gas trading hubs – across most of the United States.

This week the Commission has issued a series of orders that certificate, in aggregate, more than several billion cubic feet of new gas pipeline capacity. This infrastructure can provide significant economic, reliability, and resiliency benefits. Gas is the marginal fuel in most wholesale power markets, and the wholesale price of electricity has dropped by double-digit amounts in 2015[3] and 2016 across the

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[1] *United States remains largest producer of petroleum and natural gas hydrocarbons*, U.S. ENERGY INFORMATION ADMINISTRATION: TODAY IN ENERGY (May 23, 2016), http://www.eia.gov/todayinenergy/detail.php?id=26352.

[2] *Short-Term Energy Outlook: Natural Gas*, U.S. ENERGY INFORMATION ADMINISTRATION: ANALYSIS AND PROJECTIONS (Jan. 10, 2017), https://www.eia.gov/outlooks/steo/report/natgas.cfm.

[3] *Wholesale power prices decrease across the country in 2015*, U.S. ENERGY INFORMATION ADMINISTRATION: TODAY IN ENERGY (Jan. 11, 2016), https://www.eia.gov/todayinenergy/detail.php?id=24492.

United States.[4] It is also true that carbon emissions from the power sector have dropped 24 percent from 2005 levels.[5] For comparison purposes, the Clean Power Plan targets a 32 percent reduction from 2005 levels by 2030, so the United States is three-quarters of the way there with 13 years to go.[6] While the increased use of renewable energy has helped, fuel switching from coal to gas has driven much of the reduction since gas emits about half the carbon as coal. In 2016, for the first time ever, more electricity was produced from gas than from coal.[7] Natural gas-fired generators, because of their fast-ramping characteristics, also complement renewable resources and can support a higher penetration of renewables. [8]

Nevertheless, it is also true that the development of natural gas pipeline infrastructure has become increasingly controversial.[9] While FERC does not regulate the production of natural gas, methane emissions, or the use of fracking, many commenters have raised environmental concerns in our certificate proceedings. Moreover, because our certificate authority under the Natural Gas Act carries with it the ability to invoke eminent domain, property rights advocates have also objected to pipeline projects, alleging that private property is not being taken for a public use. As a result, the public interest in our work on energy projects is considerable. In order to respond to this

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[4] *Wholesale power prices in 2016 fell, reflecting lower natural gas prices*, U.S. ENERGY INFORMATION ADMINISTRATION: TODAY IN ENERGY (Jan. 11, 2017), http://www.eia.gov/todayinenergy/detail.php?id=29512.

[5] U.S. Energy Information Administration, *January 2017 Monthly Energy Review* 185 (2017), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

[6] *Fact Sheet: Overview of the Clean Power Plan*, U.S. ENVIRONMENTAL PROTECTION AGENCY: THE CLEAN POWER PLAN (Aug. 3, 2015), https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-overview.pdf.

[7] *Natural Gas Expected to Surpass Coal in Mix of Fuel Used for U.S. Power Generation in 2016*, U.S. ENERGY INFORMATION ADMINISTRATION: TODAY IN ENERGY (Mar. 11, 2016), http://www.eia.gov/todayinenergy/detail.php?id=25392.

[8] *Pathways to Decarbonization: Natural Gas and Renewable Energy*, JOINT INSTITUTE FOR STRATEGIC ENERGY ANALYSIS (Apr. 2015), http://www.nrel.gov/docs/fy15osti/63904.pdf.

[9] *See, e.g.*, Sierra Club, *The Gas Rush: Locking America into Another Fossil Fuel for Decades* 1 (2017) (noting concern over methane emissions and the "gas rush"), http://content.sierraclub.org/sites/content.sierraclub.org.coal/files/1466-Gas-Rush-Report%2004_web.pdf.

interest, I write separately to encourage the Commission to build on the progress that has been made to date and, in particular, to explore two other issues.

One is how the Commission establishes need in doing its certificate reviews under section 7(c) of the Natural Gas Act. The certificate policy statement, which was issued in 1999, lists a litany of factors for the Commission to consider in evaluating need.[10] Yet, in practice, the Commission has largely relied on the extent to which potential shippers have signed precedent agreements for capacity on the proposed pipeline. This is a useful proxy for need, because presumably shippers would not sign up for capacity unless it was needed. But focusing on precedent agreements may not take into account a variety of other considerations, including, among others: whether the capacity is needed to ensure deliverability to new or existing natural gas-fired generators, whether there is a significant reliability or resiliency benefit; whether the additional capacity promotes competitive markets; whether the precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize. As an example of the latter consideration, LNG import terminals that were built during the early 2000 time period became stranded as shale gas increasingly substituted for LNG imports from overseas.

There are other long-term issues that weigh in favor of examining whether other evidence, in addition to precedent agreements, can help the Commission evaluate project need. It is in the public interest to foster competition for pipeline capacity but also to ensure that the industry remains a healthy one, not subject to costly boom-and-bust cycles. Pipelines are capital intensive and long-lived assets. It is inefficient to build pipelines that may not be needed over the long term and that become stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems. If a new pipeline takes customers from a legacy system, the remaining captive customers on the system may pay higher rates. Under such circumstances, a cost-benefit analysis may not support building the pipeline.

Adding to the uncertainty, there is fluidity in where gas is being produced in the United States. Some of the first-producing shale plays have already seen output decline as lower-cost basins, like the Marcellus and Utica, gained prominence.[11] Major new

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[10] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999) ("The types of public benefits that might be shown are quite diverse but could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives."), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

[11] U.S. Energy Information Administration, *Drilling Productivity Report* 2 (2017), http://www.eia.gov/petroleum/drilling/pdf/dpr-full.pdf.

production areas are being discovered that may impact gas flows on existing and proposed pipelines.[12] For decades, pipeline flows generally went from south to north and west to east. Production in the Marcellus and Utica led to flow reversals, with gas being transported from east to west and north to south. What happens to infrastructure developed to ship Marcellus and Utica gas west, if gas is cheaper to produce in Texas and Oklahoma? To the extent that producer-shippers are driving the development of new infrastructure, pipeline developers may now be exposed to market risk not present with shippers that are local distribution companies with a reliable rate base and predictable revenue stream. Similarly, it is important to ask what happens if basis differentials largely disappear at major gas trading hubs across the United States. A shipper would not need to transport gas from a more distant hub if it can be readily obtained for the same price from a closer one. This, too, might reduce the revenues of large interstate gas pipelines.

The other issue the Commission should address is how we conduct our environmental reviews of pipeline projects. With respect to upstream impacts, the Commission has concluded in many cases that the pipelines do not cause the production of gas. Under the National Environmental Policy Act (NEPA), in my view, the strongest legal argument against causation is based on *Department of Transportation v. Public Citizen*.[13] *Public Citizen* holds 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."[14] Here, of course, FERC has no authority to regulate the production of natural gas; unless federal lands are involved, in general, that authority resides with the states.

Despite the growing importance of Marcellus and Utica gas production – it was 22.5 Bcfd in 2016 and is projected to surpass 44 Bcfd by 2050 – the Commission has never conducted a comprehensive study of the environmental consequences of increased

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[12] *USGS Estimates 20 Billion Barrels of Oil in Texas' Wolfcamp Shale Formation*, U.S. GEOLOGICAL SURVEY (Nov. 15, 2016), https://www.usgs.gov/news/usgs-estimates-20-billion-barrels-oil-texas-wolfcamp-shale-formation. In addition, the SCOOP-STACK play in Oklahoma is another major recent find. *Information on the Oklahoma Liquids Plays*, NATURAL GAS INTEL: SHALE DAILY, http://www.naturalgasintel.com/oklahomaliqinfo.

[13] 541 U.S. 752 (2004).

[14] *Id.* at 770. *See also EarthReports v. FERC*, 828 F.3d 949, 956 (2016) (following *Public Citizen*); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (same); *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (same).

production from that region.[15] Nor has the Commission performed a programmatic review of gas production in the different shale formations. This review is not required unless there is a proposed federal plan or program to develop the resources at issue.[16] FERC does not have such a plan or program with respect to shale gas. Thus, there is no legal requirement for the Commission to do such a review of gas production from shale formations.

Even if not required by NEPA, in light of the heightened public interest and in the interests of good government, I believe the Commission should analyze the environmental effects of increased regional gas production from the Marcellus and Utica. The Department of Energy has conducted a similar study in connection with the exercise of their obligations under Section 3(a) of the Natural Gas Act.[17] Where it is possible to do so, the Commission should also be open to analyzing the downstream impacts of the use of natural gas and to performing a life-cycle greenhouse gas emissions study, both of which DOE has conducted in issuing permits for LNG exports. This information may be of use to the Commission, the public, and industry in examining the broader issues raised in certification proceedings.

Beyond the two issues I have highlighted, there may well be other issues that could usefully be examined by the Commission. Such an examination would be consistent with the best traditions of FERC, where, time and again, the Commission has sought the views of a diverse range of stakeholders when exploring important issues. Indeed, a recent example of such outreach occurred after the EPA issued its proposed rulemaking on the Clean Power Plan; FERC held a series of technical conferences to examine the implications of the Clean Power Plan for the electric industry. As important as infrastructure development is, it must also occur through processes that continue to promote public participation, transparency, and confidence.

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[15] U.S. Energy Information Administration, *Annual Energy Outlook 2017 with Projections to 2050* 53 (2017), http://www.eia.gov/outlooks/aeo/pdf/0383 (2017).pdf.

[16] *Kleppe v. Sierra Club*, 427 U.S. 390, 400-01 (1976).

[17] *See* U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States* 19 (Aug. 2014), http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf.

For all those reasons, I respectfully offer this separate statement.

Norman C. Bay
Commissioner

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AFFIDAVIT OF CRAIG A. LESLIE, ESQ., FOR PETITIONER, IN SUPPORT OF VERIFIED PETITION, SWORN TO MARCH 27, 2017 ("LESLIE AFFIDAVIT") [164-170]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

AFFIDAVIT OF CRAIG A. LESLIE

Index No.: 45092

2017 MAR 28 AM 11:54
ROBERT J. CHRISTMAN
CLERK
ALLEGANY COUNTY

ENDORSED

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

CRAIG A. LESLIE, being duly sworn, deposes and says:

1. I am a member of Phillips Lytle LLP, attorneys for National Fuel Gas Supply Corporation ("National Fuel").

RELIEF REQUESTED

2. I am familiar with the facts stated in this affidavit and submit it in support of National Fuel's application for an order:

a. Allowing National Fuel to serve the Order to Show Cause submitted herewith, the supporting affidavits, and the Verified Petition (with exhibits, including the Notice of Pendency), upon all respondents by: (i) publishing the Notice of Proposed Acquisition and Commencement of Legal Proceedings, attached to this affidavit as Exhibit A, in the Olean Times

Herald, for ten (10) consecutive days, with such publication to be completed by a date to be set by the Court; and (ii) by mailing the same, by certified mail, return receipt requested, to each respondent's last known, diligently obtainable address, on or before a date to be set by the Court;

b. Setting a return date of no later than May 1, 2017 for the Verified Petition, and establishing filing deadlines for opposition and cross-motions, if any, and reply papers (as reflected in the Order to Show Cause), so long as the Order to Show Cause, supporting affidavits and Verified Petition (with exhibits) are served on each respondent as outlined in the preceding paragraph 2.a.; and

c. Granting such other and further relief as to this Court seems appropriate.

BACKGROUND

3. National Fuel intends to construct, install, own, operate, and maintain an approximately 96.49 mile long, 24-inch diameter, natural gas transmission pipeline to be located in the counties of Allegany, Cattaraugus, and Erie, New York (the "Northern Access Pipeline" or "Project").

4. The purpose of the Northern Access Pipeline is to create additional capacity on National Fuel's pipeline system, which is required for the transportation of natural gas production, and to also provide a connection between that production and the interstate pipeline system (which, in turn, connects to markets in the northeastern United States and Canada).

5. Construction of the Project will proceed in accordance with the Certificate of Public Convenience and Necessity granted to National Fuel by the Federal Energy Regulatory Commission ("FERC") on February 3, 2017 (the "FERC Certificate").

6. National Fuel has acquired many of the necessary easements to construct the Northern Access Pipeline.

7. National Fuel requires an easement over the remaining parcels now to allow it to complete surveying and pre-construction activities in time to begin tree clearing once restrictions imposed by the United States Fish & Wildlife Service ("USFWS") associated with migratory birds end in mid-July, and to complete tree clearing during the summer dry season.

8. Although National Fuel has attempted to negotiate easements over the remaining parcels, it has been unable to come to an agreement with the owners of the parcels, and now seeks to acquire the required easements using its power of eminent domain under the Natural Gas Act, New York's Eminent Domain Procedure Law ("EDPL") and the New York Transportation Corporations Law.

9. National Fuel was required to await FERC approval to commence these eminent domain proceedings. As noted above, National Fuel received that approval on February 3, 2017.

NEED FOR EXPEDITED RELIEF

10. In order to construct the Northern Access Pipeline, National Fuel must remove trees from the pipeline right of way, where such trees exist.

11. As a part of the FERC application process, FERC completed an environmental assessment of the Project, in accordance with the National Environmental Policy Act, which included consideration of the Project's potential impact on both vegetation and wildlife. FERC's environmental assessment was published on July 27, 2016.

12. FERC's environmental assessment specifically included consideration of the tree removal necessary to construct the Project.

13. As part of the FERC review process, National Fuel, through consultation with USFWS, developed a Migratory Bird Plan in accordance with the Migratory Bird Treaty Act. This Plan was approved by the USFWS Pennsylvania office on August 17, 2015, concerning the Pennsylvania portion of the Project, and restricts National Fuel from clearing trees from April 1 to at least July 15 of each calendar year. This plan was also submitted to the USFWS New York office on July 7, 2015, concerning the New York portion of the Project, and proposed the same tree clearing restriction – April 1 to July 15 of each calendar year.

14. Before National Fuel can begin tree clearing, it must first complete surveying and pre-construction work on properties along the Project route. National Fuel anticipates such work is likely to take six to eight (6-8) weeks to complete.

15. Therefore, in order to complete that surveying and pre-construction work before July 16, 2017, so that National Fuel can commence tree clearing on July 16, 2017, and complete tree clearing during the summer dry season, National Fuel must obtain the taking orders it requires by no later than mid-May 2017.

16. If National Fuel is unable to do so, construction of the Project will likely be delayed.

17. Delays in the Project's construction timeline will prevent National Fuel from: (i) providing the nearly 500,000 dekatherms/day of incremental natural gas transportation capacity that the Project will provide to the natural gas pipeline grid; (ii) providing approximately 1,700 immediate construction jobs; and (iii) timely completing critical infrastructure expansion that will result in approximately $11.8 million in annual tax revenues for the counties and communities through which the pipeline runs, and a one-time sales tax revenue impact for those counties. National Fuel will also incur additional expense in constructing the Project based on delayed tree clearing, as portions of the Project would otherwise occur during the summer dry season would be delayed until fall, and possibly even the spring of 2018

18. National Fuel is, therefore, seeking to acquire a taking order for the subject property on or before May 15, 2017.

NO PREJUDICE TO RESPONDENTS

19. It is respectfully submitted that there is no prejudice to respondents in granting the relief that National Fuel requests.

20. First, all respondent property owners had an opportunity to participate in the proceedings before FERC that resulted in FERC's approval of the Project.

21. Thus, to the extent respondent property owners had any concerns about the proposed route, or other aspects of the Project, they were provided a forum in which to voice those concerns.

22. According to the FERC's records, many property owners along the Project route participated in the FERC proceedings.

23. Second, as part of its approval process, FERC carefully examined the proposed Project route, taking into consideration the public use, benefit or purpose of the Project, the location of the Project and reasons for choosing that location, and the general effect of the Project on the environment and residents of the locality.

24. The fact that the FERC approved the route should provide respondents, and this Court, with a large degree of confidence that it is an appropriate route.

25. Third, the fact that FERC granted the FERC Certificate fulfills the requirements of EDPL 206(A), and exempts National Fuel from the hearing requirements of EDPL Article 2.

26. Fourth, National Fuel is prepared to post a bond, in the amount determined by the Court, to assure compensation for the easements that it seeks.

27. Indeed, National Fuel has obtained an appraisal of the value of each requested easement, and has already made an offer to each property owner to purchase the requested easement for the full appraised value.

28. Fifth, National Fuel is requesting that the Court only modify slightly the timing provisions and service requirements contained in EDPL § 402(B).

29. Finally, respondents will have a sufficient amount of time, to be set by this Court, to file any compensation claims, and the granting of the relief now requested by National Fuel should not adversely impact that timing.

CONCLUSION

30. National Fuel respectfully submits that the relief requested herein is reasonable, in accordance with the law, and does not limit or otherwise diminish respondents' rights.

CRAIG A. LESLIE

Sworn to before me this
27th day of March, 2017.

RHONDA A. MILLER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Oct. 2, 2017

Notary Public

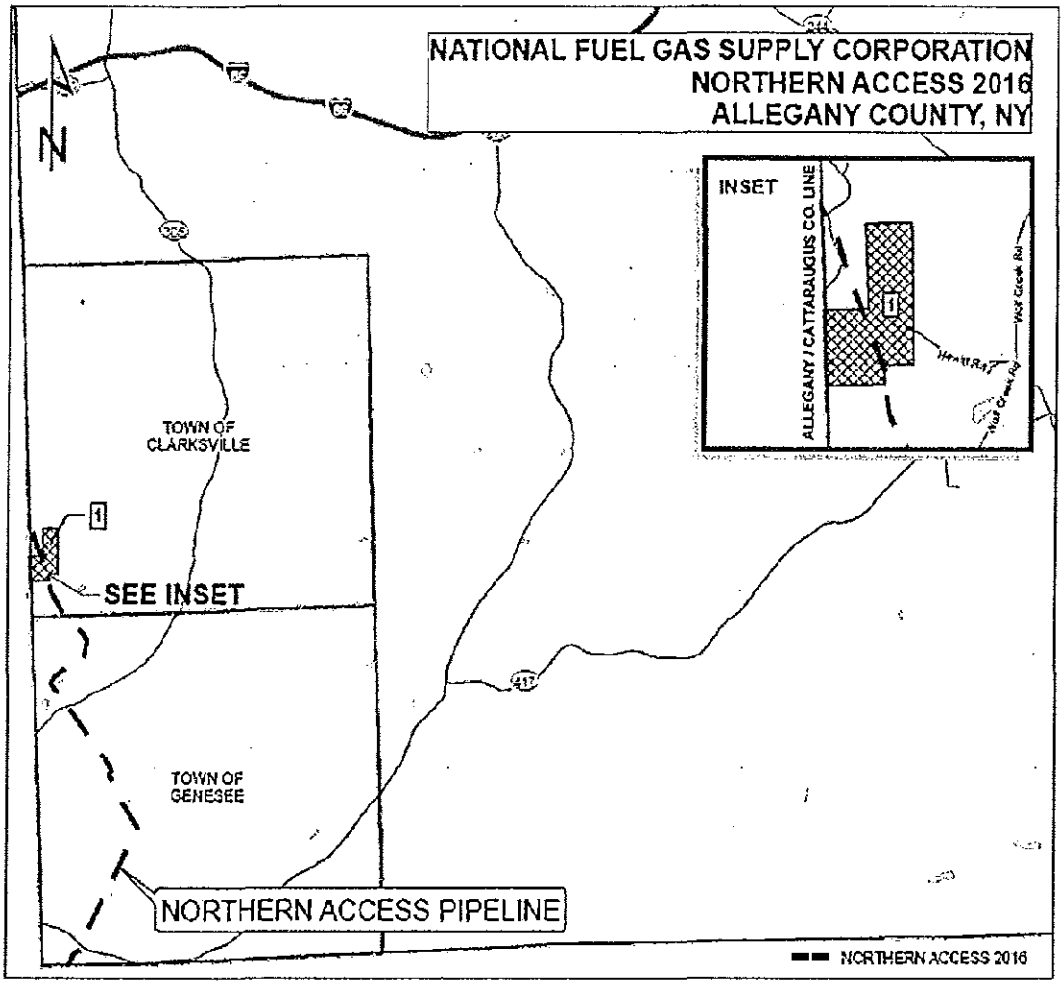
Doc #01-3022718.1

EXHIBIT A TO LESLIE AFFIDAVIT – NOTICE OF PROPOSED ACQUISITION AND COMMENCEMENT OF LEGAL PROCEEDINGS [171-172]

NOTICE OF PROPOSED ACQUISITION
AND COMMENCEMENT OF LEGAL PROCEEDINGS

PLEASE TAKE NOTICE that National Fuel Gas Supply Corporation ("National Fuel") has filed a Verified Petition seeking to acquire, by eminent domain, easements over the property listed below, for the purpose of constructing, installing, owning, operating, and maintaining a 24" diameter natural gas transmission pipeline and related facilities and equipment (the "Easements"). National Fuel's Verified Petition was filed in the Allegany County Clerk's office on March 28, 2017 and National Fuel will present the Verified Petition to the Supreme Court, Allegany County, New York, at the Allegany County Court, 7 Court Street, Belmont, New York, before the Honorable _____, on April __, 2017 at ____ a.m., or as soon thereafter as counsel can be heard, and at that time National Fuel will ask the Court to issue orders pursuant to the Natural Gas Act and New York State Eminent Domain Procedure Law, granting National Fuel the Easements.

A map, showing the route of the proposed pipeline, and the property over which National Fuel will request that the Court grant the Easements, accompanies this notice. The shaded area is subject to the above-noted proceeding, and is the parcel over which National Fuel seeks to acquire the Easements. This parcel is located in the Town of Cuba, Allegany County, and is identified in the grid below by listing the name of the property owner, the address, and the SBL number(s) of the property:



Parcel No.	Owner	Address	Tax ID #
1	SCHUECKLER, JOSEPH A.	[redacted] Hewitt Rd	[redacted]

PHILLIPS LYTLE LLP
Attorneys for National Fuel Gas Supply Corporation
One Canalside, 125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

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AFFIDAVIT OF JULIE A. BACHAN, IN SUPPORT OF VERIFIED PETITION, SWORN TO MARCH 27, 2017 ("BACHAN AFFIDAVIT") [173-175]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

AFFIDAVIT OF JULIE A. BACHAN

Index No.: 45092

2017 MAR 28 AM 11:54
ROBERT L. ORISTIMO
CLERK
ALLEGANY COUNTY

ENDORSED

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

JULIE A. BACHAN, being duly sworn, deposes and says:

1. I am a Sr. Land Services Manager for National Fuel Gas Supply Corporation ("National Fuel"). I am familiar with the facts stated in this affidavit, and submit it in support of National Fuel's application for an order allowing it to acquire various easements in connection with its plan to construct, install, own, operate and maintain an approximately 96.49 mile long, 24-inch diameter, natural gas transmission pipeline to be located in the counties of Allegany, Cattaraugus, and Erie, New York (the "Pipeline").

A. History of the Pipeline Project.

2. On March 17, 2015, National Fuel submitted application materials to the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act, to obtain FERC's approval to construct, install, own, operate and maintain the Pipeline.

3. The purpose of the Pipeline is to create additional capacity on National Fuel's pipeline system, which is required for the transportation of natural gas production, and to also provide a connection between that production and the interstate pipeline system (which, in turn, connects to markets in the northeastern United States and Canada).

4. The overall project is projected to generate more than $11.8 million in estimated annual real property tax payments to the counties where the project is located and to have a projected one-time sales tax impact of approximately $6.6 million. The project is also projected to create approximately 1,700 jobs during construction.

5. On February 3, 2017, FERC issued its Order (the "FERC Order") granting National Fuel a certificate of public convenience and necessity with respect to the pipeline project (the "FERC Certificate").

B. Eminent Domain Offers.

6. In anticipation of obtaining the FERC Certificate, National Fuel identified the owners of the properties over which it would require easements to construct, operate and maintain the Pipeline.

7. National Fuel has contacted all such owners, and has attempted to purchase the easement rights it requires from them.

8. National Fuel was able to purchase some, but not all, of the necessary easement rights required for it to begin its construction of the Pipeline.

9. National Fuel also obtained an appraisal of the fair market value of the remaining easements it requires to begin construction of the Pipeline.

10. National Fuel made an offer to purchase the easements it requires from each respondent land owner, for the full amount of the appraised value. A sample of the purchase offer package National Fuel provided to each respondent landowner is attached as Exhibit A to this Affidavit.

CONCLUSION

11. It is respectfully submitted that National Fuel is entitled to the easements and other relief it requests.

Julie A. Bachan

Sworn to before me this
27th day of March, 2017.

Stacey A. Fonagy
Notary Public

STACEY A. FONAGY
Notary Public-State of New York
No. 01FO6193472
Qualified In Erie County
Commission Expires September 22, 2020

Joanna Dickinson, Esq.
Phillips Lytle LLP

EXHIBIT A TO BACHAN AFFIDAVIT – SAMPLE PURCHASE OFFER PACKAGE TO LANDOWNERS [176-180]

National Fuel

March 20, 2017

[redacted]

RE: National Fuel Gas Supply Corporation and Empire Pipeline, Inc.
Northern Access 2016 Project
[redacted]
Tax ID: [redacted]

Dear Mr. and Mrs. [redacted]

I am writing about National Fuel Gas Supply Corporation's ("NFGSC") efforts to acquire a pipeline easement affecting your above referenced property. We regret that, at this time, we have been unable to reach an agreement about the pipeline easement with you.

The Northern Access 2016 Project was certified by the Federal Energy Regulatory Commission ("FERC") by Order dated February 3, 2017 (158 FERC, ¶61, 1451). Since receiving FERC's approval to construct and operate the Northern Access 2016 Project, we are moving forward with a timetable that anticipates completion of the project by the winter of 2017/2018.

By virtue of the FERC approval of the project, as well as the Eminent Domain Procedure Law ("EDPL") and other New York, Pennsylvania and federal laws, NFGSC has the right to commence a court action to acquire the pipeline easements it seeks across your property. It is not our preference to commence court action, but it will be a necessity should we remain at an impasse regarding the terms of the pipeline easement.

Enclosed is NFGSC's final offer for a pipeline easement over your property. As required by the EDPL, we have obtained an appraisal of the fair market real property value of the pipeline easement. The attached offer constitutes 100% of the highest appraised fair market value for the pipeline easement we seek to acquire. Please review this offer carefully and provide your response no later than March 24, 2017. However, please note that due to the timeframe necessary to complete the project, you may receive an Order to Show Cause and Verified Petition prior to March 24, 2017. Nevertheless, NFGSC will honor your response to this offer if we receive it by March 24, 2017.

It is our sincere hope that we will agree upon an acceptable arrangement with you. Please contact me at (716) 857-7089 if you would like to discuss this matter.

Very truly yours,

Julie A. Bachan
Sr. Land Services Manager
Land Department

JAB/rl
Enclosures

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OFFER TO PURCHASE

Pursuant to the Eminent Domain Procedure Law of the State of New York, National Fuel Gas Supply Corporation (NFGSC) hereby offers to purchase from you an easement in your real property as described in the attached Exhibit A, for the sum of [redacted] Dollars ($[redacted]).

This offer constitutes an amount not less than NFGSC's highest approved appraisal of the just compensation for the easement. If you accept this offer, payment will be made to you together with any appropriate interest. The sum of $ represents the following damage to you:

(a)	Total direct damage	$[redacted]
(a)	Total severance damage	$[redacted]
(b)	Total consequential damage	$[redacted]

You may accept this offer as payment in full, or reject the offer as payment in full and instead elect to accept the offer as an advance payment. Your election to accept the offer as an advance payment will not prejudice your right to claim additional compensation from NFGSC. However, if you fail to file a claim within the time specified by the Court, you will be deemed to have accepted the advance payment as full settlement of your claim. If you accept this offer, NFGSC will enter into an agreement with you providing for payment, either as payment in full or as an advance payment.

Important notice: Rejection of this offer or failure to respond to it within ninety (90) days suspends NFGSC's obligation to pay interest on the amount of this offer until the time you accept the offer as payment in full or as advance payment, or the Court directs otherwise. This notice is independent of NFGSC's request that you respond to its offer by March 24, 2017.

Notification of your response to this offer should be directed to: National Fuel Gas Supply Corporation, Attention: Julie A. Bachan, 6363 Main Street, Williamsville, New York 14221.

Dated:

3/20/17

National Fuel Gas Supply Corporation

By _____

Julie A. Bachan

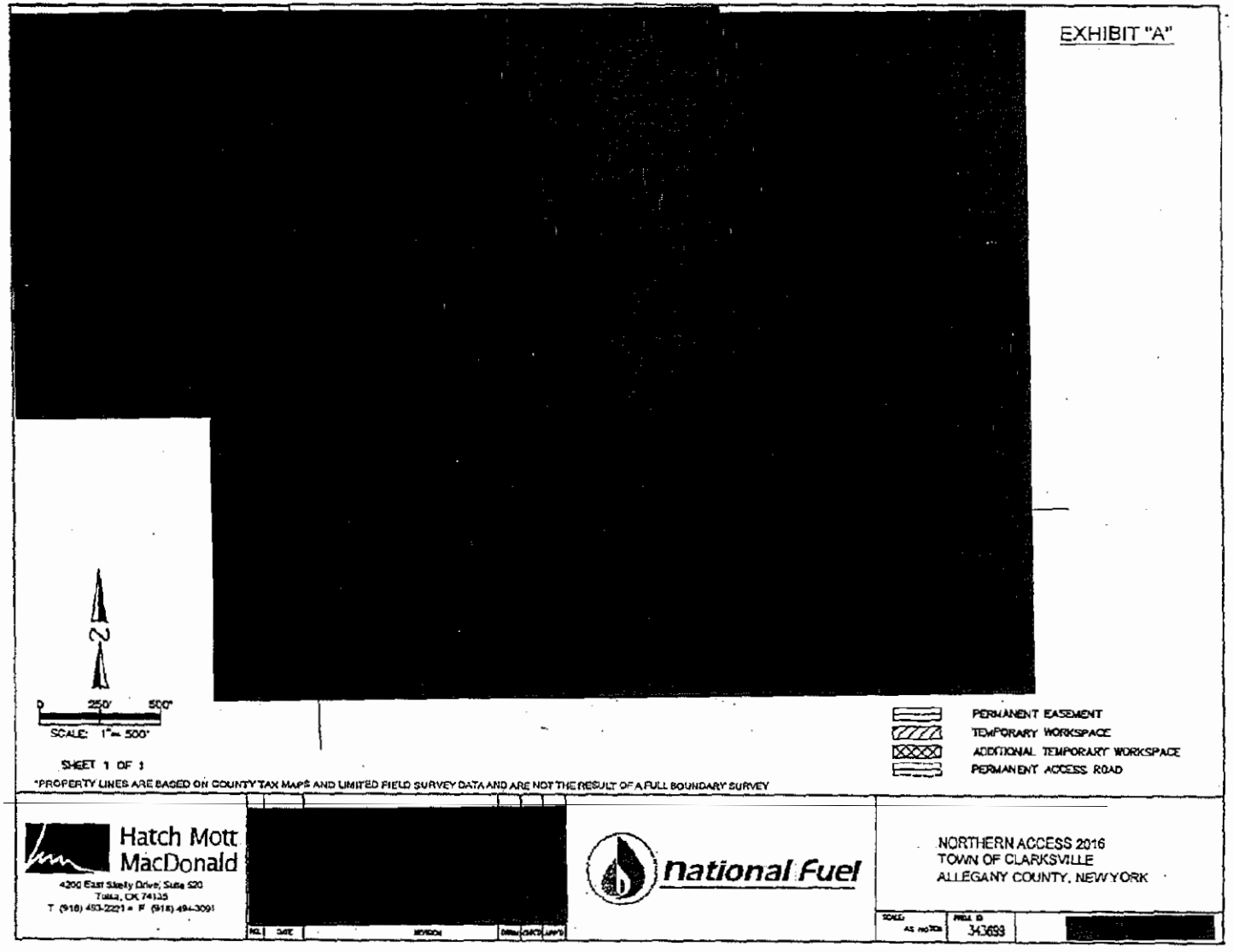
EXHIBIT "A"
N
0 250' 500'
SCALE: 1"= 500'
PERMANENT EASEMENT
TEMPORARY WORKSPACE
ADDITIONAL TEMPORARY WORKSPACE
PERMANENT ACCESS ROAD
SHEET 1 OF 1
*PROPERTY LINES ARE BASED ON COUNTY TAX MAPS AND LIMITED FIELD SURVEY DATA AND ARE NOT THE RESULT OF A FULL BOUNDARY SURVEY
Hatch Mott MacDonald
4200 East Skelly Drive, Suite 520
Tulsa, OK 74135
T (918) 453-2221 • F (918) 494-3091
National Fuel
NORTHERN ACCESS 2016
TOWN OF CLARKSVILLE
ALLEGANY COUNTY, NEW YORK
343693

Check One:

_____ I (We) accept the above offer as payment in full.

_____ I (We) accept the above offer as an advance payment.

_____ I (We) reject the above offer.

Date:

_____ By: _____

_____ By: _____

[redacted]

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VERIFIED ANSWER, BY RESPONDENTS JOSEPH AND THERESA SCHUECKLER, DATED APRIL 12, 2017 [181-191]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORP.	:	
6363 Main Street	:	
Williamsville, New York 14221,	:	
Petitioner,	:	
	:	
v.	:	Index No.: 45092
JOSEPH A. SCHUECKLER	:	JURY TRIAL DEMANDED
THERESA F. SCHUECKLER	:	
[redacted] Hewitt Road	:	
Cuba, New York 14786,	:	
	:	
EUGENE HEWITT	:	
Hubbard Road (no number)	:	
Clarksville, New York 14786,	:	
	:	
WILLIAM BENTLEY	:	
[redacted] Davis Street	:	
Bradford, Pennsylvania 16701,	:	
	:	
Respondents.	:	

RESPONDENT JOSEPH AND THERESA SCHUECKLER'S
VERIFIED ANSWER TO VERIFIED PETITION

Respondents Joseph and Theresa Schueckler (Schuecklers or Landowners) by counsel answer the Verified Petition (Petition) filed by the Petitioner National Fuel Gas Supply Corporation (National Fuel or Petitioner) in this matter and state:

I. ANSWER TO PETITION

1. Admit the allegations in Paragraph 1 of the Petition as to Petitioner's place of incorporation and address of its principal place of business.

