UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC	**)**	**Docket No. CP16-9-001**
Maritimes & Northeast Pipeline, L.L.C.	**)**	
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ANSWER OF ALGONQUIN GAS TRANSMISSION, LLC AND MARITIMES & NORTHEAST PIPELINE, L.L.C. TO REQUESTS FOR STAY AND MOTION FOR LEAVE TO ANSWER AND ANSWER TO REQUESTS FOR REHEARING

TABLE OF CONTENTS

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Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. §§ 385.212 and 385.213 (2016), Algonquin Gas Transmission, LLC ("Algonquin") and Maritimes & Northeast Pipeline, L.L.C. ("Maritimes", and together with Algonquin, "Applicants"), hereby (i) answer the requests for stay of the Order Issuing Certificate and Authorizing Abandonment[1] for the Atlantic Bridge Project ("Project"),[2] and (ii) move for leave to answer and answer the requests for rehearing[3] of the Certificate Order in the captioned docket.[4] As shown below, the requests for rehearing and related requests for stay are without merit and should be denied.

[1] *Algonquin Gas Transmission, LLC, et al.*, 158 FERC ¶ 61,061 (2017) ("Certificate Order").

[2] On February 24, 2017, the Town of Weymouth, Massachusetts ("Town") submitted the "Motion for Stay of Order of the Town of Weymouth, Massachusetts" ("Weymouth Motion"); Sandra Peters ("Ms. Peters") submitted the "Request for Rehearing and Rescission of Order of Sandra Peters and Request for Stay of the Certificate" ("Peters Request"); and the Fore River Residents Against the Compressor Station ("FRRACS"), Food and Water Watch, the City of Quincy, Massachusetts, Town of Weymouth Town Council Member Rebecca Haugh, and eleven other regional and local community and environmental organizations (collectively, the "Coalition") submitted the "Petition for Rehearing of the Order Issuing Certificate for the Atlantic Bridge Project and Request for Stay" ("Coalition Request").

[3] On February 24, 2017, the Town filed the "Request of the Town of Weymouth for Rehearing and Rescission of Order" ("Weymouth Request"); Lori Hayden, Esq. and Michael Hayden. Esq. ("Haydens") submitted the "Request for Rehearing of Lori Hayden, Esq. and Michael Hayden, Esq." ("Hayden Request"); the Coalition submitted the Coalition Request; and Ms. Peters submitted the Peters Request.

[4] Applicants may respond to the requests for rehearing if permitted by the Commission. The Commission permits answers to requests for rehearing where, as here, the Commission's consideration of matters addressed in the answer will facilitate the decisional process or aid in the explication of issues, ensure that the Commission has a complete

I.
BACKGROUND

In this proceeding, the Commission conducted an environmental review of the Atlantic Bridge Project pursuant to the Natural Environmental Policy Act ("NEPA") and the implementing regulations thereunder, 40 C.F.R. Pt. 1500 *et seq.* The Commission also evaluated the Project under its Certificate Policy Statement to evaluate proposals to certificate new construction.[5] On May 2, 2016, the staff of the Commission issued the Environmental Assessment ("EA") for the Atlantic Bridge Project. In the Certificate Order, the Commission adopted the staff's proposed mitigation recommendations included in the EA as environmental conditions for the Project. The description of the background of the instant proceeding and the specifications of the Project are included in the Certificate Order.

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and accurate record upon which to make an informed decision, and cause no undue delay in the proceeding. *See, e.g., Steckman Ridge, L.P., order on reh'g*, 125 FERC ¶ 61,217 at P 4 (2008) ("*Steckman Rehearing Order*") (allowing an answer that "provide[s] information that assists [the Commission] in addressing the new allegations and arguments raised on rehearing"); *PSEG Power Connecticut, LLC*, 113 FERC ¶ 61,210 at P 17 (2005) (accepting an answer to a request for rehearing because it "provided information that assisted [the Commission] in [its] decisionmaking process"); *Algonquin Gas Transmission Co.*, 96 FERC ¶ 61,364, p. 62,368 (2001) (finding "good cause to admit Algonquin's answer [to a request for rehearing] in order to ensure a complete record in this proceeding"); *Norteño Pipeline Co., et al.*, 94 FERC ¶ 61,247, p. 61,869 (2001) (finding same "since it will cause no undue delay and will ensure a complete record upon which the Commission may base its findings"); *KN Wattenberg Transmission LLC*, 94 FERC ¶ 61,189, p. 61,671 (2001) (finding same "in order to insure a complete record in this proceeding"). The Commission's consideration of matters addressed in this answer will facilitate the Commission's decisional process because certain of the claims advanced in the rehearing requests were not raised previously by any party nor addressed elsewhere in the proceeding.

[5] Certificate Order at P 25 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, p. 61,744 (1999), *order clarifying Statement of Policy*, 90 FERC ¶ 61,128 (2000), *order further clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000) ("Certificate Policy Statement")).

II.
ANSWER

A. Natural Gas Act Issues

1. FERC reasonably concluded that there was sufficient need for the Project in accordance with its Certificate Policy Statement.

a. FERC correctly concluded that the certificate is required by the public convenience and necessity.

The Commission correctly concluded in the Certificate Order that the Project is in the public convenience and necessity.[6] On rehearing, the Town argues that the Commission erred in determining that the Project meets the public convenience and necessity standard and asserts that the public need is outweighed by the environmental harm that would result from the Project.[7] Specifically, the Town claims that the Commission did not have "an accurate understanding of the environmental impacts of the Project" when it issued the Certificate Order.[8] These claims are without merit and not supported by the record in this proceeding.

The Applicants satisfied the Commission's Certificate Policy Statement requirements for demonstrating that the Project is in the public interest. Agreements for long-term firm capacity are important evidence of market demand for a new project.[9] The Commission correctly found that Applicants' precedent agreements for 100 % of the new firm transportation service created by the Project "constitute strong evidence that there is market demand for the project."[10] Additionally, the Commission correctly determined that that Project would not be subsidized by existing customers, that the Project would not have adverse effects on existing customers and

[6] Certificate Order at P 31.
[7] Weymouth Request at 74-75.
[8] *Id*. at 75
[9] *Certificate Policy Statement* at p. 61,744 (1999); *see also* Certificate Order at P 74 (citing *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting argument that precedent agreements are inadequate to demonstrate market need); *Minisink Residents for Envtl. Pres. And Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014) (same)).
[10] Certificate Order at P 74.

other pipelines and their captive customers, and that the benefits outweigh minimal adverse effects on landowners and surrounding communities.[11] Based on its finding that the benefits outweigh the adverse effects on economic interests, the Commission then considered its environmental analysis where other interests are considered.[12]

The Commission conducted an extensive environmental review of the Project to consider the environmental impacts of the Project. On February 20, 2015, Commission staff began its environmental review of the Project by granting Applicants' request to use the Pre-filing process.[13] During the Pre-filing process, Applicants submitted draft resource reports for Commission staff review and subsequently addressed comments from staff and stakeholders in final resource reports filed with the certificate application. To aid the Commission's review, Applicants reviewed and answered comments filed during the scoping period and comments filed on the EA.[14] Throughout the certificate proceeding, the Commission continued its environmental review, including issuing six sets of data requests to which Applicants timely responded to facilitate staff's review of the Project. On May 2, 2016, the Commission staff issued the EA concluding that "the impacts associated with this project can be mitigated to support a finding of no significant impact."[15] Multiple comments on the EA were filed, addressed by Applicants, and considered by the Commission in developing the Certificate Order. After a thorough 23-month environmental review in Pre-filing and the certificate proceeding, the Commission found that, if the Project is constructed and operated as described in the EA, and in compliance with the environmental conditions, it would not constitute a major federal action

[11] Certificate Order at PP 27-31.
[12] *See id.* at P 26.
[13] *Algonquin Gas Transmission, LLC, et al.*, Docket No. PF15-12-000 (issued Feb. 20, 2015) (letter order).
[14] Response to Scoping Comments of Algonquin Gas Transmission, LLC *et al.*, Docket No. PF15-12-000 (submitted June 25, 2015); Motion for Leave to Answer and Answer of Algonquin Gas Transmission, LLC, *et al.*, Docket No. CP16-9-000 (submitted Dec. 14, 2015).
[15] Certificate Order at P 70.

significantly affecting the quality of the human environment.[16] Based on the finding that the Project was consistent with the Certificate Policy Statement, as well as the Commission's thorough environmental review, the Commission reasonably found that the public convenience and necessity requires approval and certification of the Project.[17]

b. Section 7 does not require a showing of domestic need.

The Coalition does not provide any support in the Natural Gas Act ("NGA"), the Commission's Certificate Policy Statement or related precedent for its claim that the "public interest requirement of Section 7 requires a showing of domestic need."[18] Although commenters did raise concerns about export, primarily referring to LNG export, no commenter made a claim that NGA Section 7 requires a demonstration of what the Coalition refers to as domestic need prior to the issuance of the Certificate Order.[19] Further, the amount of natural gas that would be transported on the Project to the U.S.-Canada border for export is irrelevant.[20] The ultimate destination of the gas to be transported on a project is not part of the public convenience and necessity determination pursuant to the Certificate Policy Statement, and, assuming arguendo that it was, the mere fact that some gas may be destined for export markets would not be in and of itself adverse to a finding of public convenience and necessity. In fact, the Commission has repeatedly rejected comments that a project is not needed simply because some gas will be

[16] *Id.* at P 252.
[17] *Id.* at P 31.
[18] Coalition Request at 5.
[19] *See Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 250 (2015) (rejecting "novel arguments raised on rehearing, unless we find that the argument could not have been previously presented" because "such behavior is disruptive to the administrative process . . . ") (citing *Texas Eastern Transmission, LP et al.*, 141 FERC ¶ 61,043, at 19 (2012); *Westar Energy, Inc.*, 134 FERC ¶ 61,176 (2011)), *appeal dismissed*, *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014)).
[20] The Coalition estimates that "52 percent of the gas carried is destined for export." While the Project has yet to transport any gas, Applicants have entered into agreements with shippers for firm transportation service. Once the Project is placed in service and during the life of the Project facilities, the shippers that have contracted for such capacity, or subsequently acquired the capacity through capacity release, will determine the utilization of the Project capacity, including whether natural gas transported on the Project will be exported. Accordingly, any such estimate of exports is based on unsupported assumptions.

exported.[21] In those orders, as well as in the Certificate Order, the Commission explains that it does not have jurisdiction over the import or export of natural gas.[22]

c. The Massachusetts Attorney General's and the U.S. Energy Information Administration ("EIA") studies do not address the need for the Atlantic Bridge Project.

The study prepared for the Massachusetts Attorney General[23] and EIA's Annual Energy Outlook 2017 ("2017 AEO"), cited in the Coalition Request, do not support the Coalition's claim that the need for natural gas is declining.[24] Moreover, neither study addresses the need for pipeline infrastructure to meet the needs of the Project shippers.

The Coalition Request misrepresents the applicability and conclusion of the AG Study. The AG Study addresses whether additional natural gas infrastructure is needed to meet electric reliability.[25] But the Project is not designed to support electric reliability,[26] and the Coalition provides no explanation regarding how the AG Study is relevant to the Commission's determination that the Applicants' Precedent Agreements for the 100% of the new firm transport service substantiates Project need. In addition, the Coalition incorrectly states that the AG Study shows that "New England will not have a need for gas until 2030."[27] The AG Study makes no showing regarding the need for natural gas. Instead, the AG Study concludes that, "under existing market conditions, there is no electric sector reliability deficiency through 2030, and

[21] *See Rover Pipeline LLC, et al.*, 158 FERC ¶ 61,109 at P 49 (2017) (stating that such arguments are not persuasive and that FERC "does not have jurisdiction over the exportation or importation of natural gas"); *Gulf South Pipeline Co., LP*, 155 FERC ¶ 61,287 at PP 102-103 (2016).
[22] Certificate Order at P 75.
[23] *Power System Reliability in New England: Meeting Electric Resource Needs in an Era of Growing Dependence on Natural Gas,* Analysis Group, Inc., November 2015, http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf ("AG Study").
[24] *See* Coalition Request at 16.
[25] *See* AG Study.
[26] *See* Certificate Order at P 10 (stating that the Project shippers include five local distribution companies, two manufacturing companies, and a municipal utility).
[27] Coalition Request at 5, 16.

therefore that no additional pipeline gas capacity is needed to meet electric reliability needs."[28] Accordingly, the Coalition's reliance on the AG Study for challenging the Commission's determination of Project need is unfounded.[29]

Similarly, the 2017 AEO does not address the need for the Project.[30] The Coalition Request cites to the 2017 AEO for the proposition that "by 2018, the United States is expected to become a net exporter of natural gas on an average annual basis."[31] The Coalition does not explain how this assumption, even if accurate, is relevant to the Project need. Whether the United States is a net importer or net exporter of natural gas does not, by itself, support the Coalition's claim that the need for natural gas is declining. Instead, it reflects the existence of abundant domestic production that can support domestic needs and increased exports. Moreover, the status of the United States as a net importer of natural gas bears no relation to the need for the Atlantic Bridge Project, which is supported by the firm transport commitments memorialized in the Precedent Agreements. Nor does it relate to whether additional natural gas pipeline infrastructure, including the Project, is needed in New England. Thus, the studies cited by the Coalition do not support its claim regarding Project need.

2. FERC reasonably concluded that the Project can be constructed and operated safely through Applicants' compliance with PHMSA regulations.

The requests for rehearing also make unsupported claims regarding lack of compliance with PHMSA regulations at 49 C.F.R. §192.165-169.[32] But the Coalition does not provide any

[28] AG Study at 14.
[29] Applicants do not agree with the findings of the AG Study regarding the need for additional pipeline capacity to meet electric reliability needs. There are numerous other existing studies that support the need for additional pipeline infrastructure, and contradict and/or rebut the AG Study. It is not necessary, however, for the Commission to evaluate the assumptions and findings in the AG Study in this proceeding.
[30] The 2017 AEO was not part of the record in this proceeding when the Commission issued the Certificate Order.
[31] Coalition Request at 5, 16.
[32] Coalition Request at 7.

explanation regarding how the Project will not comply with the referenced sections, and the Commission should reject that claim on that basis alone.[33]

The Coalition also asserts that the proposed Weymouth Compressor Station Site violates 49 CFR § 192.163.[34] As the Certificate Order explains, the comment in question raises the concern of fire spreading from the compressor station to the sewage pumping station; but the cited regulation addresses the risk of fire being communicated to the compressor station from the structure on the adjacent property.[35] In addition, the Commission rejected the original comment because it did not provide a "scientific basis to demonstrate that Algonquin will violate this regulation."[36] The Coalition's Rehearing Request does not remedy that basic defect. Instead, the Coalition provides an unsupported statement that Algonquin is unlikely to operate in compliance with PHMSA regulations.[37] As stated above, the Commission reasonably relies on PHMSA to oversee pipeline safety, and Algonquin has committed to comply with PHMSA regulations. The Coalition's unsupported safety claims do not provide any basis on which the Commission should reconsider its conclusion regarding the safe construction and operation of the Project.

The Coalition also claims that the Project cannot be constructed and operated safely based on the risk factor disclosure in Spectra's 2015 Annual Report on Form 10-K, including the risks of terrorism and explosions.[38] Contrary to the Coalition's claims, the Commission considered the risk of terrorism, but determined that "the continuing need to construct facilities to support the future natural gas pipeline infrastructure is not diminished from the threat of any

[33] *See Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 at P 7 (2016) ("To that end, the Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent").
[34] Coalition Request at 21-22; *see also* Peters Request at 8 (arguing that the exhaust point for the compressor station violates PHMSA safety standards).
[35] Certificate Order at P 228.
[36] *Id*.
[37] Coalition Request at 22.
[38] Coalition Request at 23-24.

such future acts."[39] The Commission also considered the risks of explosions following a pipeline rupture.[40]

Moreover, risk factors included in filings with the U.S. Securities and Exchange Commission ("SEC") applicable to an issuer of securities, which are intended to inform investors of potential risk associated with purchasing and owning securities, are not evidence that underlying events are likely to impact the Project. Risk factor disclosures are required by SEC regulations.[41] Risk factors "serve to create 'cautionary language' disclaimers for the company in the event that the company's securities—or forward-looking statements—don't fare well."[42] Although it did not previously make any such argument in comments to the Commission, the Coalition now uses the SEC disclosure to make an unsupported claim regarding the significance of those risks to the Project.[43] As discussed above, those risks were addressed in the EA and the Certificate Order, and the Coalition's rehearing request provides nothing to contradict the Commission's conclusion.[44]

3. Under the NGA and Rule 713, the grounds for rehearing must be set forth with specificity and may not be made by reference.

The Coalition Request's general allegations of other factual inaccuracies, mischaracterizations and oversights fail to satisfy the statutory requirement that an application for rehearing set forth with specificity the grounds on which the rehearing application is based.[45] Ms. Peters' general statement that mitigation measures with respect to the Weymouth

[39] EA at 2-123.
[40] *Id.* at 2-112 – 2-120
[41] 17 C.F.R. § 229.503(c).
[42] Broc Romanek, THECORPORATECOUNSEL.NET, Risk Factors Disclosure Handbook – Item 503(c) of Regulation S-K at 7 (Jan. 2017).
[43] Coalition Request at 23.
[44] The Coalition also does not justify why it should be permitted to raise a new argument on rehearing based on the SEC filings. *See Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 250 (2015) (rejecting "novel arguments raised on rehearing, unless we find that the argument could not have been previously presented" because "such behavior is disruptive to the administrative process . . . ").
[45] Coalition Request at 43.

Compressor Station are not fully explained also fails to specify with particularity the grounds for rehearing.[46] The NGA requires that an "application for rehearing shall set forth specifically the ground or grounds upon which such application is based."[47] In addition, the Commission's regulations require rehearing requests to state concisely the alleged error and set forth the matters relied upon by the party requesting rehearing.[48] Non-specific claims regarding the project's impacts do not provide a basis, in fact or law, for each alleged error.[49] Moreover, the Coalition's listing of alleged errors without providing any additional details supporting the grounds for rehearing, improperly attempts to "bootstrap" arguments from the proceeding.[50] Accordingly, the Commission should reject the Coalition Request's allegations in Section J on procedural grounds.

The Commission should similarly reject segmentation claims in the Weymouth Request that are incorporated by reference. The Weymouth Request improperly attempts to incorporate by reference its segmentation claim from its comments on the EA and a brief filed with the U.S. Court of Appeals for the D.C. Circuit in *City of Boston Delegation v. FERC* (Nos. 16-1081 and consolidated cases).[51] As described above, the Commission does not permit incorporating grounds for rehearing by reference.[52]

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[46] Peters Request at 14.
[47] 15 U.S.C § 717r(a).
[48] 18 C.F.R. § 385.713(c).
[49] *See Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 at P 7 (2016) ("To that end, the Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent"); *see also Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, P 10 (2013) ("The Commission, however, expects all grounds to be set forth in the rehearing request and will dismiss any ground only incorporated by reference").
[50] *See id*. (citing *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (rejecting argument made on rehearing to FERC by incorporating by reference objections made in other pleadings) (citing *Office of the Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990); *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)).
[51] *See* Weymouth Request at 21 and n.69.
[52] *See* notes 49-50, *supra*.

4. The Secretary of the Commission is authorized to issue a tolling order.

The Commission has the authority to issue tolling orders. The Town acknowledges "that Commission has often granted itself," through the use of a tolling order, an "extension of time to avoid the 30-day deadline to act."[53] The Weymouth Request, however, disputes the Commission's authority to issue tolling orders by analogy to an opinion of the U.S. Court of Appeals for the First Circuit ("First Circuit") addressing the 30-day deadline to request rehearing.[54] Courts, including the First, Fifth, and D.C. Circuits, have upheld the Commission's practice of issuing tolling orders as meeting the requirements of the NGA for the Commission to "act' on requests for rehearing within thirty days.[55] Accordingly, the Town's attack on the Commission's issuance of tolling orders is without merit.

