No. 03-9577

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FUEL SAFE WASHINGTON,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Review from the Federal Energy Regulatory Commission

Georgia Strait Crossing Pipeline LP, 100 FERC ¶ 61,280 (2002)
Georgia Strait Crossing Pipeline LP, 102 FERC ¶ 61,051 (2003)

PETITIONER'S OPENING BRIEF

MICHAEL ROBINSON-DORN
Assistant Professor of Law, &
Director, Kathy and Steve Berman
Environmental Law Clinic
University of Washington, School of Law
William H. Gates Hall
Box 353020
Seattle, Washington 98195-3020
(206) 616-7729

ANGELA COATS
BRETT DURBIN
Student Interns
Kathy and Steve Berman
Environmental Law Clinic
University of Washington,
School of Law
Seattle, Washington 98195
(206) 543-3434

Counsel for Petitioner Fuel Safe Washington

STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument.

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STATEMENT OF PRIOR OR RELATED APPEALS

Petitioner represents that there are no prior or related appeals.

STATEMENT OF JURISDICTION

AGENCY JURISDICTION/PROCEDURAL HISTORY

On April 24, 2001 Georgia Strait Crossing Pipeline LP (GSX) filed an application with the Federal Energy Regulatory Commission (FERC) to construct, install, own, operate and maintain a new natural gas pipeline and ancillary facilities in northwest Washington State. Doc-1. [1] On October 11, 2001, GSX amended its application. Doc-99. On September 20, 2002, FERC issued a final order granting GSX, among other things, a Certificate of Public Convenience and Necessity (CPCN) under Section 7 of the Natural Gas Act (NGA), 15 U.S.C. § 717 et seq. (2000). Doc-222 (Order Granting Certificate and Presidential Permit, Granting in Part and Denying in Part Requests for Rehearing and Clarification, and Denying Motions to Dismiss (Sept. 20, 2002)). On October 18, 2002, Petitioner, Fuel Safe Washington (FSW), timely requested a rehearing of FERC's decision to grant the CPCN. Doc-226. FERC denied FSW's request in its final order dated January 17,

[1] "Doc-1" is Record Item No. 1 of FERC's Certified List. All items contained in the Certified List are hereinafter referred to as Doc-(Record Item No.) at (page).

2003. Doc-232. FSW timely petitioned for review in the Ninth Circuit Court of Appeals on March 17, 2003. The matter was transferred to the Tenth Circuit Court of Appeals by order of the Ninth Circuit Court of Appeals on July 30, 2003. See Petition for Review, filed Aug. 18, 2003 (No. 1636936).

APPEALS COURT JURISDICTION

This Court has jurisdiction to review FERC's decision to grant GSX the CPCN pursuant to Section 19(b) of the NGA. 15 U.S.C. § 717r(b). Section 19(b) grants an aggrieved party[2] the right to appeal a FERC final order to the Circuit Court of Appeals of the United States in which the principal place of business of the pipeline proponent is located, 15 U.S.C. § 717r(b), provided that the Petitioner has sought first rehearing from the FERC. Here, Petitioner, FSW, properly sought rehearing below, and its petition was timely filed in the Ninth Circuit Court of Appeals within 60 days of FERC's rehearing order. Petition for Review, filed Aug. 18, 2003 (No. 1636936); 15 U.S.C. § 717r(b). Consequently, this Court is properly vested with jurisdiction to review FERC's final Order.

[2] FSW is aggrieved by FERC's Order granting GSX a CPCN to construct the GSX pipeline. See Declarations of Frederic Lawrence Felleman and Christopher Lee Jones. Attached as Exhibits 1 and 2.

STATEMENT OF THE ISSUES

I. FERC DOES NOT HAVE JURISDICTION OVER THE CONSTRUCTION OF THE GSX PIPELINE UNDER SECTION 7 OF THE NATURAL GAS ACT.

II. THE ENVIRONMENTAL IMPACT STATEMENT DOES NOT COMPLY WITH EITHER THE SPIRIT OR THE LETTER OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) BECAUSE IT DOES NOT ALLOW FERC OR THE PUBLIC MAKE A REASONED DECISION

STATEMENT OF THE CASE

On April 24, 2001, GSX applied to FERC for a CPCN to build a natural gas pipeline from Sumas, Washington to Vancouver Island, Canada. The purpose of the pipeline was to provide natural gas to proposed natural gas generator plants to meet the need for electricity on Vancouver Island. Pursuant to NEPA FERC prepared a draft Environmental Impact Statement (EIS).