2. Deny the allegations in Paragraph 2 of the Petition that in the proceeding at bar National Fuel has the power of eminent domain. Landowners explain their denial in Affirmative Defense No. 1 below.

3. Admit the allegations in Paragraph 3 of the Petition, as the Petition speaks for itself.

4. Admit the allegations in Paragraph 4 of the Petition.

5. Admit the allegations in Paragraph 5 of the Petition, except that the copy to which counsel is responding appears to have some pages out of order.

6. Deny the allegations in Paragraph 6 that the facilities are required for a public,

use, benefit, or purpose. Landowners explain their denial in Affirmative Defense No. 2 below.

7. Admit the allegations in Paragraph 7 of the Petition as to the names and address of the property owners.

8. Deny. Landowners are without knowledge to admit or deny the allegations in Paragraph 8 of the Petition as to other persons who may have an interest in the property.

9. Deny. Landowners deny the allegation in Paragraph 9 of the Petition that the Federal Energy Regulatory Commission (FERC) order attached to the Petition as Exhibit F grants National Fuel a certificate of public convenience and necessity. Landowner's denial is alleged more fully in Affirmative Defense No. 3 below.

10. Deny. Landowners deny the allegation in Paragraph 10 of the Petition that the proceedings held before FERC satisfy the requirements for an exemption under NY EDPL 206, because those proceedings did not result in National Fuel receiving an effective certificate of public convenience and necessity for the Northern Access 2016 project.

11. Deny. Landowners are without knowledge to admit or deny the allegations in Paragraph 11 of the Petition.

12. Deny the allegation in Paragraph 12 of the Petition because National Fuel does not hold an effective certificate of public convenience and necessity for the Northern Access 2016 project, and in any case the allegation requires a conclusion of law.

13. Deny the allegation in Paragraph 13 of the Petition that the purported certificate held by National Fuel grants a power of eminent domain or is in full force and effect.

14. Deny. Landowners are without knowledge to admit or deny the allegations in Paragraph 14 of the Verified Petition.

II. STATEMENT OF LANDOWNERS' OBJECTIONS AND DEFENSES

The Landowners oppose National Fuel's taking by eminent domain of their property and any interest therein for the following reasons and defenses:

For a First Affirmative Defense

National Fuel does Not At This Time Have The Power Of Eminent Domain To Condemn Landowners' Property

15. It is of primary importance to be clear about what a FERC Certificate of Public Convenience and Necessity (Certificate) is and is not. A Certificate is a legislative construct, embodied in a FERC order, but it is not the order itself. There is not even a particular page or paragraph in the order that one can point to as "The Certificate." There is no physical embodiment that one can frame and place on a wall, or in a filing cabinet. Whether a particular FERC order purporting to issue a Certificate has actually issued a Certificate done so is for a court to decide, as are the rights bestowed and obligations created by any particular Certificate.

16. Both the courts and FERC distinguish between an unconditional Certificate and a conditional Certificate. FERC itself characterizes a conditional Certificate as an "incipient authorization without force or effect." *See e.g.*, *Constitution Pipeline*, 154 FERC ¶ 61,046 (2016), at Page 24, para 62. The conditions set forth in the order issuing the Certificate

circumscribe what the holder of the Certificate may or may not do, under penalty of law.

17. National Fuel cannot deny that the Certificate, if any, issued by FERC on February 3, 2017 (Order), Exhibit F to the Petition, was conditional, and thus an incipient authorization without force or effect. We thus properly refer to National Fuel's purported Certificate as an Incipient Certificate(IC). At Affirmative Defense 3 below, Landowners dispute that the Order granted any Certificate whatsoever.

18. Assuming for purposes of the instant Affirmative Defense No. 1 that the IC is valid, it is clear from the language of the Order that it did not bestow upon National Fuel the power of eminent domain over Landowners' property that it now proposes to take.

19. It is well established that documents granting eminent domain are to be strictly construed against the condemnor. It is the court's responsibility to determine the facial validity of such documents and to strictly construe their terms.

20. The only place where the Order addresses eminent domain is in Paragraph 4, Appendix B, at pp. 81-82. On page 81, Para 4 begins, "The authorized facility location(s) shall be as shown in the EA, as supplemented by filed alignment sheets." It continues on the next page: "National Fuels'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." Therefore, unless Landowners' property sought to be taken by National Fuel is "shown in the EA, as supplemented by filed alignment sheets," National Fuel has no power of eminent domain to exercise against it.

21. A review of the Environmental Assessment (EA) issued by FERC does not show Landowner's property as a authorized facility location, nor is it possible to discern from the EA just where Landowners' property is even located. . Moreover, National Fuel alleges at Paragraph 11 of its Petition that the complete docket for the proceedings in CP15-115 may be viewed online, but a search of FERC's eLibray cite shows that whatever alignment sheets National Fuel had filed, were made "Privileged," precluding Landowners and this Honorable Court from verifying that Landowners property actually appears on any "alignment sheets" filed with the FERC. Because National Fuel has not even alleged that it has filed an alignment sheet with FERC showing Landowners' property, the Petition must be dismissed. Moreover, because National Fuel has brought suit for condemnation of Landowners' property without complying with the requirements of the IC, we submit that National Fuel has brought suit against Landowners' while lacking authority to do so.

For a Second Affirmative Defense

Landowners' Property Is Not Required For A Public Use, Benefit Or Purpose

22. National Fuel's proposed taking of Landowners' property for the project violates the Fifth Amendment of the United States Constitution because the pipeline's primary purpose is to transport gas for export gas overseas and not to consumers, and therefore, the project does not serve a public use.

23. National Fuel cannot demonstrate that its proposed project is for public use as required by the Fifth Amendment of the United States Constitution. All grants of eminent domain are subject to the Takings Clause of the Fifth Amendment to the U.S. Constitution,

which requires that takings be for "public use." U.S. Const. amend. V; Kelo v. City of New London, 545 U.S. 469, 472 (2005). Here, National Fuel has admitted to FERC that some seventy-two percent of gas transported by the Northern Access 2016 Project will be exported by National Fuel's sister company Empire Pipeline, Inc. to Canada for eventual export on to Asia, with the remaining twenty-eight percent be sold domestically, potentially for export or spot market sales. There has been no showing beyond precedent agreements that any of the gas will serve a domestic public need.

For a Third Affirmative Defense

The Incipient Certificate Has Been Invalidated By NYDEC's Denial of a Water Quality Certification.

24. On April 7, 2017, NYDEC issued its denial of the Water Quality Certification (WQC) that National Fuel needed pursuant to Para 10, page 85 of the Order. NYDEC's denial letter is available as a PDF here. http://www.dec.ny.gov/press/109767.html.

24. Section 510 of the Clean Water Act preserves the primary authority of States to protect the waters within their borders. 33 U.S.C. § 1370. Section 401(a)(1) of the Act mandates that any applicant for a federal license "to conduct any activity, including construction and operation of facilities, which may result in any discharge into the navigable waters" obtain a certification from the State indicating that such discharge will comply with applicable State water quality requirements (hereinafter "water quality certification"). 33 U.S.C. § 1341(a)(1).

25. Section 401(d) provides that the certification shall set forth the limitations and monitoring requirements necessary to assure compliance with water quality requirements and that the State certification "shall become a condition on any Federal license or permit subject to this section." 33 U.S.C. § 1341(d). Section 15 U.S.C. 717b(d) of the Natural Gas Act mandates compliance with the Clean Water Act.

26. Section 401(a)(1) provides that no federal license or permit "**shall be granted until the certification . . . has been obtained or waived**" and that "**[n]o license or permit shall be granted if the certification has been denied by the State….**" 33 U.S.C. § 1341(a)(1). Because the water quality certification has been denied, FERC's grant of the Incipient Certificate must be deemed revoked by action of law.

27. The Natural Gas Act addresses how it should be construed with other federal laws, including the Clean Water Act, and states that "nothing in this chapter affects the rights of States under— … the Federal Water Pollution Control Act…" (33 U.S.C. 1251 et seq.). 15 U.S.C. 717b(d).

28. National Fuel has not obtained a permit pursuant to Section 404 of the Clean Water Act, nor other applicable permits, and therefore, the Commission certificate is an "incipient authorization without force or effect" that does not authorize the proposed taking. *See e.g.*, *Constitution Pipeline*, 154 FERC ¶ 61,046 (2016), at Page 24, para 62.

29. If no WQC is ultimately granted, the pipeline project will never be constructed along the route that FERC has tentatively accepted. If the project is never constructed using the current route, this Court will have to reverse and vacate the order of condemnation, and National

Fuel will have to bear all such expenses and reimburse Landowners for their attorney fees and other expenses.

30. Any effort by National Fuel to attempt to utilize the equivalent of a quick take to access or take the property prior to payment of full compensation violates the separation of powers doctrine and is unconstitutional.

For a Fourth Affirmative Defense

Eminent Domain Is In Any Event Premature Because FERC Has Not Yest Ruled On Requests For Rehearing

31. Several parties to the FERC proceeding at Docket No. CP15-115 that issued the Incipient Certificate filed timely requests for rehearing of the Order issued on February 3, 2017. Those filings requested, *inter alia*, that the route be revised, that eminent domain proceedings be suspended until the necessary air and water quality permits havet been issued, and for an investigation of National Fuel's misuse of the Natural Gas Act for private purposes. Until FERC rules on those various requests for rehearing, it is impossible to know what the eventual route may be, and what additional conditions may be placed on the Certificate.

32. In a Separate Statement attached to the Order (concurring), Commissioner Bay urged the FERC to look beyond the "precedent agreements" that the FERC may have over-used to justify a public need for the projects it certificates. He also pointedly noted that "because our certificate authority under the Natural Gas Act carries with it the ability to invoke eminent

domain, property rights advocates have also objected to pipeline projects, alleging that private property is not being taken for a public use." National Fuel, Exhibit F, page 2 of Commissioner Bay's separate Statement. Landowners strongly agree with Commissioner Bay's position.

33. On the same day the Order was issued, Commissioner Bay resigned from the Commission, leaving only two Commissioners. This left FERC without a quorum, incapacitating FERC until a third Commissioner is appointed by President Trump, and confirmed by the Senate. Experts believe that the third Commissioner will not be appointed for at least two more months. Until the requests for rehearing are heard by a quorum, no further activity on the Northern Access project can nor should place.

III. DEMAND FOR JURY TRIAL

Landowners assert their right to a jury trial in this proceeding.

IV. CONCLUSION

WHEREFORE, Landowners pray that:

A. The Petition be dismissed;

B. That if it is determined that there is an adequate public necessity for the taking of the property as sought in the Petition, that the Landowners be awarded full and just compensation for the interests as determined by a jury;

C. That Landowners be awarded reasonable attorneys' fees and costs; and any other relief as this matter may require.

Affirmed under penalties of perjury,

Gary Abraham
Law Office of Gary Abraham
170 No. Second Street
Allegany, NY 14706
716-790-6141
gabraham44@eznet.net

W. Ross Scott
The Ross Scott Law Firm
1759 Hawks Road
Andover, New York 14806
607-478-8000
w.ross.scott@gmail.com

CERTIFICATE OF SERVICE

The foregoing Verified Answer was served this day by overnight mail on Petitioner and the Court.

April 12, 2017

W. Ross Scott, Esq.

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AFFIDAVIT OF REGULARITY OF PAUL MORRISON-TAYLOR, ESQ., IN SUPPORT OF VERIFIED PETITION, SWORN TO MAY 3, 2017 ("TAYLOR AFFIDAVIT OF REGULARITY") [192-195]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

AFFIDAVIT OF REGULARITY

Index No.: 45092

Assigned Justice: Hon. Thomas P. Brown

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

PAUL MORRISON-TAYLOR, ESQ., being duly sworn, deposes and says:

1. I am a member of Phillips Lytle LLP, attorneys for petitioner National Fuel Gas Supply Corporation ("National Fuel"). I am familiar with the facts stated in this affidavit and submit it in support of National Fuel's application for an order allowing it to acquire the easements described in the Verified Petition in this proceeding.

A. **Commencement of Proceedings.**

2. The Order to Show Cause, Verified Petition and Notice of Pendency in this proceeding were filed in the Allegany County Clerk's Office on March 28, 2017.

3. A copy of the Order to Show Cause, supporting papers, Verified Petition and Notice of Pendency was served on each respondent by certified mail, return receipt requested, on March 30, 2017. A copy of the Affidavits of Service are attached as Exhibit A.

4. Notice of the commencement of this proceeding, and of the requested acquisition of the subject easements, was published in the Olean Times Herald for ten consecutive days, beginning on April 7, 2017. A copy of the Affidavit of Publication is attached as Exhibit B.

5. Additionally, National Fuel caused the same notice that was published in the Olean Times Herald to be posted in the following locations on or about April 7, 2017: Cuba Circulating Library.

B. Jurisdiction of this Court.

6. National Fuel is a Pennsylvania corporation, is authorized to do business in New York, is in good standing, and is in the business of transporting natural gas through pipelines and related facilities. National Fuel has the power of eminent domain, and the right to commence these proceedings in New York State Supreme Court, pursuant to Section 717f of the Natural Gas Act (15 U.S.C. § 717f) as well as Section 11 of the New York Transportation Corporation Law.

7. On February 3, 2017, the Federal Energy Regulatory Commission ("FERC") issued an Order (the "FERC Order") granting National Fuel a certificate of public convenience and necessity (the "FERC Certificate"), and thereby authorizing National Fuel to acquire through eminent domain the real property rights necessary to construct, install, own, operate and maintain about 96.49 miles of a natural gas transmission pipeline, and related facilities, to create additional capacity on National Fuel's pipeline system for the transportation of natural gas production (the "Pipeline"), and to provide a connection between that production and the interstate pipeline system (which, in turn, connects to markets in the northeastern United States and Canada). A copy of the relevant

portion of the FERC Certificate is attached to each of the Verified Petitions and may be viewed online by going to FERC's eLibrary (http://elibrary.ferc.gov/idmws/search/fercgensearch.asp) under docket Nos. CP15-115-000 and CP15-115-001.

C. **National Fuel has Complied with Article 2 of the EDPL.**

8. National Fuel applied for and was granted the FERC Certificate, which is in full force, and which covers the activity for which the easements are sought.

9. Because FERC considered the public use, benefit and purpose of the Pipeline, the proposed location of the Pipeline and the reasons for selecting that location, and the effect of the proposed project on the environment and residents in the vicinity of it, and issued the FERC Order granting National Fuel's Certificate of Public Convenience and Necessity, National Fuel has satisfied the requirements of Article 2 of New York's Eminent Domain Procedure Law ("EDPL"). *See* FERC Order; EDPL §§ 204(B) and 206(A).

D. **Offer to Respondent.**

10. Prior to commencement of these proceedings, National Fuel engaged in negotiations with the respondent landowners to obtain the easements needed to build, operate and maintain the Pipeline.

11. National Fuel also obtained an appraisal of the value of the easements it seeks in these proceedings.

12. In accordance with EDPL § 303, National Fuel made an offer to the respondent landowners to acquire the requested easements for their full appraised value.

13. Accordingly, National Fuel has complied with the requirements of EDPL Article 3. *See* EDPL §§ 303-304.

E. **Bond or Undertaking.**

14. This Court has the discretion to direct National Fuel to deposit a bond or undertaking with the Clerk of the Court prior to the vesting of title to the requested easements.

15. National Fuel submits that any financial interest respondents have in these proceedings is protected by National Fuel's obligation to pay just compensation for the acquired easements, which it is financially capable of and committed to doing.

CONCLUSION

16. Because National Fuel has complied with the requirements of the EDPL, it is respectfully submitted that this Court should grant an order pursuant to EDPL § 402(B)(5), in substantially the same form as the attached Exhibit C ("Taking Order"), authorizing National Fuel to: (a) acquire the easements described in the Verified Petition; (b) file the Acquisition Map in the Erie County Clerk's Office, and serve the same and the related Taking Order upon respondents by certified mail, return receipt requested; and (c) directing that title to the requested easements shall vest in National Fuel upon filing the Acquisition Map, and any bond or undertaking required by this Court.

Paul Morrison-Taylor

Sworn to before me this
3rd day of May, 2017.

Rhonda A. Miller
Notary Public

RHONDA A. MILLER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Oct. 2, 2017

Doc #01-3022710.1

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EXHIBIT A TO TAYLOR AFFIDAVIT OF REGULARITY – AFFIDAVITS OF SERVICE BY CERTIFIED MAIL, SWORN TO MARCH 30, 2017 AND APRIL 4, 2017 [196-199]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

Index No.: 45092

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

JAMES B. FERRIS, being duly sworn, deposes and says:

1. I am an employee of Phillips Lytle LLP, attorneys for National Fuel Gas Supply Corporation, and not a party to the action, and am over the age of 18 years; that on March 30, 2017, I served the annexed Order to Show Cause, granted by the Court on March 28, 2017, together with the Affidavit of Craig A. Leslie, Esq., sworn to March 27, 2017, with Exhibit, the Affidavit of Julie A. Bachan, sworn to March 27, 2017, with Exhibit, a Verified Petition and Notice of Pendency, which were filed with the Allegany County Clerk's Office on March 28, 2017 on:

Joseph A. Schueckler and
Theresa F. Schueckler
[redacted] Hewitt Road
Cuba, New York 14727

William Bentley
[redacted] Davis Street
Bradford, Pennsylvania 16701

Eugene Hewitt
Hubbard Road (no number)
Clarksville, New York 14786

at the addresses designated for each recipient, by certified mail/return receipt requested, postpaid, properly addressed wrappers, in an official depository maintained by the United States Postal Service office within the State of New York.

JAMES B. FERRIS

Subscribed and sworn to before me
this 30th day of March, 2017.

Notary Public

Doc #01-3028024.1

BRYAN J. JENKINS
No. 01JE6278963
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 04/01/20 21

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND
THERESA F. SCHUECKLER, EUGENE HEWITT,
and WILLIAM BENTLEY,

Respondents.

AFFIDAVIT OF
SERVICE BY CERTIFIED MAIL

Index No.: 45092

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

JAMES B. FERRIS, being duly sworn, deposes and says:

1. I am an employee of Phillips Lytle LLP, attorneys for National Fuel Gas Supply Corporation, and not a party to the action, and am over the age of 18 years; that on April 4, 2017, I served the annexed Order to Show Cause, granted by the Court on March 28, 2017, together with the Affidavit of Craig A. Leslie, Esq., sworn to March 27, 2017, with Exhibit, the Affidavit of Julie A. Bachan, sworn to March 27, 2017, with Exhibit, a Verified Petition and Notice of Pendency, which were filed with the Allegany County Clerk's Office on March 28, 2017 on:

Gene Hewitt
[redacted] Drake Street
Oakfield, New York 14125

at the address designated for the recipient, by certified mail/return receipt requested, enclosed in a postpaid, properly addressed wrapper, in an official depository maintained by the United States Postal Service office within the State of New York.

JAMES B. FERRIS

Subscribed and sworn to before me
this 4th day of April, 2017.

Notary Public

Doc #01-3029557.1

BRYAN J. JENKINS
No. 01JE6278963
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 01/01/20 22

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EXHIBIT B TO TAYLOR AFFIDAVIT OF REGULARITY –
AFFIDAVIT OF PUBLICATION, SWORN TO APRIL 17, 2017 [200- 201]

#45892

AFFIDAVIT

Advertiser:

Phillips Lytle, LLP
Attn: Deena Mueller
125 Main Street
Buffalo, NY 14203

National Fuel Gas Supply Corporation
- vs -
Joseph A. Schweckler, etal

(County of Cattaraugus)

I, Cathy Powley, being duly sworn, deposes and says that she is a Legal Clerk of Olean Times Herald, publishers of Olean Times Herald, a newspaper published in Olean, New York, having a general circulation in Cattaraugus and Allegany Counties, and that the attached advertisement was published 10 time(s) on
04/07/17; 04/08/17; 04/09/17; 04/10/17; 04/11/17; 04/12/17; 04/13/17; 04/14/17; 04/15/17; 04/16/17.

Cathy Powley
Legal Clerk

Subscribed and Sworn to before me this 17th day of April, 2017

Lesli L. Linderman

LESLI L. LINDERMAN
Notary Public, State of New York
No. 01LI6025284
Qualified in Cattaraugus County
My Commission Expires 5/24/20

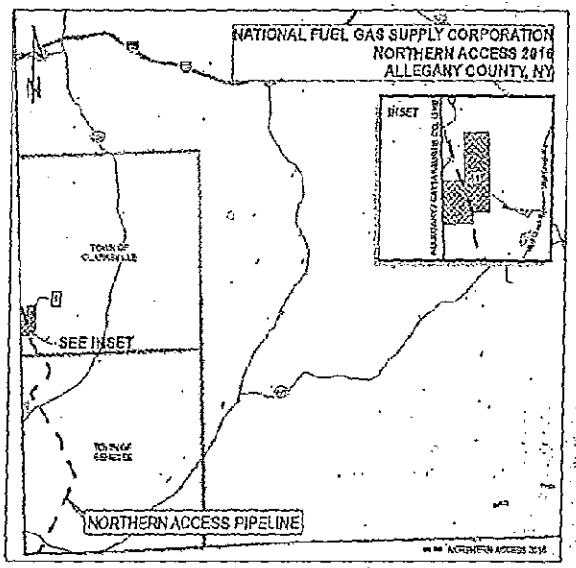
Olean Times Herald, 639 Norton Drive, Olean, NY 14760 (716) 372-3121

ENDORSED
2017 APR 26 AM 10: 14
ROBERT L CHRISTIAN
CLERK
ALLEGANY COUNTY

NOTICE OF PROPOSED ACQUISITION AND COMMENCEMENT OF LEGAL PROCEEDINGS

PLEASE TAKE NOTICE that National Fuel Gas Supply Corporation (ÂgNational FuelÂh) has filed a Verified Petition seeking to acquire, by eminent domain, easements over the property listed below, for the purpose of constructing, installing, owning, operating, and maintaining a 24Âh diameter natural gas transmission pipeline and related facilities and equipment (the ÂgEasementsÂh). National FuelÂfs Verified Petition was filed in the Allegany County ClerkÂfs office on March 28, 2017 and National Fuel will present the Verified Petition to the Supreme Court, Allegany County, New York, at the Allegany County Court, 7 Court Street, Belmont, New York, before the Honorable Thomas P. Brown, on April 19, 2017 at 9:30 a.m., or as soon thereafter as counsel can be heard, and at that time National Fuel will ask the Court to issue orders pursuant to the Natural Gas Act and New York State Eminent Domain Procedure Law, granting National Fuel the Easements.

A map, showing the route of the proposed pipeline, and the property over which National Fuel will request that the Court grant the Easements, accompanies this notice. The shaded area is subject to the above-noted proceeding, and is the parcel over which National Fuel seeks to acquire the Easements. This parcel is located in the Town of Cuba, Allegany County, and is identified in the grid below by listing the name of the property owner, the address, and the SBL number(s) of the property:



Parcel No.	Owner	Address	Tax ID #
1	SCHERCOLER, JOSEPH A	[redacted] Lewis Rd	[redacted]

PHILLIPS LYTLE LLP, Attorneys for National Fuel Gas Supply Corporation
One Canalside, 125 Main Street, Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

A copy of this notice is also available to view at the Cuba Circulating Library, 39 East Main Street, Cuba, New York 14727.

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EXHIBIT C TO TAYLOR AFFIDAVIT OF REGULARITY – PROPOSED ORDER [202- 204]

At a Term of the Supreme Court, held in and for the County of Allegany, at the Allegany County Courthouse, 7 Court Street, Belmont, New York on the 19th day of May, 2017.

PRESENT: HON. THOMAS P. BROWN
Acting Justice Presiding

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER AND THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

ORDER

Index No.:

Petitioner National Fuel Gas Supply Corporation ("National Fuel") having sought an order authorizing the acquisition of the permanent and temporary easements described in the Verified Petition (the "Easements"); permitting National Fuel to file the Acquisition Map relating thereto, and serve the same and this Order upon respondents by certified mail, return receipt requested; directing that title to the Easements shall vest in National Fuel upon filing of the Acquisition Map; and for other appropriate relief; and said Verified Petition having come on to be heard before me on May 19, 2017;

NOW, upon reading and filing the Order to Show Cause dated March 28, 2017, the Verified Petition filed in the Allegany County Clerk's Office on March 28, 2017, the Affidavit of Craig A. Leslie in support this application, sworn to March 27, 2017, the Affidavit of Julie A. Bachan in support this application, sworn to March 27, 2017, and the Affidavit of Regularity of Paul Morrison-Taylor, sworn to May 3, 2017, and after due deliberation, and this Court having found that National Fuel has complied with the procedural requirements of the New York Eminent Domain Procedure Law ("EDPL"), it is

ORDERED that National Fuel's Verified Petition is granted, and it is further

ORDERED that National Fuel is authorized to acquire the Easements described in the Verified Petition, and it is further

ORDERED that National Fuel is permitted to file the Acquisition Map in the Allegany County Clerk's Office, and to serve the Notice of Acquisition and a copy of this Order upon respondents by certified mail, return receipt requested, and it is further

ORDERED that title to the Easements described in the Verified Petition shall vest in National Fuel upon filing of the Acquisition Map in the Allegany County Clerk's Office, and it is further

ORDERED that National Fuel, pursuant to EDPL § 402(B)(3)(f), shall _____ be required to file a bond in the total amount of $_____, and it is further

ORDERED that each respondent having or claiming to have an interest herein, in order to preserve or assert such interest or claim, shall, within one hundred eighty (180) days from service upon it or them of the Notice of Acquisition, Acquisition Map, and a copy of this Order, file a written claim for damages, demand or notice of appearance with:

(1) National Fuel at 6363 Main Street, Williamsville, New York 14221, Attn. Julie A. Bachan; and (2) the Clerk of the Supreme Court of Allegany County, New York.

ENTER:

HON. THOMAS P. BROWN, A.J.S.C.

GRANTED

Doc #01-3022717.1

AFFIDAVIT OF PAUL MORRISON-TAYLOR, ESQ., IN SUPPORT OF VERIFIED PETITION, SWORN TO MAY 15, 2017 ("TAYLOR AFFIDAVIT") [205- 207]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

Index No.: 45092

JOSEPH A. SCHUECKLER AND
THERESA F. SCHUECKLER, EUGENE HEWITT,
and WILLIAM BENTLEY,

Respondents.

AFFIDAVIT OF PAUL MORRISON-TAYLOR

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

PAUL MORRISON-TAYLOR, being duly sworn, deposes and says:

1. I am a member of Phillips Lytle LLP, attorneys for National Fuel Gas Supply Corporation ("National Fuel").

2. I submit this Affidavit in further support of National Fuel's Verified Petition and Order to Show Cause.

A. Alignment Sheets for the Schuecklers' Property

3. On March 17, 2015, National Fuel submitted its application to the Federal Energy Regulatory Commission ("FERC") for a certificate of public convenience and necessity ("Certificate") for the construction and operation of the Northern Access 2016 Project (the "Project"). As part of its FERC application, National Fuel submitted alignment sheets demonstrating where National Fuel intends to construct the proposed natural gas

transmission pipeline. The alignment sheets are publicly available on the FERC electronic docket at https://elibrary.ferc.gov/idmws/Doc_Family.asp?document_id=14313199 (FERC Accession No. 20150317-5092).

4. Attached as **Exhibit A** is an excerpt from the alignment sheets filed with FERC, showing the proposed pipeline route over the property of Respondents Joseph Schueckler and Theresa Schueckler (the "Schuecklers").

B. Negotiations with the Schuecklers and National Fuel's Offer

5. Between May 2015 and March 2017, National Fuel (and its counsel) engaged in extensive negotiations with the Schuecklers (and their counsel) concerning a proposed right-of-way agreement so that National Fuel could acquire the necessary easements over the Schuecklers' property.

6. The parties negotiated through at least several drafts of a proposed right-of-way agreement, which included as compensation to the Schuecklers, among other things, an offer of a significant payment from National Fuel and the performance of certain work along the proposed easement. Ultimately, however, the parties could not reach an agreement concerning the right-of-way agreement.

7. On March 20, 2017, National Fuel sent an offer to the Schuecklers to acquire the easements, in accordance with Sections 303 and 304 of New York's Eminent Domain Procedure Law. National Fuel's offer to the Schuecklers was for the full amount of the appraised value of the easements requested in this proceeding. Attached as **Exhibit B** is a copy of the March 20, 2017 offer letter.

8. The Schuecklers rejected National Fuel's offer on March 23, 2017. Attached as **Exhibit C** is a copy of the Schuecklers' March 23, 2017 rejection notice.

C. Request for Reconsideration of the FERC Order

9. On February 3, 2017, FERC issued an Order Granting Abandonment and Issuing Certificates for the Project (the "FERC Order").

10. The FERC Order references, among other things, an Environmental Assessment prepared by FERC. Attached as **Exhibit D** is an excerpt of the Environmental Assessment.

11. On March 3, 2017, National Fuel requested reconsideration and clarification of the FERC Order ("Request for Reconsideration"). In its Request for Reconsideration, which is currently pending before FERC, National Fuel asserts that the New York State Department of Environmental Conservation ("NYSDEC") waived the requirement for a Water Quality Certification ("WQC") because of its failure to comply FERC's deadline. Attached as **Exhibit E** is an excerpt of National Fuel's Request for Reconsideration before FERC (FERC Accession No. 20170303-5147).

12. On April 14, 2017, NYSDEC purportedly denied National Fuel's request for a WQC. Attached as **Exhibit F** is a copy of the letter from NYSDEC, dated April 7, 2017, and emailed to National Fuel on April 14, 2017.