Further, the Commission has appropriately delegated its authority to issue tolling orders to the Secretary[56] through a 1995 rulemaking.[57] In its *Order Delegating Further Authority to Staff in Absence of Quorum*, the Commission clarified that pre-existing delegations, including authority "to toll the time for action on requests for rehearing," would remain in effect.[58] The Weymouth Request incorrectly assumes that the Commission's further delegation of "the authority to extend the time for action on matters where such extension of time is permitted by statute" is applicable to tolling orders.[59] The delegated authority to issue tolling orders, however, is a pre-existing delegation and the further delegation language referenced in the Weymouth Request is not applicable. For the same reason, the Town's analysis of whether the NGA permits

[53] Weymouth Request at 76.
[54] *Id*. (citing *Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1978)).
[55] *See Kokajko* v. *Fed. Energy Reg. Comm'n*, 837 F.2d 524, 525 (1st Cir. 1988) (citing *California Company v. Federal Power Commission*, 411 F.2d 720 (D.C. Cir. 1969) (construing Natural Gas Act, 15 U.S.C. § 717r(a)); *General American Oil Co. of Texas v. FPC.*, 409 F.2d 597 (5th Cir. 1969) (same)).
[56] 18 C.F.R. § 375.302(v).
[57] *Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation, and the General Counsel*, Order No. 585, 60 Fed. Reg. 62326 (Dec. 6, 1995), FERC Stats. & Regs. ¶ 31,030 (1995).
[58] *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 at n. 5 (2017) ("2017 Delegation Order").
[59] *Id*. at P 5.

an extension of time is unavailing.[60] Courts have uniformly upheld non-final actions taken by agency officials pursuant to a valid prior delegation, even when the delegating multi-member body lost a quorum in the intervening period.[61]

B. National Environmental Policy Act Issues

1. FERC did not improperly segment the analysis of Atlantic Bridge from Access Northeast or other projects.

Several Requesters argue the Commission improperly segmented its NEPA review of the Atlantic Bridge Project from the Algonquin Incremental Market ("AIM") and Access Northeast Projects.[62] They assert the Commission erred in finding that the Access Northeast Project is not yet a proposal[63] and that the three projects should be considered connected, cumulative, and similar actions that must be evaluated by the Commission in the same environmental document.[64]

Contrary to these assertions, as explained below, the Access Northeast Project is not yet a proposal under NEPA. And the Commission appropriately determined that neither the AIM Project nor the Access Northeast Project (even if it were considered a proposal at this stage) are connected, cumulative, or similar actions with the Atlantic Bridge project that must be considered in the same NEPA document. Thus, FERC did not impermissibly segment its environmental review of the Project.

While several requestors[65] attempt to rely on *Delaware Riverkeeper Network v. FERC*,[66] the situation here is factually and legally distinct. *Delaware Riverkeeper* involved four pipeline

[60] *See* Weymouth Request at 76-77, n.307.
[61] *E.g.*, *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015) (delegation to NLRB regional director); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844 (5th Cir. 2010) (delegation to NLRB general counsel); *see also New Process Steel, L.P. v. NLRB*, 540 U.S. 674, 684 n.4 (2010).
[62] *See* Hayden Request at 22-28; Coalition Request at 25-29.
[63] Coalition Request at 28.
[64] Hayden Request at 22-28.
[65] Coalition Request at 25-28; Hayden Request at 27-28.

upgrades that completely looped a mainline system, all of which the D.C. Circuit described as either actual proposals pending before the Commission or under construction at the same time. The Commission conducted the environmental reviews separately, in each case with an EA leading to a Finding of No Significant Impact ("FONSI"). In that case, the D.C. Circuit found that the commission had impermissibly segmented the analysis.[67] It also held that the Commission's review of cumulative impacts was inadequate.[68] In this case, the Commission fully evaluated the cumulative impacts in an EIS for the AIM Project and a detailed EA for the Atlantic Bridge Project and appropriately considered the reasonably foreseeable impacts of other projects that would occur in the same affected environment and overlap temporally. As for the Access Northeast Project, it is a future project that remains in the early development stage, but is anticipated to have substantial independent utility and that would only occur later in time, if approved. The Commission considered the cumulative impacts of Access Northeast, to the extent they are reasonably foreseeable at this stage in the project's development, together with those for Atlantic Bridge and AIM. Thus, the *Delaware Riverkeeper* case is inapposite.

a. The Access Northeast Project is not a "proposal," and cannot be a connected, similar, or cumulative action.

NEPA's requirement to consider potential effects in a single environmental document applies only to "proposals" for federal action "which are related to each other closely enough to be, in effect, a single course of action."[69]

A project is not "proposed" until a certificate application is filed with the Commission. In *Minisink Residents for Envt'l Pres. v. FERC*, petitioners claimed improper segmentation when the Commission did not discuss a second project in its environmental review of a proposed

[66] 753 F.3d 1304 (D.C. Cir. 2014).
[67] *Id.* at 1309.
[68] *Id.*at 1319-20.
[69] 40 C.F.R. § 1502.4; *see also* 42 U.S.C. § 4332(2)(C).

project.[70] The D.C. Circuit rejected that claim, explaining that "[a]t the time of its application for the . . . [proposed] Project, [the company] had *not yet applied for approval* of the [second] Project, nor was construction on either project underway."[71] *Minisink* aligns with the general view that for an "improper segmentation" claim, "the mere contemplation of certain action[s] is not sufficient to require an impact statement."[72] Even the public announcement of a possible future project does not constitute a "proposal."[73] A proposal occurs when agency "action is imminent."[74] The court also noted that "[a]n agency need not revised an almost complete environmental impact statement to accommodate new proposals submitted to the agency, regardless of the uncertainty of maturation."[75]

Algonquin is still very much in the planning and development process for the Access Northeast Project. As originally conceived, Access Northeast would upgrade Algonquin's existing pipeline system, improve direct interconnects to New England power plants, and add regional liquefied natural gas storage assets. The project's principal "customers" were to be New England electric distribution companies.[76] Access Northeast held an open season between February and May 2015, and requested permission to begin the pre-filing process on November 3, 2015. But the project has not yet filed a certificate application. In fact, the project has evolved significantly since May 2015 – and today remains in a preliminary development stage. On August 17, 2016, the Massachusetts Supreme Judicial Court held that the Massachusetts Department of Public Utilities lacks authority to approve electric distribution companies' long-

[70] *Minisink Residents for Envt'l Pres. v. FERC*, 762 F.3d 97 (D.C. Cir. 2014).
[71] 762 F.3d at 113 n.11 (emphasis added).
[72] *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 236 (5th Cir. 2007).
[73] *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010) ("incipient notion of the two projects expressed in notices of intent to prepare an [environmental document]").
[74] Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008).
[75] *Id.* at 514.
[76] *See* Resource Report 1 at 1-2 of Algonquin Gas Transmission, LLC, Docket No. PF16-1-000 (submitted Dec. 17. 2015).

term contracts for natural gas capacity – *i.e.*, the very kind of agreements intended to support Access Northeast.[77] That ruling prompted Access Northeast's intended customers (*i.e.*, shippers) to withdraw requests for approval of Access Northeast contracts in Massachusetts.[78] Subsequently, regulators in New Hampshire declined to approve a contract that would have supported Access Northeast, and Connecticut cancelled its review of proposals for natural gas pipeline capacity.[79] Access Northeast's development remains ongoing today.

As the above history makes clear, requesters are incorrect when they assert that a project at such an early stage of development "is an action that can be meaningfully evaluated."[80] As the Commission noted, "projects that are in early stages of development have uncertain futures and not all projects that enter the pre-filing process go on to be proposed in applications."[81] In fact, even today, the scope of the Access Northeast project has not been established and Pre-filing review of Access Northeast has recently slowed.[82] Consequently, the potential environmental effects resulting from the Access Northeast Project are not yet reasonably foreseeable and are speculative. Like many large infrastructure projects, interstate pipeline upgrades "are in the

[77] *See ENGIE Gas & LNG v. Dep't of Pub. Utils*., 56 N.E.3d 740 (Mass. 2016).
[78] *See Order on Eversource Energy and National Grid's Motions to Withdraw* 2, Mass. Dep't. of Pub. Utils., Nos. D.P.U. 15-181, 16-05 (Oct. 7, 2016), http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=15-181%2f15181_1605_Order_10716.pdf.
[79] *See* Order No. 25,950 Dismissing Petition, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, No. DE 16-241 (N.H. Pub. Utils. Comm'n Oct. 6, 2016), http://www.puc.state.nh.us/Regulatory/Orders/2016orders/25950e.pdf; Conn. Dep't of Energy & Envtl. Prot., *Notice of Cancellation* (Oct. 25, 2016), ttp://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/0db222228c36cbcb852580570070ec28/$FILE/DEEP%20Notice%20%20of%20RFP%20Cancellation_10.25.16_Final.pdf
[80] Coalition Request at 28.
[81] Certificate Order at P 108.
[82] Monthly Progress Report of Algonquin Gas Transmission, LLC, Docket No. PF16-1-000 (submitted Dec. 16, 2016) (noting that Algonquin believes it is prudent to take additional time to solidify the commercial foundation for critically needed infrastructure and expects limited activity on the FERC docket).

planning and development stage over a long period of time,"[83] and "customarily change in design, cost, scope, and impact over the years required for development."[84]

b. Neither the AIM nor Access Northeast projects are connected actions to Atlantic Bridge.

The Atlantic Bridge Project is an unconnected single action that has independent utility.[85] "Connected actions" are defined as those that (i) automatically trigger other actions, (ii) cannot proceed unless other actions are undertaken previously or simultaneously, or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.[86] Neither the AIM nor Access Northeast projects meet any of the criteria of a connected action with respect to Atlantic Bridge.

Two actions are not "connected" under NEPA if the first will proceed without the second.[87] The fact that one project may provide benefits to another is irrelevant, because "if such mutual benefits compelled aggregation, no project would be said to enjoy independent utility."[88] As the EA explains, the Atlantic Bridge, AIM, and Access Northeast projects have independent utility and are separate, distinct projects.[89] Specifically, the Atlantic Bridge Project does not depend on any other actions for its justification, nor does it cause other actions to occur. Even if the Access Northeast Project develops to the point of being a "proposal" for purposes of NEPA, neither it nor the AIM Project are connected actions that must be considered in the same NEPA document as the Atlantic Bridge project.

[83] *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 299 (D.C. Cir. 1987).
[84] *Save Barton Creek Ass'n v. Fed. Highway Admin*., 950. F.2d 1129, 1137 (5th Cir. 1992).
[85] 40 C.F.R. § 1508.25.
[86] *Id.* at § 1508.25(a).
[87] *Coalition on Sensible Transp. Inc v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987).
[88] *Id*.
[89] EA at 17.

Requesters assert that the Atlantic Bridge and Access Northeast Projects "involve updates and expansions to many of the same parts of the Algonquin pipeline."[90] They argue that the two projects have overlapping shippers and that portions of the AIM and Atlantic Bridge projects were incorporated into other projects.[91] This, they assert, demonstrates a geographic, functional, temporal, and interdependent relationship.[92] The record demonstrates that these arguments are factually inaccurate.

i. The Access Northeast Project is not a connected action with Atlantic Bridge under NEPA.

In considering whether separate actions satisfy the requirements under prongs (i) and (ii) of NEPA's definition of a "connected action," the test that most courts have applied is whether the project has independent utility – that is, whether the project in question will be undertaken regardless of whether any other subsequent or contemporaneous project is undertaken, or whether one project necessarily causes a separate project to occur.[93]

The AIM Project proceeded irrespective of the Atlantic Bridge Project, and Algonquin will proceed with the Atlantic Bridge Project regardless of whether the Access Northeast Project eventually proceeds to the "proposal" stage or is ultimately constructed. As the EA notes, "[t]he construction schedule of the [Access Northeast] Project does not coincide with the anticipated Atlantic Bridge Project construction schedule."[94] Further, "[t]he Atlantic Bridge Project would be constructed and the rights-of-way restored before the construction of the [Access Northeast]

[90] Hayden Request at 23.
[91] *Id*.
[92] *Id.* at 23-24.
[93] *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987); *River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 (2d Cir. 1988) (holding that it is "inappropriate" to treat two actions as "connected" under 40 C.F.R. § 1508.25(a)(1) when the first action will "proceed" even in the absence of the second action).
[94] EA at 2-130.

Project would commence."[95] As is clear from the timing, the Atlantic Bridge Project is not connected to the Access Northeast Project.

The Coalition further argues that the Commission is allowing Algonquin to use the pre-filing process as a way to avoid a comprehensive environmental review.[96] But the Coalition's arguments fail for numerous reasons, including that they are based on completely unsupported assertions. For example, the Coalition claims – without any citation whatsoever – that Algonquin has referred to the Atlantic Bridge Project as a "Trojan horse."[97] These unfounded allegations do nothing to address the fact that "[t]he Commission does not undertake a detailed environmental review of projects in the pre-filing stage because the pre-filing concept may not mature into an application."[98] Therefore, consistent with this long-held agency view, the Commission is not somehow allowing Algonquin to use the pre-filing process as a way to shield allegedly broader plans from comprehensive review.

ii. The AIM Project is not a "connected action" with Atlantic Bridge under NEPA.

For its part, the AIM Project can, *and did*, proceed without approval for the Atlantic Bridge Project—in fact, the record shows that Algonquin proposed, received approval, built, and placed the Aim Project into service before the Commission issued the Certificate Order approving Atlantic Bridge.[99]

[95] *Id*.
[96] Coalition Request at 25-26.
[97] *Id*.
[98] *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,012 at P 113 (2015).
[99] Notice of Commencement of Service of Algonquin Gas Transmission, LLC, Docket No. CP14-96-000 (submitted Jan. 9, 2017); Notice of Commencement of Service of Algonquin Gas Transmission, LLC, Docket No. CP14-96-000 (submitted Dec. 15, 2016); Notice of Commencement of Service of Algonquin Gas Transmission, LLC, Docket No. CP14-96-000 (submitted Nov. 14, 2016).

In their request, the Haydens assert that the AIM, Atlantic Bridge, and Access Northeast Projects are "interdependent parts of a larger action" and are therefore connected.[100] As evidence of this, the Haydens point to the fact that "the complete expansion will only occur after all three projects are completed."[101] As a preliminary matter, this argument simply states the applicable test from the regulations and assumes its own conclusion, without any real support. Moreover, the Commission's record demonstrates that this is incorrect. As mentioned above, the AIM Project was designed to (and did) proceed without Atlantic Bridge, Access Northeast, or any other future system modifications.[102] Similarly, the Atlantic Bridge Project does not depend on any other actions for its justification, nor does it automatically cause other actions to occur.

Algonquin's Atlantic Bridge Project application was driven by market demand for natural gas in the northeastern United States. As the Commission has previously noted, it would be unreasonable to expect Algonquin to defer requesting approval of its projects until each potential future project is sufficiently developed to allow for a consolidated application.[103] Since neither the AIM Project nor the Access Northeast Project are connected to the Atlantic Bridge Project, there is no reason for the Commission to grant rehearing to reconsider those issues.

c. Even if the three projects are considered "similar" actions, the Commission has discretion whether to consider them in the same NEPA document.

CEQ regulations define "similar actions" as 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."[104] As explained above, the Access Northeast Project is still in its development phase and is not yet

[100] Hayden Request at 23.
[101] *Id.*
[102] Certificate Order at P 95.
[103] *Id.* at P 114.
[104] 40 C.F.R § 1508.25(a)(3).

a "proposal" subject to NEPA review. Thus, it does not need to be addressed in the same NEPA document as a similar action.

At the time the EIS for the AIM Project was drafted, both Atlantic Bridge and Access Northeast were in their development phases and the Commission lacked sufficient information regarding those projects to complete an environmental review of all three projects.[105] And even today, while the Access Northeast Project is still in its early stages, the Commission concluded that "[a]lthough the same geographic scope would be affected, the temporal scale for construction impacts of the projects is different and does not overlap."[106] Indeed, assuming Access Northeast were built under current plans, the three projects (AIM, Atlantic Bridge, and Access Northeast) will serve different regions, different delivery[107] and receipt[108] points, have different contracted volumes and different (albeit somewhat overlapping) customers.[109] Further, the projects have different timelines and use different pipeline systems. And unlike *Delaware Riverkeeper*—where Tennessee Gas negotiated rate adjustments based on the anticipated completion of subsequent projects, thus creating financial interdependence—there is no rate subsidy or roll-in that could be viewed as creating similar interdependence between the Algonquin Project, Atlantic Bridge, and Access Northeast.[110]

[105] Certificate Order at P 84.
[106] *Id.* at P 109.
[107] The AIM Project will serve southern New England. Atlantic Bridge will primarily serve customers northern New England and Atlantic Canada. While there is some overlap in delivery points and customers, the majority are distinct. Although even today Access Northeast remains in a preliminary development phase, it is anticipated to have delivery points distinct from the Algonquin Project and Atlantic Bridge.
[108] The AIM Project will source gas from a receipt point at Ramapo, NY. Atlantic Bridge, by contrast will source gas from receipt points at both Mahwah, NJ and Ramapo. Potential receipt points for Access Northeast have not been finalized.
[109] The AIM Project serves southern New England local distribution companies and two municipal utilities that will use the capacity to distribute natural gas to end users in southern New England. Atlantic Bridge has a mix of local distribution companies and industrial customers. Access Northeast's details are still developing; but it is anticipated to serve a different customer base focused on electric generation.
[110] *See Delaware Riverkeeper*, 753 F.3d at 1316-17.

In any event, even if Access Northeast, AIM, and the Project were considered to be similar actions, the applicable regulations are clear that whether similar actions should be considered in the same NEPA document, lies within the discretion of the agency. The CEQ regulations provide 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."[111] Courts have treated the regulation's use of "may" as a precatory (*i.e.*, non-mandatory) statement, and have "accorded more deference [to an agency] in deciding whether to analyze such [similar] actions together."[112] Given the disparity in time and lack of detail to assess the potential impacts from the Access Northeast Project, it is reasonable for the Commission to have "determined independent project analysis was preferred."[113]

d. Neither Access Northeast nor AIM is a cumulative action requiring consideration in the same NEPA document as Atlantic Bridge.

The Haydens incorrectly assert that the AIM, Atlantic Bridge, and Access Northeast projects are cumulative actions because (in their view) each project contributes to the "cumulative impacts to many of the same areas" and are interdependent.[114] "Cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts."[115] Courts have made clear that an agency need not analyze actions in a

[111] 40 C.F.R. § 1508.25(a)(3) (emphasis added); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004).
[112] *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004) (rejecting challenge to agency's conclusion that analyzing the projects together was not necessarily the "best way" to evaluate them).
[113] *Native Ecosystems Council v. Weldon*, 2017 WL 491638, *5 (D. Montana, Feb. 2, 2017).
[114] Hayden Request at 26.
[115] 40 C.F.R. § 1508.25(a)(2).

single NEPA document as long as there is no intention on the part of the agency to "minimize cumulative impact analysis."[116]

Here, the Commission thoroughly considered the cumulative impacts of the AIM Project, Atlantic Bridge Project, and Access Northeast Project (to the extent they are reasonably foreseeable) in both the AIM Project's EIS[117] and the Atlantic Bridge's EA.[118] In both cases, the Commission concluded that although there may be limited overlap in construction workspace, the temporal scale associated with the three projects is different and their cumulative impacts are not significant.[119] Whereas construction of the Atlantic Bridge Project will commence in 2017, the Access Northeast Project is still very much in the planning and development process for the Access Northeast Project and there is limited activity in its Pre-filing review.[120] Thus, the Commission reasonably declined to treat these projects as cumulative actions, particularly in light of the significant differences regarding the timing and development of each project.