FSW, the Environmental Protection Agency (EPA), several Washington State agencies, and many other commentators cited numerous deficiencies in the draft. FERC reviewed these comments but did not remedy the cited deficiencies in the final EIS. FERC subsequently granted GSX a CPCN to build the pipeline. FSW timely requested a rehearing pursuant to 15 U.S.C. § 717r, which FERC denied. FSW subsequently

petitioned pro se for review of FERC's order to the Ninth Circuit Court of Appeals. The case was then transferred to this Court.

Of course, had FERC heeded the Congressionally imposed limits on its jurisdiction, the questions raised concerning the adequacy of FERC's environmental analysis would be moot.

STATEMENT OF FACTS

THE AREA

The San Juan Island/Gulf of Georgia archipelago is a collection of hundreds of rocks and islands surrounded by a deep, glacially carved inland sea of unique diversity and productivity. R.E. Thomas, Physical Oceanography of the Strait of Georgia-- Puget Sound-- Juan de Fuca Strait System, in Review of the Marine Environment and Biota of Strait of Georgia, Puget Sound and Juan de Fuca Strait 36-98 (R.C.H Wilson et al. eds., 1994). Numerous rivers sourced in the surrounding mountains drain minerals and nutrients into this water body. R.M. Strickland, The Fertile Fjord: Plankton in Puget Sound 146 (University of Washington Press, 1983). The silt deposited on the shores of Georgia Strait and Whatcom County by one of these rivers, the Fraser River, creates unique habitat suitable for the growth of eel grass, used by herring to deposit their spawn. H.A. Stout et

al., Status Review of Pacific Herring in Puget Sound, Washington 175 (2001). Salmon, seabirds, sea lions and killer whales (orcas) all depend on these oil-rich herring for their survival.

These waters are also home to approximately 500 marine plant species, including many species of sea grass, and over 200 varieties of seaweed, among which is the world's fastest growing kelp. Inhabiting these waters are the world's largest octopus, 30 species of marine mammals, including orcas, dolphins and porpoises, and 400 different types of fish, including cod, herring, and salmon. In addition, more than 200 different species of seabirds depend on these waters for survival. Finally, the sea floor hosts more than 7000 invertebrates, including sea urchins, anemones, sea cucumbers, oysters, clams, shrimp, crab, sea stars, and over 400 varieties of nudibranchs, or sea slugs. Announcement of Washington State Nearshore (Northern Puget Sound) as an Active Candidate for National Marine Sanctuary Designation; Intent to Prepare a Draft Environmental Impact Statement and Management Plan: Intent to Hold Public Scoping, 54 Fed. Reg. 41481 (Oct. 10, 1989).

GEORGIA STRAIT CROSSING PROJECT DESCRIPTION

The Georgia Strait Crossing Project (GSX Project) is a joint undertaking by an American corporation, Williams Gas Pipeline Company

LLC (Williams)[3] and a Canadian provincial Crown corporation, British Columbia Hydro and Power Authority (BC Hydro), to construct, operate and maintain a natural gas pipeline approximately 84 miles long. Doc-1 at 2, 3. GSX, the entity responsible for the United States portion of the pipeline, proposes to construct and operate a 16 to 20 inch diameter pipeline that originates at the United States-Canada border near Sumas, Washington. Doc-213 at ES-1. The U.S. section of that pipeline crosses Washington State for 47.3 miles, through Whatcom County to the coast of the Puget Sound.[4] Id.

The offshore/marine portion of the proposed route is 13.9 miles long, constructed on a new right-of-way cutting directly through the Cherry Point State Aquatic Reserve, and San Juan Island County, before crossing the international border back into Canada at sub-sea interconnection at the Boundary Pass, in the Strait of Georgia. Doc. 213 at ES-1, ES-2, 2-9. This right of way would be laid under Cherry Point by directional drilling or an open trench. FERC has already approved this proposal to trench through Cherry Point, subject only to state approval.

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[3] The relationship among Williams, GSX, and their related partners and common parent is set forth in GSX's Corporate Disclosure Statement filed on or about Sept. 17, 2003, and will not be repeated here.

[4] For ease of use, the Puget Sound and its adjacent water bodies, Boundary Bay and the Georgia Strait, will generally be referred to as the "Puget Sound" unless a more specific definition is warranted.

From its midchannel connection in the Boundary Pass, the Canadian portion of the pipeline consists of 27.5 miles of marine pipeline to Vancouver Island, and 9.7 miles of onshore pipeline on Vancouver Island, where the pipeline will feed two proposed electrical power plants.[5] Doc-213 at 1-10.

PIPELINE OPERATIONS

The GSX pipeline will import the majority[6] of its natural gas from Westcoast Energy (Westcoast), a Canadian natural gas company, at a pipeline connection at the U.S.-Canada border near Sumas, Washington.