PAUL MORRISON-TAYLOR

Sworn to before me this
15th day of May, 2017.

Rhonda A. Miller
Notary Public

RHONDA A. MILLER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Oct. 2, 2017

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EXHIBIT A TO TAYLOR AFFIDAVIT – EXCERPT OF ALIGNMENT SHEETS FILED WITH FERC

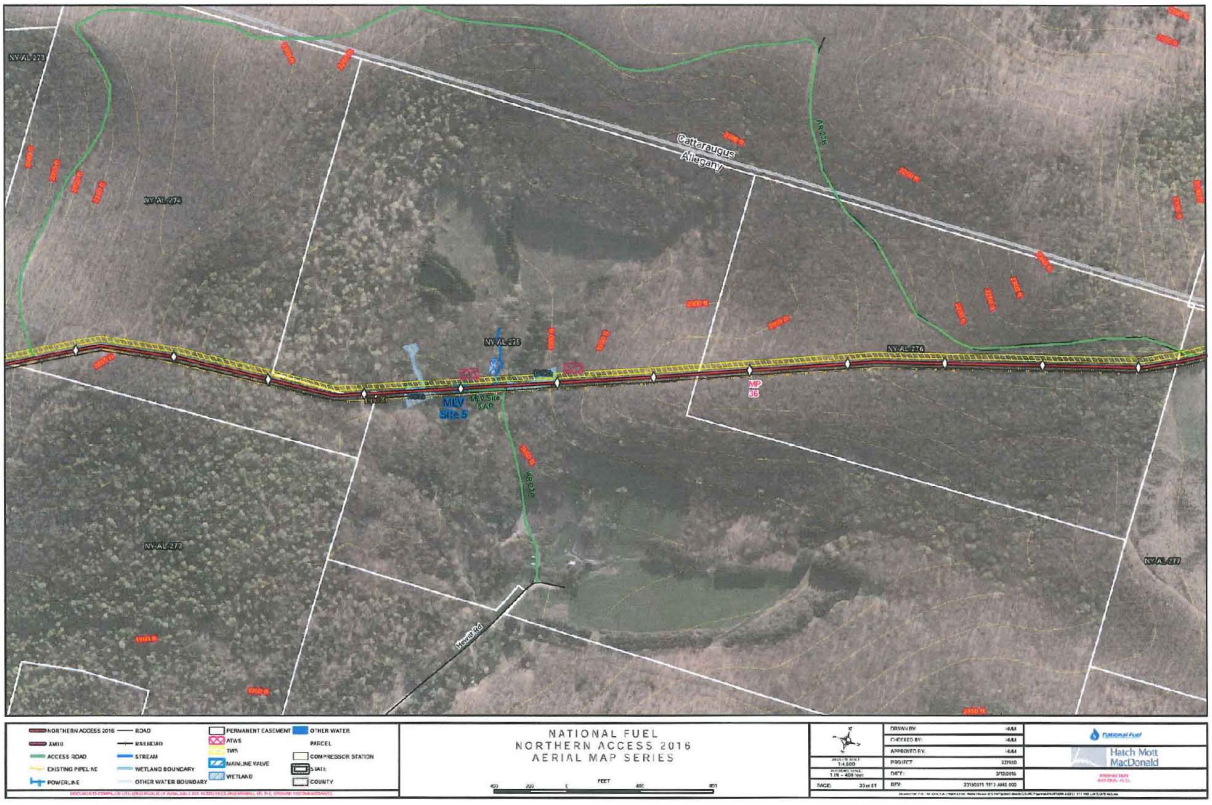

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EXHIBIT B TO TAYLOR AFFIDAVIT – MARCH 20, 2017 CORRESPONDENCE FROM NATIONAL FUEL GAS SUPPLY CORPORATION ("NATIONAL FUEL") TO JOSEPH AND THERESA SCHUECKLER [209- 214]

National Fuel

March 20, 2017

Joseph A. Schueckler and Theresa F. Schueckler
[redacted] Hewitt road
Cuba, NY 14727

RE: National Fuel Gas Supply Corporation and Empire Pipeline, Inc.
Northern Access 2016 Project
Town of Clarksville, Allegany County, NY
Tax ID: [redacted]

Dear Mr. and Mrs. Schueckler:

I am writing about National Fuel Gas Supply Corporation's ("NFGSC") efforts to acquire a pipeline easement affecting your above referenced property. We regret that, at this time, we have been unable to reach an agreement about the pipeline easement with you.

The Northern Access 2016 Project was certified by the Federal Energy Regulatory Commission ("FERC") by Order dated February 3, 2017 (158 FERC, ¶61, 1451). Since receiving FERC's approval to construct and operate the Northern Access 2016 Project, we are moving forward with a timetable that anticipates completion of the project by the winter of 2017/2018.

By virtue of the FERC approval of the project, as well as the Eminent Domain Procedure Law ("EDPL") and other New York, Pennsylvania and federal laws, NFGSC has the right to commence a court action to acquire the pipeline easements it seeks across your property. It is not our preference to commence court action, but it will be a necessity should we remain at an impasse regarding the terms of the pipeline easement.

Enclosed is NFGSC's final offer for a pipeline easement over your property. As required by the EDPL, we have obtained an appraisal of the fair market real property value of the pipeline easement. The attached offer constitutes 100% of the highest appraised fair market value for the pipeline easement we seek to acquire. Please review this offer carefully and provide your response no later than March 24, 2017. However, please note that due to the timeframe necessary to complete the project, you may receive an Order to Show Cause and Verified Petition prior to March 24, 2017. Nevertheless, NFGSC will honor your response to this offer if we receive it by March 24, 2017.

It is our sincere hope that we will agree upon an acceptable arrangement with you. Please contact me at (716) 857-7089 if you would like to discuss this matter.

Very truly yours,

Julie A. Bachan
Sr. Land Services Manager
Land Department

JAB/rl
Enclosures

OFFER TO PURCHASE

Pursuant to the Eminent Domain Procedure Law of the State of New York, National Fuel Gas Supply Corporation (NFGSC) hereby offers to purchase from you an easement in your real property as described in the attached Exhibit A, for the sum of Twenty Five Thousand Seven Hundred Dollars ($25,700.00).

This offer constitutes an amount not less than NFGSC's highest approved appraisal of the just compensation for the easement. If you accept this offer, payment will be made to you together with any appropriate interest. The sum of $ represents the following damage to you:

(a)	Total direct damage	$25,700.00
(a)	Total severance damage	$ 0
(b)	Total consequential damage	$ 0

You may accept this offer as payment in full, or reject the offer as payment in full and instead elect to accept the offer as an advance payment. Your election to accept the offer as an advance payment will not prejudice your right to claim additional compensation from NFGSC. However, if you fail to file a claim within the time specified by the Court, you will be deemed to have accepted the advance payment as full settlement of your claim. If you accept this offer, NFGSC will enter into an agreement with you providing for payment, either as payment in full or as an advance payment.

Important notice: Rejection of this offer or failure to respond to it within ninety (90) days suspends NFGSC's obligation to pay interest on the amount of this offer until the time you accept the offer as payment in full or as advance payment, or the Court directs otherwise. This notice is independent of NFGSC's request that you respond to its offer by March 24, 2017.

Notification of your response to this offer should be directed to: National Fuel Gas Supply Corporation, Attention: Julie A. Bachan, 6363 Main Street, Williamsville, New York 14221.

Dated:

3/20/17

National Fuel Gas Supply Corporation

By _____

Julie A. Bachan

TOWN OF CLARKSVILLE
ALLEGANY COUNTY, NEW YORK

EXHIBIT "A"

SHEET 1 OF 1

*PROPERTY LINES ARE BASED ON COUNTY TAX MAPS AND LIMITED FIELD SURVEY DATA AND ARE NOT THE RESULT OF A FULL BOUNDARY SURVEY

NO.	DATE	REVISION	DRWN	CHK'D	APP'D
G	04/28/16	PROPERTY LINE CHANGE	ZIF	RPM	SG
F	01/14/16	ADDED ACCESS ROAD	JNH	RPM	SG
E	12/17/15	ACCESS ROAD REROUTE	DBH	RPM	SG
D	08/17/15	PERMANENT ACCESS ROAD EDITS	JJS	RPM	SG
C	06/15/15	PERMANENT ACCESS ROAD EDITS	JNH	RPM	SG
B	05/12/15	TOWNSHIP CHK	JDH	RPM	SG
A	04/21/15	ISSUE FOR REVIEW	JNT	RPM	SG

Hatch Mott MacDonald
4200 East Skelly Drive, Suite 520
Tulsa, OK 74135
T (918) 493-2221 ▪ F (918) 494-3091

National Fuel

NORTHERN ACCESS 2016
TOWN OF CLARKSVILLE
ALLEGANY COUNTY, NEW YORK

SCALE: AS NOTED | PROJ. ID: 343699 | NY-AL-275

Check One:

_____ I (We) accept the above offer as payment in full.

_____ I (We) accept the above offer as an advance payment.

_____ I (We) reject the above offer.

Date:

_____ By:_____
Joseph A. Schueckler

_____ By:_____
Theresa F. Schueckler

EXHIBIT C TO TAYLOR AFFIDAVIT – MARCH 23, 2017 CORRESPONDENCE FROM JOSEPH AND THERESA SCHUECKLER TO NATIONAL FUEL [209- 214]

JOSEPH A. & THERESA F. SCHUECKLER
[redacted] HEWITT ROAD
CUBA, NEW YORK
[redacted]

MARCH 23, 2017

MAR 24 2017

Julie A. Bachan
National Fuel Gas Supply Corporation
6363 Main Street
Williamsville, New York

Dear Julie;

Thank you for talking with me today on the phone. In regard to the Northern Access Pipeline proposal, NFG seems to be unaware of the constitutional rights of landowners and furthermore are only interested in adding to the profits of NFG and its share holders while disrupting the lives of landowners as well as forcing their customers to finance the cost of installing the Northern Access Pipeline by charging higher rates for heating gas.

The methods of negotiating smacks of legal threats, bulling, vague and exaggerations and blunt refusal of agreements to landowners requests that would make the NAPL less of an impact on the landowners. A fair and compassionate compensation would have a small effect on the overall cost of the NAPL. Even with the cost of high paid negotiators seems to be a very inefficient cost that reduces profit for NFG and shareholders. In light of all the environmental issues, we are still optimistic that an agreement can be reached.

Renewable energy is a better way to go.

Sincerely,

Joseph A. Schueckler

Theresa F. Schueckler

EXHIBIT D TO TAYLOR AFFIDAVIT – EXCERPT FROM JULY 2016 FERC NORTHERN ACCESS 2016 PROJECT ENVIRONMENTAL ASSESSMENT [215- 216]

Federal Energy Regulatory Commission

Office of Energy Projects

July 2016

National Fuel Gas Supply Corporation
Empire Pipeline, Inc.

Docket No. CP15-115-000
CP15-115-001

NORTHERN ACCESS 2016 PROJECT

Environmental Assessment

Cooperating Agencies:

New York State Agriculture and Markets

U.S. Army Corps of Engineers

Washington, DC 20426

National Fuel has also committed to participate in a FERC third-party compliance monitoring program during the construction phase of the Project. Under this program, National Fuel would fund a contractor, to be selected and managed by the FERC, to provide environmental compliance monitoring services. The FERC third-party Compliance Manager would provide daily reports to the FERC on compliance issues and make recommendations to the FERC Environmental Project Manager on how to address compliance issues and construction changes, should they arise. FERC staff would also conduct inspections throughout construction and restoration.

e. Operation and Maintenance

National Fuel would operate and maintain the new pipeline and aboveground facilities in accordance with all applicable federal and state requirements, including the minimum federal safety standards identified in 49 CFR 192.

National Fuel's maintenance of the pipeline facilities would include periodic visual inspections as well as routine pedestrian surveys, as necessary, in accordance with the applicable regulatory requirements and National Fuel's operations requirements. Leak inspections and cathodic protection maintenance would be conducted in accordance with DOT requirements. Additionally, all pipeline markers and signs would be routinely inspected and would be replaced as necessary to ensure that pipeline locations are clearly identified.

Post-construction monitoring would be conducted to identify erosion or washout areas, damaged or non-functional permanent erosion control devices, and to evaluate restoration of affected wetlands. Any issues identified during post-construction monitoring would be addressed in accordance with applicable federal and state regulations and National Fuel's ESCAMP. National Fuel would file quarterly activity reports with the FERC documenting problems, including those identified by landowners, and corrective actions taken for at least 2 years following construction or until restoration is complete. The FERC staff would conduct annual restoration inspections until restoration is successful.

Maintenance of the permanent pipeline right-of-way would include periodic mowing, as necessary, to allow for visual inspections. Actively cultivated areas would be allowed to revert to pre-construction use for the full width of the right-of-way. In all other upland areas a 50-foot-wide permanent pipeline right-of-way would be maintained in a primarily herbaceous state. In wetlands, a 10-foot corridor centered over the pipeline would be maintained; trees within 15 feet of the pipeline with roots that could compromise the integrity of the pipeline coating would be selectively cut and removed.

Operation and maintenance activities at the new compressor stations would include calibration, inspection, and other scheduled or routine maintenance. Operational testing would also be performed on safety equipment to ensure proper functioning.

8. Permits, Approvals, and Consultations

Table A.8-1 lists the applicable permits, approvals, and consultations for the Project. National Fuel would be required to obtain all necessary permits and approvals relating to construction and operation of the Project, regardless of whether they appear in the table or not.

EXHIBIT E TO TAYLOR AFFIDAVIT – EXCERPT FROM NATIONAL FUEL'S MARCH 3, 2017 REQUEST FOR FERC FOR RECONSIDERATION AND CLARIFICATION OF FEBRUARY 3, 2017 FERC ORDER [217-227]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation	)	**Docket No. CP15-115-000**
Empire Pipeline, Inc.	)	**Docket No. CP15-115-001**

REQUEST FOR RECONSIDERATION AND CLARIFICATION OR, IN THE ALTERNATIVE, APPLICATION FOR REHEARING OF NATIONAL FUEL GAS SUPPLY CORPORATION AND EMPIRE PIPELINE, INC.

Pursuant to Section 19(a) of the Natural Gas Act ("NGA")[1] and Rules 207 and 713 of the Rules of Practice and Procedure[2] of the Federal Energy Regulatory Commission ("Commission"), National Fuel Gas Supply Corporation ("National Fuel") and Empire Pipeline, Inc. ("Empire"), collectively, "Applicants," hereby request reconsideration and clarification or, in the alternative, rehearing of the Order Granting Abandonment and Issuing Certificates ("Order") issued February 3, 2017 in the above-captioned proceedings.[3]

I. Background

National Fuel and Empire filed a joint certificate application on March 17, 2015 for the Northern Access 2016 Project ("Project"), which was subsequently amended on November 2, 2015 (collectively, the "Joint Application"). The Joint Application requested, among other things, that the Commission issue a certificate of public convenience and necessity to National Fuel and Empire under Section 7(c) of the NGA to construct and operate certain natural gas pipeline facilities in New York and Pennsylvania. The Project will expand the National Fuel pipeline system to provide 497,000 dekatherms per day of new firm natural gas transportation

[1] 15 U.S.C. § 717r(a) (2012).

[2] 18 C.F.R. §§ 385.207, 385.713 (2015).

[3] *National Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (2017).

Applicants will use, and how dewatering filter bags are handled. NYSDEC Comments at 7-9. The Commission should specifically clarify that the avoidance and mitigation measures specified in the EA and the Order constitute the entirety of Applicants' obligations and that all other NYSDEC regulations or agency approvals are preempted by the NGA.

C. The Commission Should Find that NYSDEC Has Waived Its Authority to Issue a Water Quality Certificate under Section 401 of the Clean Water Act.

NYSDEC, as a state agency with delegated authority to issue permits or authorizations under federal law, was required to issue a decision on Applicants' pending Water Quality Certification application in accordance with FERC's regulations and Notice of Schedule for Environmental Review of the Project ("Schedule"). That established a deadline for NYSDEC to grant or deny Applicants' WQC application by October 25, 2016. There is no question that NYSDEC failed to meet that deadline. As required under 33 U.S.C. § 1341(a)(1), NYSDEC's failure to act within the time required by the applicable statute (on or before October 25, 2016) constitutes a waiver of the Clean Water Act's certification requirements. Accordingly, Applicants request that the Commission find that a NYSDEC WQC is not required before construction on the Project may begin. To the extent required, the Order should be clarified or supplemented to add a finding of a waiver or, in the alternative, Applicants seek rehearing of any failure to make the required finding.

1. The Energy Policy Act of 2005 and FERC's Implementing Regulations

Section 313 of the Energy Policy Act of 2005 ("EPAct") amended 15 U.S.C. § 717n of the NGA to require "[e]ach Federal and State agency considering an aspect of an application for Federal authorization" to "cooperate with the Commission and comply with the deadlines established by the Commission." *See also* 71 Fed. Reg. 30,632, 30,633 (May 30, 2006) (FERC-proposed rule implementing Section 313 and noting that EPAct requires FERC to "establish a

schedule for agencies to review requests for Federal authorizations required for a project....). The term "Federal authorization," as defined by the EPAct, means "any authorization required under Federal law with respect to an application for authorization under" Sections 3 or 7 of the NGA and "includes any permits, special use authorization, certifications, opinions, or other approvals as may be required under Federal law...." 15 U.S.C. §§ 717n(a)(1)-(2). These federal authorizations include Water Quality Certifications under 33 U.S.C. § 1341.[15]

FERC promulgated new regulations to "better coordinate[ ] the review undertaken by the various agencies responsible for issuing necessary Federal authorizations" so that "all agencies responsible for issuing federal authorizations necessary for natural gas projects ... reach timely final decisions." 71 Fed. Reg. at 30,633. Among those was the creation of a default deadline for all federal authorizations to be granted or denied within 90 days of FERC issuing an EA or an Environmental Impact Statement for the project "unless a schedule is otherwise established by Federal law." 18 C.F.R. § 157.22. Order 687 clarified that FERC's schedules for the completion of permitting or authorization reviews cannot compel federal or state agencies to comply with deadlines shorter or longer than those provided in underlying federal law. Order No. 687, RM06-1-000 (Oct. 19, 2006) at PP 18, 19 (citing 15 U.S.C. § 717n(c)(1)(B)). Section 401 of the Clean Water Act, however, does not set any definitive deadline or review period. Instead, federal or state agencies must grant or deny a WQC application "within a reasonable period of time" no longer than one year. 33 U.S.C. § 1341(a). Therefore, although FERC cannot issue a

[15] In a letter to Applicants, NYSDEC claimed that "[t]he Section 401 WQC Review is a State certification, not a Federal authorization ...." Letter from NYSDEC to Tetra Tech, Inc., CP15-115-000 (Sept. 21, 2015) at 3. NYSDEC's claim is plainly incorrect given that Water Quality Certificates are not a creature of state law but instead are required solely by Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, as NYSDEC has tacitly acknowledged more recently in a D.C. Circuit filing involving another party. *See* NYSDEC *Millennium* Br. at 3 ("One necessary authorization [under the federal NGA] is a state certification under section 401 of the Clean Water Act . . ."); *id.* at 5 (similar).

scheduling order extending the review period beyond one year, it may issue a review period of less than one year so long as it is "reasonable."[16]

To further implement the scheduling authority provided in the EPAct, FERC also promulgated an amendment to its Rules of Practice and Procedure at 18 C.F.R. § 385.2013. Rule 2013 requires all agencies providing a federal authorization, including state agencies with delegated authority to issue federal authorizations, to file a notice within 30 days of the date of a "receipt of a request for a Federal authorization" that contains the following:

> (1) Whether the application is ready for processing, and if not, what additional information or materials will be necessary to assess the merits of the request;
>
> (2) The time the agency or official will allot the applicant to provide the necessary additional information or materials;
>
> (3) What, if any, studies will be necessary in order to evaluate the request;
>
> (4) The anticipated effective date of the agency's or official's decision; and
>
> (5) If applicable, the schedule set by Federal law for the agency or official to act."

18 C.F.R. § 385.2013(a)(1)-(5).

This new regulation allows federal and state certifying agencies to notify FERC of any concerns regarding their ability to meet a scheduled deadline or an applicant's submission of incomplete applications due to the need for additional information. As indicated in subsections (a)(1)-(a)(5), the certifying agency is required to notify FERC of whether an application is incomplete and whether any other federal deadlines for making a decision on the application should be used instead of those within FERC's schedule.

[16] The U.S. Army Corps of Engineers, for instance, established by rule a review period for WQC applications of 60 days after a federal or state agency receives the application. 33 C.F.R. § 325.2(d)(3). This is significantly shorter than the review period of 90 days after FERC issues the project's environmental document. 18 C.F.R. § 157.22.

2. NYSDEC's Failure to Comply with FERC's Deadline and Notice Regulations

In this case, FERC issued a Notice of Application for the Project on March 27, 2015 wherein it stated that the "filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's" EA. *See* Notice of Application, CP15-115-000 (Mar. 27, 2015) at 2. NYSDEC subsequently submitted scoping comments for the EA, Letter from NYSDEC to FERC, CP15-115-000 (May 29, 2015), and intervened in the proceeding. *See* NYSDEC Petition to Intervene, CP15-115-001 (Nov. 10, 2015). Pursuant to 18 C.F.R. § 157.22, on April 14, 2016, FERC issued the Schedule for this proceeding. The Schedule referenced the 90-day deadline in its March 27, 2015 Notice of Application and explained that the "notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment... for the Project." *See* Notice of Schedule, CP15-115-000 (Apr. 14, 2016) at 1. The Schedule then listed July 27, 2016 as the anticipated date of the EA and October 25, 2016 as the "90-day Federal Authorization Decision Deadline." The Commission staff did, in fact, issue the EA on July 27, 2016.

As an intervenor in the proceeding, NYSDEC was provided notice of the 90-day deadline as early as March 2015 through the Notice of Application. The April 2016 Schedule listed the specific date of October 25, 2016 as the deadline for NYSDEC to grant or deny Applicants' WQC application. Further, NYSDEC received Applicants' application for a WQC on March 2, 2016. This provided NYSDEC in excess of seven months to consider Applicants' WQC

application in advance of the October 25, 2016 deadline. NYSDEC's receipt of Applicants' WQC application also triggered the 30-day time limit for NYSDEC to submit its notice to FERC under 18 C.F.R. § 385.2013, describing whether Applicants' application was complete, what additional information was required if the application was incomplete, the anticipated date of NYSDEC's decision, and whether there was any other "schedule set by Federal law." NYSDEC failed to file the required notice. Nor did NYSDEC request an extension of time for the October 25, 2016 deadline under 18 C.F.R. § 385.2008(a) or otherwise lodge any objection to the deadline with FERC.

3. NYSDEC waived the Water Quality Certification requirement under Section 401 of the Clean Water Act.

Under Section 401 of the Clean Water Act, where an applicant "for a Federal license or permit" proposes to construct or operate a facility "which may result in any discharge into the navigable waters," the appropriate state agency "shall provide the licensing or permitting agency a certification ... that any such discharge will comply with the applicable provisions" of the Clean Water Act. 33 U.S.C. § 1341(a)(1). "If the State ... fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to the Federal application." *Id.* Although the Clean Water Act is silent as to which entity determines that a waiver has occurred, for Section 7 proceedings, Congress vested that authority in the Commission through the NGA's scheduling authority. Indeed, NYSDEC has recently expressly taken the position that it is this Commission that should first determine whether a waiver has occurred:

> FERC, and not this Court, is the proper forum to consider in the first instance [a] claim that the Department waived its right to deny or conditionally grant the section 401 application. . . . [A]n applicant for a delayed state section 401 certification should raise

> the waiver issue with the federal permitting authority first, and then sue the federal permitting authority if it declines to find waiver.

NYSDEC *Millennium* Br. 20-21; *accord id.* at 4 ("FERC is also responsible for determining whether a State has waived its right to issue a certification under section 401 of the Clean Water Act."); *id.* at 21-22 ("FERC is the proper forum for the initial consideration of claims that the Department has waived its right to provide a section 401 certification."). The Commission should take NYDEC at its word, especially because the statutory command—described below—is clear.

Under 15 U.S.C. § 717n(b)(2), "[e]ach Federal and State agency considering an aspect of an application for Federal authorization *shall* cooperate with the Commission and comply with the deadlines established by the Commission." (emphasis added). Congress further ordered that FERC "shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall (A) ensure expeditious completion of all such proceedings; and (B) comply with applicable schedules established by Federal law." *Id.* § 717n(c)(1). This language requires a state agency to comply with FERC deadlines for *any* federal authorization it has delegated authority to issue. By vesting such scheduling powers in FERC, Congress placed in FERC the responsibility for determining the "reasonable period of time (which shall not exceed one year)" for State agencies to grant or deny a WQC in Section 7 certificate proceedings. In this case, FERC exercised its powers under Section 717n by setting an October 25, 2016 deadline for NYSDEC to grant or deny Applicants' WQC application. NYSDEC did not comply with FERC's scheduled deadline. Therefore, pursuant to the remedy specified in the Clean Water Act for inaction, where a state agency "fails or refuses to act on a request for certification ... the certification requirements ... shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1).

4. NYSDEC has waived any right to contest FERC's Schedule.

In its correspondence and litigation briefing,[17] NYSDEC asserted that the requirements of the NGA and the associated Commission orders do not apply to the states when acting under Section 401 of the Clean Water Act. *See, e.g.*, Letter from NYSDEC to Tetra Tech Inc., CP15-115-000 (Sept. 21, 2015) at 3 (FERC schedule does not apply to Water Quality Certificate reviews); NYSDEC *Millennium* Br. at 24-31. Here, however, NYSDEC has waived any argument that its time to consider Applicants' WQC application has not yet expired. It cannot be disputed that NYSDEC failed to file the notice required under 18 C.F.R. § 385.2013 – or that it failed to act on Applicants' WQC application by October 25, 2016. If NYSDEC had any objections to FERC's Schedule, it was obligated to lodge those objections in its notice under 18 C.F.R. § 385.2013 and to request an extension of time (to the extent permitted by the time limit under 33 U.S.C. § 1341(a)). NYSDEC's failure to object to FERC's Schedule through the manner set forth in the applicable regulation waived any objections it might have had regarding the deadline for granting or denying Applicants' WQC application.

5. To the extent FERC considers NYSDEC's late objections, they are without merit.

In correspondence, comments, and other proceedings involving NYSDEC's denial of, or its failure to act on, Water Quality Certifications in connection with other NGA-jurisdictional projects, NYSDEC has advanced various arguments as to why the timing requirements of the Clean Water Act trump the Commission's scheduling authority under the NGA, and its related waiver deadline. Although NYSDEC has failed to comply with the Commission's applicable notice and scheduling requirements, to the extent the Commission considers these arguments,

[17] In addition to the aforementioned *Millennium* case pending before the D.C. Circuit, a challenge to NYSDEC's denial and failure to act on a Section 401 Water Quality Certification application is pending before the United States Court of Appeals for the Second Circuit in *Constitution Pipeline Co.* *See* n. 17, *supra*.

Applicants respectfully suggest that the Commission should reject them for the reasons discussed below.

(a) NYSDEC is not entitled to a full year to complete its review of a Water Quality Certification application.

In recent and ongoing litigation in the D.C. Circuit Court of Appeals, NYSDEC asserts that it is entitled to take a full year to consider a WQC application and that the Clean Water Act prohibits the Commission from imposing a shorter schedule. *See* NYSDEC *Millennium* Br. at 14-16. That argument, however, ignores the plain language of the Clean Water Act. The statute affords reviewing agencies "a reasonable period of time (which shall not exceed one year) after receipt of such request" to grant or deny a WQC. 33 U.S.C. § 1341(a)(1). NYSDEC's view that it is guaranteed a full year to make a decision would render the language "a reasonable period of time (which shall not exceed...) . . ." superfluous. In order to give effect to the language that NYSDEC would delete, one can only read the statute as allowing for reasonable periods of time of less than one year.

Where Congress has intended to guarantee a reviewing agency a full one year to review a permit application, it has specifically stated so. For instance, under the Clean Air Act's Prevention of Significant Deterioration permitting program, "[a]ny completed permit application under section 7410 of this title for a major emitting facility ... shall be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). The Clean Air Act has similar language with respect to its Title V permitting program. *See* 42 U.S.C. § 7661b(c) ("The permitting authority shall approve or disapprove a completed application ... and shall issue or deny the permit, within 18 months after the date of receipt thereof...."). In neither statute is the language modified to allow for a "reasonable period of time" less than the maximum review period, as the Clean Water Act does. To credit NYSDEC's interpretation

would render this modification meaningless despite the clear intent of Congress for Section 401 of the Clean Water Act to operate differently than the Clean Air Act.

(b) The time period set by FERC's Schedule was reasonable, and provided NYSDEC with sufficient and adequate time to complete its review of Applicants' WQC application.

NYSDEC may argue that taking less than a full year to consider a WQC application is not "reasonable" due to the complexity of the technical issues involved. NYSDEC, as discussed above, waived any right to contest whether FERC's October 25, 2016 deadline was reasonable by failing to file the required notice under 18 U.S.C. § 385.2013. Even if NYSDEC was in a position to argue against the "reasonableness" of FERC's order, its argument would be incorrect for two reasons.

First, the requirement that state agencies reach a decision on federal authorizations within 90 days of the Commission issuing its final environmental review document was established by rule. 18 C.F.R. § 157.22. Any attempt to argue that this period of time is unreasonable would constitute an impermissible collateral attack on a FERC regulation.

Second, if NYSDEC required more time to consider Applicants' WQC application, then it was free to deny the application on October 25, 2016 or otherwise request an extension of time, including requesting up to a full year after receipt to consider the application.[18] NYSDEC did neither, believing it was free to ignore the Commission's regulations and schedule. *See* Letter from NYSDEC to Tetra Tech, Inc., CP15-115-000 (Sept. 21, 2015) at 3 (asserting NYSDEC is not bound by FERC regulations or schedule because a Clean Water Act Water Quality Certification "is a State certification, not a Federal authorization...."). Because

[18] NYSDEC has argued elsewhere that "[i]f the Department were required to act within one year of receiving an *incomplete* application for a section 401 certification, it could be forced to act on an application before the public notice process has concluded or even commenced." NYSDEC Millennium Br. at 28. This is no reason to ignore either the plain language of the Clean Water Act or FERC's scheduling authority. No applicant has the ability to "force" NYSDEC "to act on" anything. NYSDEC overlooks the option of denying an incomplete application.

NYSDEC failed to comply with the Commission's orders, and failed to comply with the deadline set under FERC's NGA authority, the Commission should find that the NYSDEC Water Quality Certification is waived.

Conclusion

WHEREFORE, for the foregoing reasons, Applicants respectfully request that the Commission grant reconsideration of the Order and also request clarification or, absent such clarification, rehearing of the Order.

Respectfully submitted,

/s/ William A. Williams

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Dated: March 3, 2017

EXHIBIT F TO TAYLOR AFFIDAVIT – APRIL 7, 2017 CORRESPONDENCE FROM NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO NATIONAL FUEL [228- 240]

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Environmental Permits
625 Broadway, 4th Floor, Albany, New York 12233-1750
P: (518) 402-9167 I F: (518) 402-9168 I deppermitting@dec.ny.gov
www.dec.ny.gov

April 7, 2017

National Fuel Gas Supply Corporation and
Empire Pipeline, Inc.
6363 Main Street
Williamsville, NY 14221
Attn: Ronald Kraemer

RE: Joint Application: NYSDEC Permit Nos.:
9-9909-00123/00004 (Water Quality Certification)
9-9909-00123/00001 (Article 24 - Freshwater Wetlands)
9-9909-00123/00002 (Article 15 – Protection of Waters)
Notice of Denial

Dear Mr. Kraemer:

On April 8, 2016, New York State Department of Environmental Conservation (NYSDEC or Department) received[1] from National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, NFG or Applicants) a Joint Application (Application) to obtain a Clean Water Act (CWA) Section 401[2] Water Quality Certification (WQC) for the proposed Project (as defined below) and New York State Environmental Conservation Law (ECL) Article 15, Title 5 (Protection of Waters) and Article 24, Title 23 (Freshwater Wetlands permits).[3] Based on a thorough evaluation of the Application as well as supplemental submissions, the Department hereby provides notice to NFG that, in accordance with Title 6 New York Codes Rules and Regulations (NYCRR) Part 621, the Application fails to demonstrate compliance with New York State water quality standards. Accordingly, NFG's Application, including its request for a WQC, is denied.[4] As required by 6 NYCRR § 621.10, a statement of NYSDEC's basis for denial is provided below.