2. FERC's conclusion that an EIS is not warranted is well supported.

Several requesters allege that FERC violated NEPA and the CEQ regulations by determining that an EIS was not warranted.[121] These arguments are incorrect. NEPA requires agencies to prepare an EIS for major federal actions that "significantly affect[] the quality of the human environment."[122] As the Commission explained in the EA, when an agency "believes that a proposed action . . . may not be a major federal action significantly affecting the quality of

[116] *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9th Cir. 2003).
[117] *See* AIM EIS at 4-288 – 4-290 (discussing the potential cumulative impacts associated with the Atlantic Bridge and Access Northeast Projects).
[118] *See* EA at 2-128 (discussing cumulative impacts associated with the AIM Project), 2-219 (discussing cumulative impacts associated with the Access Northeast Project).
[119] *Id*.
[120] *See supra notes* 69 through 84 and accompanying text.
[121] Coalition Request at 34; Weymouth Request at 29.
[122] 42 U.S.C. § 4332(2)(C).

human environment" it may prepare an EA rather than an EIS.[123] The analysis performed in the EA assists the agency in determining whether to prepare an EIS or to issue a FONSI.[124] Here, the Commission prepared a robust EA and properly determined that approval of the Project would not constitute a major federal action significantly affecting the quality of the human environment.[125] Thus, no EIS is required.

a. The Commission properly determined that the Project's impacts were not significant.

Several Requesters allege that the Commission should have prepared an EIS because various "intensity factors" weigh in favor of concluding that the Project significantly affects the environment.[126] When determining whether a project's impacts are significant, CEQ regulations require the agency to consider both the "context" and "intensity" of the project.[127] When evaluating the intensity of a project, an agency should consider ten 'intensity factors.'[128] Requesters assert that several of the intensity factors justify the preparation of an EIS.[129] This is incorrect with respect to each factor.

i. Intensity Factor 2: Public Safety.

The Town first argues that Intensity Factor 2 (public safety) weighs in favor of preparing an EIS because the proposed Weymouth Compressor Station threatens public safety by placing a fire and explosion hazard in close proximity to residential areas and other facilities.[130] This concern is ill-founded. The EA addressed public safety and properly concluded that the siting of

[123] *See* EA at 1-3.
[124] 40 CFR § 1508.9 (2016) (The EA "serves to briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.").
[125] EA at 4-1.
[126] Weymouth Request at 46-52; Coalition Request at 34-35.
[127] 40 C.F.R. § 1508.27.
[128] 40 C.F.R. § 1508.27.
[129] Weymouth Request at 46-52.
[130] Weymouth Request at 47.

the compressor station would not result in a significant increase in risk to the nearby public.[131] Indeed, the EA explains that the project will be subject to and will comply with various safety regulations implemented by PHMSA.[132] The EA discusses the PHMSA regulations at length, noting the types of safety issues the regulations address. For example, the EA notes that PHMSA regulations "define area classifications, based on population density in the vicinity of the pipeline and specifies more rigorous safety requirements for populated areas."[133] The EA further considers the nature of the safety requirements, including the depth at which the pipe must be buried, pipe wall thickness, pipeline design pressures, inspection and testing of welds, etc.[134] Based on Algonquin's commitment to comply with these requirements, the Commission properly concluded that the siting of these facilities would not result in a significant increase to public safety risk.[135]

The Town argues that the Commission's reliance on Algonquin's compliance with another agency's regulations is inconsistent with NEPA.[136] This argument misunderstands the Commission's obligations under NEPA. Agencies may rely on compliance with federal regulations to support their conclusions that a project's impacts will be insignificant.[137] Moreover, pipeline safety issues clearly fall within PHMSA's expertise and that agency has

[131] EA 2-113 – 2-117.
[132] *Id.*
[133] *Id.* at 2-114.
[134] *Id*.
[135] *Id*.
[136] Weymouth Request at 48.
[137] *See, e.g., WildEarth Guardians v. Jewell*, 738 F.3d 298, 311 (D.C. Cir. 2013) (affirming use of ambient standards as "proxies" in projecting ozone emissions); *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 268 (D.C. Cir. 1988) (upholding agency's reliance on the "implied presumption . . . that continued compliance with the Clean Air Act emission standards means there will be no significant increase in emissions."); *Lockhart v. Kenops*, 927 F.2d 1029 (8th Cir. 1991) ("compliance with zoning laws tends to show that impact of the land use is not significant"); *Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Serv.*, 487 F.3d 1029, 1036-37 (D.C. Cir. 1973) (holding that a construction project's compliance with local zoning regulations supports the finding that the project's environmental impacts will be insignificant).

promulgated regulations that directly address the safety issues raised by requesters.[138] The Commission may appropriately rely on that expertise in concluding that the Project will not significantly increase the risk to human safety.[139]

Finally, the Town argues that the Commission failed to consider the significant public safety risks that would occur during a storm due to the Project's location within a Hurricane Inundation Zone.[140] The record reflects otherwise. The EA notes commenters' concern that the project was located in a hurricane inundation zone in Table 1.4-1[141] and responds to these concerns by considering the public safety impacts associated with flash flooding, storm surge, and sea level rise.[142] The EA acknowledges that portions of the Weymouth Compressor Station would be located within the 100-year flood zone, but notes that the permanent station facility footprint would not be within any flood zone.[143] The EA thus concludes that while "temporary impacts may occur on floodplains should a flood occur at the same time as construction of the Weymouth Compressor Station," "the Project would have minimal impacts on flood storage capacity." Further, the project's design and other measures would "minimize the risk of . . . storm surges" and flash flooding.[144]

[138] *See* 49 C.F.R. 192.
[139] *See*, *e.g.*, *Murray Energy Corp. v. FERC*, 629 F.3d 231, 239 (D.C. Cir. 2011) ("[T]he Commission would do well to respect the views of other agencies as to those problems for which those other agencies are more directly responsible and more competent than [the] Commission." (internal quotations and citations omitted)); *EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (the FCC did not abdicate NEPA responsibilities when it relied on the EPA, "the agency with primacy in evaluating environmental impacts"); *Consol. Rail Corp. v. Interstate Commerce Comm'n*, 646 F.2d 642, 649 (D.C. Cir. 1981) (ICC properly deferred to the NRC because the latter agency is entrusted to ensure the safety of nuclear materials).
[140] Weymouth Request at 48.
[141] EA at 1-5.
[142] *Id.* at 2-3.
[143] *Id*.
[144] *Id.*

ii. Intensity Factor 3: Unique Geography

The Town next argues that Intensity Factor 3 (unique geography) weighs in favor of preparing an EIS because of the Compressor Station's location near two conservation parcels, Kings Cove and Lovells Grove.[145] The Town asserts that the Project will negatively impact these conservation parcels by decreasing the Public's desire "to use these scenic spaces."[146] This argument falls short. Courts have explained that the "proximity of a project to a sensitive area does not per se warrant an EIS."[147] "Plaintiffs must also explain how the project would have a significant effect on the area."[148] Moreover, "[i]t does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment."[149]

While the Town has asserted that the Project will decrease the Public's desire to visit the conservation areas, it provides no evidence to support its speculation that the Public will be less inclined to visit these conservation areas due to the presence of Project facilities in an already developed, industrial area.[150] Second, even if this assertion were true, it does not "rise[] to the level of demonstrating a significant effect on the environment."[151] The EA found that "impacts on [the public's use of] the Kings Cove and Lovells Grove parcels would be sufficiently

[145] Weymouth Request at 48.
[146] *Id*.
[147] *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, 424 Fed. Appx. 635, 638 (9th Cir. 2011) (citing *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1162 (9th Cir.1998)); *Conservation Congress v. U.S. Forest Serv.*, 2017 WL 661959 at * 6 (E.D. Cal. Feb. 17, 2017) (evaluating uniqueness of geography in light of other factors because proximity to sensitive areas does not per se warrant an EIS); *Utah Shared Access Alliance v. Wagner*, 98 F.Supp.2d 1323, 1332 (D. Utah 2000) ("[The] fact [that Boulder Top is a unique geographic area] is not dispositive.").
[148] *Conservation Congress v. U.S.F.S.*, 2017 WL 661959 at *6 (E.D. Cal. February 17, 2017) (*citing Klamath-Siskiyou Wildlands Ctr.*, 424 Fed. Appx. at 638).
[149] *Klamath-Siskiyou Wildlands Ctr.*, 424 Fed. Appx. at 638 (finding that Plaintiffs did not demonstrate a significant effect on the environment under the Unique Geography Intensity Factor merely by establishing that a project was located near ecologically critical areas).
[150] *See* Weymouth Request at 48; *see also* EA at 2-68 (noting that the Weymouth Compressor Station site is a mix of open and industrial land with additional industrial sites to the south).
[151] *See Klamath-Siskiyou Wildlands Ctr.*, 424 Fed. Appx. at 638.

minimized" because Algonquin "would implement measures . . . to prevent disturbance."[152] The Town does not present any argument to the contrary.[153]

Finally, courts that have relied on this intensity factor in finding the need for an EIS have generally done so on the grounds that a project might physically harm a unique geographic area. For example, in *Environmental Protection Center v. Blackwell*, a district court held that this intensity factor warranted the preparation of an EIS because the Forest Service failed to show that the project would not harm habitat connectivity in an ecologically critical area.[154] In contrast, the Town does not argue that the Project in this case will have any impact other than on the public's desire to visit the Kings Cove and Lovells Grove. To the contrary, the Town concedes that this Project "will not physically disturb the land subject to these conservation restrictions."[155]

iii. Intensity Factor 4: Controversy

Both the Coalition and the Town argue that under Intensity Factor 4, the Commission should have prepared an EIS because the project is 'highly controversial.'[156] This argument is misplaced. An action is controversial where a "substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to use, the effect of which is relatively undisputed."[157] Mere opposition to or disagreement about the nature of a project is not enough to make an action controversial.[158] Generally, courts agree that an action is not controversial unless there is some "evidence [that] . . . casts serious doubt upon the

[152] EA at 2-66.
[153] *See* Weymouth Request at 48-49.
[154] *See, e.g., Envt'l Protection Info. Ctr. v. Blackwell*, 389 F.Supp.2d 1174, 1196-97 (N.D. Cal. 2004); *c.f. Conservation Congress*, 2017 WL 661959 at * 6 - 12 (finding that no EIS was necessary despite the project's proximity to a unique geographic area).
[155] Weymouth Request at 48-49.
[156] Coalition Request at 34; Weymouth Request at 49.
[157] *In Defense of Animals v. U.S. Dep't. of Interior*, 751 F.3d 1045, 1069 (9th Cir. 2014).
[158] *See, e.g., id.* at 1070 ("[I]f any opposition to an agency's proposed actions created a 'substantial dispute,' an EIS would seemingly always be required.").

reasonableness of the agency's conclusions."[159] Thus, even where petitioners can point to comments that question the agency's methodology, courts will not find that the action is controversial unless the petitioners present solid evidence undermining the agency's analysis.[160]

Under this standard, although the Coalition and the Town clearly oppose the project, neither has shown that the project is "controversial" as that term is used in the CEQ regulations. Indeed, they have not presented any evidence that "casts serious doubt upon the reasonableness of the agency's conclusions."[161] Rather, the Coalition merely asserts that project opponents and the Commission are "far apart in their views of project impacts."[162] Without more, this bare assertion does not "cast serious doubt upon the reasonableness of the agency's conclusions." Similarly, the Town notes that "137 . . . written comments" were submitted during pre-filing, as well as "a large number of comment letters [on the] EA . . . in opposition to the Project."[163] But, as explained above, mere opposition to a project is not enough to create controversy.[164] The Town asserts in a conclusory fashion that these comments "cast doubt on the sufficiency of the analysis," but does not provide any specific evidence or explain how the Commission's analysis is deficient.[165]

Finally, the Town also asserts that the project is controversial because the U.S. Environmental Protection Agency ("EPA") and the Siting Board submitted comments that

[159] *Id.*; *see also Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156 (10th Cir. 2012) (public opposition to transportation facility did not amount to controversy in light of the absence of dispute over agency's methodology and data and lack of opposition from other commenting agencies).
[160] *Compare Town of Cave Creek Arizona v. FAA*, 3215 F.3d 320, 331-32 (D.C. Cir. 2003) (finding no controversy where comments merely requested the FAA use a different model without presenting evidence undermining the FAA's analysis), *with Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736-37 (9th Cir. 2001) (finding controversy where 85% of the 450 comments urged that the EA's analysis was incomplete).
[161] *See In Defense of Animals*, 751 F.3d at 1070.
[162] Coalition Request at 34.
[163] Weymouth Request at 50.
[164] *See In Defense of Animals*, 751 F.3d at 1070.
[165] Weymouth Request at 50.

"challenged the Commission's findings and analysis."[166] It is true that some courts have held that an action is sufficiently controversial to require an EIS when other agencies disagree with the lead agency's conclusions.[167] However, in those cases, the disagreement was nearly universal.[168] For example, in *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, the Ninth Circuit held that an action was controversial where two state agencies, along with "conservationists, biologists, and other knowledgeable individuals" all disputed the agency's conclusion that the action at issue would not have a significant impact on sheep.[169] In contrast, the Town has not presented any deficiency that was challenged by both the EPA and Siting Board, much less a deficiency that has been uniformly criticized by agencies and experts.[170]

iv. Intensity Factor 5: Unique or Unknown Risks

The Town also asserts that an EIS is necessary under Intensity Factor 5 because the project presents unknown safety risks.[171] Specifically, the Town contends that the risks of an explosion at the Weymouth Compressor Station are unknown because the Commission has not reviewed an emergency response and evacuation plan for the facility.[172] This argument fails for two reasons.

First, it mischaracterizes the Commission's review of safety risks at the compressor station. The EA explains that Algonquin will develop an Emergency Response Plan specific to

[166] *Id*.
[167] *Found. for North American Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1182 (9th Cir. 1982).
[168] *See e.g., Found. for North American Wild Sheep*, 618 F.2d at 1182; *see also Anderson v. Evans*, 371 F.3d 475, 491 (9th Cir. 2002) (finding that an EIS was warranted where "*[a]lmost all* of the scientific experts relied upon in the EA state that the effect of taking whales . . . is uncertain" (emphasis added)).
[169] *Found. for North American Wild Sheep*, 618 F.2d at 1182.
[170] Weymouth Request at 50.
[171] *Id.* at 50-51.
[172] *Id*.

the compressor station in accordance with PHMSA regulations.[173] Further, the EA explains the key elements of the plan that will be required by those regulations, and as explained above, NEPA allows FERC to rely on the expertise of another federal agency.[174] For instance, the plan will include making personnel, equipment, tools, and materials available at the scene of an emergency.[175] Additionally, local first responder organizations will be trained to coordinate a response with Algonquin to any emergency that might arise at the station.[176]

Second, this argument misunderstands the unknown risks intensity factor. Courts have found that unknown risks warrant an EIS when agencies had reason to be concerned about a particular environmental impact and yet failed to collect any data on the issue.[177] For example, in *Blue Mountains Diversity Project*, the case cited by the Town, the Forest Service did not discuss an independent report indicating that logging in burned areas had a negative impact on sediment loading into waterways.[178] Further, the Forest Service failed to collect any data on the issue and its EA contained "virtually no references to any material in support of or in opposition to its conclusions" that there were no significant impacts.[179] Conversely, the Commission in this case analyzed PHMSA regulations at length before concluding that the Project would not result in a significant risk to human safety.[180] Although the Town may disagree with FERC's conclusions, it cannot be said FERC did not adequately address the safety risk issue in the EA.

[173] EA at 2-121.
[174] *See* text, *supra*, accompanying notes 136-141.
[175] Certificate Order at P 64.
[176] EA at 2-121.
[177] *See, e.g.*, *Blue Mountains Diversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998); *cf. Northern Plains Resource Council Inc. v. U.S. Bureau of Land Mgmt.*, 2016 WL 1270983 at *7 (D. Mont. March 31, 2016) ("1508.27(b)(5) does not require an EIS anytime there is *some* uncertainty, but only if the effects of the project are highly uncertain.").
[178] *Blue Mountains Diversity Project*, 161 F.3d at 1213.
[179] *Id.* at 1214.
[180] EA at 2-121.

v. Intensity Factor 7: Cumulatively Significant Impacts

Finally, the Town argues that Intensity Factor 7 (Cumulatively Significant Impacts) weighs in favor of preparing an EIS.[181] These arguments fail for the reasons discussed in Section II(B)(4), *infra*.

b. FERC's FONSI was well-supported by evidence.

The Town argues that the Commission's decision to not prepare an EIS was also improper because it was based on incomplete and inadequate information.[182] Specifically, the Town argues that the Commission lacked information on coal ash impacts, noise, and public safety, failed to take the "requisite hard look" at those issues, and that these deficiencies "undermin[ed] its decision to proceed without an EIS."[183] Each of these allegations fails because the Commission took a hard look at each issue, and reasonably concluded that an EIS was not required.

NEPA requires federal agencies to "carefully consider detailed information concerning significant environmental impacts," but they are "not required to do the impractical."[184] Agencies 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."[185] When an agency decides not to prepare an EIS, it need only provide sufficient information to demonstrate that the agency "reasonably concluded that the project will have no significant environmental consequences."[186] An agency's decision to not prepare an EIS is only considered unreasonable

[181] Weymouth Request at 51.
[182] *Id.* at 30.
[183] *Id*.
[184] *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 992.
[185] *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976).
[186] *Save the Yaak Comm. v. Block*, 840 F.2d 714,717 (9th Cir. 1988).

when the agency "fails to supply a convincing statement of reasons why potential effects are insignificant."[187] The Commission's EA easily passes muster under this deferential standard, because it analyzes at length the Project's impacts on soils, water resources, wetlands, vegetation, wildlife, and fisheries, land use, recreation, visual resources, socioeconomics, cultural resources, air quality, noise, reliability, safety, and cumulative impacts, and reasonably concludes that those effects are not significant so as to require an EIS.[188]

i. Coal Ash

The Town of Weymouth asserts that the Commission erred by not considering in sufficient detail the risks associated with coal ash at the Weymouth Compressor Station.[189] This is incorrect. The Commission's consideration of coal ash at the Weymouth Compressor Station more than supports its reasonable conclusion that those impacts were insignificant.