BACKGROUND

Prior to receiving NFG's application for a certificate of public convenience and necessity for the Project pursuant to sections 7(b) and 7(c) of the Natural Gas Act (which was submitted by

[1] By letter agreement, dated January 20, 2017, the Department's Office of General Counsel and counsel for the Applicants mutually agreed that, for the purposes of review under Section 401 of the CWA, the Joint Application was deemed received by NYSDEC on April 8, 2016, "[t]hereby extending the date the NYSDEC has to make a final determination on the application until April 7, 2017."
[2] 33 U.S.C. § 1341.
[3] NFG's remaining applications for two Air State Facility permit applications; one for the Pendleton and Portersville compressor stations, remain pending before the Department and are not discussed herein.
[4] By this Notice of Denial, the Department also denies NFG's applications for permits pursuant to ECL Article 15 (stream disturbance) and Article 24 (freshwater wetlands disturbance) for the same reasons stated herein

NFG on March 17, 2015), Federal Energy Regulatory Commission (FERC) issued a *Notice of Intent to Prepare an Environmental Assessment for the . . . Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* on October 22, 2014 (EA Notice). The Department responded to the EA Notice by letter to FERC, dated November 21, 2014, asserting, among other issues, that the Project warranted a full Environmental Impact Statement (EIS) rather than an Environmental Assessment (EA) due to its expansive scope and significant impacts to New York's environmental and natural resources.[5] The Department reiterated this position to FERC in two additional letters on May 29, 2015 (before the issuance of the EA) and August 25, 2016 (after issuance of the EA), respectively.[6] FERC disregarded the Department's concerns and, on February 3, 2017, issued a certificate approving construction and operation of the Project. This certificate relies upon the EA and is conditioned upon NFG first obtaining all other necessary approvals, including the WQC. Accordingly, along with other necessary approvals from the Department, the Application for a WQC pending with the Department must be approved before construction of the Project may commence. NFG's Application was reviewed by NYSDEC in accordance with ECL Article 70 (Uniform Procedures Act or UPA) and its implementing regulations at 6 NYCRR Part 621, which provide a review process for applications received by NYSDEC.

Project Description and Overview of Impacts

The project primarily consists of a new 97-mile, 24-inch, interstate transmission pipeline that would transport natural gas extracted in Pennsylvania, through Allegany, Cattaraugus and Erie Counties in New York, ultimately delivering natural gas, to New York, the Northeast and Midwest United States and Canada (Project).[7] Construction and operation of the Project will (i) cross 192 State-regulated streams and (ii) impact a total of 73.377 acres of federal and State wetlands, of which there will be 2.335 acres of permanent impacts to NYSDEC-regulated Class I[8] and Class II[9] wetlands. The impacted streams and wetlands are home to a number of significant animal species, including trout (brown and rainbow) and the Eastern Hellbender, which is a State-listed species of concern; these water resources provide the necessary habitat to support their survival and

[5] FERC Docket No. CP15-115-000, Submittal 20141121-5254

[6] FERC Docket No. CP15-115-000, Submittals 20150529-5329 and 20160826-5189

[7] The Project also includes; (i) the take up and relay of approximately 4 miles of an existing 16-inch supply pipeline with a 24-inch pipeline in the Towns of Wheatfield and Pendleton in Niagara County, New York; (ii) a pipeline interconnection with Tennessee Gas Pipeline in the Town of Wales, Erie County, New York; (iii) a new 22,214 horsepower compressor station in Town of Pendleton, Niagara County; (iv) the addition of approximately 5,350 horsepower of compression at NFG's existing Porterville Compressor Station in the Town of Elma, Erie County, New York; and (v) a new natural gas dehydration facility in the Town of Wheatfield, Niagara County, New York.

[8] Class I wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefits of the Class I wetland. 6 NYCRR § 663.5(e)(2). A compelling economic need implies that the proposed activity carries with it actual necessity and that the proposed activity is one which must be done and is unavoidable. [6 NYCRR 663.5(f)(4).]

[9] Class II wetlands provide important wetland benefits, the loss of which is acceptable only in very limited circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a pressing economic or social need that clearly outweighs the loss of or detriment to the benefits of the Class II wetland. 6 NYCRR § 663.5(e)(2). A pressing economic or social need is one that is urgent and intense, although it does not have to be necessary or unavoidable. [6 NYCRR 663.5(f)(5).]

propagation. The Project, as proposed, would necessarily impact these waterbodies and jeopardize their best usages that New York's water quality standards were enacted to protect.

I. NYSDEC Application Review

The Department received NFG's Application to obtain a WQC pursuant to § 401 of the CWA on April 8, 2016. NFG supplemented the Application a number of times and, on January 25, 2017, the Department published a Notice of Complete Application for public review in the Environmental Notice Bulletin. NFG also had the Notice of Complete Application published in the Buffalo News, the Niagara Gazette, the Lockport Union Sun, the Olean Times, the Salamanca Press and the Wellsville Daily Reporter. This notice commenced a public comment period ending on February 24, 2017. During this time period three legislative hearings were held at different locations along the Project route. Approximately 5,700 public comments, both written and oral, were received during the comment period.

In making its determination to deny NFG's Application for a WQC and permits pursuant to ECL Articles 15 and 24, NYSDEC has reviewed the impacts directly associated with the Project proposal in terms of water body water quality, stream bed and bank disturbances, and wetlands and wetland adjacent area disturbances. The following discusses the nature of those impacts stemming from Project construction and operation. Because of these identified impacts, as well as their cumulative effect of these impacts, the Application does not demonstrate that the Project will comply with the State's water quality standards.

STATEMENT OF REASONS FOR DENIAL

The Department, in accordance with CWA § 401, is required to certify that a project meets State water quality standards if the project requires a federal agency issuing a federal license or permit in conjunction with its proposed operation. An applicant for a water quality certification must demonstrate compliance with the water quality regulations found at 6 NYCRR Section 608.9 (Water Quality Certifications). In order to make this demonstration, an applicant must show compliance with §§ 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, as implemented by New York's applicable water quality standards and thermal discharge criteria set forth in 6 NYCRR Parts 701, 702, 703, 704 and 750, as well as other applicable State statutes, regulations, and criteria. Additional State statutes and regulations applicable to the Project activity here include, for example, ECL Article 15, Title 5 and its implementing regulations at 6 NYCRR Part 608, as well as ECL Article 24, Title 23 and its implementing regulation at 6 NYCRR Part 663.

To obtain a WQC, an applicant must demonstrate compliance with the above-referenced State water quality standards. Here, NFG's Application fails to demonstrate that the Project will comply with New York State water quality standards. Specifically, NFG has failed to demonstrate that construction and operation of the Project will comply with the best usages of the impacted waterbodies, as set forth in 6 NYCRR § 701.6, 701.7, 701.8 and 701.25 and NYSDEC's Narrative Water Quality Standards set forth in 6 NYCRR § 703.2. The Department is guided by statute to take into account the cumulative impact upon all relevant resources in making a determination in connection with any license, order, permit or certification, which in this case includes being able

to evaluate the cumulative water quality impacts of right-of-way (ROW) construction and operation on the numerous water bodies mentioned in this letter.[10]

In particular, the Project fails to avoid or adequately mitigate adverse impacts to water quality and associated resources. Crossing multiple streams and freshwater wetlands within a watershed or basin, including degrading riparian buffers, causes a negative cumulative effect on water quality to that watershed or basin. If allowed to proceed, the Project would materially interfere with or jeopardize the biological integrity[11] and best usages[12] of affected water bodies and wetlands.

Pertinent to the Department's review are the best usages of Class A, B and C streams (being 126 of the 192 streams crossed by the Project). These best usages include fish propagation and survival, and fishing. Class A waters also include usages related to drinking water supply. It is evident that the impacts from the Project, as set forth below, will impede the best usages of many water bodies, particularly those with a trout standard or rare species, by degrading the survival and propagation of balanced, indigenous populations of shellfish, fish and wildlife that rely upon these waters. As it relates to State Narrative Water Quality Standards, 6 NYCRR § 703.2 states that there shall be "no increase [in turbidity] that will cause a substantial contrast to natural conditions." The techniques utilized for construction of the Project will cause numerous violations of the turbidity standard.

The following are the Department's reasons for denial of the Application based on applicable sections of the Federal and New York State environmental laws, regulations or standards related to water quality.

I. Stream Crossings

The Department's review of applications for water quality impacts due to stream disturbances is conducted pursuant to Articles 15 and 17 of the ECL and 6 NYCRR Part 608 (Use and Protection of Waters), including sections 608.8 (Standards) and 608.9 (Water Quality Certifications);[13] Part 701 (Classifications) and section 703.2 (Narrative Water Quality Standards). As mentioned above, 6 NYCRR § 608.9(a)(6) requires the Department to consider "all state statutes, regulations and criteria" applicable to a given activity in making an ultimate determination regarding a WQC. In its consideration of NFG's Application, and pursuant to § 608.9(a)(6), the

[10] ECL § 3-0301(1)(b).
[11] 33 U.S.C. § 1251(a).
[12] *See generally* 6 NYCRR Part 701.
[13] In order to be obtain a WQC pursuant to 6 NYCRR § 608.9, an applicant must also demonstrate compliance various Federal statutes and State regulations, including: sections 301-303, 306 and 307 of the Federal Water Pollution Control Act, as implemented by the following provisions:

(1) effluent limitations and water quality-related effluent limitations set forth in Section 754.1 of this Title [now § 750-1.1];
(2) water quality standards and thermal discharge criteria set forth in Parts 701, 702, 703 and 704 of this Title;
(3) standards of performance for new sources set forth in section 754.1 of this Title [now § 750-1.1];
(4) effluent limitations, effluent prohibitions and pretreatment standards set forth in section 754.1 of this Title;
(5) prohibited discharges set forth in section 751.2 of this Title [now § 750-1.3]; and
(6) State statutes, regulations and criteria otherwise applicable to such activities.

Department relied, in part, on the standards set forth in 6 NYCRR § 608.8, which provide the framework within which the Department reviews stream disturbance impacts and other water resource impacts of a given project. Specifically, § 608.8(c) states that a "basis for the issuance [will include whether] . . . the proposal is in the public interest, in that . . . the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment."

NFG's Application, and subsequent submissions, outline the techniques to be used to install the Project pipeline. Considering the permitting standards described above in context with the Application, numerous environmental impacts will occur both during and after Project construction that will violate, or cause or contribute to violation of State water quality standards.

Because of the potential for significant habitat damage, destruction and permanent loss from pipeline construction, the Department recognizes that trenchless pipeline installation techniques, namely horizontal directional drilling (HDD) or conventional boring (CB), would prevent or substantially minimize impacts to regulated aquatic resources by avoiding surficial construction within these habitat areas and the associated water quality impacts. Because such trenchless crossing methods are proven to be a method to generally assure compliance with water quality standards, by avoiding and/or minimizing impacts, the Department has required a trenchless feasibility analysis of streams crossed by the Project's pipeline. Based on its analysis, NFG has concluded that such methods are not feasible with respect to 184 of the stream crossings. Consequently, impacts and damage to water resources will necessarily occur where trenchless crossing methods are not employed.

Impacts to Streams

During the course of construction, including clearing a 75-foot wide ROW along the entire length of the pipeline in New York (approximately 75 miles), 192 State-regulated streams will be crossed. Of these streams, there are seven Class A waterbodies (including two class A(T) streams); five Class B waterbodies; and 59 Class C waterbodies (including nine C(T) and six C(TS) streams). Cumulatively, construction would impact a total of 15,954 linear feet of streams and result in a combined total of 3.26 acres of temporary stream disturbance impacts. During its review of the Application, NYSDEC directed NFG to demonstrate compliance with State water quality standards[14] by providing site-specific information for each of the streams impacted by the Project. NYSDEC informed NFG that all stream crossings must be evaluated for environmental impacts and, for the reasons stated above, that trenchless technology was the preferred construction method for stream crossing.

Rather than directly clearing and excavating a ROW path and installing a pipe through all regulated areas, trenchless crossing methods, here HDD or CB, would instead 'drill' a void under the affected resource through which the pipeline follows thereby avoiding nearly all impacts to regulated aquatic resources. While trenchless crossing methods are the preferred crossing methods for all stream crossings in order to avoid or minimize water quality impacts, the Department recognizes the additional expense that may be associated with such methods. Therefore, the

[14] 6 NYCRR §§ 608.9 and 703.2

Department focused on more environmentally sensitive or significant waterbodies for purposes of additional analysis. Thus, rather than require the analysis at each of the 192 stream crossings, the Department requested that NFG provide a trenchless feasibility analysis aimed to assess the possibility of installing the Project pipeline using trenchless technology at 55 selected crossings. Of those 55 streams, 13 were identified by the Department as having even greater environmental significance and therefore requiring greater consideration for trenchless installation. These 13 priority streams had the following classifications: one Class A; one Class A(T); one Class B; four Class C(T); and six Class C(TS). A three-tiered method of evaluation was performed comprising of sequential reviews encompassing *physical/technical parameters*, then *environmental constraints* and lastly *technical design parameters*. NFG's analysis progressed through these categories until preventative constraints were identified, at which point NFG's analysis ended. Ultimately, even after the Department narrowed the scope of review for trenchless feasibility analysis, NFG concluded it would utilize trenchless methods at only five of the 13 priority streams identified by the Department.

NFG intends that the remaining 184 streams, which includes eight priority streams (*see* Table 1, below), will be crossed using dry crossings, permanent culverts or temporary bridges, all of which will negatively affect water quality. NFG proposes dry crossings of three Class A waterbodies (including one class A(T) stream); five Class B waterbodies; and 57 Class C waterbodies (including eight C(T) and five C(TS) streams). These crossings will permanently impair aquatic habitat and generate turbidity that will impair the best usages[15] of these waterbodies, thereby violating State water quality standards.

Table 1

Stream Name	Classification	Environmental Significance
Five Mile Creek	C(T)	Brown trout
Elton Creek	C(TS)	Brown trout and rainbow trout – wild and stocked
Ischua Creek	C(T)	Brown trout
Cattaraugus Creek	C(T)	Brown trout and rainbow trout – wild and stocked
Unnamed Tributary to Ischua Creek	C(TS)	Brown trout
Dodge Creek	C(T)	Brown trout, hellbender, mussels (creeper, fat mucket, flutedshell, plain pocketbook, spike)
McKinstry Creek	C(TS)	Brown trout and rainbow trout, including trout spawning
Haskell Creek	C(TS)	Brown trout, including trout spawning

[15] 6 NYCRR Part 701 sets forth the best usages of various waterbodies. The following best usages are applicable here:
- Class A waters are a "source of water supply for drinking, culinary or food processing purposes; primary and secondary contact recreation; and fishing . . . [and] shall be suitable for fish, shellfish, and wildlife propagation and survival";

- Class B waters are "primary and secondary contact recreation and fishing . . . [that] shall be suitable for fish, shellfish, and wildlife propagation and survival"; and

- Class C waters are for fishing[,] . . . shall be suitable for fish, shellfish and wildlife propagation and survival [and] . . . shall be suitable for primary and secondary contact recreation, although other factors may limit the use for these purposes.

The dry crossing of streams designated as trout (T) or trout spawning (TS) will negatively affect riparian and in-stream conditions necessary to provide habitat to support trout presence and preserve water quality. The loss of and conversion of riparian cover types will increase the input of turbid water (in violation of water quality standards). Construction in the ROW will destabilize stream banks and increase risks for further erosion and bank instability that would compromise water quality, notably turbidity. Excavation across stream beds will remove in-stream habitat forms such as rocks and woody debris that form pools and pockets as habitat for trout and other aquatic organisms. For example, cobble bars and gravel bottoms of streams provide spawning areas for aquatic organisms, and provide benthic invertebrates habitat areas. Furthermore, this will destabilize stream beds and likely make them much more susceptible to erosion, affecting both immediate habitat in the ROW but also downstream water quality and habitat by introducing turbidity and sedimentation. Upstream habitat may also be affected by migrating upstream erosion. These changes will negatively affect the best usages of trout and trout spawning streams by reducing the habitat to support trout and thereby fish survival, spawning and fishing.

NYSDEC's recent experiences with constructing large scale natural gas pipelines across New York State, involving multiple water body crossings in multiple watersheds or basins, point to the fact that, even with stringent water quality protection conditioning, violations of water quality standards at this scale occur causing significant degradation of water quality in stream after stream along a constructed ROW.

More broadly, riparian habitat surrounding streams within the Project ROW will be permanently impacted by construction activities involving excavation and burial of the pipeline and any needed grading of local topography by heavy construction equipment. When crossing streams, installing the pipeline requires excavating a trench a minimum of six feet deep by five feet wide through any stream bed. Currently, NFG does not propose to use HDD or CB for the majority of the stream crossings and instead proposes alternative construction methods, all of which have adverse water quality impacts. Conducting such construction in the wet would lead to far greater water quality impacts than HDD or CB. Furthermore, construction in dewatered conditions will not only physically disturb stream beds via excavation along the centerline of the pipeline, but also dry and desiccate any stream habitat between the excavated centerline and the perimeter of the dewatered ROW. The Department finds that these construction techniques would cause significant damage or destruction to both riparian and in-stream habitat, in turn causing violations of State water quality standards related to turbidity and best usages of the affected waterbodies. This damage or destruction would occur during construction and continue for a period of time post-construction.

Waters of the State are assigned classification and standards of quality and purity.[16] In establishing a waterbody classification, the Department is required to take into consideration the characteristics of surrounding lands in arriving at said classification in order to conserve the value of the water uses.[17] With respect to NFG's Project, several water quality standards will be negatively affected. The narrative standard for *turbidity*[18] will be violated when in-water

[16] ECL § 17-0301(4) and 6 NYCRR Part 701.
[17] ECL § 17-0301(3)(b)
[18] 6 NYCRR § 703.2.

construction occurs and at certain times during the post-construction phase. These water quality impacts and changes in riparian and stream habitat will degrade the affected waters which will then be unable to support best usages. This is particularly the case with a trout standard or rare species designation where the water body impact degrades the water body's capacity to guarantee the survival and propagation of balanced, indigenous populations of shellfish, fish and wildlife that rely upon those waters.

a. Impacts During Construction

Pipeline construction will cause significant impacts to riparian and stream habitat, with resulting adverse impacts to water quality.

i. Riparian Losses

Intact, naturally forested buffers, known as riparian zones, are critical for maintaining and protecting stream corridors and stream water quality. Areas with degraded riparian zones exhibit poorer aquatic habitat and water quality characteristics. NFG's open-dry trench stream crossing method will clear riparian vegetation (established woodland areas, trees and other woody plant material) and fully expose a full 75-foot bare soil ROW on both sides of each stream crossed. Using this area of disturbance, riparian impacts have been assessed as a percentage change in the area of riparian cover 100' x 75' wide on either side of all open-dry trenched streams. The loss of riparian habitat to this extent within the 100-foot buffer of a stream crossing is a negative impact to water quality and stream habitat to the extent that the riparian area contributes unfiltered, sediment laden, turbid water to the water body through bank erosion. This typically happens after construction has been completed, when revegetation measures have yet to adequately take hold, or have been unsuccessful, and therefore do not prevent stream bank erosion.

The Department performed a desktop aerial analysis of all open-dry trench stream crossings which aggregated the area of impacts within the riparian habitat zone. The area of all these crossings was summed and multiplied by one (100% habitat loss) to yield an area of 14 acres of total impact to riparian habitat. This represents the loss of riparian habitat along the entire length of the Project ROW during construction. While NFG proposes to regrade and replant select zones of the impacted riparian areas following construction, fully in-kind vegetation, including mature trees, will not be replanted nor ever be allowed to fully regrow to pre-construction conditions. Riparian habitat values will therefore not return to previous capacity to protect each water body from erosion and resulting sedimentation and turbidity in violation of State water quality standards. In addition, this has the added effect of negatively impacting best usages of the water body by aquatic species that cannot sustain exposure to these impacts.

Upon preparing a stream for dewatering, various construction steps, such as the excavation of intake pits and the placement of barriers, will be conducted within flowing water that will cause a significant visible contrast and exceedance of the turbidity water quality standard. At the completion of construction, work within flowing water will again occur as the materials and fill are removed from stream channels. There are 130 streams categorized as perennial or intermittent that are expected to be subject to these conditions. As proposed, the Project will cause State water quality violations related to turbidity to occur on at least two days at each stream crossing site,

totaling at least 260 water quality violations during the course of the Project. The installation and removal of temporary bridges and stream bank stabilization efforts associated with these stream crossings will also cause single event violations of the turbidity water quality standard. There will be further violations of the turbidity standard within regulated wetlands due to the extent of wetlands disturbance and degradation of wetlands values and benefits, as described above. The Application's inadequate design of mitigation of wetlands impacts will result in further degradation of the water quality benefits that wetlands perform.

ii. In-Stream Losses

All streams with flowing water at the time of construction of open-dry trench stream crossings will be dewatered for a length of 75 feet (being the width of the ROW) to facilitate excavating a trench and installing the pipeline across the stream bed. This will physically disturb the entire portion of stream bed between the up- and downstream limits of construction and the bankfull widths of each stream. Because of dewatering and subsequent drying, any aquatic organisms within this area will be lost. Thus, the disturbed stream bed is considered a 100% loss of stream habitat. This loss will continue for a period of time and only gradually abate under natural conditions when recovery and stabilization of this area occurs following completion of construction and rewatering. As calculated and reported by the applicant (which included only perennial and intermittent streams), the length of disturbed stream channels and their bankfull widths within the disturbed ROW will cause a total of 3.26 acres of in-stream habitat to be lost. Due to the increased turbidity caused during construction, the best usages of these waters for aquatic species and maintenance of these species' habitat will be lost until the affected water bodies recover and stabilize.

b. Post-Construction Impacts

i. Riparian Losses

In the post-construction time frame, regrading and replanting of new vegetation in the fully cleared riparian corridor will only occur within a limited portion of the riparian area disturbed during construction (see above). The re-vegetated area within the permanently maintained ROW in the riparian zone will be routinely mowed; new vegetation will not be allowed to grow higher than 15 feet. Based upon the typical disturbance layout described above (for both sides of a stream), clearing and ROW maintenance for the project will create a permanent loss of 0.11 acres of riparian habitat. Applying the percent cover from the riparian losses calculation to this 0.11 acre area per stream crossing yields a project total of 8.8 acres of permanent riparian habitat loss for all stream crossings. The permanent loss of the native, established riparian vegetation in these locations will have a negative effect on water quality and stream ecological health for the full service life of the pipeline. As described above, the degraded vegetative buffer, including the removal of established treed areas that hold and maintain stream bank structure, will cause bank erosion, resulting in sedimentation and turbidity in the water body. When this occurs, it will also degrade the best uses of the water body for aquatic organisms.

ii. In-Stream Losses

Following construction, disturbed in-stream areas will be rewatered and stabilized as necessary to prevent any obvious sources of erosion or stream degradation. However, the hydro-geomorphology of these streams is extremely complicated and disturbance to the bed and banks of the streams will result in instability and lead to future vertical or lateral erosion, which will result in additional turbidity and impairment of water quality. Given the increasing frequency of extreme weather and rainfall events, and the recent history of such events in this region of New York,[19] the integrity of streams and adjacent riparian areas will be of increasing importance to maintaining water quality. Only by avoiding physical disturbance to the bed and banks of streams will ongoing extensive and violations of water quality standards (turbidity) prevent along with the prevention of an impairment of designated best usages. The instability and turbidity of concern extends up- and down-stream beyond the project ROW.

Significantly, at least one of the streams proposed to be dry crossed by NFG (Dodge Creek, classified as a C(T) waterbody) is habitat occupied by the Eastern Hellbender, a listed New York State Species of Special Concern pursuant to ECL § 11-0535 and 6 NYCRR § 182.4. Eastern Hellbenders require clear streams and rivers to sustain their habitat and spawning. Accordingly, the impacts to Dodge Creek caused by Project construction, including changes in water quality (including turbidity) and flow, constitute a threat to the Eastern Hellbender and violate the best usage of the waterbody pursuant to 6 NYCRR § 701.8 and standards set forth in 6 NYCRR § 608.8(c).

II. Wetlands

Freshwater wetlands are an invaluable resource for flood protection, the protection and preservation of water resources and wildlife habitat. In addition to preserving water quality though their hydrologic absorption and storage capacity, wetlands protect subsurface water resources, recharge groundwater, and cleanse surface runoff to water bodies.[20] A permit pursuant to Article 24 of the ECL is required for any disturbance which will impair any of the functions and benefits of a NYSDEC regulated wetland and its associated adjacent areas.[21] Because 6 NYCRR § 608.9(a)(6) provides that an applicant for a WQC must also demonstrate compliance with "State statutes, regulations and criteria otherwise applicable to such activities," NFG must demonstrate that disturbances to a NYSDEC regulated wetland and its adjacent area will not violate applicable water quality standards, including those related to turbidity.[22]

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[19] Szabo, C.O., Coon, W.F., and Niziol, T.A., 2010, Flash floods of August 10, 2009, in the Villages of Gowanda and Silver Creek, New York: U.S. Geological Survey Scientific Investigations Report 2010-5259, 23 p.

[20] As pertinent to the Department's review here, ECL § 24-0105(7) defines the following wetland benefits:

1. flood and storm control;
2. wildlife habitat;
3. protection of subsurface water resources; . . .
5. pollution treatment;
6. erosion control; . . . and
9. sources of nutrients in freshwater food cycles and nursery grounds for freshwater fish.

[21] Adjacent area is defined as areas of land and water that are outside a wetland and within 100 feet, measured horizontally, of the boundary of the wetland. [6 NYCRR § 663.2(b).]

[22] *See* ECL 24-0701(2); 6 NYCRR §§ 608.9 and 703.2.

The freshwater wetlands permit issuance standards provide that a proposed activity must:

- be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area; and

- minimize degradation to, or loss of, any part of the wetland or its adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides.[23]

In the event that there are impacts that cannot be avoided and minimized, the applicant should provide a mitigation proposal to enhance the existing benefits provided by a wetland or create and maintain new wetland benefits. The purpose of mitigation is to offset those benefits lost by construction and operation of the Project and increase the likelihood that the proposed activity will meet permit issuance standards.[24]

Impacts to Wetlands

NFG has estimated that the Project will disturb a total of 73.377 acres of federal and State wetlands. Of that total, there are 2.335 acres of permanent, and 17.262 acres of temporary, impacts to NYSDEC-regulated Class I and Class II wetlands. In addition, 21.461 acres of the associated adjacent area would be impacted by the Project.

Disturbances to these wetlands due to construction and ROW maintenance will have permanent and temporary negative impacts on New York's surface and subsurface water quality by decreasing wetland functions and benefits directly associated with protecting and preserving the integrity of water chemistry and biology. For example, a change in vegetative cover type due to construction and ROW maintenance will change evapotransporation rates, altering the capacity of a wetland to hold and release flood and storm water. Changing the type and species of vegetation in the wetland will permanently change ecological community dynamics and the types and composition of wildlife using that wetland. NFG's wetlands disturbances will not only cause permanent changes to surface water, those Project activities will cause soil compaction and alter the soil profile. These activities will also cause at least temporary, and possibly permanent, changes to soil dynamics from the altered soil characteristics, including complete removal and "replacement" of the pre-existing soil layers. Infiltration rates of water and the flow of water through the soil will also be impacted, which will affect local subsurface water quality. In addition to these persistent impacts described above, construction will temporarily remove or degrade all vegetation from some work areas. NFG's activities – particularly removing and changing vegetation – will alter the wetlands abilities to hold and release flood waters, and will change the ability of those disturbed areas to provide pollution treatment and water quality benefits.

As discussed below, NFG has failed to demonstrate that the Project disturbances adequately avoid or minimize impacts to wetland benefits as they relate to State water quality standards, or, alternatively, satisfactorily mitigate such impacts.

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[23] 6 NYCRR § 663.5(e)(2).
[24] 6 NYCRR § 663.5(g).

a. Avoidance and Minimization

NFG has not demonstrated that there are no practicable alternatives to avoid all disturbance to wetlands impacts due to construction of the Project, and post-construction ROW maintenance, thereby avoiding State water quality impacts. 6 NYCRR § 663.5(e)(2). In at least one situation (Dodge Creek), impacts to regulated wetlands and associated streams could have been entirely avoided, thereby avoiding State water quality impacts. 6 NYCRR § 663.5(e)(2).

NFG has also not demonstrated that it will adequately minimize disturbances to wetlands so as to assure that there will be no adverse impacts to wetlands themselves or to State water quality. NFG is not proposing to replace woody plants located in and near forested and shrub wetlands that its Project will impact. Nor does NFG propose to reduce impacts on wetlands functions and benefits by replacing the preexisting wetland and reestablishing a fully functional habitat and riparian areas adjacent to those wetlands. NFG's Application does not offer minimization of wetland impacts, which means NFG does not assure that water quality standards will be met in water bodies associated with these impacted wetlands.

b. Mitigation

Mitigation of impacts to regulated wetlands associated with this Project do not meet the regulatory provisions of 6 NYCRR § 663.5(g)(1), requiring that proposed mitigation be "in the immediate vicinity of the site of the proposed project" and be regulated by ECL Article 24. Permanent impacts to Article 24 regulated freshwater wetlands, and the associated adjacent areas, occur across several subwatersheds and two different basins. The area proposed by NFG to mitigate these collective impacts is not in the same basin as that containing the majority of these impacts, much less in the same subwatershed where most of the impacts occur, contrary to § 663.5(g)(1)(i). Furthermore, the mitigation is not proposed on or adjacent to a wetland regulated by Article 24 and therefore cannot be considered mitigation for the wetland benefits that will be degraded or lost through the proposed activity.

III. Basis for Denial of the WQC and ECL Articles 15 and 24 Permits

As stated above, in order for the Department to grant its request for a WQC, NFG must demonstrate the Project's compliance with §§ 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act, as implemented by applicable State water quality standards criteria set forth in 6 NYCRR Parts 701, 702, 703, 704 and 750, and State statutes, regulations and criteria otherwise applicable to such activities.[25] NFG has failed to demonstrate compliance with (i) §§ 303 and 306 of the Federal Water Pollution Control Act, as implemented; (ii) 6 NYCRR Parts 701, 703 and 750;[26] and (iii) 6 NYCRR Parts 608 and 663, which are State regulations applicable to the Project.

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[25] 6 NYCRR § 608.9.

[26] Part II.B of the State Pollutant Discharge Elimination System ("SPDES") General Permit for Stormwater Discharges from Construction Actives (GP-0-15-002) states that an owner or operator (here, NFG) cannot commence construction activity until its authorization to discharge goes into effect. Effectiveness does not occur at least until the owner or operator has obtained "all necessary [NYSDEC] permits subject to the UPA (*see* 6 NYCRR Part 621)," which includes WQCs as well as ECL Articles 15 and 24 permits.

It is evident that the impacts from the Project, as set forth above, will cause turbidity in such a manner to that impedes the best usages of many waterbodies, particularly those with a trout standard or rare species, by degrading the survival and propagation of balanced, indigenous populations of shellfish, fish and wildlife that rely upon these waters.