The Commission considered coal ash as part of its broader analysis of the Project's impacts on soils.[190] The Commission noted that Applicants conducted a Phase I Environmental Site Assessment that revealed that coal ash had been used as a historic filling of the site.[191] The Commission then reviewed the Project Applicants' *Unexpected Contamination Encounter Procedure*, which provides a response plan for encountering contaminated soil (including coal ash) during construction.[192] The Commission noted that the plan includes measures to be taken by 'the Chief Inspector and construction personnel' to (1) isolate the contaminated area, (2) notify the appropriate agencies, (3) gather information, and (4) monitor hazardous conditions, if

[187] *Id*.
[188] EA at 2-1 – 2-144.
[189] Weymouth Request at 30.
[190] EA at 2-8.
[191] *Id*.
[192] *Id.*

possible.[193] Further, the Commission noted that the Applicants would implement a Spill Prevention, Control, and Countermeasure Plan ("SPCC") to prevent accidental release of hazardous materials during construction.[194] This analysis is more than sufficient for the agency to "reasonably conclude" that any risks posed by the coal ash are addressed by the Applicant's *Unexpected Contamination Encounter Procedure* and the SPCC Plan.[195]

The Town argues that the Commission should have considered (1) the risks posed by coal ash to human health when spilled and (2) the routes by which coal ash could spill during construction.[196] To the extent the Town argues that this lack of analysis somehow renders the decision to issue a FONSI unreasonable, this is incorrect. As stated above, the Commission's review of the Project's ability to respond to any contaminated soils provides sufficient detail and information for the agency to have reasonably concluded that the Project's impacts are not significant. Moreover, the Town's complaint hardly rises to the level of unreasoned or wholly arbitrary decision-making that has led courts to find that an EA is lacking. For example, in *Save the Yaak Committee v. Block*, the Ninth Circuit held that an EA was inadequate where the "entire discussion of wildlife [was] comprised of five brief sentences," the discussion of endangered species merited a single, conclusory sentence, and employees directly testified that the EA was "not prepared to examine the environmental impacts."[197] In contrast, the Commission in this case adequately considered the risk of contaminated soil, as well as the solutions that Applicants had put in place to address the risk.[198]

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[193] *Id*.
[194] *Id*.
[195] *See Save the Yaak Comm.*, 840 F.2d at 717.
[196] Weymouth Request at 30-33.
[197] *Save the Yaak Comm.*, 840 F.2d at 718.
[198] EA at 2-8.

ii. Noise

The Town criticizes the Commission's noise impact analysis on what are essentially three fronts, asserting that various flaws undermined the agency's ability to make an informed decision.[199] First, the Town asserts that the Commission relied on an inappropriate baseline ambient sound level.[200] This assertion is not supported by the record, and ignores the significant deference that the Commission receives on technical and methodological questions relating to an environmental review.[201] The Town bases its allegation in part on the assertion that the baseline is derived from recordings taken at measurement positions that are allegedly "not representative of the majority of sensitive receptors in the area."[202] In the Town's view, most residences in the area are located on secondary streets in the community, while the measurement positions are located on (presumably noisier) main thoroughfares.[203] To the extent the Town is attempting to show that the Commission has relied on a baseline ambient sound level that is more noisy than the real ambient sound level experienced by residences in the area, this argument falls short as the Town mischaracterizes the measurement positions. In fact, the very map that the Town cites to for support shows that five of the eight measurement positions are on secondary streets, with only three on 'main thoroughfares.'[204]

Second, the Town argues that the Commission wrongly failed to include the Kings Cove and Lovells Grove Parcels as noise sensitive areas ("NSAs").[205] The Town explains that federal regulations require that noise from compressor stations remain below a specified limit at pre-

[199] Weymouth Request at 36.
[200] *Id*.
[201] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2016).
[202] Weymouth Request at 36-37.
[203] Weymouth Request at 36-37.
[204] EA at 2-108, Fig. 2.8.3-4.
[205] Weymouth Request at 38.

existing NSAs.[206] This argument is incorrect for several reasons. To begin with, the Commission was not required to consider the two parcels to be NSAs. While the term 'NSA' is undefined, the regulations offer several examples of areas that would qualify, including "schools, hospitals, or residences."[207] Notably, these examples do not include conservation areas, or anything like a conservation area. Further, in its Guidance Manual for Environmental Report Preparation, the Commission notes that NSAs "include residences, schools and day-care facilities, hospitals, long-term care facilities, places of worship, and libraries. NSAs may also include . . . parks . . . *valued specifically for their solitude and tranquility*."[208] There was no evidence in the record in this proceeding that either conservation parcel is 'valued specifically for [its] solitude and tranquility.' Indeed, the two parcels "are located near a significant transportation corridor and a developed industrial area."[209] The Commission's reasonable decision about how to label the two conservation parcels therefore does not render its analysis arbitrary or unreasonable. Moreover,, the Compressor Station will not have a significant impact on either parcel.[210] The Order explains that both areas are located sufficiently "far away from the noise producing equipment" that neither one "will [ ] experience a perceptible increase in noise."[211] The Town counters that the Order's analysis of noise impacts on Kings Cove is based on insufficient data.[212] But the Town's only substantive criticism is that the Commission overestimated the ambient noise level at Kings Cove.[213] The Town does not contest the

[206] *Id*.
[207] 18 C.F.R. §380.12(k)(4)(v)(A).
[208] Federal Energy Regulation Commission, *Guidance Manual for Environmental Report Preparation* 4-128 (February 2017) (emphasis added).
[209] Certificate Order P 220.
[210] Certificate Order P 220.
[211] *Id*.
[212] Weymouth Request at 39. Note, the Town does not contest the Order's conclusions with respect to Lovells Grove. *Id.*
[213] *Id*.

Commission's conclusion that Kings Cove is located sufficiently far away from the compressor station that it will not experience a perceptible noise increase.[214]

Finally, the Town asserts that the Commission wrongly relies on the infrequency of blowdowns, without analyzing their impacts, to conclude that there are no significant impacts.[215] This mischaracterizes the Commission's analysis and misunderstands its obligations under NEPA. First, the Commission did not rely solely on the infrequency of blowdowns to conclude that there are no significant impacts; it also noted that Algonquin will take certain mitigation measures to ensure that "noise attributable to blowdown events will be at or below 60 dBA at a distance of 300 feet."[216] This, combined with the infrequency of blowdowns, is more than sufficient for the Commission to "reasonably conclude[] that the project will have no significant environmental consequences."[217]

iii. Public Safety

The Town asserts that the Commission's analysis of public safety is deficient because it improperly relies on the Applicants' compliance with PHMSA regulations. These arguments fail for the reasons discussed in Section II(B)(2)(a)(i), *supra*.

3. FERC took the requisite "hard look" at the impacts of the Atlantic Bridge Project.

Various requesters assert that the Commission violated the "hard look" requirement because it failed to "independently investigate the applicant's claims" about the Project.[218] NEPA mandates a process by which federal agencies must take a "hard look at the environmental consequences of proposed actions utilizing public comment and the best available

[214] *Id*.
[215] *Id*.
[216] Certificate Order P. 223.
[217] *See Save the Yaak Comm.*, 840 F.2d at 717.
[218] Hayden Request at 34-45; Peters Request at 4-8.

scientific information."[219] However, it "does not mandate particular results."[220] NEPA thus "prohibits uninformed – rather than unwise – agency action."[221] The NEPA process requires that federal agencies "carefully consider[] detailed information concerning significant environmental impacts."[222]

Although an agency's analysis must comply with NEPA requirements, an agency will receive considerable "defer[ence]," "particularly with respect to scientific matters within the purview of the agency."[223] A federal agency is given wide discretion in assessing [] scientific evidence, so long as it takes a hard look at the issues and responds to reasonable opposing viewpoints."[224] Furthermore, the NEPA standard "does not require that every conceivable study be performed and that each problem be documented from every angle to explore its potential for good or ill."[225] It "does not require that all impacts be discussed in exhaustive detail;" it simply requires the provision of "such information as appears to be reasonably necessary under the circumstances for the evaluation of the project."[226] Indeed, "NEPA does not require the government to do the impractical."[227] Ultimately, the "hard look" standard under NEPA "does not necessarily require the agency to develop 'hard data.'"[228]

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[219] *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001) (internal quotation marks and citations omitted).
[220] *Id*.
[221] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).
[222] *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992-93 (9th Cir. 2004) (quoting *Robertson*, 490 U.S. at 349).
[223] *Id.* at 993.
[224] *Earth Island Institute v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)).
[225] *Sierra Club v. Froehlke*, 486 F.3d 946, 951 (7th Cir. 1973) (internal quotation and citation omitted). Furthermore, "[i]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project." *Id.* (internal quotation and citation omitted).
[226] *Britt v. U.S. Army Corps of Eng'rs*, 769 F.2d 84, 91 (2d Cir. 1985).
[227] *Id.* at 1380 (quoting *Inland Empire Public Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996)).
[228] *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179 (10th Cir. 2008) (citing *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1190 (10th Cir. 2006)).

An EA is a "concise" statement that briefly provides evidence whether a proposed action will result in significant impacts requiring the preparation of an EIS.[229] As noted above, an EA need not contain the detailed level of analysis required in an EIS.[230] It need only provide sufficient information to demonstrate that the agency "reasonably concluded that the project will have no significant environmental consequences."[231] Here, the Commission prepared a robust and exhaustive 347-page EA, which addressed, at length, all of the potentially significant environmental issues, including impacts to soils, water resources, wetlands, vegetation, wildlife, fisheries, land use, recreation, visual resources, socioeconomics, cultural resources, air quality, noise, reliability, safety, and cumulative impacts. Relying on this analysis, the Commission reasonably concluded an EIS was not necessary.

a. Safety

Ms. Peters and the Coalition reprise safety-related concerns that the Commission already considered and correctly rejected. Ms. Peters' argues the Commission failed to evaluate concerns related to the Fore River Bridge and the use of fireworks near King's Cove.[232] The Coalition asserts more generally that the Commission violated the NGA by approving the Project in a highly populated and heavily trafficked area.[233] Both requests fail to acknowledge the extensive safety analysis provided in the record.

Ms. Peters argues that the Commission failed to evaluate impacts on "the structural integrity of the human skeleton or skin" or the "contribution of automobile accidents on the

[229] 40 C.F.R. 1508.9.
[230] *Sierra Club v. Espy*, 38 F.3d at 802 ("An EIS must contain a detailed statement of the expected adverse environmental consequences of an action, the resource commitments involved in it, and the alternatives to it. An EA, on the other hand, is prepared in order to determine whether an EIS is required.").
[231] *Save the Yaak Committee*, 840 F.2d at 717.
[232] Peters Request at 4-8.
[233] Coalition Request at 6.

[Fore River Bridge.]"[234] The Commission, however, closely examined safety concerns related to the Fore River Bridge, or other nearby industrial infrastructure.[235] Ms. Peters fails to acknowledge that the EA and Certificate Order both consider safety issues related to the Fore River Bridge, and conclude it is unlikely that a major event at the Weymouth Compressor Station would pose a threat to the structural integrity of the Fore River Bridge or other nearby infrastructure.[236] Moreover, it appears that Ms. Peters is attempting to raise these arguments for the first time on rehearing. The Commission "look[s] with disfavor on parties raising on rehearing issues that should have been raised earlier"; "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."[237]

Ms. Peters also asserts that the Commission failed to consider safety risks related to fireworks.[238] However, the Certificate Order explicitly mentions its consideration of comments regarding "industrial strength fireworks [ ] launched over King's Cove for the Fourth of July."[239] The Commission reasonably relied on the analysis in the EA to conclude that fireworks did not present a risk to the safe operation of the Project.

The Coalition argues that the Commission "failed to consider the Atlantic Bridge's adverse impacts on public safety."[240] On the contrary, safety-related impacts of the Project are addressed throughout the EA and Certificate Order. The Commission generally discusses potential public safety impacts in section 2.9 of the EA and extensively in the Certificate

[234] Peters Request at 4.
[235] EA at 2-120 – 2-121.
[236] EA at 2-121; Certificate Order at P 182.
[237] *Baltimore Gas and Electric Co.*, 92 FERC at p. 61,114 (citations omitted).
[238] Peters Request at 8.
[239] Certificate Order at P 236.
[240] Coalition Request at 7.

Order.[241] The Commission further reasonably relies on the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") to oversee pipeline safety.[242] Applicants have designed and will construct, operate, monitor, and maintain the Project in accordance with the federal pipeline safety regulations. Applicants provided a certification to that effect as part of its Project certificate application. Accordingly, the EA concludes that the increased risk of public safety would not be significant and would not result in a cumulative operational or public safety hazard.[243]

b. Noise

Ms. Peters argues the Certificate Order contains an "[i]ncomplete noise analysis that does not address all possible impacts upon the public and homeowners."[244] To the contrary, the EA contains extensive discussion of the Project's potential effects on overall noise levels in the Project area.[245]

The Peters Request claims the Commission relied on an analysis that lacked sufficient details on noise sensitive area ("NSA") locations, and alleges that the sound study did not consider neighborhoods located at elevations above the Weymouth Compressor Station.[246] In reality, the EA contains an exhaustive discussion of the potential noise effects from the Weymouth Compressor Station on surrounding neighborhoods. [247] The Commission also considered Ms. Peters' assertion that the noise surveys were incomplete, and subsequently found that "the background air quality and noise surveys accurately represent the existing conditions

[241] Certificate Order at PP 181-183; PP 225-238.
[242] *See* Coalition Request at 15-17 (questioning PHMSA' safety and enforcement capabilities).
[243] EA at 2-143.
[244] Peters Request at 10.
[245] EA at Section 2.8.
[246] Peters Request at 10-11.
[247] EA at 2-108 – 2-210.

near the Weymouth Compressor Station site."[248] Further, the Commission included a specific mitigation measure related to the Weymouth Compressor Station, requiring Algonquin to file a full noise survey after the compressor station is in service.[249]

c. Weymouth Compressor Station

Without citing any evidence, Ms. Peters asserts that the Weymouth Compressor Station will render an adjacent community recreation area "totally useless."[250] FERC properly evaluated the potential impacts associated with the Weymouth Compressor Station on the surrounding area. The Certificate Order specifically considered comments on the Weymouth Compressor Station's potential impacts on economic development and waterfront recreation areas.[251] The Commission noted that the Weymouth Compressor Station is sited on and will be surrounded by industrial land and water uses, and took the necessary "hard look" at the issue in reaching its conclusion that the Project will not directly impact any recreational areas.[252]

d. Property Values

The Peters Request asserts in her request that the "Commission's analysis did not fully consider all factors which would impact home values" and that "there is no mention of property values related to compressor stations."[253] Contrary to her assertions, however, the EA addressed potential effects of the Project, including the Weymouth Compressor Station, on property values in section 2.5.5. The Commission took the requisite "hard look" at this issue.

Based on its analysis, the Commission reasonably determined that "these pipeline and aboveground facilities would not result in any long-term changes that would negatively impact

[248] Certificate Order at P 224.
[249] *Id.* at Environmental Condition 20.
[250] Peters Request at 13.
[251] *Id.* at P 166.
[252] *Id.* at P 166.
[253] Peters Request at 7.

property values outside of the pipeline rights-of-way or aboveground facility sites." With respect to the Weymouth Compressor Station, the Commission found that it "would not significantly increase the noise at any NSA, alter the visual character of the area, which already includes a number of industrial facilities, significantly increase the safety risk in the surrounding communities, or result in other impacts that would significantly impact adjacent property values."[254] In support of its conclusions, the Commission included citations to several studies of the Project's potential impact on property values, which support its findings.[255]

4. FERC adequately considered cumulative impacts.

Several requesters allege that the Commission failed to adequately consider the cumulative impacts of the project.[256] These challenges fail.

NEPA requires an agency to address cumulative impacts,[257] defined as "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 regardless of what agency . . . or person undertakes such other actions."[258] "A NEPA cumulative-impact analysis need only consider the effect of the current project along with any other past, present or likely future actions *in the same geographic area as the project under review*."[259] Importantly, the agency is only required to consider "reasonably foreseeable" impacts.[260] An "impact 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."[261] This does not include "speculative" impacts[262] and agencies are "not

[254] EA at 2-74.
[255] *Id*.
[256] Hayden Request at 39 – 51; Weymouth Request at 52-69; Coalition Request at 29-34.
[257] 40 C.F.R. § 1508.25(c).
[258] 40 C.F.R. § 1508.7.
[259] *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 50 (D.C. Cir. 2016) (emphasis added).
[260] *Id.* at 50.
[261] *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (*citing Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

require[d] . . . to do the impractical."[263] Under this standard, impacts that would occur too far off in the future are too speculative to result in a meaningful analysis and should not be considered in the cumulative impacts analysis.

To determine the scope of the impacts that should be evaluated, the agency should consider (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area; (3) other actions – past, present, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.[264] This determination "of the extent and effect of [cumulative impacts] . . . is a task assigned to the special competency of the agencies."[265] Agencies 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."[266] Further, the analysis of the impacts should be proportional "to the magnitude of the environmental impacts of a proposed action."[267]

Under this standard, the Commission's cumulative impacts analysis is more than sufficient. The EA follows the five steps approach listed above, considering the cumulative impacts of all known and reasonably foreseeable actions within the geographic scope of the

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[262] *Id*.
[263] *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (noting that "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements"); *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1118 (W.D. Va. 1994)).
[264] *See San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1056 (10th Cir. 2011); *Gulf Restoration Network v. United States Dept. of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006); *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 345 (D.C. Cir. 2002).
[265] *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976)
[266] *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976).
[267] CEQ Guidance on the Consideration of Past Actions in Cumulative Effects Analysis at 3 (June 24, 2005) (2005 CEQ Cumulative Effects Guidance), *available at* https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

project on relevant resources, including: geology and soils, waterbodies, groundwater, and aquatic resources, wetlands, vegetation, wildlife and habitat, protected species, land use, recreation and special interest areas, visual resources, socioeconomics, cultural resources, air quality and noise, climate change, reliability and safety.[268]

Requesters nevertheless attempt to flyspeck the Commission's cumulative impacts analysis, identifying certain perceived deficiencies related to specific resources. Each of these challenges fails.

a. FERC adequately considered the cumulative impacts of the Access Northeast Project

The Coalition argues that the Commission did not adequately analyze the cumulative impacts of the Atlantic Bridge and Access Northeast Projects.[269] This is incorrect. As explained above, the Commission is not required to analyze unforeseeable or speculative impacts.[270] Due to its early stage of development, the Access Northeast Project's key contours (e.g., size, number and location of affected facilities, timing) remain ill-defined and its impacts cannot be meaningfully analyzed.[271] Indeed, "the specific details about the Access Northeast Project are not fully developed and no application has been filed."[272] Nevertheless, the EA's cumulative impacts analysis here "includes portions of the Access Northeast Project that are within the same geographic scope as the Atlantic Bridge Project and reflecting information that was publically available at the time the EA was published."[273] This is all that the Commission was required to do – it was not required to speculate about uncertain or unforeseeable impacts.[274]

[268] EA at 2-123 – 2-144.
[269] Coalition Request at 29.
[270] *See* text, *supra*, accompanying notes 258-264.
[271] *See* text, *supra*, accompanying notes 76-84.
[272] Certificate Order at P. 108.
[273] *Id*.
[274] *See, e.g.*, *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003).

The Coalition makes several specific challenges to the cumulative impacts analysis. First, the Coalition asserts that the Commission incorrectly concludes that there are no cumulative impacts on air from the Access Northeast's proposed expansion at the Weymouth Compressor Station.[275] As is explained in depth below, the Commission's cumulative air impacts analysis is more than adequate.[276] Second, the Coalition asserts that the Commission's conclusions with respect to cumulative impacts are generally conclusory.[277] The Coalition provides no specific supporting citations or authority for this statement, but instead simply cites generally to the cumulative impacts section of the EA.[278] As explained above and in the sections to follow, the Commission's cumulative impacts analysis meets its obligations under NEPA.[279] Third, the Coalition argues that the Commission improperly assumes that permits will guard against cumulative impacts.[280] The Coalition asserts that this undermines the purpose of the cumulative impacts section, which is intended to capture those impacts that are generally excluded from the permitting process.[281] The Coalition asserts, for example, that the Commission cannot rely on the fact that Atlantic Bridge and Access Northeast Projects will obtain air permits, in concluding that there will be no significant cumulative impacts from these projects on air.[282] This argument is incorrect because it mischaracterizes the Commission's analysis and misunderstands the Commission's obligations under NEPA. The Commission's analysis did not rely solely on compliance with federal permits. With respect to air, for example, the Commission analyzed air modeling that took into account emissions from both Atlantic

[275] Coalition Request at 31.
[276] *See* text, *infra*, accompanying notes 336-373.
[277] Coalition Request at 31.
[278] *Id*.
[279] *See* text, *supra*, accompanying notes 268-269; *see also* text, *infra*, accompanying notes 288-404 (demonstrating that the Commission's cumulative impacts analysis is adequate),
[280] Coalition Request at 31.
[281] Coalition Request at 31.
[282] *Id* .

Bridge *and* Access Northeast, noting that these *cumulative* emissions would not lead to violations of ambient air quality standards.[283] The Commission further noted that federal and local permitting schemes would ensure that the Projects continued to comply with those standards in the future.[284] This is entirely proper under NEPA, under which agencies may rely on compliance with federal regulations and permits to support their conclusions regarding the significance of a project's impacts.[285]

b. The Commission took a sufficiently hard look at the cumulative impacts of the Project on geology and soil.

The Town of Weymouth asserts that the Commission failed to adequately assess whether the construction schedules of the Atlantic Bridge, Access Northeast, and Fore River Bridge Replacement Projects will cumulatively increase the likelihood of a release of hazardous materials.[286] This argument is incorrect and based on a misunderstanding of the Commission's NEPA obligations.

First, as the Town notes, the Commission considered the possibility that "hazardous materials or contaminated soils [would] be encountered during construction" and concluded that such materials "would be disposed of at a fully licensed and permitted disposal facilities in accordance with applicable state and federal laws and regulations."[287] The Commission also reviewed the Project's '*Unexpected Contamination Encounter Procedure'* and found it acceptable, noting that that if such materials were encountered, the Project would "isolate the contaminated area, notify the appropriate agencies, gather information, and monitor hazardous

[283] EA at 2-97, 2-140 (Air modeling for Atlantic Bridge includes "cumulative air modeling for the two projects."); *see also* text, *infra*, accompanying notes 336-373.
[284] EA at 2-140.
[285] *See* text, *supra*, accompanying notes 136-139.
[286] Weymouth Request at 53.
[287] EA at 2-131.

conditions, if possible."[288] Further, the Commission noted that the effects "on geology and soil would be highly localized" and would be minimized by state and local erosion control requirements.[289] Given the limited impacts the project would have on geology and soils, the Commission's discussion of the risks surrounding a release of hazardous materials was more than adequate.[290]

Second, as explained above, the Access Northeast project is not a reasonably foreseeable action[291] and the Commission was not required to consider the cumulative impacts of Access Northeast on geology and soils.[292] Further, even "assum[ing] that the Applicants file an application [for Access Northeast]" at some point in the future and "that project is [eventually] approved," "the disturbed areas associated with the Atlantic Bridge Project would be restored prior to any start of the ANE project construction."[293] Nevertheless, the Commission considered the cumulative impacts of Access Northeast, noting that the impacts would be "short-term and localized."[294] Thus, the Commission properly concluded that there "would be no significant cumulative impact on geology and soils."[295]

c. The Commission took a sufficiently hard look at the cumulative impacts on waterbodies, groundwater, and aquatic resources.

The Town of Weymouth also asserts that the Commission failed to adequately assess the cumulative impacts on surface water quality and aquatic resources. This is incorrect.

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[288] *Id.* at 2-8.
[289] *Id.* at 2-131.
[290] CEQ Cumulative Effects Analysis at 3 (the analysis of the impacts should be proportional "to the magnitude of the environmental impacts of a proposed action.").
[291] *See* text, *supra*, accompanying notes 76-84.
[292] *City of Shoreacres*, 420 F.3d at 453 (agencies need not consider speculative impacts).
[293] EA at 2-131.
[294] *Id*.
[295] *Id*.

With respect to surface water resources, the EA identifies the other projects located within the Project's geographic scope that would directly impact surface waters.[296] The EA then identifies the "greatest potential impacts" on "surface waters," which include "an increase in sediment loading to surface waters and an increase in internal sediment loading due to channel/floodplain instability as a result of a change in erosion/deposition patterns."[297] Further, the Commission concludes that "cumulative impacts on surface waters of other projects . . . would be adequately minimized by the implementation of required erosion and stormwater measures."[298]

The Town takes issue, however, with the Commission's statement that "the level of impact [of sediment loading] would depend on precipitation events, sediment loads, stream area/velocity, channel integrity, bed material, and the proposed construction method."[299] The Town asserts that this is "plainly insufficient."[300] Not so. As explained above, the Commission is not required to analyze "speculative impacts" or "to do the impractical."[301] Analyzing the exact amount of sediment loading that could potentially occur in response to hypothetical future precipitation events would require the Commission to speculate as to the weather and other variables. Further, such analysis would not be proportional to the "magnitude of the environmental impacts of [the] proposed action."[302] The Commission's analysis of cumulative impacts on surface waters was therefore adequate.

[296] *Id*. (identifying the AIM and Access Northeast projects as projects within Atlantic Bridge's scope that would directly impact streams).
[297] *Id*.
[298] *Id*.
[299] Weymouth Request at 54.
[300] Weymouth Request at 54.
[301] *See* text, *supra*, accompanying notes 258-264.
[302] CEQ Cumulative Effects Analysis at 3.

With respect to aquatic resources, the Town argues that the Commission improperly relied on compliance with federal regulatory programs to conclude that the impacts to aquatic resources would be mitigated or avoided.[303] This argument is misplaced. As explained above, agencies may rely on compliance with federal regulations to conclude that impacts will be insignificant.[304]

Finally, the Town asserts that the Commission inadequately considered the impacts from horizontal directional drilling associated with the Access Northeast project, which the Town asserts should be analyzed in combination with the impacts from Atlantic Bridge and the Fore River Bridge Replacement Project.[305] This mischaracterizes the Commission's analysis and misunderstands the Commission's obligations under NEPA. As stated above, the Commission was not obligated to analyze impacts from the Access Northeast Project, which is not reasonably foreseeable. Nevertheless, the Commission considered potential cumulative impacts from the Access Northeast project, including the fact that Access Northeast may cross some waterbodies "using the HDD construction method."[306] The Commission noted that impacts from Access Northeast "would be minimized through the implementation of the Applicant's Erosion & Sediment Control Plan, [Spill Prevention Control and Countermeasure Plan], and site-specific crossing plans as required by FERC and other agencies." Further, the "potential for cumulative impacts would also be minimized due to the short duration of the proposed in stream activities and the 1 year separation in time between the construction schedules of the Atlantic Bridge and the AIM and ANE Projects."[307]

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[303] Weymouth Request at 54.
[304] *See*, text, *supra*, accompanying notes 136-139.
[305] Weymouth Request at 55.
[306] EA at 2-131.
[307] *Id.* at 2-132. The Town once again takes issue with the FERC's reliance on compliance with federal regulations to conclude that impacts will be mitigated. Weymouth Request at 55. However, as explained above, the

d. The Commission took a sufficiently hard look at the cumulative impacts of the Project on vegetation, wildlife, habitat and protected species.

The Town next argues that the Commission wrongly concluded that there was insufficient information on the Access Northeast Project to assess its impacts on vegetation, wildlife, habitat, and protected species.[308] The Town asserts that the Commission should have been able to assess the "acre[age] of vegetation disturbance" because Algonquin has "filed a series of maps depicting the exact location of the ANE pipeline and associated facilities."[309] But these maps do not mean that the impacts of the Access Northeast Project are reasonably foreseeable. As explained above, the Access Northeast Project is still in the planning and development stage and its future is therefore highly uncertain.[310] Like other interstate pipeline upgrades, Access Northeast is subject to "change in design, cost, scope, and impact over the years required for development."[311] In other words, the maps filed by Algonquin do not render the exact vegetation disturbance impacts of Access Northeast foreseeable. The Commission was therefore not required to consider that project's impacts on vegetation.

e. The Commission took a sufficiently hard look at the cumulative impacts of the Project on land use.

Similarly, the Town asserts that the Commission did not sufficiently analyze the cumulative land use impacts from the Access Northeast Project's expansion of the Weymouth Compressor Station.[312] This challenge is baseless. The Commission was not required to consider the cumulative impacts on land use that would result from the proposed expansion of the

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Commission may rely on the existence of federal regulatory schemes administered by other agencies to conclude that impacts will be insignificant. *See*, text, *supra*, accompanying notes 136-139.

[308] Weymouth Request at 55.

[309] *Id*.

[310] *See* text, *supra*, accompanying notes 76-84.

[311] *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950. F.2d 1129, 1137 (5th Cir. 1992).

[312] Weymouth Request at 56.

compressor station because the specific expansion of the compressor station under the Access Northeast Project is not reasonably foreseeable.[313] Again, as a project in the planning and development stage, Access Northeast is subject to "change in design, cost, shape, and impact[s] . . . ."[314]

f. The Commission took a sufficiently hard look at the cumulative impacts of the Project on recreational areas.

The Town also argues that the Commission did not adequately analyze the cumulative impacts of the Atlantic Bridge, Access Northeast, and Fore River Bridge Replacement Projects on the Kings Cove and Lovells Grove conservation parcels.[315] With respect to Lovells Grove, the Town asserts that the Commission wrongly failed to include "any analysis of the cumulative impacts on the Lovells Grove conservation area" despite its location within the geographic zone identified for cumulative land-related impacts analysis.[316] This concern is misplaced. The EA identified the two recreational areas that would be affected by both the Atlantic Bridge Project and either the AIM Project or the Access Northeast Project in the same time-period and adequately analyzed the cumulative impacts on those areas.[317] Lovells Grove was not identified as such an area and the Town has provided no evidence that Lovells Grove would be impacted by both Atlantic Bridge and either the AIM Project or Access Northeast Project.[318] In any event, the Commission does consider potential environmental effects associated with the Atlantic Bridge project on Lovells Grove, including the noise, dust and visual impacts that would occur

[313] *See* text, *supra*, accompanying notes 76-84.
[314] *Barton Creek Ass'n*, 950 F.2d at 1137.
[315] Weymouth Request at 57.
[316] *Id.* at 57-58.
[317] EA at 2-135.
[318] Weymouth Request at 57-58.

during construction,[319] as well as noise impacts that would occur during the Project's operation.[320]

With respect to Kings Cove, the Town asserts that the Commission wrongly relied on the Project's compliance with the Erosion and Sediment Control Plan to conclude that impacts on Kings Cove would be sufficiently minimized.[321] This argument is misplaced. The Erosion and Sediment Control Plan is based on mitigation contained in the Commission's Upland Erosion Control, Revegetation, and Maintenance Plan, the Commission's Wetland and Waterbody Construction and Mitigation Procedures, as well as guidelines from the U.S. Army Corps of Engineers and Fish and Wildlife.[322] The Commission reviewed this plan and determined that the Applicants' compliance with the Plan's requirements would reduce the impacts of the Project.[323] This conclusion was proper. As explained above, the Commission may rely on the expertise of other agencies, and the existence of regulatory schemes administered by those agencies, to conclude that impacts will be insignificant.[324] The Town further argues out that even if the Commission could rely on the plan to address dust and construction impacts, the plan would not address (i.e., mitigate) the cumulative noise impacts.[325] However, this complaint misunderstands the Commission's obligations under NEPA. While NEPA requires the Commission to consider the impacts on noise, it does not mandate a particular outcome or the adoption of mitigation measures.[326] Here the Commission considered and acknowledged the cumulative impacts on

[319] EA at 2-65.
[320] Certificate Order at P. 220.
[321] Weymouth Request at 58.
[322] EA at 1-14.
[323] *Id.* at 1-14, 2-135.
[324] *See*, text, *supra*, accompanying notes 136-139.
[325] Weymouth Request at 58.
[326] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If 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.").

noise, noting that "construction and operation activities associated with [Atlantic Bridge and Access Northeast] . . . would result in noise . . . impacts" and that these impacts "at Kings Cove parcel could be prolonged if both projects are approved."[327] Consideration of these impacts is all that NEPA requires.

g. The Commission took a sufficiently hard look at the cumulative impacts of the Project on traffic.

The Town also asserts that the Commission did not adequately address cumulative impacts on traffic.[328] First, the Town argues that the Commission mischaracterized the nature of the cumulative impacts on traffic when it noted that cumulative impacts on traffic will not occur unless the construction schedules for the Fore River Bridge Replacement Project, the Atlantic Bridge Project, and the Access Northeast Project overlap.[329] This is wrong, the Town asserts, because "[l]iving through year after year of continuous construction related impacts is itself a cumulative impact."[330] This argument fails. Cumulative impacts are those "impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ."[331] The Commission could reasonably conclude that this definition does not include traffic impacts that occur at different points in time; a traffic jam that occurs in January does not amplify the impacts of a traffic jam that occurs in February. The Commission has analyzed the cumulative traffic impacts here, noting that "[c]onstruction of the proposed Project would have a temporary impact on road traffic in some areas and could contribute to cumulative traffic, parking, and transit impacts if other projects are

[327] EA at 2-135.
[328] Weymouth Request at 60.
[329] *Id*.
[330] *Id*.
[331] 40 C.F.R. § 1508.7.

scheduled to take place at the same time and in the same area as the Atlantic Bridge Project."[332] The Commission also acknowledges that "if the ANE Project were to be approved and constructed as currently proposed it would prolong the traffic related impacts at the Weymouth Compressor Station."[333] The Commission thus reasonably considered the possibility that traffic will continue over time as other projects are in construction.[334]

h. The Commission took a sufficiently hard look at the cumulative impacts of the Project on air.

Both the Town of Weymouth and the Haydens allege that the Commission did not adequately analyze the cumulative impacts on air that would result from the Weymouth Compressor Station.[335] These arguments are unfounded.

The Commission considered and adequately analyzed the cumulative air impacts that would result from the Weymouth Compressor Station.[336] As an initial matter, the Commission was not obligated to consider impacts from the Access Northeast project because its impacts are not reasonably foreseeable.[337] Nevertheless, the Commission's air quality modeling for the Atlantic Bridge project includes modeling for the Weymouth Compressor station expansion under Access Northeast based on current designs.[338] The air modeling for the Atlantic Bridge project therefore includes "cumulative air modeling for the two projects."[339] This modeling

[332] EA at 2-137.
[333] *Id.*
[334] *Id.*
[335] Weymouth Request at 638-68; Hayden Request at 43—45.
[336] EA at 2-140.
[337] *See* text, *supra*, accompanying notes 76-84.
[338] EA at 2-140.
[339] *Id.* at 2-140; *see also* Certificate Order at P 110 ("Algonquin performed cumulative air quality modeling that included the expansions to the Weymouth and Chaplin compressor stations contemplated by the Access Northeast Project.").

showed that the Weymouth compressor station "would not contribute to a violation of the NAAQS." [340]

The Commission also performed analysis on the exposure from Hazardous Air Pollutants ("HAPs") and Volatile Organic Compounds ("VOCs"), concluding that resulting health risks would not be significant.[341] The Commission explains that the CAA establishes thresholds for facilities to be considered a "major source" of HAP emissions that is subject to additional limitations, air permitting, and review.[342] Noting that the Weymouth Compressor Station will emit only 3.2 percent of the emissions required to meet the major source threshold, the Commission concluded that the HAP emissions are not significant.[343] As a point of comparison, the Commission also noted that studies of a New Market Compressor Station emitting at *37 percent* of the major source threshold found that the facility's emissions fell well below a level of health concern.[344] This comparison, along with the small "scale of emissions in relation to the major source thresholds," was "sufficient to determine that [HAP emissions] impacts are not significant for the purposes of NEPA."[345]

Moreover, the Commission noted that both projects would be subject to federal and state regulations and permitting regimes that protect ambient air quality.[346] Under those regulatory schemes, the relevant expert agencies would make determinations that (1) "the cumulative effect of both projects would not cause or contribute to an exceedance of [ambient air quality standards]," (2) "the appropriate level of [air emissions] control[s] would be installed," and (3) "the compressor stations would be in compliance with all applicable federal and state air quality

[340] EA at 2-97.
[341] *Id*.
[342] Certificate Order at P 206.
[343] *Id*.
[344] *Id.* at P 207. This facility was a compressor station for the New Market Project.
[345] *Id*.
[346] EA at 2-140.

regulations and permit conditions."[347] Based on the Commission's own modeling and these regulatory requirements, the Commission concluded that there would not be any significant cumulative impacts on regional air quality.[348] The analysis of the proposed expansion of the Weymouth Compressor Station under Access Northeast was therefore robust and amply meets the Commission's obligations under NEPA.

The Town disagrees on three separate grounds. First, the Town argues first that the EA does not demonstrate that the Access Northeast Project's addition to the compressor station would not result in a violation of the federal and state ambient air quality standards.[349] The Town asserts that the emissions from the Access Northeast addition were not included in the air modeling study for the Atlantic Bridge project.[350] This is incorrect. The EA states clearly that "modeling based on the current design [of Access Northeast's addition to the Weymouth Station] has been included as part of the air quality modeling for Atlantic Bridge, thereby completing cumulative air quality modeling for the two projects."[351] Moreover, in addition to the air modeling, the Commission also noted that the Projects would necessarily meet all relevant ambient air quality standards as required by state and federal regulations.[352] On this basis, the Commission concluded that "there would not be any significant cumulative impacts on regional air quality.[353] The Town does not challenge this assertion. Nor could it – courts have made clear that agencies may rely on compliance with ambient air quality standards, which by statute are set

[347] EA at 2-140.
[348] *Id*.
[349] Weymouth Request at 63.
[350] *Id*.
[351] EA at 2-140.
[352] *Id*.
[353] *Id*.

at a level requisite to protect public health and welfare, to conclude that there will be no significant increase in emissions.[354]

Second, the Town asserts that the Weymouth Compressor Station's HAP emissions will be higher than the Commission's modeling demonstrates because the modeling does not take into account the emissions that would result from the Access Northeast expansion. Again, this is incorrect. As just noted, the Access Northeast expansion was "included as part of the air modeling for Atlantic Bridge."[355]

Third, the Town argues that the Commission wrongly relies on the fact that the Weymouth Compressor Station will not exceed "major source" thresholds for HAP emissions, in concluding that those emissions are not significant.[356] The Town concedes that the HAP emissions do not exceed "major source" thresholds,[357] but argues that additional emissions from Access Northeast's expansion will likely cause the station to violate at least three of Massachusetts's ambient air quality standards.[358] Again, this argument is misplaced because the emissions from the Access Northeast expansion *were*, in fact, included in the air modeling for Atlantic Bridge.[359]

The Haydens also find fault with the Commission's analysis of the impacts of HAP emissions, asserting three separate arguments. First, the Haydens argue that the Commission should have analyzed those impacts together with the impacts of HAP emissions from "other industry in the area," speculating that "the additional HAPs from the project when added to the

[354] *See, e.g.*, *WildEarth Guardians v. Jewell*, 738 F.3d 298, 311 (D.C. Cir. 2013) (affirming use of ambient standards as "proxies" in projecting ozone emissions); *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 268 (D.C. Cir. 1988) (upholding agency's reliance on the "implied presumption . . . that continued compliance with the Clean Air Act emission standards means there will be no significant increase in emissions.").
[355] EA at 2-140.
[356] Weymouth Request at 66.
[357] *Id*.
[358] *Id*.
[359] EA at 2-140.

current HAPs emitted from the other infrastructure [in the area] . . . may be the straw that breaks the back of the environmental camel."[360] This argument is unfounded. Hayden provides no evidence or data to support this concern.[361] The Commission, in contrast, has properly relied on the New Market Compressor Station studies, as well as the CAA's "major source" threshold for HAP emissions, to support its conclusion that HAP emissions are not significant.[362] NEPA does not require more. As the Commission noted in its Order, "performing a detailed modeling analysis for facilities with such small HAP emissions . . . is overly burdensome and unnecessary."[363] Such analysis is therefore unnecessary, as NEPA does not require analysis that is "so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible."[364]

Second, the Haydens argue that the study of the New Market facility did not provide a helpful point of comparison because the New Market facility was located on a larger property than the proposed Weymouth site.[365] The Commission sufficiently addressed these concerns in the Order, noting that the Weymouth site is surrounded by water on three sides.[366] The Haydens counter that the comparison is still problematic because one side of the Weymouth site is "not surrounded by water."[367] To the extent this argument is meant to question the Commission's conclusion that HAP emissions are insignificant, this concern is ill-founded. As the Commission notes, the emission levels of the Weymouth site are an order of magnitude lower than those of the New Market facility (3.2% of the Major Source threshold, as compared to 37%) and the New

[360] Hayden Request at 43 (internal citations omitted).
[361] *Id*.
[362] *See, e.g., Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d at 268 (upholding agency's reliance on the "implied presumption . . . that continued compliance with the Clean Air Act emission standards means there will be no significant increase in emissions.").
[363] Certificate Order at P 207.
[364] *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976).
[365] Hayden Request at 44.
[366] Certificate Order at P 209.
[367] *Id*.