NYSDEC Denial

For the reasons articulated above, the Department hereby denies NFG's Application for a water quality certification, as well as for an ECL Article 15 (stream disturbance) permit and an ECL Article 24 (freshwater wetlands disturbance) permit, because it fails to demonstrate compliance with State water quality standards and other applicable State statutes and regulations. This notice of denial is the Department's final determination. Should NFG wish to address the above deficiencies, a new joint application must be submitted pursuant to 6 NYCRR § 608.9 and 6 NYCRR Part 621. UPA, 6 NYCRR § 621.10 provide that that an applicant has a right to a public hearing on the denial of a permit, including a § 401 WQC. A request for hearing must be made in writing to me within 30 days of the date of this notice.

Sincerely,

John Ferguson
Chief Permit Administrator

Cc: B. Clark
J. Kittka
K. Webster
S. Lare
S. Russo
R. Rosenthal
T. Berkman
P. Casper
W. Little
J. Binder
S. Crounse
D. Whitehead
C. Hogan
M. Higgins

ADDITIONAL MATERIALS SUBMITTED TO THE APPELLATE DIVISION

New York Supreme Court
Appellate Division—Fourth Department

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner-Respondent,

– against –

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER,

Respondents-Appellants,

EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

STIPULATION PURSUANT TO CPLR 5532

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties hereto that the foregoing Record on Appeal is hereby deemed correct and complete.

Dated: 1/26/18

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Dated: 1/23/18

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LETTER FROM JOANNA DICKINSON TO MARK W. BENNETT, CLERK OF THE APPELLATE DIVISION, DATED AUGUST 30, 2018, WITH ENCLOSURES [243-317]

Phillips Lytle LLP

Via U.S. Mail
Mark W. Bennett
Clerk of the Appellate Division
of the Supreme Court
Fourth Judicial Department
M. Dolores Denman Courthouse
50 East Avenue
Rochester, New York 14604

August 30, 2018

Re: *National Fuel Gas Supply Corporation v. Joseph A. and Theresa F. Schueckler, et al.*
CA 17-02021; County of Allegany, Index No.: 45092

National Fuel Gas Supply Corp. v. Duffield Camp and Retreat Center Inc., et al.
CA 18-00239; County of Cattaraugus, Index No. 85515

Dear Mr. Bennett:

As the Court is aware, we represent National Fuel Gas Supply Corporation ("National Fuel") in the above-captioned matters.

We write with respect to the August 28, 2018 correspondence we submitted to the Court with respect to these matters, which enclosed for the Court's consideration a copy of the Federal Energy Regulatory Commission's Order of National Fuel's Application and Motion, dated August 6, 2018. Enclosed in accordance with the Court's rules are two (2) duplicate originals of our August 28, 2018 correspondence, with enclosures, plus twenty (20) copies of same (i.e. 10 copies for filing with each matter). In addition, although we served our August 28, 2018 correspondence upon all counsel on August 28, 2018, by copy of this letter, we are serving all counsel with two additional copies. Accordingly, we also enclose our original affidavits of service of our August 28, 2018 correspondence, plus original affidavits of service of the additional copies we served today.

Lastly, we enclose an additional copy of our August 28, 2018 correspondence and all four affidavits of service. Please stamp each copy "filed" and return the filed, stamped copies to us in the enclosed self-addressed, stamped envelope.

JOANNA DICKINSON
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ATTORNEYS AT LAW

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We appreciate the Court's assistance with these matters. Feel free to contact the undersigned with any questions or concerns.

Respectfully,

By

Joanna Dickinson
J-D2/kvs2/ Doc #01-3145790.1
Enclosures

c (via U.S. Mail, w/o enc.): Gary A. Abraham, Esq.
W. Ross Scott, Esq.
David Colligan, Esq.

Phillips Lytle LLP

Via U.S. Mail

Mark W. Bennett
Clerk of the Appellate Division
of the Supreme Court
Fourth Judicial Department
M. Dolores Denman Courthouse
50 East Avenue
Rochester, New York 14604

August 28, 2018

Re: *National Fuel Gas Supply Corporation v. Joseph A. and Theresa F. Schueckler, et al.*
CA 17-02021; County of Allegany, Index No.: 45092

National Fuel Gas Supply Corp. v. Duffield Camp and Retreat Center Inc., et al.
CA 18-00239; County of Cattaraugus, Index No. 85515

Dear Mr. Bennett:

As the Court is aware, our firm represents National Fuel Gas Supply Corporation ("National Fuel") in the above-captioned matters.

Oral argument was heard on the *Schueckler* matter, CA 17-02021, on May 16, 2018; while oral argument on the *Duffield Camp* matter, CA 18-00239, is scheduled to occur on October 25, 2018. Both matters involve similar legal issues regarding National Fuel's power and authority to condemn easements over the appellants' respective properties for the purpose of construction and operating a natural gas pipeline.

When we appeared for oral argument on the *Schueckler* matter, National Fuel's Application for Re-Hearing and Motion for Waiver Determination under Section 401 of the Clean Water Act were both pending before the Federal Energy Regulatory Commission ("FERC"). The Court specifically requested that National Fuel advise it of any subsequent developments with respect to the same.

On August 6, 2018, FERC issued the enclosed Order of National Fuel's Application and Motion ("FERC's Order"). The Court will note that FERC's Order concludes that New York State waived its water quality certification authority under Section 401 of the

JOANNA DICKINSON
DIRECT 716 847 5498 JDICKINSON@PHILLIPSLYTLE.COM

Clean Water Act with respect to the Northern Access 2016 Project. (*See* FERC Order at 59). In addition, National Fuel respectfully draws the Court's attention to paragraph 22 of FERC's Order, which further recognizes and confirms that:

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

(Emphasis added).

National Fuel respectfully submits that FERC's Order is dispositive as to most, if not all, of the issues raised on appeal in both the *Schueckler* and *Duffield Camp* matters, and also confirms that the Northern Access 2016 Project is, to answer the Court's inquiry at oral argument, very much alive. Accordingly, National Fuel requests that the Court take FERC's Order into account in deciding both matters, and renews its request that the orders appealed from, in both matters, be affirmed in their entirety.

Respectfully,

By

Joanna Dickinson
J-D2/kvs2/ Doc #01-3142264.1
Enclosure

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

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

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

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

(Issued August 6, 2018)

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

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

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

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

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

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

I. Procedural Issues

A. Tolling Order

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

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

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

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

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

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

B. Companies' Renewed Motion for Expedited Action

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

C. Motions for Leave to Answer Pleadings

7. New York DEC filed a motion for leave to answer the companies' request for reconsideration and clarification or, in the alternative, request for rehearing.[11] The companies then filed a motion for leave to answer New York DEC's answer.[12] The

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

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

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

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

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

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

companies also filed a pair motions for leave to answer the requests for rehearing and stay filed by Allegheny and by the Landowners and the Town of Pendleton.[13]

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

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

D. Request for a Trial-Type Evidentiary Hearing

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

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

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

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

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

[17] *Id.* § 385.213(a)(2).

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

E. Access to Privileged Precedent Agreements

12. The Landowners state that they are unable to verify the companies' commitments to serve consumers in the Northeast because the precedent agreements were filed as privileged.[19] However, the Landowners could have obtained those documents. As participants to the proceeding, the Landowners could have made a written request to the companies for a copy of the complete, non-public version of the precedent agreements, pursuant to the procedures set forth in our regulations.[20] Landowners did not do so, and so cannot raise arguments resulting from this failure.

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

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

[20] *Id.* § 388.112(b)(2)(iii)-(iv).

II. Discussion

A. Issues under the Natural Gas Act

1. Public Convenience and Necessity under Section 7

13. The Commission's Certificate Policy Statement explains that, in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences.[21] In the Certificate Order we found that the companies had demonstrated market demand for the Northern Access 2016 Project because all of the proposed transportation capacity has been subscribed by Seneca Resources Corporation (Seneca Resources)[22] under long-term precedent agreements.[23] The Commission explained that under these agreements, "[o]f the total incremental firm service, 140,000 Dth per day (28 percent) will be delivered into Tennessee's system for delivery into markets in the northeastern U.S. The remaining 357,000 Dth will be carried over Empire's system for intended delivery into Canada, but with the option for delivery along Empire's system in northern and central New York."[24] The Certificate Order also explained that the project "will provide benefits to all sectors of the natural gas market by providing producers access to multiple markets throughout the U.S. and Canada and increasing the diversity of supply to consumers in those markets."[25]

14. On rehearing, Allegheny claims that, by relying on the precedent agreements with Seneca Resources, an affiliate of both applicants, the Commission failed to adequately and independently evaluate the economic need for the project. Allegheny asserts that the Commission's reliance on precedent agreements ignores the potential for illusory

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[21] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

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

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

[24] *Id.* P 32.

[25] *Id.*

contracts with affiliates. Allegheny points to former Chairman Norman Bay's separate statement to support their claim that the Commission erroneously "fixat[es] on precedent agreements."[26]

15. Allegheny, the Landowners, and the Town of Pendleton argue on rehearing that the Applicant's intent to deliver up to 350,000 Dth/d (72 percent) of transported gas to Canada undermines the Commission's finding of public benefit. Allegheny asserts that the deliveries to Canada undermine the value of the precedent agreements as evidence of economic need. The Landowners claim that the Commission should have excluded the 350,000 Dth/d from the project's public benefits.[27] In a related argument, the Landowners claim that eminent domain authority under the NGA should not be used to benefit consumers outside the U.S.[28] The Landowners also state that the authorization for Empire to export natural gas should not be allowed until the current Secretary of the U.S. Department of Energy develops a rationale why such exports accord with the current President's goal of energy independence. The Town of Pendleton asserts that there has been no showing of economic need for the project because all of the project's capacity is subscribed by a Canadian pipeline company and, thus, the natural gas to be transported will not serve domestic consumers.[29]

16. The Certificate Policy Statement established a policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a specified percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[30] These factors can include,

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

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

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

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

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

but are not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.[31] The Commission stated that it would consider all evidence submitted by the applicant regarding project need. Even so, the Certificate Policy Statement made clear that, although the Commission no longer requires applicants to submit precedent agreements, they are "significant evidence of demand for the project" and "will always be important evidence" of such demand.[32]

17. We affirm the Certificate Order's finding of economic need. Here, Seneca Resources has subscribed the entire project capacity for a primary term of 15 years. Our policy does not require that shippers be domestic end-use consumers of natural gas.[33] Shippers may be producers, marketers, local distribution companies, or end users. As we have previously stated, the fact that a project is driven primarily by producers does not render it speculative.[34] Producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for selling gas to end-use consumers in a given market and have made a business decision to subscribe to the capacity on the basis of that assessment.[35]

18. It is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.[36] When considering applications for new certificates, the Commission's primary concern regarding affiliates of the pipeline as shippers has been whether there may have been

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

[32] *Id.* at 61,748; *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (*Myersville*) (rejecting argument that precedent agreements are inadequate to demonstrate market need); *Minisink Residents for Envtl. Pres. and Safety*, 762 F.3d at 112 n.10 (same).

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

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

[35] *Id.*

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

undue discrimination against a non-affiliate shipper.[37] Here, no such allegations have been made, nor have we found that the project sponsors engaged in any anticompetitive behavior. We note that the companies offered proposed capacity under the same rates, terms, and conditions to other potential customers in an open season in June 2014.

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

20. Regarding public benefits, the Commission was not required to exclude those benefits related to the export of natural gas to Canada.[40] As we noted in the Certificate Order, the U.S. Department of Energy, not the Commission, authorizes the export or import of natural gas as a commodity.[41] The Commission does not have the authority to make an independent determination on that matter.[42] Moreover, under section 3 of the

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

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

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

[40] *See, e.g., Elba Liquefaction Co., L.L.C.*, 155 FERC ¶ 61,219, at PP 31-37 (2016) (authorizing the Elba Express Modification Project to deliver gas for export at the Elba Liquefaction Project), *Magnolia LNG, LLC*, 155 FERC ¶ 61,033, at PP 27-32 (2016) (authorizing the Lake Charles Expansion Project to deliver gas for export at the Magnolia LNG Project); *Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at PP 25-30 (2014) (authorizing a pipeline project to transport gas for import and export to and from an LNG terminal).

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

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

NGA, proposals to import and export natural gas to and from partner nations in free trade, like Canada, are to be deemed "consistent with the public interest."[43] The statute requires that the Department of Energy authorize such applications without modification or delay.[44]

21. A decision by the Department of Energy to authorize a company to export natural gas is not sufficient, by itself, to satisfy the section 7 public convenience and necessity standard for related, proposed facilities.[45] Here, the Certificate Order noted that the project will provide benefits to all sectors of the natural gas market by allowing producers to access multiple markets in the northeastern U.S. and in Canada, increasing the diversity of supply to those markets.[46] For example, Empire can flexibly integrate the project's incremental capacity by directing the 357,000 Dth/d of natural gas to Canada, as intended, or to Empire's domestic customers under a future arrangement.[47] The parties offer neither facts nor theories to undermine our assessment.

22. Under NGA section 7, the Commission has jurisdiction to determine whether the construction and operation of proposed interstate pipeline facilities are required by the public convenience and necessity. If so the Commission issues a certificate. But it is Congress, speaking directly in NGA section 7(h), that authorized a certificate-holder to exercise eminent domain authority to acquire land or other property necessary to

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

[44] *Id.*

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

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

[47] *Id.*

construct or operate the approved facilities if the certificate-holder cannot acquire such property by agreement with the owner.[48] Congress did not establish any prerequisite for eminent domain authority beyond the Commission's decision to issue a certificate.[49]

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

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

2. Predetermination of Rolled-In Rate Treatment

25. Under the Commission's Certificate Policy Statement, the threshold requirement for a pipeline proposing a new project is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.[52] To receive a predetermination from the Commission that it would be appropriate to roll the costs of an expansion project into the pipeline company's system rates in a future section 4 proceeding, a pipeline must demonstrate that project revenues generated using actual contract volumes and the maximum recourse rate (or the actual negotiated rate if the negotiated rate is lower than the recourse rate) are expected to exceed the project's cost of

[48] 15 U.S.C. § 717f(h) (2012).

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

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

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

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

service.[53] If that is demonstrated, we will grant the predetermination of rolled-in rate treatment for the cost of the project, absent a material change in circumstances. We make this determination in the certificate proceeding to provide certainty regarding the potential economic impacts of a project before it goes forward.[54]

26. The Certificate Order denied Empire's request for a pre-determination of rolled-in rate treatment because revenues from Empire's contract with Seneca Resources would not exceed the project's cost of service in the entire first year and most of the second year of service.[55] The Commission explained that if Empire were to file its next rate case before project revenues exceed costs on an annual basis, then rolled-in rate treatment of project costs could result in higher system rates, under which existing firm customers would subsidize the project costs.[56] However, the Certificate Order did not preclude Empire from seeking rolled-in rate treatment for project costs in its next section 4 rate case.[57]

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

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

> . . . the requesting party must demonstrate the existence of extraordinary circumstances. The Commission has held that the requesting party must demonstrate a change in circumstances that is more than just material — it must be a change in core circumstances that goes to the very heart of the

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

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

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

[56] *Id.* P 61.

[57] *Id.* P 62.

> case. This policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.[58]

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

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

31. Here it is Empire itself who asserts that circumstances have materially changed, and we conclude that Empire will appropriately bear the burden of proof in its next rate case if Empire seeks rolled-in rate treatment for project costs. The Certificate Order explicitly does not preclude Empire from doing so, and the Certificate Order facilitates the future rate case by directing Empire to keep separate books and accounting of costs attributable to the project.[60] The information in Empire's revised Exhibits K and N is

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

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

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

based on estimates that may change again before Empire files its next section 4 rate case. The Commission sees little value in reconsidering this moving target now, given that another material change in revenues and costs before the next section 4 rate case might negate the predetermination that Empire seeks here.

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

3. Section 401 of the Clean Water Act - Waiver

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

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

35. New York DEC received the companies' application for a water quality certification on March 2, 2016.[63] New York DEC and National Fuel agreed in a letter dated January 20, 2017, to extend the agency's period for decision under section 401 by

[61] 33 U.S.C. § 1341(a)(1) (2012).

[62] *Id.*

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

establishing April 8, 2016, as the date "on which the application was deemed received by [New York] DEC".[64] New York DEC denied the application on April 7, 2017.[65]

a. Ninety-Day Commission Deadline for Federal Authorizations

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

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

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

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

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

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

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

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

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

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

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

b. Failure to Act within One Year

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

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

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

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

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

[73] *Id.* at 6.

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

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

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

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

[76] Sierra Club Answer at 6-7.

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

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

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

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

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

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

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

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

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

[81] *Id.* P 15.

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

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

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

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

45. We are not persuaded by New York DEC's and Sierra Club's policy arguments that a decision not to allow negotiated dates of receipt will leave only inefficient alternatives, to the detriment of both the applicant's and the certifying agency's interests.[88] The certainty provided in our interpretation strikes the appropriate balance between the interests of the applicant and the certifying agency, to the benefit of both.[89] An applicant is guaranteed an avenue for recourse after a year of inaction by filing a petition for a waiver determination before the Commission (as did the applicant in *Millennium Pipeline Company, L.L.C.*[90]) or after a denial by filing a petition for review in the court of

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

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

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

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

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

[90] 160 FERC ¶ 61,065 (2017).

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

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

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

47. The Court of Appeals for the District of Columbia Circuit has rejected this argument.[95] Section 401(a)(1) of the Clean Water Act requires that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived."[96] But the court found that "on its face, section 401(a)(1) does not prohibit all 'license[s] or permit[s]' issued without a state water quality certification, only

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

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

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

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

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

[96] 33 U.S.C. § 1341(a)(1).

those that allow the licensee or permittee 'to conduct any activity . . . which may result in any discharge into the navigable waters.'"[97]

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

5. Conflicts with State and Local Law

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

50. The NGA confers "exclusive jurisdiction" to the Commission over the interstate transportation and sale of natural gas, as well as over the rates and facilities of natural gas companies engaged in interstate transportation and sale.[101] We consistently state in

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

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

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

[100] *Id.*

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

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

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

52. The companies also request clarification that Environmental Condition 21 in the Certificate Order, which requires that the companies file with the Commission a final invasive plant species plan "developed through coordination with" New York DEC and the Pennsylvania Department of Conservation and Natural Resources, does not allow the states to delay or block construction of the project by withholding their cooperation, concurrence or approval of the plan. We clarify that the companies can satisfy the

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

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

[104] 15 U.S.C. § 717b(d).

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

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

requirement that the plan be "developed through coordination" with the state agencies by providing documentation to the Commission of the companies' notice to and communication with the state agencies about the plan. A state agency's failure to cooperate on, concur with, or approve the plan would not preclude a finding by the Commission that the companies had coordinated with the state agency.

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

6. Abuse of Commission Process

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

55. We deny this request. The alleged future operations are wholly speculative—the Landowners acknowledge that all evidence is "circumstantial"[109]—and would not trigger Hinshaw status. Under section 1(c) of the NGA, known as the Hinshaw amendment, a natural gas company is not subject to the Commission's jurisdiction if (1) it receives the gas it transports within or at the boundary of its state, (2) all of the gas transported on its system will be consumed within its state, and (3) its rates and services will be subject to regulation by a state commission.[110] Because Hinshaw pipeline status applies to a natural

[107] 15 U.S.C. § 717f(e).

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

[109] *Id.* at 3.

[110] 15 U.S.C. § 717(c).

gas company, not to a subset of a company's facilities, Empire and National Fuel would need to convey the Northern Access 2016 Project's facilities in New York to a third party to transport hypothetical New York-sourced natural gas entirely for intrastate consumption under rates and services regulated by the New York Public Service Commission. The Landowners offer no explanation how this arrangement would benefit the companies more than their potential to transport the same hypothetical natural gas under the certificate for intrastate, interstate, and international consumption under Commission-regulated rates and services.

B. Issues under the National Environmental Policy Act

1. Segmentation

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

57. Allegheny argues that the Northern Access 2015 and 2016 Projects are "connected actions" because each alternative proposed by National Fuel in its application for the Northern Access 2016 Project would co-locate new facilities with an existing facility approved as part of the Northern Access 2015 Project,[113] thus the Northern Access 2016 Project cannot or will not proceed in its current form unless the Northern Access 2015 Project is constructed.

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

[112] *Id.*

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

58. "An agency impermissibly 'segments' its NEPA review when it divides connected federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."[114] Actions are "connected" if they: (i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.[115] In *Delaware Riverkeeper Network v. FERC*, the court ruled that individual pipeline projects were "connected" or interdependent parts of a larger action where four pipeline projects, when taken together, would result in "a single pipeline" that was "linear and physically interdependent" and where those projects were financially interdependent.[116]

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

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

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

[116] *Del. Riverkeeper Network*, 753 F.3d at 1314; s*ee also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project "can stand alone without requiring construction of the other [project] either in terms of the facilities required or of profitability").

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

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

Project that, though these co-located facilities will allow National Fuel to deliver gas to the existing Line X in the future, the applicants do not propose to do so at this time nor are such deliveries necessary to justify either project.[119] The Northern Access 2016 Project pipeline will receive only electric power and telecommunication services from the Hinsdale Compressor Station, not compression.[120]

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

61. In *Delaware Riverkeeper Network v. FERC*, the court also put a particular emphasis on the four projects' timing, noting that when the Commission reviewed one of the four projects, the other projects were either under construction or pending before the Commission.[123] Allegheny emphasizes the close timing of the Northern Access 2015 and 2016 Projects, arguing that National Fuel may have abused the Commission's pre-filing process by artificially keeping the Northern Access 2016 Project in pre-filing status until

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

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

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

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

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

a few weeks after the Commission had issued a certificate for the Northern Access 2015 Project on February 27, 2015. Allegheny believes that this maneuvering allowed National Fuel to claim in the Northern Access 2016 Project application that no other related application was pending before the Commission.

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

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

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

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

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

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

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

[129] EA at 139-161 (Section 10 Cumulative Impacts); *id*. at app. G, G-2 tbl.G-1 (identifying the Northern Access 2015 Project as an existing Commission-jurisdictional project to be evaluated for potential cumulative impact to water resources; vegetation, fisheries, and wildlife; threatened and endangered species; land use and visual resources; socioeconomics; and climate change).

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

64. The CEQ regulations define "similar actions" as those actions "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography."[131] As described above the Northern Access 2015 and Northern Access 2016 Projects are physically, functionally, and financially independent. Further, there is a lack of common timing between the two projects. Accordingly, we find that preparation of separate EAs for the Northern Access 2015 Project and Northern Access 2016 Project is both appropriate and consistent with CEQ guidance.

65. Moreover, even if, for the sake of argument, the Commission were to find that the projects were similar actions, our determination as to whether to prepare a single environmental document for similar actions is discretionary.[132] CEQ states that "[a]n agency *may* wish to analyze [similar] actions in the same impact statement. It *should* do so when the *best way* to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement."[133] We do not find that such a multi-project analysis is the best way to assess the impacts or alternatives to the Northern Access 2016 Project.

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

[131] 40 C.F.R. § 1508.25 (2017).

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

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

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

2. Need for an Environmental Impact Statement

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

67. With respect to factor 7, Allegheny argues that the Northern Access 2016 Project is related to both the Northern Access 2015 Project and to shale gas production by shipper Seneca Resources, which together pose a significant impact to the environment. However, the EA thoroughly evaluated the relationship between the Northern Access 2016 Project and other past, present, and reasonably foreseeable future actions posing a potential cumulative impact.[137] These other actions specifically included the Northern Access 2015 Project and shale gas development by Seneca Resources in the project area.[138] The EA and Certificate Order concluded that the cumulative impact of the Northern Access 2016 Project combined with these other actions will be minimal, temporary, and insignificant.[139]

68. Allegheny alleges that "increasing pipeline construction and shale gas development activities," generally, are detrimental to the environment, human health,

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

[135] 40 C.F.R. § 1508.27.

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

[137] EA at 139-160.

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

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

public lands, and public funds. However, Allegheny's allegations are not supported with evidence and, more importantly, are not linked directly to the proposed Northern Access 2016 Project.

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

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

71. The Landowners and Allegheny assert that the Commission failed to satisfy the requirement in our own regulation that an EIS will normally be prepared first for "[m]ajor pipeline construction projects under section 7 of the Natural Gas Act using rights-of-way in which there is no existing natural gas pipeline."[143] In the Certificate Order we quoted the exception to the same regulation, which states that an EA will be prepared first if the Commission believes that such a proposed project "may not be a major Federal action significantly affecting the quality of the human environment."[144] The Commission's

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

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

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

[143] Landowners Request for Rehearing at 5 (quoting 18 C.F.R. § 380.6(a)(3) (2016)); Allegheny Request for Rehearing at 16-18 (quoting same). The Landowners assert that the route for the Northern Access 2016 Project is only co-located with existing powerlines, not pipelines. *Id*. In fact, the EA explains that the route would be co-located with both. *E.g.*, EA at 7, 10, 54 (specifically mentioning existing pipelines).

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

conclusion was explicitly based on our expertise implementing NEPA for pipeline projects. We explained that a project like the Northern Access 2016 Project—i.e., a pipeline with 69 percent of its length co-located along existing pipeline or utility rights of way, one new and one modified gas-fired compressor station, and one new dehydration facility—normally would not fall under the "major" category for which an EIS is automatically prepared.[145]

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

73. We deny rehearing on this matter. The statements by National Fuel Gas Company, which is not an applicant before the Commission, were made in marketing documents[148] outside of this proceeding. The company's characterizations of the Northern Access 2016 Project are not material to the Commission's conclusion, applying our expertise to the specific evidence before us, that the Northern Access 2016 Project would not fall under the "major" category for which an EIS is automatically prepared.[149] The duration of National Fuel's consultation with New York DEC does not necessarily indicate that the project is more complex than other projects or to what degree. As stated above, we concluded in the Certificate Order that National Fuel's letter to New York DEC dated September 8, 2016, addressed all of New York DEC comments about both National

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[145] *Id*.

[146] Allegheny Request for Rehearing at 17.

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

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

[149] *E.g. Transcontinental Gas Pipe Line Company, LLC*, Environmental Assessment for the Dalton Expansion Project, Docket No. CP15-117 (March 2016) (114 mile pipeline project) and *Gulf South Pipeline Company, LP*, Environmental Assessment for the Coastal Bend Header Project, Docket No. CP15-517 (January 2015) (66 miles of pipeline and three new compressor stations).

Fuel's application and the Commission's EA.[150] New York DEC did not seek rehearing of the Certificate Order.

3. Unavailable Information

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

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

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

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

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

[153] *See LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (FERC did not err in permitting post-order monitoring and studies of environmental impacts); *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 282-83 (D.C. Cir. 1990) (deferring development of specific mitigation steps until the start of construction when more details are known is "eminently reasonable"); *cf. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, at 352 (1989) (mitigation only needs to be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated).

submit this information for Commission staff's review to verify consistency with the Commission's order prior to commencement of construction.[154] Allegheny does not demonstrate that the EA was inadequate by these standards. Nor does Allegheny demonstrate that any "omissions" in the EA left it or the public unable to make known its environmental concerns about the project's impact.[155]

76. Moreover, NEPA "does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated."[156] Here, the EA identified baseline conditions for all relevant resources. Later-filed mitigation plans will not present new environmentally-significant information nor pose substantial changes to the proposed action that would otherwise alter the finding of no significant impact. Moreover, as we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies.[157] And, as we found elsewhere, in some instances, the certificate holder may need to access property in order to acquire the necessary information.[158] Accordingly, post-certification studies may properly be used to develop site-specific mitigation measures. It is not unreasonable for the environmental document to deal with sensitive locations in a general way, leaving specificities of certain resources for later exploration during construction.[159] What is important is that the agency make adequate provisions to assure that the certificate holder will undertake and

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

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

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

[157] *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 94 (2016)*; E. Tenn. Nat. Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323.

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

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

identify appropriate mitigation measures to address impacts that are identified during construction.[160] We have and will continue to demonstrate our commitment to assuring adequate mitigation.[161]

77. With respect to Allegheny's concerns about being able to follow the developing record,[162] the Commission offers a free service, available to everyone, called eSubscription which automatically provides notification, via email, of all filings made in a specific proceeding, document summaries, and direct links to the filed documents.[163] Moreover, any entity, such as Allegheny, that files a motion to intervene and includes a contact name and email address is automatically added to the service list for the proceeding and is electronically served all documents filed or issued in the docket.[164] To the extent that any of the pending studies, surveys, consultations, or plans indicate a need for further study, consultation or mitigation measures, the Director of the Office of Energy Projects can modify the certificate conditions, implement additional mitigation measures (including stop-work orders), or withhold permission to commence construction.[165] Our process does not favor authorization[166] nor obstruct public review of the environmental information on which the Commission relies.

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[160] *Id*.

[161] *Id*.

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

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

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

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

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

4. Purpose and Need for the Project and Alternatives

78. An agency's environmental document must include a brief statement of the purpose and need to which the proposed action is responding[167] and must analyze reasonable alternatives.[168] The EA accepted National Fuel's and Empire's articulation of the purpose and need of the Northern Access 2016 Project to provide 350,000 Dth per day of "incremental firm transportation service to markets in the northeastern United States and Canada . . . as well as markets on the Tennessee Gas 200 Line in Erie County, New York, and other interconnections with local gas distribution companies, power generators, and other interested pipelines available on both National Fuel and Empire's systems."[169] Based on the statement of purpose and need, the EA evaluated a no-action alternative, system alternatives using two existing pipeline systems in the project area, two major route alternatives, 36 potential variations to National Fuel's original proposed route, and five alternative sites for the aboveground facilities.[170] The Certificate Order affirmed the EA's analysis and conclusions for both purpose and need and for alternatives.[171] The Certificate Order also explained that the EA's omission of renewable energy or increased energy efficiency as reasonable alternatives was justified because these alternatives cannot meet the purpose and need to which the Northern Access 2016 Project is responding.[172]

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

80. As we have previously explained, the statement of the project's purpose and need in the environmental document differs from the Commission's determination of need under the public convenience and necessity standard of section 7(c) of the NGA.[173] The

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

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

[169] EA at 2.

[170] EA at 161-176.

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

[172] *Id*. P 105.

[173] *See Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 49

(continued ...)

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

81. The Certificate Order explained that "[w]here an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application."[177] We cited the 1991 decision in *Citizens Against Burlington, Inc. v. Busey* from the same court. The court considered whether the Federal Aviation Administration had prepared an adequate NEPA review of a city's proposal to expand its airport. The court explained that "agencies must look hard at the factors relevant to the definition of purpose."[178] By the agency's assessment, affirmed by the court, Congress had directed the agency to nurture expansions like the one proposed but had also intended that the free market, not the agency, should determine the siting of the nation's airports.[179] The court upheld both the agency's definition of purpose to help

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(rejecting Allegheny's objection to the state of purpose and need in the NEPA document).

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

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

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

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

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

[179] *Id*. at 197.

launch the expansion and the agency's elimination of alternatives that would not accomplish this purpose.[180] Allegheny emphasizes a warning from the court that its deference to an agency's reasonable discussion of objectives and alternatives "does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them."[181]

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

83. The Certificate Order explained that "an agency uses the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives."[183] Allegheny responds that we misrepresented language from the 1999 decision in *Colorado Environmental Coalition v. Dombeck* from the U.S. Court of Appeals for the Tenth Circuit. The court does not refer to legitimate alternatives, it states that an agency must "take responsibility for defining the objectives of an action and then provide *legitimate consideration* to alternatives that fall between the obvious extremes."[184] Allegheny is correct about the mistaken paraphrasing. Even so, the project EA did provide legitimate consideration of alternatives, buttressed by the Certificate Order's explanation that the EA had justifiably omitted renewable energy or increased energy efficiency as reasonable alternatives because these alternatives cannot meet the purpose and need.[185]

84. In the EA's discussion of alternatives, Commission staff identified and evaluated each of the advantages and disadvantages of the preferred Killian Road site for the

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[180] *Id.* at 198.

[181] *Id.* at 196.