Market facility study was itself overly conservative in its assumptions about risk to individuals.[368] Further, the New Market facility study was not the only basis on which the Commission concluded that HAP emissions were insignificant – it also relied on the scale of HAP emissions relative to the major source threshold, as well as the regulatory oversight for HAPs under the CAA.[369]

Finally, the Haydens assert that the Commission should have conducted a health impact assessment that considered the emissions that would result from Access Northeast's proposed expansion of Weymouth Compressor Station.[370] Again, these emissions were taken into account -- the design of the compressor station for the Access Northeast expansion was "included as part of the air modeling for Atlantic Bridge."[371] And the existing health impact analyses were "developed based on the potential operation of the proposed equipment by Algonquin."[372]

i. The Commission took a sufficiently hard look at the cumulative impacts of the Project on noise.

The Town of Weymouth and the Haydens both assert that the Commission did not adequately consider the cumulative impacts on noise from Access Northeast's proposed expansion of the Weymouth Compressor Station.[373] This is incorrect. The Commission considered noise impacts from Access Northeast, "anticipat[ing] that the ANE Project would result in noise impacts similar to the Atlantic Bridge,"[374] which "could increase existing noise levels at some [noise sensitive areas ("NSAs")] between .1 and 2.5 dBA."[375] Such "increases

[368] *Id.* at P 206.
[369] *Id.* at PP 206-207.
[370] Hayden Request at 44.
[371] EA at 2-140.
[372] Certificate Order at P 203.
[373] Hayden Request at 40-42; Weymouth Request at 68-70.
[374] EA at 2-141.
[375] *Id.* at 2-140.

would be imperceptible to the human ear."[376] The Commission further noted that if the Access Northeast Project were constructed, Algonquin "would be required . . . to propose and apply appropriate mitigation . . . to ensure that the total noise from the compressor stations at NSAs . . . stays below [the Commission's noise requirement]."[377] The Commission thus appropriately concluded that it did "not anticipate significant noise impacts associated with construction and operation of the Atlantic Bridge project, when considered together with [Access Northeast]."[378]

The Haydens make multiple specific arguments in challenging the Commission's cumulative impacts analysis. First, the Haydens assert that the Commission cannot support its finding of no significant impact because the Project will cause two nearby NSAs to exceed the Commission's noise limitation.[379] To begin, this argument does not appear to relate to cumulative impacts. In any event, however understood, it is incorrect. The Commission's conclusion that there will be no significant impact is reasonable and supported by its analysis. As the Commission explained in the EA, the Project will only increase noise levels at NSAs "between .1 and 2.5 dBA," which "would be imperceptible to the human ear."[380] This conclusion, combined with the Applicants' proposed mitigation measures, and the Commission's additional recommendations, led the Commission to conclude that the Project would not result in significant impacts on residents.[381]

Second, the Haydens, as well as the Town, argue that the cumulative impacts analysis is not adequate because the Commission's noise survey for Atlantic Bridge did not include the

[376] *Id*.
[377] *Id*.
[378] *Id*.
[379] Hayden Request at 40.
[380] EA at 2-140.
[381] *Id.* at 2-141.

additional compression that may be added by the Access Northeast Project.[382] This argument misunderstands the Commission's NEPA obligations. The Commission was not required to quantify the noise impacts that would result from the Access Northeast expansion of the compressor station because the Access Northeast Project and its impacts are not "reasonably foreseeable."[383] Moreover, the Commission did consider the noise impacts from the Access Northeast Project, "anticipat[ing] that the ANE Project would result in noise impacts similar to the Atlantic Bridge,"[384] which are "imperceptible to the human ear."[385] This level of discussion more than satisfies NEPA given the speculative nature of Access Northeast's impacts, as well as the insignificance of Atlantic Bridge's own noise impacts. As explained above, the analysis of the impacts should be proportional "to the magnitude of the environmental impacts of a proposed action."[386]

Finally, the Haydens appear to question the Commission's conclusion by suggesting that the added noise from Access Northeast would push the "imperceptible" change in noise from Atlantic Bridge to a perceptible level.[387] This argument misunderstands how multiple noise sources change the noise level. The Commission explains that "[m]ultiple noise sources are added logarithmically, and noise attenuates logarithmically with distance."[388] In other words, if an area is already noisy, the addition of noise producing equipment causes noise to grow very slowly. Thus, the addition of noise impacts by Access Northeast, which will be similar to the "imperceptible" noise impacts from Atlantic Bridge, will not lead to significant cumulative

[382] Hayden Request at 40.
[383] *See* text, *supra*, accompanying notes 76-84.
[384] EA at 2-141.
[385] *Id.* at 2-140.
[386] 2005 CEQ Cumulative Effects Guidance at 3.
[387] Hayden Request at 42
[388] Certificate Order at P 222.

impacts.[389] This conclusion is further supported by the fact that, if approved, Access Northeast will be required to implement noise mitigation measures.[390]

j. The Commission adequately considered the cumulative impacts of the Marcellus Shale development.

The Coalition argues that the Commission's analysis of cumulative impacts resulting from natural gas production in the Marcellus shale is inadequate.[391] This is incorrect. As the Commission has consistently found, "environmental effects resulting from natural gas production are generally . . . [not] reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations."[392] This is so because "the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline."[393] The Commission has explained that a meaningful analysis would require "detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depend on the applicable regulations in the various states."[394] Such information is not available to the Commission[395] and it is therefore not obligated to analyze such impacts under NEPA. [396]

[389] EA at 2-141.
[390] *Id*.
[391] Coalition Request at 32.
[392] *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, 112 (2016); *see also 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).
[393] *Id.* at P. 113.
[394] *Id.*
[395] *Id.*
[396] *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010) (no NEPA violation where agency omitted natural gas production projects from cumulative impacts analysis, despite publication of NEPA notices for those projects).

The Commission nevertheless provided analyses on the upper bound estimate of upstream impacts in the Marcellus Shale.[397] To do so, the Commission estimated impacts associated with production wells that could be required to provide 100 percent of the volume of gas to be transported by the Project. The estimate made several highly conservative assumptions, assuming that the maximum capacity would be transported 365 days a year and that 100 percent of the project's capacity would be produced in the Marcellus Shale.[398] Assuming that between 290 and 560 wells would be required over the life-span of the project, the Commission arrived at upper bound estimates for (1) additional land per year impacted by drilling, (2) additional water used in well-production, and (3) certain GHG emissions.[399]

The Coalition asserts that this analysis is unsupported by substantial evidence because, as the Commission notes in its Order, the estimates are "generic in nature and reflect a significant amount of uncertainty."[400] This argument mischaracterizes the Commission's analysis and misunderstands its obligations under NEPA. As just explained above, the Commission simply does not have access to the necessary information to achieve greater certainty.[401] The Commission's analysis therefore reflects a reasonable effort to deal with "uncertainty," not because the Commission failed to analyze available data, but because production-related impacts are not foreseeable. This does not render the Commission's analysis in any way deficient. Indeed, because the Commission was not obligated to undertake this analysis at all, the Coalition's attempt to flyspeck its methodological approach falls flat.[402]

[397] Certificate Order at P 117.
[398] *Id* at P 118.
[399] *Id.* at PP 118-20
[400] Coalition Request at 32.
[401] *See* text, *supra*, accompanying notes 392-397.
[402] *See id*.

5. The Commission appropriately limited the scope of its NEPA to include only reasonable alternatives to the Atlantic Bridge Project.

a. The Commission's decision to evaluate the Atlantic Bridge Project individually does not limit its consideration of alternatives.

Requestors argue that separating the Atlantic Bridge from Access Northeast projects forecloses the opportunity to consider alternatives in a single EIS.[403] This argument is fundamentally flawed. Once an agency determines the proper scope of a NEPA document in terms of the proposed action(s) to be addressed, it must evaluate reasonable alternatives to the proposed action. As explained above, the Commission properly limited the scope of actions in the Atlantic Bridge Project's EA only to that Project, and appropriately explained why neither the AIM Project nor the Access Northeast Project needed to be considered in the same NEPA document.[404] Once the scope has been determined, NEPA requires an evaluation of the reasonable alternatives to the proposed action – that is, alternative courses of action that would meet the purpose and need of the proposed action.[405] There is no requirement under NEPA to evaluate alternatives to actions that are outside the proper scope of the NEPA document. Requestors provide no support for the assertion that the EA for the Atlantic Bridge Project was required to address alternatives that did not meet the purpose and need for the Atlantic Bridge Project, nor can they. The Commission considered reasonable alternatives to the proposed Project. NEPA requires no more.

[403] Hayden Request at 31-32.
[404] *See supra* Section B(2); 40 C.F.R. § 1508.25.
[405] 40 C.F.R. §§ 1508.25, 1502.14.

b. The Commission's consideration of alternatives to the proposed Weymouth Compressor Station was adequate.

The Town of Weymouth and the Haydens assert that the Commission did not adequately consider the alternative sites for the Weymouth Compressor Station.[406] This is incorrect. The rule of reason governs the adequacy of the alternatives discussion.[407] Under this "deferential standard,"[408] the agency's discussion is adequate "so long as the alternatives are reasonable and the agency discusses them in reasonable detail."[409] Moreover, the "obligation to discuss alternatives [in an EA] is less than in an EIS."[410] Indeed, "the rigor with which an agency must consider alternatives is greater when the agency determines that an EIS is required for a particular federal action."[411] Thus, "in rejecting any alternatives [in an Environmental Assessment], the agency must only include brief discussions . . . of alternatives as required by 42 U.S.C. § 4332(2)(E) [and] of the environmental impacts of the proposed action and alternatives . . ."[412]

Here, the Commission's alternatives analysis amply fulfills its obligations under NEPA. The analysis of alternatives was both adequate and reasonable, exploring each alternative location for the Weymouth Compressor Station in sufficient detail.[413] The EA evaluates seven site alternatives for the Weymouth Compressor Station based on several factors. These include existing land uses, environmental impacts, availability of the property, the resources to be affected by development of the site, the ability to meet the Project's purpose and need, additional

[406] Weymouth Request at 22-29; Hayden Request at 45-51.
[407] *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).
[408] *Id.*
[409] *Citizens Against Burlington, Inc.*, 938 F.2d at 195.
[410] *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013).
[411] *Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. F.E.R.C.*, 143 F.3d 165, 172 (4th Cir.1998); *see also Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir.1994); *Friends of the Ompompanoosuc v. F.E.R.C.*, 968 F.2d 1549, 1558 (2d Cir.1992).
[412] *Native Ecosystems Council v. U.S.F.S.*, 428 F.3d 1233, 1246 (9th Cir. 2005).
[413] *See* EA at 3-16 – 3-23.

infrastructure required to develop the site, proximity of residences and schools, and site access.[414]

On rehearing, Requesters raise five specific complaints with respect to the adequacy of the Commission's alternatives analysis. First, the Town and the Haydens both argue that the Commission should have considered the Access Northeast Project when evaluating alternatives.[415] The Town argues specifically, that the Commission based its assessment of the Franklin alternative site on inaccurate data, focusing on the EA's statement that the Franklin site would require 30.8 miles of 30-inch diameter discharge pipeline.[416] The Town asserts that most of this pipeline will be built as part of the Access Northeast Project and will therefore occur whether or not the Franklin alternative site is selected.[417] As a result, the Town argues that the Commission selected the Weymouth site over the Franklin site based on an inaccurate comparison of their environmental impacts.[418]

This argument misunderstands the Commission's obligations under NEPA and mischaracterizes the nature of the Access Northeast Project. The Commission was not required to assume that the pipeline infrastructure necessary for the Franklin site will be built as part of Access Northeast. NEPA does not require the Commission to evaluate impacts that are speculative or to take into account future projects that are not reasonably foreseeable.[419] As the Commission explains in its Order, the future of the Access Northeast project is uncertain and "it is not reasonably foreseeable to assume that this infrastructure will be built under the Access

[414] *Id*.
[415] Weymouth Request at 24; Hayden Request at 46-50.
[416] Weymouth Request at 24.
[417] *Id*.
[418] *Id.* at 25.
[419] *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (an agency need only consider impacts that are "reasonably foreseeable").

Northeast Project."[420] Simply put, because the Access Northeast Project is being reevaluated, it is not known at this time what facilities will be needed to support the re-configured project.

Second, the Town argues that the EA "failed to compare the human impacts of siting the compressor station in the three communities."[421] This is incorrect. As the Town itself points out, the EA compared the number of residential structures located near each alternative site.[422] The EA also compared the number of schools, in-street construction areas, street and rail crossings by the pipeline, and recreational area crossings for each alternative.[423] To the extent the Town suggests the EA did not 'consider human impacts' because there are more residential structures located near the chosen site location than the alternatives, this misunderstands the Commission's NEPA obligations. The Commission is required to consider reasonable alternatives and to "discuss[] them in reasonable detail."[424] NEPA "does not mandate particular results, but simply prescribes the necessary process."[425] NEPA imposed no obligation on the Commission to choose an alternative site simply because there were more residences located near the Weymouth site than the alternatives.

Third, the Town argues that the EA did not meaningfully compare the safety risks of the Weymouth site with the Franklin and Holbrook alternatives, noting several aspects of the site that Weymouth presumably considers unsafe.[426] The Commission was not required to compare the safety risks of the alternatives. NEPA only requires an agency to consider a reasonable range of alternatives in "reasonable detail" in order to meaningfully inform the agency's choice of

[420] Certificate Order at P 248; *see also* text *supra*, accompanying notes 76-84 (explaining that the Access Northeast Project has an uncertain future and may change in design, scope, cost, and impact).
[421] Weymouth Request at 25.
[422] EA at 3-19 (Table 3.5.1.1).
[423] *Id.*
[424] *Citizens Against Burlington, Inc.*, 938 F.2d at 196.
[425] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)
[426] Weymouth Request at 26.

alternatives. Here, the Commission did discuss the alternatives in reasonable detail, evaluating seven separate sites for their existing land uses, availability of the property, the resources to be affected by development of the site, the ability to meet the Project's purpose and need, additional infrastructure required to develop the site, proximity of residences and schools, and site access.[427] Considering the various safety risks of each alternative was not necessary; the Commission had reasonably concluded that the Weymouth site did not present significant safety risks[428] and was able to eliminate the other various alternatives on other grounds.[429]

Fourth, the Town argues that the EA did not take a hard look at the acquisition issues associated with siting the compressor station in Weymouth.[430] Specifically, the Town argues that the Commission's analysis of alternatives was deficient because the Commission failed to consider the validity of Calpine Fore River Energy Center LLC's ("Calpine") transfer of the Weymouth site to Algonquin.[431] This is incorrect. The Commission need "only include brief discussions . . . of alternatives . . . [and their] environmental impacts."[432] It is not required to discuss 'acquisition issues' in the alternatives analysis. Moreover, the Town's concerns about the validity of the transfer are misplaced, as discussed below in Section E, *infra*.

Finally, the Town claims that "the evidence in the record demonstrates that siting the compressor station in the rural community of Franklin is far preferable to the . . . Town of Weymouth."[433] This is incorrect and misunderstands the Commission's NEPA obligations. First, the conclusion that Franklin is preferable is based, in part, on Weymouth's erroneous and

[427] EA at 3-16.
[428] *See* text, *supra*, accompanying notes 130-144.
[429] *See* EA at 3-16 – 3-24.
[430] Weymouth Request at 27.
[431] Weymouth Request at 27.
[432] *Native Ecosystems Council*, 428 F.3d at 1246.
[433] Weymouth Request at 22-23.

incomplete characterization of Franklin's environmental impacts.[434] As both the EA and the Order explain, the Commission evaluated a variety of factors before concluding that "the Weymouth site is preferable to the alternative sites evaluated."[435] Second, as noted above, while NEPA requires that appropriate alternatives be considered, it does not mandate that a particular alternative be chosen.[436] Indeed, an agency's discussion of alternatives will be upheld "so long as . . . the agency discusses them in reasonable detail."[437] The Commission's discussion of alternatives meets more than meets this burden.

6. FERC fulfilled its obligations to consider GHG emissions and climate change.

The Coalition argues that the Commission violated CEQ's final guidance on climate change and greenhouse gas ("GHG") emissions by (1) failing to quantify upstream and downstream GHG emissions that would allegedly result from the project and (2) by failing to consider how the project would related to Massachusetts's GHG emissions reductions goals.[438] This argument fails for several reasons.

a. The Commission had discretion with respect to the then-draft CEQ guidance on GHG emissions.

As the Coalition notes in its request for rehearing, CEQ's Guidance was finalized in August 2016.[439] The EA, which was published in May 2016, was therefore issued before the

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[434] *See* text *supra*, accompanying notes 419-421 (explaining that Weymouth underestimates Franklin's environmental impacts because Weymouth assumes that necessary pipeline will be built as part of the Access Northeast project).
[435] Certificate Order at P 245; *see also* EA at 3-16 – 3-23.
[436] *See Robertson*, 490 U.S. at 350 ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If 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.").
[437] *Citizens Against Burlington, Inc.*, 938 F.2d at 196.
[438] Coalition Request at 36-37.
[439] *Id.* at 36; *see also* CEQ Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 1, 2016) ("CEQ Guidance on GHG Analysis"), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

guidance was final. Moreover, as the CEQ makes clear, the document (even in final form) is merely guidance, "not a rule or regulation" and "not legally enforceable."[440] The CEQ Guidance expressly advises agencies to "exercise judgment" when considering whether to apply the guidance to a NEPA process that began (but was ongoing) before the CEQ Guidance was finalized. Thus, the Coalition's argument that the Commission's decision to deviate from a facially non-binding guidance document somehow rises to the level of legal deficiency is incorrect.

Moreover, the CEQ Guidance recognizes that agencies have substantial discretion in tailoring their own NEPA processes.[441] Indeed, the document notes that the "recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances."[442] The CEQ Guidance also notes that the "rule of reason" inherent in NEPA and in CEQ's NEPA regulations should guide an agency in determining how to consider an environmental effect. Relying on its experience and expertise, an agency has broad leeway to take into account the usefulness of information to the decision-making process and the extent of the anticipated environmental consequences when applying the "rule of reason."[443] The rehearing requests provide no reason to conclude that an agency would be required to comply with (facially non-binding) guidance where the NEPA environmental review had *already concluded* (here, with issuance of the Environmental Assessment) before the Guidance was finalized.

[440] CEQ Guidance on GHG Analysis at 1-2 n.3.
[441] *Id.* at 3 ("Agencies have discretion in how they tailor their individual NEPA reviews to accommodate the approach outlined in this guidance.").
[442] *Id.* at 1, n.3.
[443] *Id.* at 6.

b. GHG emissions associated with natural gas development and consumption are not indirect effects of the project.

The Coalition relies on CEQ guidance to argue that the EA should have considered, as indirect effects, GHG emissions associated with upstream natural gas extraction and downstream activities such as burning gas for heat or power generation.[444] The Coalition argues further that the Commission was obligated under the CEQ Guidance to quantify these emissions unless the Commission could demonstrate that no tools exist for doing so.[445]

Those arguments fail because impacts related to the upstream production and the end use of natural gas, including alleged climate change impacts due to GHG emissions, are not reasonably foreseeable or causally linked to the Project's construction of facilities for transporting gas.[446] Moreover, NEPA only requires agencies to evaluate impacts, not emissions for their own sake, regardless of whether they have discernable impacts.[447] As the Commission has previously concluded, and the D.C. Circuit has upheld, there is no accepted scientific methodology for linking an individual project's specific GHG emissions cannot be linked to discernable climate change effects and thus analysis of such emissions as a proxy for the Atlantic Bridge Project's impacts.[448]

As the Supreme Court has explained, NEPA "requires a reasonably close causal relationship between the environmental effect and the alleged cause" for consideration of the

[444] Coalition Request at 36.
[445] *Id.*
[446] *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 112 (2016) (explaining that upstream production impacts are neither causally related nor reasonably foreseeable).
[447] *See, e.g.*, 40 C.F.R. § 1508.25(c) (Agencies shall consider "impacts, which may be: (1) direct; (2) indirect; (3) cumulative"); *id.* § 1502.9(a) ("The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action."); *id.* § 1507.2(a) (Agencies shall "fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking [sic] which may have an impact on the human environment").
[448] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

alleged impact.[449] This causation requirement has been analogized to the doctrine of proximate causation under tort law, which serves NEPA's purpose of focusing on impacts that are meaningful to the agency's analysis, not effects over which an agency has no control.[450] Here climate change impacts do not meet the proximate causation requirement because they result from GHG emitted from billions of global sources. Because global GHGs mix in the atmosphere before any climate change impacts occur, such impacts cannot be attributed to specific emissions or to any particular action.[451] Due to this lack of a reasonably close causal relationship, the Commission cannot control or regulate climate change through its authority under the NGA and analysis of such impacts would not be meaningful in the Commission's decision-making or required under NEPA.[452] In a recent order, the Commission agreed, holding that "there is no standard methodology to determine how a project's incremental contribution to GHG emissions would result in physical effects on the environment, either locally or globally."[453] The D.C. Circuit upheld that determination.[454]

c. The EA appropriately analyzes climate-related impacts.

Because climate change effects cannot be linked to GHG emissions associated with any single action, the EA properly analyzes climate-related impacts as part of its cumulative impacts discussion. The EA has properly done so by providing analysis of the cumulative projected

[449] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quotations and citations omitted).
[450] *Id.* at 767, 768.
[451] Although traditional air pollutants often have an identifiable "dose-response relationship" between the pollutant and its environmental effects, this is not true of GHGs. In other words, it is not scientifically possible to determine a relationship between specific GHG emissions and specific environmental effects, and an analysis of those effects is not required by NEPA. *See, e.g.*, *Envtl. Def. Fund v. Tenn. Val. Auth.*, 492 F.2d 466, 468 n.1 (6th Cir. 1974) ("[NEPA] . . . does not require . . . the impossible.").
[452] *Pub. Citizen*, 541 U.S. at 768.
[453] *Transcontinental Gas Pipe Line Co., LLC*, 149 FERC ¶ 61,258 at P 109 (2014); *see also Columbia Gas Transmission Co., LLC*, 153 FERC ¶ 61,064 at P 69; *Sabine Pass*, 151 FERC ¶ 61,253 at P 45.
[454] *Earthreports*, 828 F.3d at 956.

climate change impacts for the Northeast Region of the United States over the course of the Project's lifetime.[455]

The Coalition argues that this analysis of climate impacts is not adequate, presumably because the Commission did not evaluate the climate impacts resulting from the specific increase in GHG emissions caused by the Project.[456] However, as explained above, there is no accepted scientific methodology for linking climate change impacts to specific emissions associated with particular action.[457] Indeed, as the EA explained, in the same reasoning recently upheld by the D.C. Circuit, "there is no standard methodology to determine how a project's relatively small incremental contribution to GHGs would translate into physical effects on the global environment."[458] The Coalition does not identify any methodology to the contrary.

d. The Commission was not obligated to consider how the project interfered with Massachusetts's GHG emission reduction goals.

The Coalition also argues that the Commission improperly failed to discuss whether the Project will interfere with GHG emissions reduction targets established in Massachusetts' Global Warming Solutions Act ("GWSA").[459] The Coalition also asserts that the Commission "bypasse[d] consideration of Massachusetts' climate change goals" and concluded, without evidence or discussion, that its analysis of the Project's climate change implications was appropriate.[460] This is incorrect. The Commission explicitly considers, and discusses the Project's impacts on, Massachusetts' climate change goals in the EA and the Order.[461] The EA notes that the Project is consistent with the Massachusetts Executive Office of Energy and

[455] EA at 2-142.
[456] Coalition Request at 36.
[457] *See* text *supra* accompanying notes 451-455.
[458] EA at 2-143.
[459] Coalition Request at 37.
[460] Coalition Request at 37.
[461] EA at 2-143; Certificate Order at P 201.

Environmental Affairs' ("MEEEA") Strategic Plan for 2013 to 2016, which recommends "initiatives to increase availability of low-cost natural gas, like getting more natural gas into distribution systems and more pipeline capacity across the Commonwealth."[462] Further, the Order notes that the MEEEA issued a Global Warming Solutions Act 5-Year Progress Report in January 2014 that attributed current progress towards the state's 2020 reduction goal in part to "the decline in natural gas prices."[463] Based on these considerations, the Commission appropriately concluded that "the Project would be consistent with state plans."[464] The Coalition's assertion that the Commission "does not cite to any evidence to support its conclusion" is plainly incorrect.[465]

7. FERC properly considered the impacts of the Project on environmental justice communities.

Several requestors challenge the Commission's environmental justice analysis of the Project as insufficient under NEPA. Specifically, they assert that the Project will disproportionately harm environmental justice communities and that the Commission violated Executive Order 12898, which requires additional measures to protect environmental justice communities from the health impacts of projects and to ensure adequate opportunities to participate in the decision-making process.[466]

Pursuant to precedent, the Commission typically includes an environmental justice analysis as part of its NEPA review, to consider whether a proposed project has disproportionately high and adverse human health or environmental effects on minority or low-income populations. Contrary to Requestors' assertions, however, Executive Order 12898 is not

[462] EA at 2-143.
[463] Certificate Order at P 201.
[464] EA at 2-143.
[465] *See* EA at 2-143; Certificate Order at P 201.
[466] *See* Weymouth Request at 70-74; Coalition Request at 40-41.

itself binding on the Commission.[467] Similarly, publications by the EPA regarding environmental justice are not binding on the Commission, but instead are recommendations. Regardless, the Commission satisfied the requirements of the Executive Order and EPA's Guidance.

An agency's environmental justice analysis satisfies NEPA if it represents a "hard look" at the potential consequences of approving a project.[468] Contrary to the Coalition's apparent suggestion, the environmental justice analysis does not compel FERC to reach any particular substantive requirement or to approve or disapprove a project based on effects on environmental justice communities.[469] Here, the Commission has conducted an appropriate and sufficient environmental justice analysis in the EA.[470] It specifically considered the area surrounding the proposed Weymouth Compressor station and concluded that it "is not directly located in an Environmental Justice census tract" but noted that "there are 4 Environmental Justice census tracts composed of 12 block groups within a 0.5-mile radius of the [] site."[471] As explained in the Order, "[i]mpacts on environmental justice communities in the Weymouth/Quincy area were evaluated by analyzing the existing environment, and the cumulative impacts of the Atlantic Bridge Project when added to other reasonably foreseeable actions in the geographic scope of the project."[472] The Commission determined that "the primary issues associated with environmental justice communities for the [Atlantic Bridge] project are visual impacts, air quality, and noise."[473] The Order explains that each of these issues was explored in depth and the

[467] *East Tennessee Natural Gas Co.*, 101 FERC ¶ 61,188 at P 100 (2002); *Millennium Pipeline Co., L.P*, 97 FERC ¶ 61,292 (2001).
[468] *Runway Expansion*, 355 F.3d at 685.
[469] *Id.*
[470] EA at Section 2.5.7.
[471] *Id* at 2-78.
[472] Certificate Order at P 187.
[473] Certificate Order at P 112.

Commission found that the Project "will not result in any disproportionately high or adverse environmental or human health impacts on minority or low-income communities."[474]

Contrary to the assertions of the Town, the Commission did not "rel[y] upon the fact that the facility is consistent with local zoning."[475] Instead, the EA notes that "Algonquin would implement a series of measures that would minimize any potential impacts on the nearby communities, including the Environmental Justice Communities located near the Weymouth Compressor Station."[476] These measures include construction practices to control fugitive dust and noise control measures employed during construction and operation of the Project, among others.[477] The Commission concluded "that with the implementation of the mitigation measures discussed [in the EA], the Project would not result in any disproportionately high or adverse environmental and human health impacts on minority or low-income communities."[478] NEPA requires no more.

C. Coastal Zone Management Act Issues

1. The Commission's conditional order does not violate the Coastal Zone Management Act.

The Commission was not required to wait for the Massachusetts' Office of Coastal Zone Management ("OCZM") concurrence that the Project is consistent with the Massachusetts coastal management program pursuant to the Coastal Zone Management Act ("CZMA") before issuing a certificate for the Project. Two of the rehearing requests claim the Commission violated the CZMA by issuing the Certificate Order for the Project before the concurrence by the

[474] Certificate Order at P 187.
[475] Weymouth Request at 71.
[476] EA at 2-79.
[477] *Id*.
[478] EA at 2-80.

OCZM.[479] These arguments lack merit, and have been repeatedly rejected in the same and closely analogous circumstances.[480]

The Certificate Order expressly conditions FERC's approval of the Project on Algonquin's compliance with numerous specific conditions, including the Environmental Conditions in Appendix B to the order.[481] Specifically, Environmental Condition 9 prohibits Algonquin from commencing construction of any Project facility before receiving all authorizations required under federal law, which includes Massachusetts' concurrence under the CZMA.[482] This is consistent with prior Commission Orders.[483] As addressed in the Certificate Order, "in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate without unduly delaying the project."[484]

The Coalition also contends that it is unreasonable to allow certain Project activities to proceed under the Certificate Order, including eminent domain proceedings, when the Project

[479] Coalition Request at 17-19; Weymouth Request at 14-19.

[480] *See Delaware Dep't of Natural Resources & Env. Control v. FERC*, 558 F.3d 575 (D.C. Cir. 2009) (dismissing an appeal, for lack of standing, regarding the Commission's approval of a liquid natural gas terminal conditioned on the applicant's attainment of a state certification under the CZMA and a state permit under the Clean Air Act ("CAA")); *see also City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1508-09 (D.C. Cir. 1994) (upholding the Federal Aviation Administration's approval of a runway conditioned upon the completion of a review process required by the National Historic Preservation Act); *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1315, 1317-21 (D.C. Cir. 2015) (holding that the Commission did not violate or preempt the CAA by issuing a conditional certificate authorizing natural gas facilities prior to the project sponsors obtaining the required CAA permits); *Public Utilities Comm'n of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) (holding that the Commission did not violate NEPA when it issued a certificate whose effectiveness was conditioned upon the successful completion of environmental analysis required by NEPA).

[481] Certificate Order at Ordering Paragraph (B)(3).

[482] Certificate Order at Appendix B, Condition 9.

[483] *See, e.g., Crown Landing LLC*, 117 FERC 61,209 at P 26 (2006); *Sound Energy Solutions*, 108 FERC ¶ 61,155 at P 9 (2004) ("We clarify that the outcome in this proceeding will not impact state agencies that have been delegated authority to act pursuant to federal law, including state agencies that have been delegated duties with respect to the CZMA, Clean Water Act, and Clean Air Act, and we anticipate relying on these state agencies' efforts to confirm compliance with federal statutory requirements.") (internal quotation marks omitted).

[484] Certificate Order at P 60.

could ultimately be prohibited if the OCZM does not issue its concurrence.[485] However, FERC frequently issues conditional authorizations, and this course of action is consistent with Section 7(e) of the NGA, which expressly permits FERC "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."[486] This conditional authorization is not a condition precedent to Applicants' exercise of the power of eminent domain.[487]

2. Massachusetts' concurrence under the CZMA is not a state or local permit.

The Coalition Request incorrectly challenges the Commission's statement that "any state or local permits issued with respect to the project must be consistent with the conditions of the certificate."[488] In consecutive paragraphs of the Certificate Order, the Commission makes it clear that it "routinely issues certificates for natural gas infrastructure projects subject to the **federal permitting requirements** of the CZMA and other federal statutes,"[489] but that state and local permits must be consistent with the certificate.[490] It is clear the reference to "state or local permits" means permits issued pursuant to state or local law, not permits issued pursuant to federal law by state authorities. Although a Massachusetts agency will act on Algonquin's certification under the CZMA, the OCZM concurrence is not a state or local permit and the

[485] Coalition Request at 18-19.
[486] 15 U.S.C. § 717f(e).
[487] *See Constitution Pipeline Co., LLC v. A Permanent Easement for 1.77 Acres et al.*, 2015 WL 1638370 (N.D.N.Y. March 16, 2015) (rejecting landowner's argument that condemnation proceeding should be terminated because the certificate was conditioned upon the company's receipt of a permit. The court found that the provisions in the certificate did not create a condition precedent to the company's exercise of the power of eminent domain.)
[488] Coalition Request at 19 (citing Certificate Order at P 61).
[489] Certificate Order at P 60 (emphasis added).
[490] *Id*. at P 61.

statement challenged by the Coalition is not applicable to such concurrence.[491] As such, the language has no bearing on permits issued under federal law, such as CZMA concurrence.[492] Accordingly, the Coalition's claims regarding "States' rights" are based solely on its incorrect reading of the Certificate Order and are without merit.

3. The Certificate Order does not need to be dismissed because of potential outcome of the OCZM proceeding.

The Commission conditioned Applicants' authorizations on receipt of all applicable authorizations required under federal law, including under the CZMA.[493] Although Algonquin disagrees with the Coalition's characterization of the likelihood for concurrence by the OCZM,[494] the conditions in the Certificate Order adequately address any risk that the Algonquin may not receive the necessary federal authorizations.[495]

D. The Alleged Conflicts of Interest Do Not Present Any Basis to Revisit the Environmental Review or Grant Rehearing.

Several rehearing requests assert that the Commission's third-party NEPA contractor had an "impermissible" conflict of interest, primarily based on that contractor's work for Algonquin or its affiliates in other past or ongoing projects.[496] These arguments fail for several reasons. First, the requests do not identify any actual conflict of interest as that term is defined in NEPA caselaw and the Commission's governing regulations. Second, even assuming the requests did

[491] *Regulations Implementing the Energy Policy Act of 2005*, Order No. 687, 117 FERC ¶ 61,076 at P 2, n.4 (2006) ("To the extent recommendations and opinions are necessary for a federal agency, or state agency acting under federally delegated authority, to reach a decision on a request for a federal authorization that is needed for a proposed NGA section 3 or 7 project to go forward, the Commission interprets EPAct 2005's mandate as encompassing such recommendations and opinions as "federal authorizations.").

[492] *Islander East Pipeline Co., LLC v. Connecticut Dep't of Envtl. Protection*, 482 F.3d 79 (2d Cir. 2006).

[493] This condition is not a condition precedent to Applicants' exercise of the power of eminent domain. *See Constitution Pipeline Co., LLC v. A Permanent Easement for 1.77 Acres et al.*, 2015 WL 1638370 (N.D.N.Y. March 16, 2015) (rejecting landowner's argument that condemnation proceeding should be terminated because the certificate was conditioned upon the company's receipt of a permit. The court found that the provisions in the certificate did not create a condition precedent to the company's exercise of the power of eminent domain.)

[494] Coalition Request at 19-20.

[495] Certificate Order at Appendix B, Condition 9.

[496] *See* Hayden Request 10-22; Coalition Request 41-43; Peters Request 13.

identify such a conflict in the contractor, they do not show that it affected the integrity and objectivity of the Commission's own environmental review.

1. Neither Algonquin Nor Its Affiliates Were Responsible For Selecting the Third-Party Contractor

Neither Algonquin nor Spectra Energy Partners was responsible for selecting the Natural Resource Group ("NRG") as the third-party contractor for the Project, or as a public affairs consultant for PennEast Pipeline Company, LLC ("PennEast"). The Commission is the lead federal agency responsible for conducting an environmental review in compliance with NEPA as part of its review of the Project. As part of that review process, the Commission staff selected an independent third-party contractor. Although Algonquin was initially responsible for requesting proposals for the third-party contractor work, the Commission staff selected, approved, and hired the third-party contractor from among the proposals.

The third-party contractor works directly for, and under the supervision and control of, Commission staff. Commission staff "maintains complete control over the scope, content, quality, and schedule of the contractor's work."[497] Here, Commission staff independently determined that an environmental assessment was appropriate for the Project's environmental review, and independently found that "approval of the Project would not constitute a major federal action significantly affecting the quality of the human environment" if appropriate mitigation measures are implemented.[498]

[497] Letter from Cheryl LaFleur, Acting Chairman, to the Honorable Elizabeth Warren, FERC Docket No. CP16-9 (Mar. 9, 2017) ("LaFleur Letter").
[498] EA at 4-1.

2. The Rehearing Requests Identify No Conflict of Interest Under NEPA, Council on Environmental Quality Regulations, or the Commission's Rules.

Under NEPA, if an agency elects to select a contractor to conduct an environmental review, that contractor must "execute a disclosure statement . . . specifying that [it has] no financial or other interest in the outcome of the project."[499] An organizational conflict of interest may exist if a contractor has "a past, present, or ongoing financial interest in a project," such as where a contractor "has an ongoing relationship with the applicant" or "has a financial or other interest in the outcome of the Commission's decision."[500] A conflict of interest exists if the contractor "has past, present, or currently planned interests that either directly or indirectly (through a client, contractual, financial, organizational or other relationship) may relate to the work to be performed under the third-party contract and that . . . may diminish its capacity to give impartial, technically sound, objective assistance and advice."[501] Such an interest could include an agreement, "'[enforceable] promise of future construction or design work on the project,'" or guarantee of future work.[502] However, "the normal flow of benefits from the performance of the contract" does not constitute a conflict of interest.[503]

In proceedings before the Commission, potential NEPA contractors must submit a statement of potential organizational conflicts of interest ("OCI Statement"), and the Commission's Office of General Counsel analyzes those disclosures to determine whether "there

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[499] 40 C.F.R. § 1506.5(c).

[500] Federal Energy Regulatory Commission, Handbook for Using Third-Party Contractors to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects at 4-1 (Dec. 2014 rev.) ("Handbook"). More than a year after selecting NRG as the contractor for the Project, and several months after the Commission finalized the Environmental Assessment for that project, the Commission revised its Handbook. Those revisions "would have had no effect on the conflict of interest determination in this proceeding" that was undertaken under the prior version of that document. See Certificate Order P 57 n.44. The rehearing requests do not argue otherwise.

[501] *Id.* at 4-5.

[502] *E.g.*, *Burkholder v. Peters*, 58 F. App'x 94, 97 (6th Cir. 2003) (citing 46 Fed. Reg. 18,031 (Mar. 23, 1981) (Council on Environmental Quality guidance)); *Ass'ns Working for Aurora's Residential Envt. v. Colorado Dep't of Transp.*, 153 F.3d 1122, 1128 (10th Cir. 1998) ("*AWARE*").

[503] *Handbook* at 4-5.

are conflicting roles (including potential financial involvement) which might bias a contractor's judgment in relation to its work for the Commission."[504] An OCI Statement must disclose, among other things, a contractor's "relationships, including ownership interests, with all FERC regulated pipelines and their affiliates."[505] A potential contractor should "avoid agreeing to perform any function for another company on a similar project in the same geographic area, and over the same time period if the facilities would be located in the same area or if there could be a perception that there would be a conflict." *Id.* at 4-4.