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

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

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

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

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

85. The Town of Pendleton misunderstands that the majority of the analysis in the EA assumes a project configuration with the Pendleton Compressor Station at the preferred Killian Road site. Therefore the disadvantages of the Killian Road site are included in the analysis of the project's potential impacts (both direct and cumulative) to environmental resources.[188] The EA concluded that the site's disadvantages, even when combined with impacts from all other proposed facilities, do not rise to the level of significant impacts when one accounts for National Fuel's and Commission staff's proposed mitigation.[189] The Supreme Court has explained that "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[190] Further, while we seek to avoid unneeded exercise of eminent domain,[191] the possibility that National Fuel would exercise eminent domain to acquire

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

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

[188] See discussions of the Frontier Chemical Waste Process site at pages 34 (soil contamination), 87 (land use), and 138 (public safety). See discussions of noise at 119-120 (construction noise), 125-128 (operational noise), and 157-158 (cumulative noise). See discussions of impacts to wetlands at 28 (geology), 48-51 (wetland resources), and 68 (wildlife).

[189] EA at 177.

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

the Killian Road site is not a basis to eliminate the site from consideration. We affirm the EA's analysis and conclusion that the Killian Road site is the preferred alternative site for the Pendleton Compressor Station.

5. Direct Impacts

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

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

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

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

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

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

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

reasonable background noise. Moreover, the Certificate Order is conditioned to ensure that the operational noise at the Pendleton Compressor Station will not exceed 55 dBA.[196]

88. The Town of Pendleton repeats a claim that the Commission ignored future noise-sensitive areas in a proposed housing subdivision that would be closer to the new Pendleton Compressor Station than any housing subdivision considered in the EA. The Certificate Order explained that NEPA review is not warranted for an unconstructed residence that would be part of a residential development not yet under construction.[197] Here, the town attaches the minutes from the February 17, 2015 meeting of the Town Planning Board, at which the board conditionally approved the "Major Subdivision Preliminary Plat" for the relevant site, noting that the applicant must provide missing information required under the town's code.[198] The Town Planning Board's conditional approval of a preliminary plat appears to be incomplete. The Commission has no way to determine whether or when plans for this housing subdivision will be final and construction may begin. The Commission's NEPA review of the proposed future noise-sensitive area is still not warranted.[199]

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

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reviewing agency has discretion to choose to rely on the reasonable opinion of one or some of the disputing parties or experts).

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

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

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

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

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

90. In the Certificate Order we considered and affirmed National Fuel's assessment that trenchless crossing methods, which pose the least risk of mobilizing sediments, are only feasible at five stream and wetland crossings.[201] Because there is no evidence of contaminated sediment at the stream crossing at Bull Creek, National Fuel did not evaluate a trenchless crossing method for this site and Commission staff did not require an evaluation. National Fuel will use dry crossing methods at Bull Creek.[202] In National Fuel's answer to the Town of Pendleton's request for rehearing, National Fuel explains that the location where Line EMP-03 will cross Bull Creek is approximately 0.2 miles upstream of the Frontier Chemical Waste Process Inc. hazardous waste site.[203] National Fuel states that New York DEC concluded in 1992, based on sediment samples, that the hazardous waste site's effect on water quality in Bull Creek was "negligible."[204] National Fuel also states that New York DEC concluded in 1996 that no further remediation for the site was necessary in Bull Creek.[205] National Fuel acknowledges that New York DEC has designated Bull Creek as impaired due to "unknown toxicity," but National Fuel notes that this designation was based on samples taken from Bull Creek 0.8 mile downstream of the planned Line EMP-03 crossing.[206] For the Northern Access 2016 Project, National

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

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

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

[204] *Id*.

[205] *Id*.

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

Fuel reviewed federal and state databases to identify potential sources of contaminants within a three-mile radius of the Line EMP-03 crossing at Bull Creek. National Fuel states that it discovered no contamination or sources of contamination within the Bull Creek drainage at or above the proposed crossing. Based on the preceding information, we find that the proposal to use a dry crossing method at Bull Creek does not present a significant risk of increased mobilization of contaminated sediments. Accordingly, we deny the Town of Pendleton's request that the Commission require an alternative crossing method.

6. Indirect Impacts of Natural Gas Production

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

92. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.[207] Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[208] Further, indirect effects "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[209]

93. Consistent with prior natural gas infrastructure proceedings, we concluded in the Certificate Order that evidence in the record does not demonstrate a reasonably close causal relationship between the Northern Access 2016 Project and the impacts of future natural gas production warranting their review under NEPA.[210] We further concluded that evidence in the record does not allow the Commission to reasonably foresee the impacts

[207] 40 C.F.R. § 1508.25(c).

[208] *Id.* § 1508.8(b).

[209] *Id.*

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

of future natural gas production.[211] Nevertheless, we provided upperbound estimates of upstream and downstream effects based on DOE and Environmental Protection Agency (EPA) methodologies.[212]

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

a. Causation

95. Much of Allegheny's argument turns on the nature and degree of causation that Congress intended between a federal action and indirect impacts.[213] Allegheny claims that the limitation on NEPA in *U.S. Department of Transportation v. Public Citizen*[214] does not apply in this case because the Commission has the discretion to attach conditions to a certificate and to deny a certificate that is not required by the public convenience and necessity.[215]

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

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

[213] Allegheny Request for Rehearing at 22-24, 28-29. Allegheny discussing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007), *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) (*Freeport*), and *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016) (*Sabine Pass*). Allegheny also points to a 2015 draft Environmental Impact Statement issued by the federal Surface Transportation Board as an example where an agency analyzed indirect impacts from coal production upstream of a proposed railroad, regardless that the agency had no jurisdiction over coal production. Allegheny Request for Rehearing at 25-26.

[214] *See* 541 U.S. at 770 ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."); *cf. Sierra Club v. FERC*, 867 F.3d at 1373 (interpreting *Public Citizen*'s limitation on NEPA to apply only where environmental effects are outside the factors that an agency can consider when regulating in its proper sphere).

[215] Allegheny Request for Rehearing at 24.

96. Allegheny mischaracterizes the Certificate Order. Our determination that potential incremental upstream production activities are not indirect effects of the Project did not rely on the reasoning in *Public Citizen*. Rather, we explained that a causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if a proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).[216] Based on the information Commission staff obtained through data requests,[217] we determined that the project shipper's (Seneca Resources) natural gas development activities contemplated under the shipper's Joint Development Agreement will precede the Northern Access 2016 Project and does not rely on it.[218] As discussed in more detail below, neither Allegheny nor the dissent has presented or pointed to any evidence that contradicts our finding. Thus, we affirm our prior conclusion that the Project's incremental transportation capacity is not an essential predicate for production growth or that the Project must precede production growth for the production activities contemplated under the Joint Development Agreement to occur.

97. Allegheny argues on rehearing that the drilling and completion of wells under the Joint Development Agreement are only interim steps to get the wells as close as possible to the remaining production phase of development.[219] Allegheny asserts that these interim steps do not prove that the wells will be producing gas before the Northern Access 2016 Project's in-service date. Allegheny suggests that because the Commission rarely denies an application for a natural gas pipeline, Seneca did in fact rely on the high degree of certainty that the approved project would provide an outlet for Seneca's gas. In Allegheny's view, Seneca was and is ready to immediately place the completed wells into

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

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

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

[219] Allegheny Request for Rehearing at 27.

production when the project enters service.[220] Allegheny cites statements from parent company National Fuel Gas Company to investors in 2016 and 2017 that the Northern Access 2016 Project is "designed to provide Seneca with a key outlet for its natural gas production," that Seneca has been "developing an inventory of reserves that would begin flowing into the [Northern Access 2016] pipeline," and that Seneca plans to increase its rig count in the Clermont/Rich Valley area in fiscal years 2017 and 2018 "to grow into Northern Access 2016 capacity."[221]

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

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

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

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

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

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

100. The statements from the Commission and our staff cited by Allegheny do not reveal that transportation infrastructure causes production. Many factors drive new drilling, including production costs and market prices for natural gas. The opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas.[226]

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

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

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

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

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

b. Reasonable Foreseeability

102. In the Certificate Order we denied Allegheny's argument that indirect impacts of induced natural gas production are reasonably foreseeable and must be analyzed under NEPA.[229] Allegheny repeats this argument on rehearing in substantially the same form.[230]

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region across the lower 48 states is part of the interconnected pipeline system and may respond in unpredictable ways to prices that rise or fall with export demand); *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

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

[228] *Compare City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the project's potential to induce additional development), *with City of Davis v. Coleman*, 521 F.2d 661, 674-677 (9th Cir. 1975) (remanding decision for further analysis where a proposed freeway interchange would intentionally and necessarily lead to development at the interchange's location in an undeveloped agricultural area).

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

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

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

103. Thus, for the reasons stated in the Certificate Order, we continue to find that impacts from upstream production activities do not meet the definition of indirect effects, and therefore they are not mandated to be included in the Commission's NEPA review. Nevertheless, the Certificate Order did provide estimates of the potential impacts associated with upstream unconventional gas production and of natural gas.[236] Allegheny is thus mistaken in asserting that the public has been left to make these assessments.[237]

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

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

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

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

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

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

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

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

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

7. Cumulative Impacts

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

107. A "cumulative impact," as defined by CEQ is the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[240] The D.C. Circuit has explained that "a meaningful cumulative impacts analysis must identify: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the

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

[239] *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 41-43 (2018) (explaining that the Commission is not required to consider environmental effects that are outside of our NEPA analysis of the proposed action in our determination of whether a project is in the public convenience and necessity under section 7(c)). *See also Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with enough specificity to make their consideration meaningful need not be included in the environmental analysis).

[240] 40 C.F.R. § 1508.7.

impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."[241] The geographic scope of the Commission's cumulative impacts analysis varies from case to case, and resource to resource, depending on the facts presented. Further, where the Commission lacks meaningful information about potential future natural gas production within the geographic scope of a project-affected resource, then production-related impacts are not reasonably foreseeable so as to be included in a cumulative impacts analysis.[242]

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

109. The project crosses four watershed subbasins that together comprise 4,667 square miles of land. Of these, the Upper Allegheny subbasin comprises 2,591 square miles.[245]

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

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

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

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

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

The effort required to identify discrete natural gas development infrastructure within the Upper Allegheny subbasin is not proportional to the limited magnitude of the impacts from the Northern Access 2016 Project's 27.8 miles of pipeline in McKean County, Pennsylvania, of which 14 miles are co-located with existing rights-of-way.[246] Here, the Commission's cumulative impacts analysis was correctly proportional to the magnitude of the environmental impacts of the proposed action.[247] The remaining 71 miles of pipeline, both compressor stations, and the dehydration facility sit in New York where shale gas development is prohibited.

110. The EA appropriately quantified potential cumulative impacts to the extent practicable and otherwise described them qualitatively.[248] For example, the EA used figures from the U.S. Geological Survey to calculate that the development of the 118 wells currently drilled or proposed within 0.25 mile of the project would use 1,062 acres of land and indirectly affect 2,478 acres of land presumed to be forested.[249] The EA did not ignore cumulative impacts to water resources from erosion and sedimentation related to the construction of new roads, well sites, and associated infrastructure. The EA acknowledged that the greatest potential cumulative impact to wetlands and surface waters from other activities, including oil and natural gas wells and gathering lines, is sediment loading both from construction within or adjacent to wetlands and surface

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

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

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

[249] EA at 151.

waters and storm runoff from areas disturbed by construction.[250] The EA also explains that these other activities and the Northern Access 2016 Project would avoid or minimize sediment loading through mandatory mitigation and erosion and sedimentation control measures.[251] The EA points to National Fuel's implementation of its Erosion and Sediment Control & Agricultural Mitigation Plan and National Fuel's use of horizontal directional drilling and dry crossing methods; both are required.[252] This analysis satisfied NEPA and conformed with CEQ guidance.[253]

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

[250] EA at 145-46.

[251] EA at 145.

[252] *Id.*

[253] *See, e.g.*, CEQ, *Considering Cumulative Effects under the National Environmental Policy Act* at 8 (1997) ("it is not practical to analyze the cumulative effects of an action on the universe; the list of environment effects must focus on those that are truly meaningful"); *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (a cumulative impact analysis should only include "such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible").

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

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

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

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

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

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

[257] EA at 146 (emphasis added).

[258] *Id*.

[259] Allegheny Request for Rehearing at 35.

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

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

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

[262] EA at 73-77.

[263] EA at 74.

[264] *Id*.

[265] EA at 74-75.

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

[267] EA at 78-83.

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

[268] EA at 150.

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

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

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

[272] 50 C.F.R. § 402.02.

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

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

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

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

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[274] 50 C.F.R. § 402.14(h)(3).

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

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

[277] EA at 160.

[278] EA at 141 and 160.

[279] EA at 160.

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

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

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

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

[281] *Id.*

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

[283] *Id.* P 42.

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

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

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

The Commission orders:

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

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

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

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

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

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

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

(Issued August 6, 2018)

GLICK, Commissioner, *dissenting*:

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

[1] 15 U.S.C. § 717f (2012).

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

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

The Commission Has Not Demonstrated that the Project Is Needed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued ...)

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

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

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

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

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

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

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

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

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

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

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

[18] *Id.* P 99.

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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Richard Glick
Commissioner

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

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Document Content(s)

AFFIRMATION OF GARY A. ABRAHAM, FOR RESPONDENTS, DATED SEPTEMBER 10, 2018 [318-324]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner/Respondent,

App. Div. No. CA 17-02021
-vs- Allegany Co. Index No. 45092

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,
Respondents/Appellants.

AFFIRMATION OF GARY A. ABRAHAM

STATE OF NEW YORK)
) ss:
CATTARAUGUS COUNTY)

GARY A. ABRAHAM, an attorney duly admitted to practice law in the courts of the State of New York, under penalty of perjury, affirms as follows:

1. I make this affirmation in opposition to a post-argument submission and argument by the Respondents-Appellees, served on me August 28, 2018 and again on August 30, 2018. No argument date has been provided.

2. With its submission, National Fuel Gas Supply Corp ("NFG") requests that the Court "take into account" a Federal Energy Regulation Commission ("FERC") *Order on Rehearing and Waiver Determination Under Section 401 of the Clean Water Act*, 164 FERC ¶ 61,084 ("Waiver Order"), dated August 6, 2018, finding that the New York State Department of

Environmental Conservation ("NYSDEC") waived jurisdiction under Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, and invalidating NYSDEC's determination that the Northern Access 2016 pipeline project (the "Project") proposed by NFG will degrade waterways within New York State in violation of the CWA.

3. With its submission, NFG also asserts that FERC's new ruling is "dispositive" of most or all issues now before the Court. The Schuecklers' opposition is to this assertion, and thus to the weight if any to be given the FERC Waiver Order in this Court.

4. The Schuecklers' opposition is also based on the irreparable harm to them should this Court allow NFG to exercise eminent domain over a portion of their land, as balanced against the much lesser harm to NFG of preserving the status quo until the waiver issue is finally disposed.

5. FERC's Waiver Order has not been finally disposed because it is currently the subject of two pending requests for rehearing and stay, by NYSDEC (filed August 14, 2018) and the Sierra Club (filed September 5, 2018). FERC Dkt. CP15-115-004, Accession Nos. 20180905-5158 and 20180905-5059, respectively, available at <https://elibrary.ferc.gov/idmws/docket_search.asp> (Docket search on "CP15-115-004"). Relevant portions of NYSDEC's rehearing request are attached hereto as **Exhibit A**. Appeal from a denial of these requests is directly to the District of Columbia Court of Appeals. 15 U.S.C. § 717r(b).

6. An application for rehearing to FERC is a precondition to an appeal to the District of Columbia Court of Appeals. *Id.*

7. In 2017, and also pending, NFG challenged NYSDEC's denial of its application for a Section 401 water quality certificate in the U.S. Court of Appeals for the Second Circuit, arguing that the denial was waived as outside NYSDEC's authority under the CWA and NYSDEC's findings

were arbitrary and capricious. *See* Final Br. for Pet'rs, *Nat'l Fuel Gas Supply Corp. v. NYSDEC*, No. 17-1164 (Sept. 1, 2017).

8. In federal courts, FERC receives no deference for its interpretation of provisions of the Clean Water Act, including a delegated state's waiver of CWA Section 401 authority. *Cf.* FERC Waiver Order, at P 44. *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (FERC's "interpretation of Section 401 is entitled to no deference by the court, because the Environmental Protection Agency, and not the Commission, is charged with administering the Clean Water Act"); *AES Sparrows Pt. LNG v. Wilson*, 589 F.3d 721, 730 (4th Cir. 2009); *Ala. Rivers All. v. FERC*, 325 F.3d 290, 296–97 (D.C. Cir. 2003); *Cal. Trout, Inc. v. FERC*, 313 F.3d 1131, 1133–34 (9th Cir. 2002). Indeed, the Second Circuit has recently concluded in a case similar to the one at bar that NYSDEC and a FERC-jurisdictional pipeline project sponsor may alter the date of receipt of an application for a Section 401 water quality certificate by resubmitting the application. *NYSDEC v. FERC*, 884 F.3d 450, 455-456 (2d Cir. 2018).

9. NYSDEC's August 14, 2018 rehearing request to FERC provides a colorable basis for judicial rejection of the Waiver Order.

10. Exhibit C to NYSDEC's rehearing request addresses the feasibility of crossing Dodge Creek utilizing horizontal directional drilling ("HDD"), a technique that would avoid adverse impacts to water quality in the creek.[1] In its rehearing request, Dodge Creek is the only stream crossing

1 **Exhibit A** hereto omits from NYSDEC's 70-page submission to FERC Exhibit B, comprising NYSDEC's letter to NFG, dated April 7, 2017, denying a CWA water quality certification. However, this document is provided in the Record at R.228-240. Also omitted from **Exhibit A** are the Appendix to Attachment 1 to NYSDEC's Exhibit C, comprising analytical results of the geotechnical investigation of the proposed Dodge Creek crossing. NYSDEC's complete August 14, 2018 submission is available on FERC's e-Docket for Case CP15-115, Accession No. 20180814-5138, *via* direct link at <https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14697122>. *Cf.* NFG, Verif. Pet., ¶11 (also citing to FERC's e-Docket for Case CP15-115).

NYSDEC fully documents. (The Dodge Creek crossing is also identified in Exhibit B to NYSDEC's April 7, 2017 determination, provided at R.228-240.)

11. As previously asserted by the Schuecklers, the Dodge Creek crossing is near the Schuecklers' land; NYSDEC determined that the Dodge Creek crossing is one of eight high-priority streams crossed by the Project as proposed that would be degraded in violation of the federal Clean Water Act, warranting denial of a CWA water quality certification for the Project; NFG declined NYSDEC's request to utilize HDD technology to avoid violating the CWA; and the effect of NYSDEC's denial of a CWA water quality certification is to block the Project until NFG reapplies with a modified proposal. *See* Schueckler Br., 20, 28-29. *See also* R.240.

12. A map showing the relative proximity of the Dodge Creek crossing and the Schuecklers' land on Hewitt Road in Cuba, New York, composited by the undersigned from publicly available "Mapquest" mapping, is provided herewith as **Exhibit B**. *Cf.* Schueckler Br., 20. *Cf. also* **Exhibit A**, penultimate page ("HDD Concept Overview at Dodge Creek", aerial imagery).

13. Attachment 1 to Exhibit C to NYSDEC's rehearing request is NFG's geotechnical drilling and exploration report on the feasibility of avoiding adverse impacts to water quality in Dodge Creek by implementing HDD to cross the creek. Page 1 of the report notes that the proposed Dodge Creek crossing is "located approximately 4,900 ft. northeast of the intersection of the New York State Route 305 (aka Porterville Obi Road) and Hooker Road (aka Dodge Creek Road)." *Cf.* **Exhibit B**.

14. NFG's geotechnical drilling and exploration report concludes that HDD at the proposed Dodge Creek crossing is not feasible.

15. This report and accompanying correspondence with NYSDEC establishes that utilizing HDD

for the Dodge Creek crossing is a high priority for NYSDEC, and is a basis for NYSDEC's denial of a water quality certification.

16. As NYSDEC's determination letter to NFG shows, (R.239), NFG remains free to reapply to NYSDEC for a CWA water quality certification with a modified alignment that will avoid crossing Dodge Creek at the location proposed.

17. In its August 14, 2018 request to FERC, NYSDEC notes that "Project construction would require clearing of a 75-foot wide swath over the entire pipeline route . . ." **Exhibit A**, at 4. This would occur notwithstanding the fact that the Northern Access 2016 Project would be sited adjacent to an existing NFG pipeline corridor for a substantial length, including the portion on the Schuecklers' land. *Cf.* R.208 (aerial imagery of Schueckler parcel at end of Hewitt Road showing NFG proposed alignment runs through forested area).

18. The information summarized above supports the conclusion that to resolve its dispute with NYSDEC, NFG may be required to alter the alignment of the Northern Access 2016 Project and thereby avoid the Schuecklers' land.

19. This information also shows that NFG's legal ability to construct the Northern Access 2016 Project has not been finally disposed. By requesting rehearing before FERC, NYSDEC has preserved its position, that NFG is bound by its agreement with the agency to deem NFG's application for approval under Section 401 of the Clean Water Act received such that NYSDEC's denial of approval was not waived, and the denial undermines the public interest finding made by FERC. As previously noted, FERC is also being challenged by NYSDEC on the waiver issue in the Second Circuit Court of Appeals. Finally, in the event that FERC denies NYSDEC's rehearing request, NYSDEC may appeal to the District of Columbia Court of

Appeals. NFG accordingly has a long way to go before it can be determined whether NYSDEC's action blocking its Project was inappropriate.

20. In the meantime, this Court should do nothing to upset the status quo, and thereby visit upon the Schuecklers irreparable harm should NFG be allowed to take land for a Project that may never be approved. As noted by NFG in its most recent required project update to FERC, provided herewith as **Exhibit C**, FERC has not issued a Notice to Proceed with construction.

21. As shown above, contrary to NFG's assertion, (NFG Verif. Pet., ¶10), the FERC proceedings governing the Project have not concluded, further litigation in superior courts will likely follow when they do, and therefore FERC's Waiver Order is not dispositive of the issues in this case.

DATED: September 10, 2018
Humphrey, New York

Gary A. Abraham
Attorney for Respondents-Appellants
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gabraham44@eznet.net

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner/Respondent,

-vs-

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,
Respondents/Appellants.

AFFIRMATION OF SERVICE

CA 17-02021
Index No. 45092

By this statement I affirm that on September 10, 2018, I did serve by United States Postal Service priority mail a true and accurate copy of the responding papers, in response to a post-argument submission in this Court by National Fuel Gas Supply Corporation, requesting permission to submit an Order issued by the Federal Energy Regulatory Commission dated August 6, 2018 in the matter of National Fuel Gas Supply Corporation and Empire Pipeline, Inc., (FERC Docket Nos. CP15-115-002, -003).

DATED: September 10, 2018
Humphrey, New York

Gary A. Abraham
Attorney for Respondents/Appellants
3949 Conlan Rd.
Great Valley, New York 14741
(716) 790-6141
gabraham44@eznet.net

EXHIBIT A TO ABRAHAM AFFIRMATION - RELEVANT PORTIONS OF NYSDEC'S REHEARING REQUEST [325- 355]

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel
625 Broadway, 14th Floor, Albany, New York 12233-1010
P: (518) 402-8543 I F: (518) 402-9018
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation	)	**Docket Nos. CP15-115-000; -001; and -002**
Empire Pipeline, Inc.	)	

REQUEST FOR REHEARING AND STAY

Pursuant to Section 19 of the Natural Gas Act ("NGA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission[2] ("FERC" or "Commission"), the New York State Department of Environmental Conservation ("NYSDEC" or "Department") respectfully makes this Request for Rehearing and Stay ("Request") of the August 6, 2018 Order on Rehearing and Motion for Waiver Determination Under Section 401 of the Clean Water Act, 164 FERC ¶61,084 ("Waiver Order"), finding that the Department waived its jurisdiction under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341 ("CWA") with respect to the Northern Access 2016 project ("Project"), as proposed by National Fuel Gas Supply Corporation and its affiliate Empire Pipeline, Inc. (together, "National Fuel"), (FERC Docket Nos. CP15-115-000; -001; and -002).

[1] 15 U.S.C. § 717r

[2] 18 C.F.R. § 385.713

The Commission erred because National Fuel executed an agreement with NYSDEC that established the date on which NYSDEC received National Fuel's application for a Water Quality Certificate ("Section 401 Certificate"), which had the effect of extending the time for the Department's review under Section 401 of the CWA.[3] The agreement was voluntarily made for "the mutual benefit of both parties." (*See* Ex. A.) While National Fuel reserved other rights, it did not reserve its right to contest NYSDEC's receipt date or the extension of time. *See id.* Principles of waiver, estoppel, ratification, and basic contract law now bar National Fuel from challenging the agreement's legal basis and prevent FERC from countermanding that agreement.

I. Statement of Issues

1. The Commission erred in holding that the Department waived its jurisdiction under Section 401 of the CWA. Specifically, the Commission erred in holding that the one-year timeframe in which the Department must act on an application for a Section 401 Certificate cannot be extended by written agreement between the Department and an applicant that establishes the receipt date of an application for purposes of determining when the statutory one-year timeframe begins. The Waiver Order should therefore be vacated insofar as it held that the Department waived its right to issue or deny a Section 401 Certificate.

2. The Commission should stay the Waiver Order, as well as refrain from issuing any Notices to Proceed with respect to the Project, during the pendency of review of this Request, including any appeal thereof. *See* 18 C.F.R. § 385.713(e). A stay would prevent irreparable environmental harm to the State of New York. It would also preserve the jurisdiction of the Second Circuit, which (a) has *sub judice* jurisdiction over National Fuel's challenges to the merits of NYSDEC's denial of

[3] A copy of the agreement is annexed hereto as Exhibit A.

a Section 401 Certificate; and (b) would have jurisdiction over a petition challenging the Waiver Order if this Request is denied.

II. Factual Background

The Department denied National Fuel's application for a Section 401 Certificate for the Project on April 7, 2017.[4] As proposed by National Fuel, the Project includes an approximately 97-mile-long multistate natural gas pipeline to transport natural gas extracted from McKean County, Pennsylvania through New York, delivering natural gas to New York, the Northeast and Midwest United States and Canada. The proposed new pipeline would cross approximately 71 miles in New York, through Allegany, Cattaraugus, and Erie Counties. Additionally, the Project also includes: (i) replacement of 4 miles of an existing 16-inch supply pipeline with a 24-inch pipeline in the Towns of Wheatfield and Pendleton in Niagara County, New York; (ii) interconnection with Tennessee Gas Pipeline in the Town of Wales, Erie County, New York; (iii) a new 22,214 horsepower compressor station in Town of Pendleton, Niagara County; (iv) the addition of approximately 5,350 horsepower compression capacity at National Fuel's existing Porterville Compressor Station in the Town of Elma, Erie County, New York; and (v) a new natural gas dehydration facility in the Town of Wheatfield, Niagara County, New York. *See* Project Environmental Assessment, dated July 2016, at 1-2.[5] On March 17, 2015, National Fuel filed an application with FERC seeking a certificate of public convenience and necessity pursuant to Section 7(c) of the NGA to construct and operate the Project. On February 3, 2017, the Commission issued an order granting the requested certificate of public convenience and necessity. That order required National Fuel to obtain certain authorizations from the Department, including (but not limited to) a Section 401 Certificate.

[4] A copy of the Joint Application Denial is annexed as Exhibit B.
[5] The Environmental Assessment is available at on the FERC Docket at Issuance No. 20160727-4003.

On March 2, 2016, National Fuel submitted to the Department a Joint Application for a Section 401 Certificate for the Project. On January 20, 2017, the Department and National Fuel negotiated and entered into a written agreement that, for the purpose of review under the Clean Water Act, the Joint Application was received on April 8, 2016 ("Agreement").

The environmental consequences of the Project would be significant for New York. The Project would cross approximately 192 waterbodies (25 of which support trout or trout-spawning streams and cold-water fisheries) and over 73 acres of State and Federal wetlands. Project construction would require clearing of a 75-foot wide swath over the entire pipeline route through water and wetland resources, interior forests, and other natural areas. Due in part to the amount of pipeline right-of-way clear-cutting, construction, and ground disturbance activities, NYSDEC determined that the Project would directly and indirectly impact the water quality of small and large streams and wetlands by destabilizing stream banks and wetland areas, causing erosion, creating turbidity, degrading habitat, contravening best usages, and changing water levels, stream velocity and flow variations, all of which are prohibited under New York law. *See* title 6 of the New York Code of Rules and Regulations ("NYCRR") Parts 668, 700–705, 750. (*See* Ex. B.) Under the CWA and New York's water quality protection laws, these impacts on water resources are prohibited and therefore must be avoided, minimized or mitigated. *See* CWA 401, 33 U.S.C. § 1341; N.Y. Environmental Conservation Law ("ECL") § 15-0501 (no person "shall change, modify or disturb the course, channel or bed of any stream"); ECL § 24-0103 (declaring that New York's public policy is "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom"); ECL § 24-0105(1) (finding that "[t]he freshwater wetlands of the state of New York are invaluable resources for flood protection, wildlife habitat, open space, and water resources"). When the Department denied National Fuel's Joint Application on April 7, 2017, it

acted within one year from NYSDEC's receipt of the Joint Application as established by the Agreement. (*See* Exs. A and B.)

III. Argument

A. Request for Rehearing

The Commission should grant rehearing and, upon rehearing, hold that the Department did not waive its right to issue or deny a Section 401 Certificate. In holding otherwise, the Waiver Order neglected fundamental principles of waiver, estoppel, ratification, and contract law.

1. *The Commission applied principles of statutory construction erroneously.*

The Waiver Order holds that because "'Section 401 contains no provision authorizing . . . parties to extend the statutory deadline,'" the Agreement "must fail." Waiver Order at 19. That rationale is incorrect. Indeed, the law is the opposite: statutory rights "are generally waivable unless Congress affirmatively provides they are not." *Price v. U.S. Dep't of Justice,* 865 F.3d 676, 679 (D.C. Cir. 2017), "It is hornbook law that rights of all kinds – even constitutional ones – can be waived." *Secretary, U.S. Dep't of Labor v. Preston,* 873 F.3d 877, 878-79 (11th Cir. 2017), *cert. denied,* 138 S.Ct. 2680 (2018). The U.S. Supreme Court has observed, "in the context of a broad array of constitutional and statutory provisions," that "[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption." *U.S. v. Mezzanatto,* 513 U.S. 196, 200-01 (1995). In light of that principle, for a provision to be *non-waivable*, a statute, regulation, or case law must say so. Section 401 contains no such condition.

Indeed, the Commission regularly – and unilaterally – extends its own 30-day statutory deadline set forth in the NGA for acting on the merits of applications for rehearing by issuing tolling orders that extend this deadline indefinitely. The NGA's provision concerning rehearing,

15 U.S.C. § 717r(a), does not contain any language expressly authorizing FERC to extend the 30-day statutory deadline. *See* 15 U.S.C. § 717r(a). ("Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied."). Nonetheless, FERC continues the practice of unilaterally extending its statutory timeframe to review rehearing requests on the merits, as discussed in the Waiver Order.[6] Waiver Order at 2. As FERC points out in the footnote 6 of the Waiver Order, courts have upheld FERC's issuance of tolling orders unilaterally extending this statutory time. Waiver Order at 2, fn.6, citing *Kokajko v. FERC,* 837 F.2d 524, 525 (1st Cir. 1988) (internal citations omitted). The CWA requires that a state "act" within one year of receiving an application for certification and – just like the NGA rehearing provision that the Commission regularly extends on a unilateral basis – does not contain language expressly authorizing or prohibiting an applicant or a state from extending the statutory deadline. 33 U.S.C. § 1341(a). Nevertheless, as described below, the Commission acknowledges that an applicant can unilaterally extend a state's CWA statutory timeframe by electing to withdraw and resubmit its application. Given that FERC can extend its own NGA statutory deadline, and an applicant can unilaterally extend a state's CWA statutory deadline, it follows that an applicant or a state should at least able to effectively extend its CWA deadline through a bilateral agreement between the state and the applicant. Therefore, because the Agreement is a mutual resolution between the Department and NFG regarding when the CWA one-year review period began, it is consistent with the CWA. The Commission's ruling to the contrary is inconsistent with the proper application of principles of statutory construction, as well as its own precedent.