The Council on Environmental Quality has warned, however, against an "overly burdensome" interpretation of NEPA's conflict-of-interest provisions, which can lead to "reduced competition in bidding for EIS preparation contracts, unnecessary delays in selecting a contractor and preparing an EIS, and confusion and resentment about the requirement."[506] As the Commission recently explained, "only a limited number of contractors are qualified to provide environmental assessment services," and "the necessity of third-party contracting services to support environmental reviews across multiple sectors of the energy industry creates high demand for their services."[507] Thus, "a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site."[508] Similarly, if "completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit," the consulting firm should not prepare the environmental statement.[509] But where there are "no such separate interests or arrangements, and if the contract for [the

[504] *Handbook* at 4-1, 4-4.
[505] *Id.* at 4-1.
[506] 48 Fed. Reg. 34,263, 34,266 (July 28, 1983).
[507] LaFleur Letter, *supra* n. 497, at 1.
[508] *Id.*
[509] 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981).

environmental review] preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist."[510] For these reasons, an agency must "reflect both ethical and technical considerations in selecting from a limited number of qualified contractors to assist [the agency] in developing highly complex and specialized environmental analysis."[511]

The rehearing requests here do not allege any actual conflict of interest, in the sense of the NRG having a direct financial stake in the Project's success, any agreement for, or promise of, future work on the Project, or the like. Rather, the rehearing requests' core concern is that NRG has performed similar environmental review work for Algonquin (or its affiliates) in past projects dating to 2010,[512] and that at the time the Commission selected NRG to work on the Project environmental review, NRG was also providing public relations services to PennEast.[513]

With respect to NRG's work for Algonquin (or its affiliates) on past projects, NRG's January 2015 OCI Statement expressly disclosed the existence of such work, and calculated the percentage of NRG's "total income" for each of the preceding calendar years—just as the Commission's *Handbook* requires.[514] NRG specified that such work constituted well less than one percent of its total revenues: 0.75% in 2014, 0.15% in 2013, and 0.31% in 2012. As the Commission reasonably explained, "if less than one percent of a contractor's business (for the current and preceding year) concerns a party that could be affected by the work being done, then

[510] 48 Fed. Reg. at 34,266.
[511] LaFleur Letter, *supra* n. 497, at 3.
[512] Arguments regarding the New Jersey-New York expansion project, the Line 2-H Abandonment, the Bailey East Mine Panel 2L, the Ozark Gas abandonment, and a "new crude oil pipeline in the Midwest" (Hayden Request 13-14) do not appear to have been timely raised in comments to the Commission. *Cf. Baltimore Gas and Electric Co.*, 92 FERC ¶ 61,043 at 61,114 (2000) (citations omitted) (The Commission "look[s] with disfavor on parties raising on rehearing issues that should have been raised earlier"; "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.").
[513] *E.g.*, Hayden Request at 12-14; Coalition Request at 42.
[514] *See* Natural Resource Group, LLC OCI Disclosure Statement (attached in redacted form to Letter from Norman C. Bay to Hon. Elizabeth Warren (Nov. 23, 2016)).

the contractor is not considered to have a conflict of interest."[515] NRG's past work for Algonquin and Spectra undisputedly falls below that threshold. The rehearing requests do not assert that NRG's disclosures were inaccurate in this regard, but merely focus on the fact that such prior work occurred.[516]

One rehearing request suggests that the Commission's one-percent threshold "may not be sufficient to ensure that all potential conflicts of interest are eliminated."[517] But the Commission's threshold is "based on well-established ethical standards," which recognize that a financial interest of one percent or less would not typically compromise impartiality."[518] Beyond general descriptions of the purpose of conflict-of-interest provision, the rehearing requests cite no authority—and Algonquin is aware of none—to suggest that such a *de minimis* fraction of a contractor's prior business would constitute a disabling conflict of interest. To the contrary, it is reasonable to conclude, as the Commission did here, that a professional environmental contractor would not jeopardize its reputation—and 99% of its other revenues—by distorting an environmental review in the hope of currying favor with a customer that represented less than 1% of its income in prior years. For that reason, "the Office of Government Ethics (OGE) recognizes that an employee may ethically perform work while maintaining a *de minimis* financial interest that could well exceed one percent of his or her total income."[519] The extreme and absolute view of conflicts advanced in the rehearing requests represents just the kind of "overly burdensome" approach that the Council on Environmental Quality has long warned

[515] Certificate Order P 57.
[516] *E.g.*, Hayden Request at 12-14, 17-18 (discussing NRG's role in New Jersey-New York Expansion Project in 2010, and other projects between 2013 and 2014).
[517] Hayden Request at 19.
[518] LaFleur Letter, *supra* n. 497, at 1.
[519] *Id.* (citing 5 C.F.R. § 2640.202 (2016)).

against, and would dramatically "reduce[] competition in bidding for [environmental review] contracts," and lead to "unnecessary delays" in contractor selection and environmental review.[520]

The rehearing requests also contend that NRG's January 2015 disclosure form in the Atlantic Bridge proceeding did not discuss the company's public-relations work for PennEast. The rehearing requests argue that such a disclosure was required because Algonquin's parent company, Spectra Energy Corp, "is a 10% owner of PennEast."[521] To begin, NRG was hired by PennEast in August 2014, prior to Spectra Energy Partners' investment in PennEast in late October 2014.[522] Moreover, as the rehearing requests concede, Spectra Energy Partners is a small (10%) minority owner in PennEast. As such, Spectra Energy is not responsible for managing the PennEast project, which would include coordination with NRG regarding public affairs work for the PennEast project.[523] Moreover, as the Commission has explained and the rehearing requests do not dispute, NRG "provided a supplemental OCI Statement to the Commission on August 15, 2016," which indicated that NRG "continues to receive less than one percent of its income from Spectra Energy Corp[]."[524] The rehearing requests do not contend that NRG's supplemental OCI Statement was incomplete, or dispute the Commission's conclusion that NRG's revenues from Spectra remained below the one-percent threshold.[525] Nor do the rehearing requests cite any authority for the proposition that such a diffuse and indirect

[520] 48 Fed. Reg. at 34,266.
[521] *E.g.*, Hayden Request at 12; Coalition Request at 42.
[522] *See* Press Release, *Spectra Energy Partners Becomes Newest Member in PennEast Pipeline Project*, (Oct. 29, 2014) http://www.spectraenergy.com/Newsroom/News-Archive/Spectra-Energy-Partners-Becomes-Newest-Member-in-PennEast-Pipeline-Project/.
[523] *See id.* (UGI Energy Services "is the project manager for the development of the project and will operate the pipeline").
[524] Certificate Order P 57.
[525] One rehearing request cites the 2016 version of the Commission's *Handbook* for the proposition that a contractor must "refresh[]" its OCI Statement "on an annual basis." Hayden Request 21. That requirement, however, was added in August 2016, and did not apply under the prior version or at the time NRG submitted its original OCI Statement in January 2015. NRG filed a supplemental statement on August 15, 2016. *See* Federal Energy Regulatory Commission, *Handbook for Using Third-Party Contractors to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects* (Aug. 2016 rev.), at https://www.ferc.gov/industries/hydropower/enviro/tpc/tpc-handbook.pdf.

potential interest—a small amount of work for an entity in which Spectra had only a 10% interest—could give rise to a disabling conflict of interest.

The rehearing requests also contend in passing that FERC's project manager for the Project has a "family member who provided consulting services to Algonquin on the Access Northeast Project."[526] This concern was not timely raised in comments on the Environmental Assessment,[527] and should not be considered for the first time on rehearing.[528] In any event, the rehearing requests provide no argument or authority to support the existence of a claimed conflict of interest, nor do they explain how it might have affected the Commission's review of the Project. Indeed, the rehearing requests' own internet source states that the employee "notified FERC about [her husband's company's] work [on Atlantic Bridge]."[529] That disclosure would evidently satisfy at least one of the parties seeking rehearing. [530]

Finally, the rehearing requests pose several additional questions regarding NRG's business operations that they believe are necessary to avoid a conflict of interest.[531] But the rehearing requests cite no authority, and Algonquin is aware of none, to support that proposition, or to suggest that without answers to those questions, NRG must be "disqualified" and the Environmental Assessment discarded. Neither the Commission's Handbook nor the Council on Environmental Quality regulations or guidance support such a radical position.

[526] Hayden Request at 15; Coalition Request at 42.
[527] So far as appears, this concern was raised for the first time on December 1, 2016, long after the comment period for the Environmental Assessment had closed. *See* Comments of Food & Water Watch et al. (Dec. 1, 2016) (Accession No. 20161201-5379).
[528] *Ne. Utilities Serv. Co. & Select Energy, Inc.*, 109 FERC ¶ 61204 at P 16 (Nov. 22, 2004).
[529] Itai Vardi, Husband of FERC Official Responsible for Reviewing New Spectra Energy Pipelines Consults on Related Spectra Projects (Nov. 1, 2016).
[530] *See* Coalition Request at 42 (contending only that relationship "potentially gives rise to a . . . conflict if . . . not disclosed").
[531] *See* Hayden Request at 20-21.

3. Even if There Were A Conflict of Interest, the Rehearing Requests Identify No Basis To Invalidate the Environmental Assessment

Even assuming, arguendo, that the rehearing requests had identified a conflict of interest, that would not automatically invalidate the environmental review; the question is whether a conflict compromised the "objectivity and integrity of the NEPA process."[532] For that reason, courts have consistently held that "[n]ot every violation of the NEPA regulations warrants reversal of an agency determination."[533] For instance, *Communities Against Runway Expansion, Inc. v. FAA*, found "no [disqualifying] conflict" even where a third-party contractor was "engaged [by the applicant] for four other clearly identified projects," because the engagements "would not influence [the contractor's] ability to participate objectively."[534]

The rehearing requests do not show that any of the alleged conflicts affected the "objectivity and integrity of the NEPA process."[535] As noted, the Commission staff directly supervised and controlled NRG as a third-party contractor. Commission staff independently determined that an environmental assessment was appropriate for the Project's environmental review, and found that "approval of the Project would not constitute a major federal action significantly affecting the quality of the human environment" if appropriate mitigation measures were implemented.[536] The Commission retained "complete control" over NRG's work, and Algonquin "ha[d] no control over the work done . . . and [wa]s not able to review the

[532] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991) (violation of NEPA regulation gave the court "no reason" to "invalidat[e]" an environmental impact statement).
[533] *Colo. Rail Passenger Ass'n v. Fed. Transit Admin.*, 843 F. Supp. 2d 1150, 1163 (D. Colo. 2011); *Busey*, 938 F.2d at 202 (only if error "compromise[d] the objectivity and integrity of the NEPA process"); *cf. PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (harmless-error rule); 40 C.F.R. § 1500.3 (no cause of action for "trivial violation[s] of these regulations").
[534] 355 F.3d 678, 686-87 (D.C. Cir. 2004).
[535] *Busey*, 938 F.2d at 202.
[536] EA at 4-1.

[contractor's] work product before its release to the public."[537] As in other cases where courts have found no basis to disturb an agency's environmental review, the record "indicates that [the Commission] exercised substantial supervision over the preparation of the [Environmental Assessment]," including "independently and extensively review[ing] all of [NRG's] analysis, comment[ing] on [NRG's] field data and written product," giving direction to NRG's work."[538]

To the extent the rehearing requests attempt to link the alleged conflicts to deficiencies in the NEPA process, they fail. One request suggests that NRG had "insufficient time" to conduct "an expanded health impact assessment" of the Weymouth Compressor Station.[539] But as the Commission explained, the existing health impact analysis "was developed based on the potential operation of the proposed equipment by Algonquin" under the Project; "[i]f the compressor station is proposed to be expanded in the future, it would be subject to additional reviews and/or permits."[540] The rehearing requests also contend that FERC "never followed up on its data request" regarding an alternate location for the compressor station,[541] and fault the Commission's discussion of effects on property located within a half-mile of the compressor station.[542] Those arguments fail for the reasons discussed *supra*, and do not undermine the objectivity or integrity of the NEPA process.[543] .

[537] *See* Letter from Norman Bay, Chairman, to Hon. Elizabeth Warren at 2, Docket No. CP16-9-000 (issued July 19, 2016) ("Bay Letter").
[538] *AWARE*, 153 F.3d at 1129.
[539] *See* Hayden Request at 14 & n.12 (citing EPA comments on EA).
[540] Certificate Order at P 203. The EPA comments appear to contemplate precisely this approach. *See* U.S. Envtl. Prot. Agency, Comments on the FERC Environmental Assessment for the Atlantic Bridge Project at 4-5, CP16-9 (June 1, 2016) ("Because many of the concerns arising from the Weymouth compressor station are common to both the Atlantic Bridge and Access Northeast projects, we plan to suggest a more comprehensive analysis of [health impact] issues for the Access Northeast project currently in the FERC pre-filing process.").
[541] Hayden Request at 16.
[542] *Id.* at 17.
[543] *Busey*, 938 F.2d at 202

E. The Commission is not required to consider claims regarding Calpine's transfer of the Weymouth Compressor Station Site.

The Town argues that Calpine (1) breached a Host Community Agreement ("HCA") associated with the Calpine facility, by transferring the compressor station site to Algonquin in violation of a commitment to develop a mutually agreeable plan for the future development of this parcel and (2) failed to honor its obligations under the decision by the Massachusetts Energy Facilities Siting Board ("Siting Board") that approved the construction of the Calpine facility in 2000.[544] These claims only address Calpine's right to transfer the parcel to Algonquin. Neither of these claims arises under the NGA, nor is Calpine's right to transfer the parcel relevant to the Commission's review of the Project under the NGA or NEPA as discussed above. The claims regarding Calpine's compliance with the HCA and Siting Board decision are outside of the scope of this proceeding.[545]

Calpine's transfer of land for the Weymouth Compressor Station is not part of the Commission's review under the NGA. Under the NGA, the Commission considers adverse impacts of the Project on landowners, which includes landowner property rights that are "different in character from other environmental issues considered under [NEPA]."[546] In accordance with the Certificate Policy Statement, the acquisition of necessary land rights through negotiation avoids adverse impact on the landowner.[547] Further, the negotiated transfer of land is consistent with Commission policy discouraging reliance on condemnation or eminent domain

[544] Weymouth Request at 27-28; *see also* Coalition Request at 14 (claiming that Calpine illegally subdivided the parcel it sold to Algonquin).

[545] These claims also lack merit. Algonquin has uncovered no provision within the HCA that prevents Calpine from conveying all or part of the North Parcel to any third party. Further, the Town's lawsuit in Massachusetts state court, because of Calpine's failure to obtain the endorsement of the Weymouth Planning Board, is without merit under Massachusetts law. Finally, Condition L of the Siting Board decision, which requires Calpine to provide access to the King's Cover Parcel, is not frustrated by the transfer of the parcel to Algonquin. Contrary to the Town's claim, only a portion of the 0.482 acres retained by Calpine is part of the King's Cove Parcel. Thus, Calpine can provide additional access, if necessary, on the retained acreage that is not part of the King's Cove Parcel.

[546] Certificate Policy Statement at p. 61,748.

[547] *Id*. at p. 61,749.

proceedings.[548] Accordingly, the settlement reached between Algonquin and Calpine for the transfer of the necessary land for the Weymouth Compressor Station is consistent this policy and avoids adverse impacts on the landowner, Calpine.[549] Under the NGA, however, the Commission is not required to consider Calpine's obligations under the HCA and the Siting Board decision.

The Commission also was not required to take a "hard look" at the conveyance of the parcel under NEPA.[550] As part of its NEPA review of the Project, the Commission took a "hard look" at potential environmental impacts from the construction and operation of the Weymouth Compressor Station. In addition, the Commission evaluated the location of seven site alternatives for the Weymouth Compressor Station and concluded that "the Weymouth site is preferable."[551] Calpine's obligations under the HCA and the Siting Board decision are not potential environmental impacts of the Project and, as a result, the Commission was not required to consider the conveyance of the parcel under NEPA.

F. Requests for Stay

The Commission's general policy is to refrain from granting a stay.[552] The rationale underlying this policy is to assure definiteness and finality in Commission proceedings.[553] In addressing motions for a stay, the Commission considers the following factors: "(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay

[548] *See id.* (stating that the benefits needed to be shown for a proposed project are less in the case where land rights were acquired by negotiation rather than subjecting landowners to eminent domain proceedings).
[549] *See* Algonquin Gas Transmission, LLC, Docket No. CP16-9-000 (submitted Aug. 3, 2016) ("August 3 Filing") (describing a settlement agreement with Calpine Fore River Energy Center, LLC ("Calpine") for Calpine to transfer a parcel of land to Algonquin for the construction and operation of the Weymouth Compressor Station).
[550] *See* Weymouth Request at 27-28.
[551] Certificate Order at P 245.
[552] *See CMS Midland, Inc.*, 56 FERC ¶ 61,177, p. 61,630 (1991) ("CMS Midland"), *aff'd sub nom. Mich. Mun. Coop. Grp. v. FERC*, 990 F.2d 1377 (DC Cir. 1993)(per curiam); *see also Regulation of Cash Management Practices*, 104 FERC ¶ 61,217 at P 4 (2003) ("Cash Management") (denying stay of Commission order); *Sea Robin Pipeline Co*., 92 FERC ¶ 61,217, p. 61,710 (2000) ("Sea Robin").
[553] *Id*.

may substantially harm other parties; and (3) whether a stay is in the public interest."[554] If the moving party is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.[555] As discussed in *Ruby Pipeline*, for a party to show that it will suffer irreparable harm, the party must provide "proof indicating that the harm is certain to occur in the near future" and "show that the alleged harm will directly result from the action which the movant seeks to enjoin."[556] Any claim of irreparable harm "must be both certain and great; it must be actual and not theoretical."[557]

The Weymouth Motion alleges that the Town will be "immediately harmed if it cannot enforce state and local regulatory requirements."[558] But that theory of harm would entitle virtually every state and local government entity to a stay of the Commission's orders, a result that is inconsistent with the general rule that the Commission does not automatically grant a stay. Nor can the Town viably claim irreparable harm based on the Natural Gas Act's preemptive effect on state and local laws, where that preemption doctrine has been uniformly and repeatedly upheld by the Supreme Court and lower federal and state courts.[559]

The Coalition Request makes almost no attempt to demonstrate harm and certainly does not identify a harm that is "both certain and great; it must be actual and not theoretical."[560] The Coalition makes a general statement that the irreparable harm is "self-evident" and follows up that without a stay "it [would be] impossible for homeowners to sell their residences in the face

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[554] *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103 at P 17 (2011) ("Ruby Pipeline"); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,142 at P 18 (2005).
[555] Cash Management at P 4; *see also CMS Midland* at p. 61,631; Sea Robin at p. 61,710.
[556] Ruby Pipeline at P 18.
[557] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (the party requesting a stay must offer "proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in near future."); *Texas Eastern Transmission Corp.*, 33 FERC ¶ 61,012, p. 61,031 (1985) (citing *Wisconsin Gas Co. v. FERC*).
[558] Weymouth Motion at 9-10.
[559] E.g., Schneidewind v. ANR Pipeline, 485 U.S. 293 (1988); Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 244-45 (D.C. Cir. 2013).
[560] Coalition Request at 44 (citing *Wisconsin Gas Co. v. FERC*).

of uncertainty."[561] The Coalition Request makes no attempt to identify any homeowners who have been unsuccessful in selling their residences or to explain whether such homeowners are part of the Coalition. Moreover, this alleged harm appears to be economic in nature; it is well established, however, that economic harm "does not and cannot constitute irreparable harm for purposes of justifying a stay.[562] Thus, the Coalition has failed the threshold requirement of demonstrating that they will be irreparably harmed by the commencement of construction of the Project, and the Commission need not examine the other factors.[563]

The Peters Request does not specifically address any of the factors that the Commission considers when addressing a request for a stay.

[561] *Id*. at 45.
[562] *CMS Midland* at p. 61,631; *see also Puget Sound Energy, Inc*., 82 FERC ¶ 61,142, p. 61,526 (1998) ("[p]ecuniary losses are not considered irreparable harm").
[563] *See, e.g.*, *Millennium*, 141 FERC ¶ 61,022 at P 14 (2012); *Ruby Pipeline*, 134 FERC ¶ 61,103 at P 18; *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245 at P 18 (2009); *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021 at P 6 (2009); *Guardian*, 96 FERC ¶ 61,204, p. 61,869.

III.
CONCLUSION

For the reasons stated herein, Applicants respectfully request that the Commission grant Applicants' leave to answer the requests for rehearing, deny the requests for rehearing and related requests for stay.

Respectfully submitted,
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March 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 13th day of March, 2017.

/s/ Victoria R. Galvez
Victoria R. Galvez