2. ***The Commission's ruling would cause additional delay.***

[6] *See e.g.,* Order Granting Rehearing for Further Consideration, dated April 3, 2017, available on the FERC Docket at Issuance No. 20170403-3016.

In the Waiver Order, FERC held that the only mechanism by which the one-year CWA timeframe can be "extended," is by an applicant unilaterally withdrawing and resubmitting its application before a certifying agency. Waiver Order at 8, 20. The withdrawal-and-resubmission process required by the Waiver Order would result in *more* delay than accepting the parties' stipulation to a start date for the one-year period, for two reasons.

First, if National Fuel had withdrawn and resubmitted the Joint Application in January 2017 (when the Agreement was executed), the Department would have been obligated under its regulations to publicly notice the "new" application for comment and hearings. 6 NYCRR § 321.7. That burden – both on the Department and National Fuel – would be unnecessary because there would be no substantial change between the Joint application and the "new" application.

Second, as the Commission acknowledged, withdrawal and resubmittal would restart the one-year clock, pushing the deadline for a decision out considerably farther than April 7, 2017. The same scenario would have played out if the Department had denied the Joint Application for lack of information and National Fuel resubmitted a "new" application.

The alternative to such delay was the mutually beneficial Agreement. The Agreement afforded the Department additional time to review the revised trenchless feasibility study, submitted February 17, 2017,[7] without extending the deadline for decision months beyond what was necessary. No environmental or energy policy favors withdrawal and resubmission over a simple agreement to adjust the timeframe.

3. ***The Commission erred in disregarding the parties' Agreement.***

In the Waiver Order, the Commission incorrectly held that its "construction of the law is not affected by a private agreement." Waiver Order at 17, fn.71. The Agreement was a settlement

[7] A copy of Supplement #5 to Joint Application for Permits, dated February 17, 2017, is annexed as Exhibit C.

of a discrete issue (i.e., the date on which the Joint Application was received by the Department). The D.C. Circuit "has consistently *required* the Commission to give weight to the contracts and settlements of the parties before it." *Erie Boulevard Hydropower, LP v. FERC,* 878 F.3d 258, 268 (D.C. Cir. 2017) (emphasis added; internal quotation marks and citation omitted). "[E]ven if the legal underpinning of a settlement has eroded, the settlement remains intact before the Commission." *Id.*

National Fuel, a sophisticated corporation represented by outside counsel, voluntarily negotiated and entered into the Agreement with a full reservation of all its rights "with the exception of any claim as it may relate to the date of April 8, 2016, by which the Application was deemed received by NYSDEC as set forth [t]herein." (Ex. A.) The Department had requested National Fuel complete a revised trenchless feasibility study and, at the time the Agreement was entered into, that revised study had not been completed. The revised study was not submitted to the Department until February 17, 2017. Execution of the Agreement, which occurred while National Fuel was completing this study, was necessary to afford the Department adequate time to review the supplemental information.

This receipt date is the primary and discrete aspect of the Agreement that had the effect of extending the Department's time to act on the Application. In other words, National Fuel's claim that the Department waived its authority to issue or deny a Section 401 Certificate for the Project is contingent upon the date on which the Application is deemed received by NYSDEC, the very issue addressed by the mutually agreed-upon exception to National Fuel's reservation of rights.

4. Principles of estoppel, waiver, and ratification require enforcement of the Agreement.

National Fuel's failure to object at the time it executed the Agreement, plus its knowing acceptance of the Agreement's benefits, estops it from challenging the Agreement's validity. *See*

Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1064 (2d Cir. 1993); *accord Register.com v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004); *Nirvana Intern. v. ADT Sec. Servs., Inc.*, 525 Fed. Appx. 12, 13-14 (2d Cir. 2013) (summary order).

The Agreement stated that it was made for "the mutual benefit of both parties." (Ex. A.) By not repudiating the Agreement promptly and instead accepting its benefits—which included avoiding an earlier denial of its application or a need to resubmit the Section 401 Certificate application—National Fuel ratified the Agreement. *See Allen v. Riese Org., Inc.,* 106 A.D.3d 514, 517 (1st Dep't 2013). When National Fuel made its "Request for Reconsideration and Clarification or, in the Alternative, Application for Rehearing" on March 3, 2017, it did not argue that the Agreement was invalid, even though the Agreement had been in place for more than a month and the original deadline for NYSDEC to act – March 1, 2017 – had already passed. Instead, National Fuel waited until eight months after NYSDEC denied its Section 401 Certificate application to attempt to undo the Agreement. Even when a contract is voidable, a party "must act promptly to repudiate" the contract "or he will be deemed to have waived his right to do so." *DiRose v. PK Mgmt. Co.,* 691 F.2d 628, 633-34 (2d Cir. 1982).

The Department's performance of the Agreement also precludes National Fuel from repudiating it. "[P]artial performance is an unmistakable signal that one party believes there is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect." *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d 69, 75-76 (2d Cir. 1984). NYSDEC performed its promise under the Agreement by continuing to review National Fuel's application between March 2 and April 7, 2017, rather than denying the application outright and requiring National Fuel to re-submit a new application, thus restarting the one-year review

period allowed under Clean Water Act Section 401. National Fuel accepted the benefits of the Agreement without objection.

5. *National Fuel's waiver argument was untimely.*

Lastly, as a procedural matter, the Commission erred in construing three pages of National Fuel's December 5, 2017 "Renewed Motion for Expedited Action" as a separate "motion requesting a waiver determination." Waiver Order at 2. National Fuel had presented the waiver issue in its March 3, 2017 motion for reconsideration or rehearing. At that time, the Agreement was in place and one year from the submittal of National Fuel's application had already elapsed. Accordingly, the claim that the Department waived its review notwithstanding the Agreement could and should have been raised at that time. By failing to raise the waiver issue at the earliest possible opportunity – and instead waiting until eight months after the Department had acted – National Fuel attempted to bootstrap a new argument to its earlier submission. National Fuel thus impermissibly filed an untimely supplement to its earlier request for rehearing. The supplement should have been rejected. *See City of Tacoma, Washington*, 110 FERC ¶61,140, at ¶¶61,542-43 (2005) (prohibiting parties from raising "new or different arguments" under the guise of "renewing" an earlier request for rehearing); *In Re CMS Midland, Inc.*, 56 FERC ¶61,177, at ¶¶61,621-22 (1991) (Commission has "no authority to accept materials in support of rehearing applications if such materials are filed after the 30-day deadline for submitting rehearing applications.").

B. Request for Stay

The Commission conducted its environmental review of the Project pursuant to the National Environmental Policy Act ("NEPA"), culminating with the issuance of an Environmental Assessment in July 2016. The Environmental Assessment "addressed potential impacts from air

emissions, water withdrawals, and the crossing or disturbance of streams and wetlands, concluding that the [P]roject's impacts, if mitigated by listed measures, would not be significant." (Waiver Order at 23.) These listed measures, which were deemed necessary to mitigate the Project's potential environmental impacts, included the Section 401 Certificate and permits pursuant to ECL Articles 15, 19 and 24, all of which are issued by NYSDEC. *See* Table A.8-1 of the Environmental Assessment. The Commission did not, however – in either the Environmental Assessment or the Waiver Order – provide for alternative mitigation in the event of waiver of the Section 401 Certificate and/or a denial of state-issued permits. Thus, if the Project proceeds without NYSDEC-issued permits, there will be no mitigating measures of the impacts that were specifically relied upon in the Environmental Assessment. Under those circumstances, the Environmental Assessment's conclusion of no significant impact would no longer be valid. In turn, without a proper Environmental Assessment or other NEPA compliance, FERC's February 3, 2017 Certification and Order is itself invalid. Thus, not only must FERC reevaluate its NEPA obligations, it must also revoke the Certification and Order pending further administrative action.

The impact of allowing the Project to be constructed – particularly without additional mitigation measures – would be severe. As detailed in the Department's decision denying the Section 401 Certificate, the Project would have a substantial impact on over 73 acres of wetlands and 192 State-regulated streams, of which 126 have been classified as best suitable for drinking water, recreation and fishing, and propagation of fish, shellfish, and wildlife. (Ex. B at 2 and 4.) The Department concluded that the Project did not adequately avoid or mitigate the Project's cumulative impacts to water quality, which "would materially interfere with or jeopardize the biological integrity and best usages of affected water bodies and wetlands." (Ex. B at 4.) The Project would "impede the best uses of many water bodies, particularly those with a trout standard

or rare species, by degrading the survival and propagation of balanced, indigenous populations of shellfish, fish and wildlife that rely upon these waters." (Ex. B at 4.) Species particularly affected include the Eastern Hellbender, a listed New York State Species of Special Concern, which requires clear streams and rivers to sustain its habitat and spawning. (Ex. B at 10.)

To prevent irreparable harm to the State's environment, the Commission should stay the Waiver Order during the pendency of review of this Request for Rehearing, including any appeal thereof. *See* 18 C.F.R. § 385.713(e).

IV. Conclusion

For the foregoing reasons, NYSDEC respectfully requests that the Commission (i) immediately stay the Waiver Order until the conclusion of this proceeding (including all appeals); and (ii) grant rehearing of the Waiver Order and, upon rehearing, hold that National Fuel are barred from challenging the timeliness of NYSDEC's Section 401 determination by waiver, estoppel, ratification, and principles of contract law.

Dated: Albany, New York
August 14, 2018

Respectfully submitted,

THOMAS S. BERKMAN
Deputy Commissioner and General Counsel
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Exhibit A

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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625 Broadway, 14th Floor, Albany, New York 12233-1010
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January 20, 2017

Steven C. Russo
Greenberg Traurig, LLP
54 State Street
Albany, New York 12207

RE: Northern Access 2016 – FERC Docket No. CP15-115
Application for Section 401 Water Quality Certification,
Freshwater Wetlands and Protection of Waters Permit

Dear Mr. Russo:

Your client, National Fuel Gas Supply Corporation (NFG) submitted to the New York State Department of Environmental Conservation (NYSDEC) (collectively with NFG, the "Parties") a Joint Application for Permits (Application) under Sections 401 and 404 of Clean Water Act (CWA), and Articles 15 and 24 of the Environmental Conservation Law for the proposed Northern Access 2016 Project (Project). Pursuant to our discussions, and as memorialized and acknowledged by your countersignature below, the Parties have mutually agreed that, for the purposes of review under Section 401 of the CWA, we are revising the date, to the mutual benefit of both parties, on which the Application was deemed received by NYSDEC to April 8, 2016. Thereby extending the date the NYSDEC has to make a final determination on the application until April 7, 2017. The Parties further agree that this agreement supersedes the previously agreed upon March 2, 2016 date of receipt of the Application, as set forth in email correspondence dated April 14, 2016 between NYSDEC, Office of General Counsel and Robert M. Rosenthal. The Parties reserve all rights under the applicable State and Federal laws, as may be applicable, with the exception of any claim as it may relate to the date of April 8, 2016, by which the Application was deemed received by NYSDEC as set forth herein.

Please confirm your concurrence with this agreement, on behalf of your client, NFG, by countersigning this letter on the line indicated below and return a copy to my attention. NYSDEC will file a copy this letter, as countersigned, with the Federal Energy Regulatory Committee under the appropriate docket number of the Project. If you have questions, please feel free to contact the project attorney, Sita Crounse, Office of General Counsel at (518) 402-9198 or sita.crounse@dec.ny.gov.

Sincerely,

Thomas S. Berkman
Deputy Commissioner
and General Counsel

AGREED: This 23rd day of January, 2017

By: _____
Steven C. Russo
On behalf of National Fuel Gas Supply Corporation

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Exhibit C

TETRA TECH

February 17, 2017

VIA EMAIL AND FEDERAL EXPRESS DELIVERY

Mr. Michael Higgins
New York State Department of Environmental Conservation
Division of Environmental Permits & Pollution Prevention
625 Broadway, 4th Floor
Albany, New York 12233
(518) 402-9167

RE: Supplement #5 to Joint Application for Permits
Northern Access 2016 Project
National Fuel Gas Supply Corporation and Empire Pipeline, Inc.

Dear Mr. Higgins:

On behalf of National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, "National Fuel"), enclosed please find two (2) copies of supplemental information related to National Fuel's February 29, 2016 Joint Application for Permits ("Application") under Sections 401 and 404 of Clean Water Act, and Articles 15 and 24 of the Environmental Conservation Law for the proposed Northern Access 2016 Project ("Project").

In particular, this supplemental information updates Supplement #2 dated November 17, 2016, Attachment 2A - Narrative Trenchless Feasibility Assessment for the Northern Access 2016 Project (specifically, Section II.A – Individual Crossings and HDD/Conventional Bore Feasibility Analysis, *Trenchless Feasibility Assessment for crossing Dodge Creek*). In that earlier trenchless feasibility assessment, National Fuel committed to further evaluating an additional potential HDD alignment, discussed as Option #3, related to the crossing of Dodge Creek (Stream S284a, located at Mainline Pipeline milepost 33.30, Allegany County, New York). This Supplement #5 provides additional information and documentation, and concludes that, after consideration of geotechnical survey results and further information obtained relating to an affected landowner's future land use plans along the Option #3 alignment, the trenchless/HDD crossing of Dodge Creek Option #3 is not feasible. Moreover, this Supplement #5 is provided to the New York State Department of Environmental Conservation ("NYSDEC") as part of National Fuel's cooperation in the NYSDEC's ongoing review of the Application and should not in an any manner be construed as a re-submittal of the Application by National Fuel.

Tetra Tech, Inc.
301 Ellicott St, Buffalo, New York 14203
Tel 716.849.9419 Fax 716.849.9420 www.tetratech.com

If you have any questions or need additional information, please contact me at 716-849-9419 x110 or sandy.lare@tetratech.com, or Bruce Clark (National Fuel) at 814-871-8518 or ClarkR@natfuel.com. National Fuel appreciates your continued review of the Application.

Sincerely,
Tetra Tech, Inc.

Sandra J. Lare

Sandy Lare
Environmental Project Manager

Enclosure

cc: Joseph Rowley (U.S. Army Corps of Engineers, Buffalo District)
Bruce Clark (National Fuel)

Narrative Trenchless Feasibility Assessment
for the Northern Access 2016 Project – Updated Dodge Creek Analysis

In connection with National Fuel's Trenchless Feasibility Assessment ("Trenchless Feasibility Study") for the Northern Access 2016 Project, submitted as part of National Fuel Gas Supply Corporation and Empire Pipeline, Inc.'s (collectively, "National Fuel") November 17, 2016 Supplement No. 2 to Joint Application for NYSDEC Article 15, Article 24, and Section 401 Water Quality Certification and USACE Section 404 Stream/Wetland Crossing Permits ("Supplement No. 2"), National Fuel committed to further geotechnical study of a potential horizontal direction drill ("HDD") of Dodge Creek (S284a). Specifically, National Fuel noted that it would continue to investigate a further alternate alignment that would place the southern HDD pad further west of the utility corridor than originally studied, in excess of 1,000 feet west of the existing utility corridor. This alternate alignment was shown on the Dodge Creek Area Study Map (Attachment 2, Exhibit L of Supplement No. 2) as Option #3. National Fuel further noted that consideration of this option was subject to National Fuel's receipt of satisfactory geotechnical results demonstrating strata conductive to a successful HDD, and all clearances necessary to construct the necessary pipeline.

Based on this commitment, National Fuel drilled three geotechnical core borings along this potential Option #3 alignment during the period of November 10 to November 15, 2016, with these borings reaching to depths of 85'-90' below the surface elevation. The Geotechnical Report is attached herein as Attachment 1 - Drilling & Exploration Report dated November 2016 (Urban Engineers). The initial geotechnical results for this alignment did not demonstrate ideal conditions; and specifically raised concerns regarding gravel concentration. Of greatest concern were the results near the southern end of the potential HDD path where gravels with concentrations as high as 47%, and with 10% of particles larger than ¾", were found to depths of 30'. Gravels of this concentration and size would be difficult to drill and remove, for the reasons previously described in the Trenchless Feasibility Assessment.

Additionally, the HDD Concept Plan for Option #3 (Attachment 2- HDD Concept Overview at Dodge Creek dated 2/13/2017 attached herein) depicts the workspace required for a potential HDD, estimated at 1970' in length, and indicates a significantly larger footprint during construction than the proposed dry open cut crossing. Indeed, even though the HDD would not have earth disturbance along the HDD path, there would be approximately 7.8 acres of disturbance for the entirety of the HDD drill pad and pipeline connections (entry and exit locations). In comparison, the proposed dry open cut option has an estimated 3.7 acres of disturbance. Therefore, the HDD would temporarily impact an additional 4.1 acres.

Equally important, as field surveys began of the "Option #3" HDD concept alignment, National Fuel was informed by the landowners on the south side of Dodge Creek that such landowners are working through the engineering review and permitting process for a proposed gravel mine. The Option #3 alignment would directly bisect this proposed gravel mine (see Attachment 2 for an approximate location of planned mine limits). As per NYSDEC Setback Requirements Technical Guidance Memo MN96-1MLR, a 25-foot mining setback would be required from the pipeline ROW, plus a 1.5H:1V slope. National Fuel's permanent 50' ROW is centered on the pipeline, thus the Option #3 HDD concept alignment would sterilize at minimum 100' centered

through the proposed mine area. Thus, if an HDD was completed along the Option #3 alignment, National Fuel's permanent facilities would preclude the economic development of at least that portion of the mine, and would unnecessarily impose a significant hardship on the landowner. For these reasons, HDD along this potential new alignment was eliminated from consideration.

Therefore, after final analysis, National Fuel's proposed dry open cut crossing of Dodge Creek remains its preferred method. As explained in the Introduction of the Trenchless Feasibility Assessment, and in this updated analysis, the proposed dry open cut crossing is protective of the resource, remains in alignment with the existing electric utility corridor, thereby avoiding various additional resource impacts, and avoids impacts to gravel resources (including economic harm to the landowner).

Attachments
1-Geotechnical Drilling & Exploration Report dated November 2016 (Urban Engineers)
2-HDD Concept Overview at Dodge Creek dated 2/13/2017

Attachment 1

Geotechnical Drilling and Exploration Report

URBAN ENGINEERS OF NEW YORK, D.P.C.

GEOTECHNICAL DRILLING AND EXPLORATION REPORT

PROPOSED NORTHERN ACCESS 2016 PIPELINE HDD CROSSING AT DODGE CREEK

TOWN OF GENESEE ALLEGHENY COUNTY, NEW YORK

Prepared for: National Fuel Gas Supply Corporation
Erie, Pennsylvania

November 2016

Urban Project No. 2016620031.000

URBAN ENGINEERS
Formulating Excellence
Urban Engineers of New York, D.P.C.
403 Main Street, Suite 530
Buffalo, NY 14203
716.856.9510

November 18, 2016

National Fuel Gas Supply Corporation
1100 State St.
Erie, PA 16501

Attn: Brent A. Hoover, P.E.

Re: Geotechnical Drilling and Exploration Report
Proposed Northern Access 2016 Pipeline
H.D.D. Crossing at Dodge Creek
Town of Genesee, Allegheny County, New York
Urban Project No. 2016620031.000

Dear Brent:

We are pleased to submit herewith our geotechnical drilling and exploration report covering field and laboratory services for the captioned project.

We wish to thank you for the opportunity of assisting you in this project, and for your cooperation during the course of this exploration. In the event of questions, additional services or information on any of the above, please do not hesitate to contact our office.

Very truly yours,

URBAN ENGINEERS OF NEW YORK, D.P.C.

David G. Machmer, P.E.
Geotechnical Engineering Practice Leader

DGM:clb

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TABLE OF CONTENTS

I. INTRODUCTION

This report presents the results of a geotechnical drilling and laboratory testing exploration performed for the proposed Northern Access 2016 Pipeline to be constructed in the area of Dodge Creek in the Town of Genesee, Allegheny County, New York (see Dwg. 1, appended). The objective of the exploration was to explore the subsurface conditions at the site as they relate to horizontal directional drilling (HDD) for installation of the pipeline in the area of Dodge Creek. Specifically, the scope of services was as follows:

1. Layout and drill test boring,
2. Coordinate the drilling operations and perform full-time drilling observation,
3. Conduct laboratory observation of the subsurface samples to estimate their engineering properties, and
4. Prepare a written report to include summaries of the field testing performed, the area geology, and test boring and laboratory testing results.

These services have been performed in accordance with Urban's email proposal dated November 7, 2016, and National Fuel Gas Supply Corporation's Purchase Order No. SUPG1-0000025980, dated February 3, 2016.

II. PROPOSED CONSTRUCTION

The installation of National Fuel's Northern Access 2016 pipeline may require crossing Dodge Creek by means of horizontal directional drilling (HDD). The proposed crossing will generally run north south, and will be located approximately 4,900 ft. northeast of the intersection of New York State Route 305 (aka Porterville Obi Road) and Hooker Road (aka Dodge Creek Road). The HDD is planned to start about 700 ft. north of Dodge Creek and to

terminate about 1,270 ft. south of Dodge Creek. The 1,970 ft. long HDD is expected to extend at least 70 ft. beneath the ground surface, and at least 60 ft. beneath Dodge Creek.

III. FIELD AND LABORATORY INVESTIGATION

Three (3) test borings, identified as B-1, B-2, and B-3, were performed to depths of 85 ft. and 90 ft. in the area of the proposed crossing by Earth Dimensions, Inc., Elma, New York, between November 10 and 15, 2016. A truck-mounted, diesel-powered drilling rig was used, and split-barrel sampling and penetration tests were in accordance with ASTM D1586 guidelines and standard practices. The holes were backfilled with tremied grout. The drilling operations were coordinated and observed on a full-time basis by Urban's drilling technician. The boring locations were obtained using GPS survey equipment and the ground surface elevations were interpolated from a topographic survey plan provided by National Fuel Engineering.

All recovered subsurface samples obtained in the borings were visually inspected and the soil descriptions are presented on the boring logs. The soil descriptions follow the Simplified Burmister's System for soil descriptions. Twenty-six (26) soil samples were tested to determine index properties, including moisture content (ASTM D2216), gradation (ASTM D422 and ASTM D1140), Atterberg Limits (ASTM D4318), and classifications of soils in accordance with the Unified Soil Classification System (USCS, ASTM D2487). The soil testing was performed in Urban's in-house testing laboratory. The soil testing results are included in the appendix and discussed in the following sections.

IV. SITE CONDITIONS

Geology

The site is located in the "Allegheny Plateau" physiographic province of New York. The site is covered with sandy and silty alluvial soils associated with Dodge Creek, overlying silty and sandy glacial till soils deposited during glacial advances of the Pleistocene Era.

Site Description

Dodge Creek is located in an approximately 2,300 ft. wide stream valley. The ground surface is relatively flat between the HDD entry point to within 300 ft. of the HDD exit point, after which it slopes up to the exit point, which is about 40 higher in elevation than the entry point. Most of the proposed HDD alignment is currently comprised of low lying land covered with farm fields, brush, and trees. The HDD entry and exit areas are currently farm fields. A 4 in. to 6 in. thick layer of topsoil was found at the ground surface in the borings. Due to the presence of brush and tree covered land the topsoil and root mat may be thicker in some areas of the alignment. The subsurface materials encountered below the topsoil and ground surface are presented graphically on Dwg. 2, appended, and are discussed in the following paragraphs.

Subsurface Strata

Gravel and Sand, Little to Some Silt

Brown gravel and sand, little to some silt, was found at the ground surface in Borings B-1 and B-3. The thickness of this stratum is 24 ft. in Boring B-1, and 7 ft. in Boring B-2. The moisture content is "low," and the plasticity of the fines varies from "slight" to "non-plastic." The USCS classification is GM, and as indicated by the standard penetration test blow counts the relative density of the soil is "medium dense" and "dense."

Sand, Trace to Some Silt and Gravel

A 12 ft. to 28 ft. thick layer of brown sand, trace to some silt and gravel, was found at the ground surface in Boring B-2, and at depths of 24 ft. and 7 ft. in Borings B-1 and B-2. The moisture content is "moderate" to "high," and the fines are "non-plastic." The USCS classifications are SM, SP-SM, and ML, and the relative density varies from "loose" to "medium dense."

Clayey Silt, Trace Sand

A 40 ft. thick layer of brown and gray clayey silt, trace sand, was found at a depth of 12 ft. in Boring B-2. The moisture content is "high," and the plasticity of the fines is "low." The USCS classification varies from CL to ML, and the consistency is "medium stiff."

Gravel and Sand, Little to Some Silt

Brown and gray silt, trace to some sand, was found at a depth of 52 ft. in Borings B-1 and B-2, and at a depth of 21 ft. in Boring B-3. The moisture content is "moderate" to "high," and the plasticity of the fines ranges from "low" to "non-plastic," and is generally "non-plastic." The USCS classifications are ML and CL-ML, and the consistency is generally "medium stiff" and "stiff."

Ground Water

Water level observations were made at the time of drilling and are noted on the logs. The readings indicate depths between 13.6 ft. and 35.0 ft. beneath the ground surface, corresponding to elevations between 1463 and 1470. These readings do not reflect daily, periodic, or seasonal variations in the ground water levels.

V. GENERAL

The results and evaluations contained in this report are based on the information revealed in the course of our study and exploration. The report has been prepared based on the material properties of the subsurface soil and rock and does not address environmental aspects. Furthermore, we cannot be responsible for any conclusions drawn from the data included in this report other than those specifically stated. The report has not been prepared to be used directly as construction specifications. This report is intended for use with regards to the specific project discussed herein.

URBAN ENGINEERS OF NEW YORK, D.P.C.
November 18, 2016

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Attachment 2

HDD Concept Overview Map


HOCKER ROAD
BEGIN HDD
HDD CONCEPT L.O.D.
CURRENT ROUTE L.O.D.
DODGE CREEK
HDD CONCEPT PIPELINE
END HDD
CORNELL PROPOSED AGGREGATE MINE
0' 120' 240'
National Fuel
PRELIMINARY
NATIONAL FUEL GAS SUPPLY CORPORATION
HDD CONCEPT OVERVIEW at DODGE CREEK
TOWN OF GENESEE, ALLEGANY CO., NY
FEBRUARY 13, 2017

20180814-5138 FERC PDF (Unofficial) 8/14/2018 3:16:52 PM

Document Content(s)

EXHIBIT B TO ABRAHAM AFFIRMATION - MAP SHOWING NFG-PROPOSED DODGE CREEK CROSSING AND SCHUECKLER'S LAND

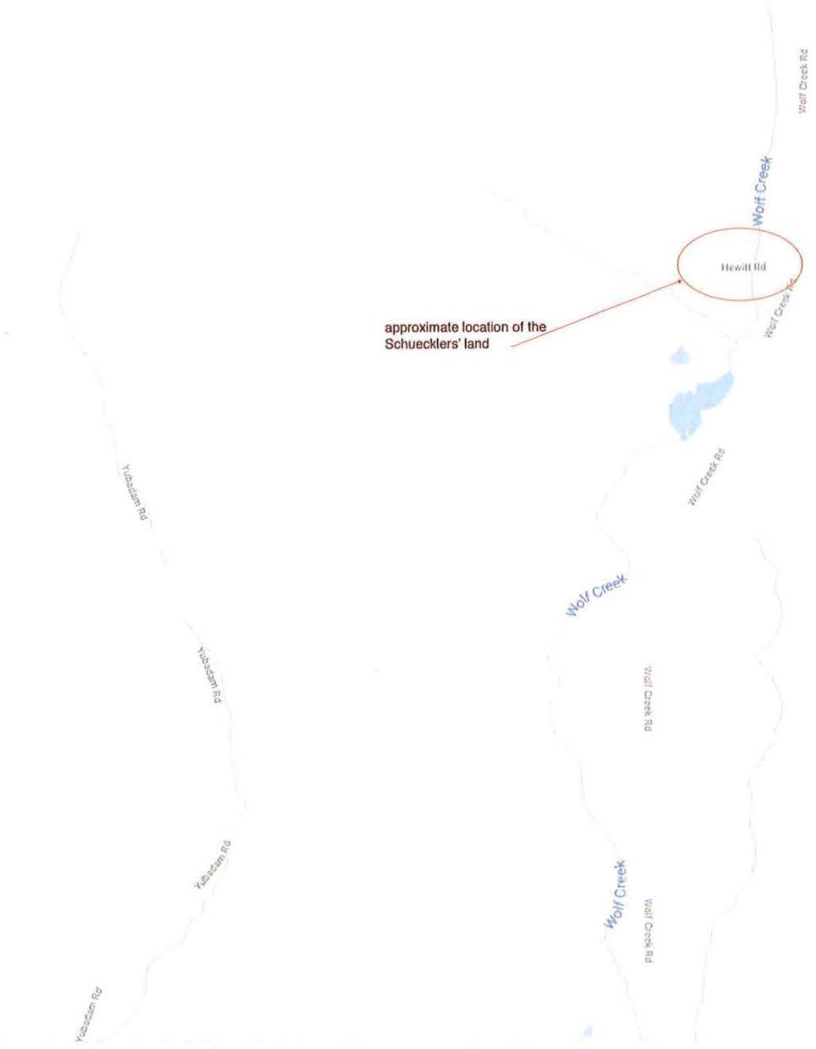

EXHIBIT C TO ABRAHAM AFFIRMATION - NFG STATUS REPORTS FOR JULY 9-AUGUST 12, 2018, SUBMITTED TO FERC [357- 359]

national fuel

Jeffrey B. Same
Attorney
(716) 857-7507

August 21, 2018

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

RE: National Fuel Gas Supply Corporation and Empire Pipeline, Inc.
Northern Access 2016 Project
Docket No. CP15-115-000 and CP15-115-001

Weekly Status Reports: 07/09/18 to 07/15/18
07/16/18 to 07/22/18
07/23/18 to 07/29/18
07/30/18 to 08/05/18
08/06/18 to 08/12/18

Dear Ms. Bose:

Pursuant to Environmental Condition No. 8 of Appendix B to the Federal Energy Regulatory Commission's February 3, 2017 order in the above-referenced proceeding,[1] National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively "National Fuel") submit their Weekly Status Reports of construction activities for the reporting periods indicated above.

National Fuel is submitting an abbreviated report since construction activities have not commenced.[2]

Please direct any questions regarding this filing to the undersigned.

Very truly yours,

/s/ Jeffrey B. Same

[1] *National Fuel Gas Supply Corporation and Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (2017).
[2] With consent of FERC staff, National Fuel is filing status reports on a monthly basis until such time as significant project developments occur, which require weekly reports.

National Fuel Gas Supply Corporation
Empire Pipeline, Inc.
Northern Access 2016 Project
Docket No. CP15-115-000 and CP15-115-001

Weekly Status Reports: *07/09/18 to 07/15/18*
07/16/18 to 07/22/18
07/23/18 to 07/29/18
07/30/18 to 08/05/18
08/06/18 to 08/12/18

Federal Authorizations Update
The following applications are no longer under review by the New York Department of Environmental Conservation (NYSDEC):

Section 401 Water Quality Certification – on April 7, 2017, NYSDEC Issued a Notice of Denial purporting to deny National Fuel's application for a Water Quality Certification for the New York portion of the Project, in addition to state law based stream and wetland crossing permits. However, as stated in FERC's August 6, 2018 Order on Rehearing and Motion for Waiver Determination Under Section 401 of the Clean Water Act ("Order"), NYSDEC waived its water quality certification authority under section 401 by failing to act by March 2, 2017.[3]

The following permit applications are under review by the U.S. Army Corps of Engineers:
- Section 404 Permit (Pennsylvania facilities – Pittsburgh Office)
- Section 404 Permit (New York facilities – Buffalo Office)

Work performed this reporting period:
This item is not applicable until construction commences. Construction will not commence until National Fuel receives its Notice to Proceed from the Director of Office of Energy Projects.

Work planned for the next reporting period:
This item is not applicable until construction commences. Construction will not commence until National Fuel receives its Notice to Proceed from the Director of Office of Energy Projects.

Schedule changes:
An updated project schedule will be provided along with a request for Notice to Proceed upon receipt of applicable permits.

Problems encountered, noncompliance observed, corrective actions, effectiveness and cost:
This item is not applicable until construction commences.

Landowner/Resident Complaints:
This item is not applicable until construction commences.

Noncompliance from other federal, state, or local permitting agencies:
This item is not applicable until construction commences.

[3] *National Fuel Gas Supply Corporation and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (2018).

Document Content(s)

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LETTER FROM CRAIG A. LESLIE TO MARK W. BENNETT, CLERK OF THE APPELLATE DIVISION, DATED SEPTEMBER 19, 2018 [360-361]

Phillips Lytle LLP

Mark W. Bennett
Clerk of the Appellate Division
of the Supreme Court
Fourth Judicial Department
M. Dolores Denman Courthouse
50 East Avenue
Rochester, New York 14604

October 3, 2018

Re: *National Fuel Gas Supply Corporation v. Joseph A. and Theresa F. Schueckler, et al.*
CA 17-02021; County of Allegany, Index No.: 45092

Dear Mr. Bennett:

We are in receipt of Mr. Abraham's letter to the Court, and enclosed affirmation, dated September 10, 2018, relative to the above-captioned appeal. We note at the outset that there is no "motion" pending for Mr. Abraham to respond to, and submit that Mr. Abraham's submission amounts to an unauthorized and improper sur-reply brief, which should be disregarded. *See* Rule 1000.2(f).

No "motion" is pending because the Court specifically requested during oral argument that National Fuel advise the Court if FERC issued an Order on National Fuel's then-pending Application for Re-Hearing and Motion for Waiver Determination. We promised the Court that we would do so, and have now submitted a copy of FERC's resulting Order to the Court pursuant to the Court's request and Rule 1000.11(g).

We therefore renew our request that the Court consider FERC's Order, and its impact upon this pending appeal. To the extent that Mr. Abraham attempts to interject a host of other issues and arguments in response, we again submit it is improper for him to do so, and that National Fuel was authorized to acquire the easement at issue by eminent domain upon the issuance of the initial FERC Certificate (as FERC's Order confirms).

ATTORNEYS AT LAW

CRAIG A. LESLIE, PARTNER DIRECT 716 847 7012 CLESLIE@PHILLIPSLYTLE.COM

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NEW YORK: ALBANY, BUFFALO, CHAUTAUQUA, GARDEN CITY, NEW YORK, ROCHESTER | WASHINGTON, DC | CANADA: WATERLOO REGION | PHILLIPSLYTLE.COM

We otherwise stand on our briefing and argument on the substantive issues involved.

Respectfully,

By

Craig A. Leslie

CALram
c: Gary A. Abraham, Esq.
Doc #01-3150088.1

ADDITIONAL DOCUMENTS TO THE COURT OF APPEALS

Court of Appeals

of the

State of New York

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner-Appellant,

– against –

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER,

Respondents-Respondents,

EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case in the court below is 45092. The Appellate Division docket number is CA 17-02021.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The proceeding was commenced in Supreme Court, Allegany County.

4. The proceeding was commenced on or about March 15, 2013 by the filing of an Order to Show Cause, and the Petition filed on or about March 27, 2017 by National Fuel Gas Supply Corporation. Respondents, Joseph A. Schueckler and Theresa F. Schueckler served a Verified Answer on or about April 12, 2017.

5. The nature and object of the proceeding is appellant's claims to entitlement to easements over respondents' property to construct parts of a natural gas pipeline.

6. This appeal is from an Opinion and Order of the Appellate Division, Fourth Judicial Department, entered November 9, 2018, which reversed the Order appealed from on the law without costs and dismissed the Petition.

7. This appeal is on the full reproduced record.

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NOTICE OF APPEAL, BY PETITIONERS, DATED DECEMBER 5, 2018 [364-365]

COPY

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALLEGANY

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner,

v.

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

NOTICE OF APPEAL

Index No.: 45092/2017

PLEASE TAKE NOTICE that, petitioner National Fuel Gas Supply Corporation ("National Fuel"), pursuant to CPLR 5601(a), hereby appeals, as of right, to the New York State Court of Appeals, from each and every part of the attached Opinion and Order of the New York State Supreme Court, Appellate Division, Fourth Department, which was entered in the Office of the Clerk of the Appellate Division on November 9, 2018, and served by respondents Joseph A. Schueckler and Theresa F. Schueckler, together with Notice of Entry, on November 19, 2018.

PLEASE TAKE FURTHER NOTICE that the Opinion and Order appealed from finally determined the action and that two Justices of the Appellate Division dissented on questions of law in favor of National Fuel.

ENDORSED
2018 DEC -7 PM 3:54
ROBERT L. CHRISTMAN
CLERK
ALLEGANY COUNTY

Dated: Buffalo, New York
December 5, 2018

PHILLIPS LYTLE LLP

By: _____
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Craig A. Leslie
One Canalside
125 Main Street
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Attorneys for Petitioner-Respondent
National Fuel Gas Supply Corporation

TO: Gary A. Abraham, Esq.
Attorneys for Respondent-Appellants
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4939 Conlan Road
Great Valley, New York 14741
Telephone: (716) 790-6141

William Bentley
[redacted] Davis Street
Bradford, Pennsylvania 16701

Eugene Hewitt
Hubbard Road (no number)
Clarksville, New York 14786

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

725

CA 17-02021

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF NATIONAL FUEL GAS SUPPLY CORPORATION, PETITIONER-RESPONDENT,

V OPINION AND ORDER

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.

LAW OFFICE OF GARY A. ABRAHAM, GREAT VALLEY (GARY A. ABRAHAM OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered June 28, 2017. The order, inter alia, granted the petition for the acquisition of easements.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the petition is dismissed.

Opinion by NEMOYER, J.:

Petitioner National Fuel Gas Supply Corporation wants to build an interstate gas pipeline that would run, in part, across the land of Joseph A. Schueckler and Theresa F. Schueckler (respondents). The State of New York, however, has blocked the entire pipeline project by denying petitioner the necessary environmental permits. Notwithstanding the barrier posed by the State's regulatory action, petitioner still seeks to acquire easements over respondents' land by eminent domain. This appeal therefore presents a novel question of condemnation law: can a corporation involuntarily expropriate privately-owned land when the underlying public project cannot be lawfully constructed? We answer that question firmly in the negative.

I

This case lies at the intersection of federal law governing interstate pipeline construction and state law governing eminent domain procedure. In order to properly contextualize the underlying facts and the parties' arguments, we will first sketch out the applicable statutory framework.

A. Federal Interstate Pipeline Construction Law

The regulatory process for constructing a natural gas pipeline across state lines is spelled out in the federal Natural Gas Act (NGA) (15 USC § 717 *et seq.*). Under the NGA, a company wishing to construct such a pipeline must apply for a "certificate of public convenience and necessity" (certificate) from the Federal Energy Regulatory Commission (FERC) (15 USC § 717f [c], [d]). Following the necessary review and public hearing, "the application shall be decided in accordance with the procedure provided in subsection (e) of [section 717f] and such certificate shall be issued or denied accordingly" (§ 717f [c] [1] [B]).

Subsection (e) of section 717f, in turn, says as follows:

> "a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the . . . construction . . . covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the NGA] and the requirements, rules, and regulations of the [FERC] thereunder, and that the proposed . . . construction . . . , to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The [FERC] shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The import of a valid and effective certificate cannot be overstated in this context, for the NGA explicitly provides that "[n]o natural-gas company . . . shall . . . undertake the construction or extension of any [pipeline] facilities . . . unless there is *in force* . . . a certificate of public convenience and necessity issued by the [FERC] authorizing such acts" (15 USC § 717f [c] [1] [A] [emphasis added]).

In exercising its power conferred by section 717f (e) to condition a certificate "[i]n conjunction with the . . . review of a natural gas project application, [the FERC] must ensure that the project complies with the requirements of all relevant federal laws, including . . . the Clean Water Act (CWA) [33 USC § 1251 *et seq.*]" (*Islander E. Pipeline Co., LLC v Connecticut Dept. of Envtl. Protection*, 482 F3d 79, 84 [2d Cir 2006]). Insofar as relevant here, the CWA obligates "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters" — such as the construction of an interstate natural gas pipeline — to obtain a water quality certification (WQC) from each affected State (33 USC § 1341 [a] [1]). If a WQC is granted, the affected State certifies that the pipeline will be built and operated

in a manner that complies with the CWA's "effluent limitations and other pollutant control requirements, including state-administered water quality standards" (*Delaware Riverkeeper Network v Federal Energy Regulatory Commn.*, 857 F3d 388, 393 [DC Cir 2017]).

Critically, however, the CWA provides that "[n]o license or permit shall be granted if [a WQC] has been denied by the State" (33 USC § 1341 [a] [1]). It therefore follows that, given the requirements of both the NGA (15 USC § 717f [e]) and the CWA (33 USC § 1341 [a] [1]), the FERC must condition the construction of an interstate natural gas pipeline upon the issuance of a WQC by each affected State (*see Delaware Riverkeeper Network*, 857 F3d at 397-399; *see generally Islander E. Pipeline Co., LLC*, 482 F3d at 84). Indeed, the DC Circuit has strongly implied that the FERC's failure to impose such a condition would effectively render the certificate void (*see Delaware Riverkeeper Network*, 857 F3d at 399).

B. State Eminent Domain Law

When a "corporation is unable to agree for the purchase of any real property required for the [construction of a pipeline], it shall have the right to acquire title thereto by condemnation" (Transportation Corporations Law § 83; *see generally Iroquois Gas Corp. v Jurek*, 30 AD2d 83, 84-89 [4th Dept 1968]).[1] A "two-step process" for any such condemnation is set out in the Eminent Domain Procedure Law (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 543 [2006]). "First, under EDPL article 2, the condemnor must make a determination to condemn the property either by using the hearing and findings procedures of EDPL 203 and 204 or by following an alternative procedure permitted by EDPL 206" (*id.*). "Second, pursuant to EDPL article 4, the condemnor must seek the transfer of title to the property by commencing a judicial proceeding known as a vesting proceeding" (*id.*). When a condemnor invokes an alternative procedure authorized by EDPL 206 (i.e., an exemption from the standard condemnation procedure of EDPL 203 and 204), the

---

[1] Contrary to the dissent's intimations, federal law confers no broader right to eminent domain than does state law. In fact, the relevant federal eminent domain statute explicitly provides that "any action or proceeding for [eminent domain to build a pipeline] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated" (15 USC § 717f [h]). "[State] law, therefore, controls the issues in this case" regarding petitioner's entitlement to eminent domain (*Tennessee Gas Pipeline Co. v 104 Acres of Land More or Less, in Providence County of State of R.I.*, 780 F Supp 82, 85 [D RI 1991] [applying Rhode Island law in federal condemnation proceeding under section 717f (h)], citing, inter alia, *Mississippi River Transmission Corp. v Tabor*, 757 F2d 662, 665 n 3 [5th Cir 1985] [applying Louisiana law in federal condemnation proceeding under section 717f (h)]).

condemnee may obtain judicial review of the condemnor's entitlement to an EDPL 206 exemption by raising the issue in its answer to the condemnor's EDPL article 4 vesting petition (*see Matter of Rockland County Sewer Dist. No. 1 v J. & J. Dodge*, 213 AD2d 409, 410 [2d Dept 1995]; *Matter of Town of Coxsackie v Dernier*, 105 AD2d 966, 966-967 [3d Dept 1984]; *see e.g. Matter of Eagle Cr. Land Resources, LLC v Woodstone Lake Dev., LLC*, 108 AD3d 71, 74-78 [3d Dept 2013]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031, 1034-1035 [2d Dept 2006], *lv denied* 7 NY3d 921 [2006]).

"The main purpose of article 2 of the EDPL" – the first step of the eminent domain process – "is to ensure that an appropriate public purpose underlies any condemnation" (*City of New York*, 6 NY3d at 546; *see* EDPL 204 [B] [enumerating factors relevant to the public purpose inquiry]). The alternative procedures permitted by EDPL 206 are not designed to obviate the condemnor's obligation to demonstrate that the condemned land will be put to public use. Nor could they, for the existence of a "public use" for condemned property is indispensable to any constitutional exercise of the eminent domain power (NY Const, art I, § 7 [a]; *see generally Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 546-552 [2009, Smith, J., dissenting] [discussing background and history of the "public use" requirement in the State Constitution's eminent domain clause]). Rather, the alternative procedures permitted by EDPL 206 simply allow the condemnor to make its public purpose showing in a different forum.

The alternative procedure relevant to this case is set forth in EDPL 206 (A). Under that provision, a condemnor is deemed "exempt from compliance from the provisions of [EDPL article 2]" when "pursuant to . . . federal . . . law or regulation it considers and submits factors similar to those enumerated in [EDPL 204 (B)] to a . . . federal agency, board or commission . . . and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board or commission" (EDPL 206 [A]). By virtue of this exemption, the condemnor can bypass the procedural requirements of EDPL article 2 – including the paramount obligation to show a public purpose for the condemnation under EDPL 204 (B) – by obtaining a certificate of public necessity from a federal commission that weighed the risks and benefits of a project and concluded that it served a public purpose. EDPL 206 (A), in short, protects the condemnor from duplicative public purpose inquiries; it does not eliminate the condemnor's obligation to show a public purpose in the first place.

II

With the statutory background in mind, we turn now to the specifics of this case.

In February 2017, the FERC granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land in the Town of Clarksville, Allegany County. Within

the voluminous certificate, the FERC found that petitioner's "proposed [pipeline] project is consistent with the Certificate Policy Statement," i.e., the public interest. "Based on this finding and the environmental review for the proposed project," the FERC further found "that the public convenience and necessity require approval and certification of the project."

The certificate, however, was not unconditional. Throughout the certificate, the FERC emphasized that the authorization conferred thereby was "subject to the conditions described [t]herein," and that the finding of public necessity was "subject to the environmental and other conditions in this order." Insofar as relevant here, the "certificate . . . authorizing [petitioner] to construct and operate the [pipeline]" was "conditioned on [petitioner's] compliance with the environmental conditions in Appendix B."

For its part, Appendix B required petitioner, before beginning construction, to "file . . . documentation that it has received all applicable authorizations required under federal law." One of the "authorizations required under federal law" is, of course, a WQC from any affected State. In short, as required by federal law (*see* 33 USC § 1341 [a] [1]), the FERC's authorization to build the pipeline was explicitly conditioned on, inter alia, petitioner's acquisition of a WQC from the State of New York. Petitioner filed the necessary WQC application accordingly.

In March 2017, while its WQC application was still pending in Albany, petitioner commenced the instant vesting proceeding pursuant to EDPL article 4 to acquire, by eminent domain, the easements over respondents' land necessary to construct and operate the pipeline. The petition alleges that the "public use, benefit, or purpose for which the Easements are required is to construct, install, own, operate, and maintain [the pipeline]." According to petitioner, it was "exempt from the requirements of Article 2 of the [EDPL] because [it] previously applied to the [FERC] for a Certificate of Public Convenience and Necessity for the [pipeline] Project, . . . and was granted such a certificate." Specifically, petitioner explained, "the fact that FERC granted the FERC Certificate fulfills the requirements of EDPL 206 (A), and exempts [petitioner] from the hearing requirements of EDPL Article 2." Accordingly, petitioner asked Supreme Court to authorize the involuntary taking of the necessary easements.

Shortly after petitioner commenced the vesting proceeding, however, the New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC. The WQC application, held the DEC, "fails to demonstrate compliance with New York State water quality standards." Petitioner has taken various steps to challenge the WQC denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built (*see* § 717f [c] [1] [A]; 33 USC

§ 1341 [a] [1]).[2]

Respondents answered the vesting petition several days after the DEC's ruling. Insofar as relevant here, respondents denied that petitioner's FERC certificate was currently effective or that such certificate satisfied "the requirements for an exemption under . . . EDPL 206." In respondents' third affirmative defense, which was structured to "further explain" their challenge to petitioner's reliance on the section 206 (A) exemption, respondents argued that petitioner's FERC certificate "has been invalidated by [DEC's] denial

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[2] After this appeal was orally argued, the FERC apparently issued a new ruling that calls into question the timeliness of the State's WQC denial. That ruling is not final, however, and it is subject to administrative rehearing as well as to judicial review in either the Second Circuit or the DC Circuit (*see* 15 USC § 717r [a], [b]). Given its non-finality and the consequent "uncertainty as to [federal] law on this point," we decline to take judicial notice of the new FERC ruling (*Babcock v Jackson*, 17 AD2d 694, 701 [4th Dept 1962, Halpern, J., dissenting], *revd* 12 NY2d 473 [1963]; *see Majestic Co. v Wender*, 24 Misc 2d 1018, 1018-1019 [Sup Ct, Nassau County 1960, Meyer, J.]; *see also Matter of Bach*, 81 Misc 2d 479, 486-487 [Sur Ct, Dutchess County 1975], *affd* 53 AD2d 612 [2d Dept 1976]; *Berger v Dynamic Imports*, 51 Misc 2d 988, 989 [Civ Ct, NY County 1966]; *see generally* CPLR 4511; *Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015]).

The dissent faults us for disregarding the new FERC ruling because it is "no less final than the DEC's denial of the WQC." But the dissent overlooks a crucial distinction between the WQC denial and the new FERC ruling: the former is part of the appellate record and was before Supreme Court at the time of its determination; the latter is dehors the appellate record and did not exist when Supreme Court rendered its determination. It thus makes perfect sense to consider the WQC denial, but not the new FERC ruling, when reviewing the particular determination now before us. After all, our function is to decide whether Supreme Court properly granted the instant petition *based on the record before it*, not whether its determination could or should have been different had it been made under different circumstances with a different record. The dissent's ad hoc approach to intervening developments on appeal would effect a marked departure from longstanding norms of orderly procedure (*see generally Rives v Bartlett*, 215 NY 33, 39 [1915], *rearg denied* 215 NY 697 [1915]). Those norms carry particular weight here, where petitioner filed a vesting petition before it even knew whether it could actually build the underlying pipeline project. Flouting norms of orderly procedure by giving effect to the new FERC ruling in this appeal would effectively reward petitioner for its premature filing, and that we decline to do. If petitioner wants to argue that the new FERC ruling has revived the pipeline project, it is free to do so — in a new EDPL article 4 petition in Supreme Court.

of a [WQC]." "Because the [WQC] has been denied, FERC's . . . Certificate must be deemed revoked by action of law," respondents continued. In short, respondents argued that petitioner was not entitled to a section 206 exemption from the general EDPL article 2 eminent domain framework because, following the DEC's denial of a WQC, petitioner no longer held a valid and operative FERC certificate.

Supreme Court ultimately granted the petition in its entirety and authorized the acquisition of the easements necessary for the construction and operation of the pipeline. In its written decision, the court first held that petitioner "has shown that FERC has issued it an order granting a certificate of public convenience for its pipeline project, exempting it from the requirements of Article 2 of the EDPL." Supreme Court also found that respondents' third affirmative defense was "without merit" because "the [WQC] condition applied to the construction of the pipeline and not to the initiation of eminent domain proceedings." The court did not elaborate on that conclusion, nor did it explain how petitioner's legal entitlement to initiate condemnation proceedings could be divorced from petitioner's legal entitlement to build the pipeline that, by its own characterization, constituted the very "public use, benefit, or purpose" for which respondents' land was ostensibly needed.

Respondents appeal, and we now reverse.

III

The main thrust of respondents' appellate arguments can be distilled to a single central point: petitioner is not exempt from EDPL article 2 because, following the State's WQC denial, petitioner no longer holds a qualifying federal certificate for purposes of the EDPL 206 (A) exemption. As respondents put it, petitioner no longer has a valid and operative "FERC Certificate that exempts the company from the burden of demonstrating [the] project's public purpose" under article 2. We agree.

Petitioner obviously did not conduct a hearing under EDPL 203 or make findings pursuant to EDPL 204. Petitioner therefore looks — as it must — to the alternative procedure permitted by EDPL 206 (A). That reliance, however, is misplaced. Although it is true that a federal commission issued a certificate of public necessity approving petitioner's pipeline project, the certificate nevertheless authorized construction of the pipeline "subject to" various conditions, including, as discussed above, the State's issuance of a WQC. " '[S]ubject to' . . . language means what is says: no vested rights are created . . . prior to" the occurrence of the condition to which the instrument is subject (*Moran v Erk*, 11 NY3d 452, 456 [2008]). Thus, when the State denied the very permit upon which petitioner's authority to construct the pipeline was conditioned, petitioner — by definition — lost its contingent right to construct the public project that undergirds its demand for eminent domain in this proceeding (*see Islander E. Pipeline Co., LLC*, 482 F3d at 91 [recognizing that Connecticut's WQC denial "continues to prevent Islander East from proceeding with its FERC-approved natural gas pipeline project"]).

Accordingly, as a result of the State's WQC denial, petitioner does not currently hold a qualifying federal permit for purposes of EDPL 206 (A), i.e., a federal permit that (at a minimum) authorizes construction of the public project for which the condemnor seeks to exercise its power of eminent domain (*compare e.g. Matter of County of Tompkins [Perkins]*, 237 AD2d 667, 668-669 [3d Dept 1997]). Without a qualifying federal permit under EDPL 206 (A), petitioner is not entitled to bypass the standard hearing and findings procedure of EDPL article 2. And because there is no dispute that petitioner did not comply with the standard procedure set forth in EDPL article 2, it has no right to proceed directly to an EDPL article 4 vesting proceeding. The article 4 vesting petition must therefore be dismissed.

Our conclusion is consistent with the WQC's key role in the federal regulatory scheme. As the United States Supreme Court wrote in *S.D. Warren Co. v Maine Bd. of Envtl. Protection*, the CWA "recast pre-existing law and was meant to continue the authority of the State to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State" (547 US 370, 380 [2006] [internal quotation marks, ellipsis, and brackets omitted]). Consequently, as the DC Circuit elaborated, the CWA "gives a primary role to states to block [construction] projects by imposing and enforcing water quality standards that are more stringent than applicable federal standards. . . . FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless" (*City of Tacoma, Wash. v FERC*, 460 F3d 53, 67 [DC Cir 2006] [internal quotation marks omitted]). So too here; if petitioner is allowed to continue its pursuit of eminent domain in furtherance of a project that has been lawfully blocked by the State, then "the state's power to block the project would be meaningless" (*id.*).

Petitioner's contrary arguments are meritless. Initially, petitioner argues throughout its brief that the WQC requirement is only a condition precedent for the construction of the pipeline, not a condition precedent of the certificate itself. And because the certificate itself does not condition petitioner's eminent domain power on the issuance of a WQC, petitioner continues, respondents cannot defend this vesting proceeding in reliance on the State's denial of the WQC. But this entire line of argument is a non sequitur. Of course the pipeline's *construction* is conditioned on the issuance of a WQC – that is the entire point of the certificate. The certificate has no purpose except to authorize construction of the pipeline and to set the conditions precedent for such construction, and petitioner's effort to erect a distinction between a condition precedent of the certificate and a condition precedent for construction is a semantical game with no relevance to its entitlement to an EDPL 206 (A) exemption, not to mention the property rights of respondents.

Petitioner's further attempt to cleave a distinction between a condition of the certificate's authorization of construction and a condition of its purported authorization of eminent domain is also wholly unavailing. The certificate itself is not the source of

petitioner's authority to condemn, and it thus can neither authorize nor prohibit the acquisition of property by eminent domain. Rather, the lodestar of petitioner's eminent domain power is the *public project* authorized by the certificate (*see* Transportation Corporations Law § 83). The certificate, in other words, simply authorizes the public project, and the power of eminent domain stands or falls with that project as a necessary ancillary to its implementation (*see generally* NY Const, art 1, § 7 [a]). Thus, when the public project cannot be legally completed, any eminent domain power in connection with that project is necessarily extinguished.[3] To say otherwise would effectively give a condemnor the power to condemn land in the absence of a public project, and that would violate the plain text of the State Constitution.

Finally, the fact that respondents might be adequately compensated for their forced sale is entirely beside the point. As the owners of the land at issue, it is up to respondents — and respondents alone — whether or not to convey an interest in their property to petitioner. In a constitutional order such as ours, jealous as it is of the right to own property and do with it as one pleases, only a viable public project can force respondents to surrender their rights in their land. Here, given the State's WQC denial, there simply is no viable public project. Consequently, petitioner has no right to force respondents to sell something that is not for sale.

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[3] We are not bound by the unpublished case upon which petitioner and the dissent primarily rely, *Constitution Pipeline Co., LLC v A Permanent Easement for 0.42 Acres and Temporary Easements for 0.46 Acres, in Schoharie County, New York* (2015 WL 12556145 [ND NY, Apr. 17, 2015]). In any event, that case does not consider the dispositive issue of *state law* in this case, namely, whether a FERC certificate authorizing the construction of a pipeline "subject to" a particular condition constitutes a qualifying federal permit under EDPL 206 (A) upon the failure of that condition. Indeed, the District Court's analysis in *Constitution Pipeline Co., LLC* is not even grounded in the two-step process for condemnation set forth in the EDPL, and the dissent's insistence on deciding this state-law case by reference to inapplicable principles of federal law undercuts a key pillar of our system of cooperative federalism — the notion that state courts adjudicating proceedings under state law are bound "not by federal . . . requirements for an action brought under a federal statute . . . , but by this state's own requirements [and] controlling state cases" (*Hammer v American Kennel Club*, 304 AD2d 74, 80 [1st Dept 2003], *affd* 1 NY3d 294 [2003]; *see Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 81-82, 87 [2018, Rivera, J., concurring]). Tellingly, the dissent does not even engage with the dispositive issue of *state law* implicated by this appeal, i.e., whether petitioner qualified for an exemption under EDPL 206 (A) based on the record before Supreme Court.

IV

At the end of the day, this seemingly complicated case can be explained in these straightforward terms: petitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL article 2 process. Accordingly, the order appealed from should be reversed and the petition dismissed. Respondents' remaining contentions are academic in light of our determination.

CURRAN and WINSLOW, JJ., concur with NEMOYER, J.;

LINDLEY, J., dissents and votes to affirm in the following opinion in which CARNI, J.P., concurs: We respectfully dissent and would affirm. The majority concludes that the petition in this eminent domain proceeding should be dismissed because, "as things currently stand," the underlying public project, a natural gas pipeline, "cannot be lawfully constructed." The pipeline cannot lawfully be constructed, the reasoning goes, because the New York State Department of Environmental Conservation (DEC) has denied petitioner's application for a water quality certificate (WQC), the issuance of which is one of the many conditions that must be satisfied before petitioner can build the pipeline.

It is undisputed, however, that the Federal Energy Regulatory Commission (FERC) has determined, in an order issued August 6, 2018, that the DEC waived its WQC certification authority under section 401 of the Clean Water Act. Thus, as things now stand, the DEC's denial of the WQC is no longer an impediment to construction of the pipeline. Indeed, respondents-appellants (respondents) do not challenge petitioner's assertion in a post-argument submission that the project is "very much alive." Yet the majority concludes that petitioner cannot obtain an easement over respondents' property because the project is dead.

The majority's determination that the project is dead is based on its refusal to take judicial notice of the August FERC order on grounds that it is not final inasmuch as it is subject to a rehearing and appeal to federal court. But the August FERC order is binding unless and until it is vacated or overturned on appeal (*see* 15 USC § 3416 [a] [4]), and it is no less final than the DEC's denial of the WQC, which has been appealed by petitioner to the Second Circuit Court of Appeals. As noted, the majority relies on the DEC's denial of the WQC to conclude that the pipeline will not be built and that petitioner therefore no longer has "a valid and operative" certificate of public convenience and necessity from the FERC.

Even if we were to ignore the most recent FERC order, the DEC's denial of the WQC does necessarily not mean that petitioner cannot

build the pipeline. As respondents recognize in their post-argument submission, petitioner could obtain the WQC by mitigating environmental concerns expressed by the DEC. For instance, petitioner could use horizontal directional drilling (HDD) to cross various streams, as proposed by the DEC, or it could alter the path of the pipeline to avoid the streams. Although petitioner has stated that using HDD technology is too expensive for its liking, the seminal point here is that the DEC's decision does not vitiate the certificate of public convenience and necessity issued by the FERC, nor does it sound the death knell of the pipeline project.

In any event, although the issuance of a WQC by the DEC is a condition that must be met prior to construction of the pipeline, it is not, in our view, a condition precedent to the commencement of this eminent domain proceeding (*see Constitution Pipeline Co., LLC v A Permanent Easement for 0.42 Acres and Temporary Easements for 0.46 Acres, in Schoharie County, New York*, 2015 WL 12556145, *2 [ND NY, Apr. 17, 2015]). The Natural Gas Act (NGA) grants private natural-gas companies the power to acquire property by eminent domain. A natural gas company may build and operate a new pipeline if it obtains a certificate of public convenience and necessity from the FERC. Here, petitioner's proposed pipeline is authorized by a FERC order issued on February 3, 2017, which includes a certificate of public convenience and necessity for the pipeline. As the majority points out, the FERC order is subject to various conditions, one of which requires petitioner to obtain "all applicable authorizations required under federal law." That condition has reasonably been construed as obligating petitioner to obtain a WQC from the DEC prior to building the pipeline.

There are, however, various other conditions in the authorizing FERC order, many of which cannot be met until *after* petitioner has obtained possession of the rights of way for the pipeline. If petitioner is prohibited from exercising its eminent domain authority until it satisfies all of the conditions of the FERC order, as the majority holds, the pipeline can never be built (*see Constitution Pipeline Co., LLC*, 2015 WL 12556145, *2).

Finally, we note that the FERC has clearly and unambiguously stated that the conditions in its initial order need not be satisfied prior to petitioner commencing a taking proceeding under the eminent domain law. Paragraph 22 of the recent FERC order states that "it is Congress, speaking directly in NGA section 7 (h), that authorized a certificate-holder to exercise eminent domain authority to acquire land or other property necessary to construct or operate the approved facilities if the certificate-holder cannot acquire such property by agreement with the owner. *Congress did not establish any prerequisite for eminent domain authority beyond the Commission's decision to issue the certificate*" (emphasis added).

The FERC's interpretation of its own order is consistent with federal case law. As the Fourth Circuit Court of Appeals has explained, "[o]nce FERC has issued a certificate, the NGA empowers the certificate holder to exercise 'the right of eminent domain' over any

lands needed for the project" (*East Tenn. Nat. Gas Co. v Sage*, 361 F3d 808, 818 [4th Cir 2004], quoting 15 USC § 717f [h]). Respondents and the majority cite no authority for the proposition that the conditions in the FERC order are conditions precedent to petitioner's exercise of its eminent domain authority, and we could find none. We thus conclude that there is no basis to reverse Supreme Court's order, which grants petitioner easements over respondents' land.

Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

CERTIFICATION PURSUANT TO CPLR § 2105

Court of Appeals

of the

State of New York

NATIONAL FUEL GAS SUPPLY CORPORATION,

Petitioner-Appellant,

– against –

JOSEPH A. SCHUECKLER, THERESA F. SCHUECKLER,

Respondents-Respondents,

EUGENE HEWITT, and WILLIAM BENTLEY,

Respondents.

CERTIFICATION PURSUANT TO CPLR § 2105

I, Eamon P. Joyce, an attorney with the firm of Sidley Austin LLP, attorneys for the Petitioner-Appellant, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof. The originals are now on file in the office of the Clerk of the County of Allegany, with the exception of the items listed in the Additional Materials Submitted to the Appellate Division and Additional Documents to the Court of Appeals sections of this Record.

Dated: 3-13-19

Eamon P. Joyce, Esq.