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[5] The Vancouver Island Energy Corporation (VIEC), a subsidiary of BC Hydro, proposed to construct the gas-fired electrical power plant. In March of 2003, VIEC applied to the British Columbia Utilities Commission (BCUC) for a Certificate of Public Convenience and Necessity to construct the VIGP. On September 8, 2003, the BCUC denied VIEC's application, recommending that a new analysis of alternatives to supply Vancouver Island's energy needs. BCUC, In the Matter of Vancouver Island Energy Corporation: Vancouver Island Generation Project Application for a Certificate of Public Convenience and Necessity (Sept. 8, 2003) at 1,77 ("BCUC Decision").

[6] As discussed more fully below, the initial plans call for the GSX pipeline to be designed so that it could accept up to 10% of its gas supply from a connection with Northwest Pipeline—an interstate pipeline that is also receiving its supply from Westcoast (Canada). Northwest is responsible for constructing a connection between its pipeline and the GSX interconnect facility, including obtaining applicable permits. Doc-213 at 3 n.4, 12, 13. There is nothing in referenced in the EIS, and Petitioner has been unable to find any other evidence in the Record, that indicates that Northwest has filed an application to construct this connection. Northwest has, however, entered into agreements with GSX regarding the operation of the connection. Doc-1 at 15.

See Doc-222 at 3, 12, 13. The pipeline then runs from this connection approximately 500 feet to a meter facility. Doc-1 at 14. The meter facility contains two meters and an interconnect facility which would allow Northwest Pipeline Corporation (Northwest) to connect its pipeline to the GSX pipeline. Doc-1 at 20. From the meter facility, the GSX pipeline emerges as a single pipeline and runs east from the Sumas facility to the Cherry Point, Washington compressor station on the edge of the Puget Sound, to Boundary Pass in the Strait of Georgia, and then to Vancouver Island, British Columbia, where it will serve two Canadian electrical power plants. Doc-213 at 1-1, 2-1; Doc-222 at 3.

Thus, the GSX pipeline system is only designed to flow in one direction[7]–from Sumas, Washington to Vancouver Island, Canada. See Doc-222 at 14, 15. As initially designed and approved by FERC, the GSX pipeline will supply no consumers in Washington State, or anywhere else in the United States–all of the natural gas will be transported to Canada. See Doc-222 at 15 n.33.

[7] Although FERC's decisions below state that Northwest's system is bi-directional, see Doc-222 at 3 n.4, 13, 15, nothing in the Record, including GSX's application, design and flow diagrams, supports the conclusion the interconnection between Northwest and GSX will allow gas to physically flow in a west-to-east direction from GSX to Northwest.

ONSHORE IMPACTS

In total, the United States portion of this pipeline alone would disturb 636 acres of land and sea floor. The onshore portion of the GSX pipeline would span more than 33 miles and disturb 588.7 acres of land in Whatcom and San Juan Island Counties. Doc-213 at ES-1, 2-6. Of that land, 371 acres are prime farmland, Doc-213 at 3-16, and 62 acres are wetlands. Doc-213 at ES-1. A 10,302 horse power compressor unit would be constructed at Cherry Point. Doc-213 at 2-4. This compressor would generate noise that negatively impacts the species that make the Cherry Point State Aquatic Reserve their home. Doc-213 at 3-59; Doc-213, App'x O at LA3-3, LA3-4.

OFFSHORE IMPACTS

The GSX pipeline, traversing valuable marine habitat in both Whatcom and San Juan Island counties, will disturb 47 acres in 23 water bodies with sensitive fisheries and habitat for 19 federally listed endangered or threatened species. Doc-213 at ES-1, ES-2.

The proposed project has the potential to impact a number of whale species. The pipeline will cut directly across the migratory path of Puget Sound's Southern Resident Orca population, a candidate for listing under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. Doc-213 at 3-96, See also Center for Biological Diversity v. Lohn, No. C02-2505L, 2003 WL

23004985 (W.D.Wash). Dec. 17, 2003). The 78 remaining members of the Orca population are already threatened by vessel traffic, human encroachment, pollution, and dwindling prey (salmon) stocks. Doc-213 at 3-96. As many commentators noted, an increase in environmental noise and habitat modification may further interfere with the orca's food acquisition, migration, and other behaviors. Doc-213, App'x O at FA2-3, LA3-3, CO1-12. Effects from the GSX project may also threaten six other endangered whale species, including blue, fin, sei, black right, sperm, and humpback, as well as stellar sea lions (threatened), bald eagle (threatened), and great blue heron (a species of concern in Washington State) that inhabit the region. See Doc-213, App'x O at LA3-3, LA3-4, LA5-2, LA1-13, LA1-15.

The region also supports important commercial and subsistence herring and Dungeness crab fisheries. Doc-213 at 3-71, 3-72, 3-82. Cherry Point, the location where the pipeline enters the Puget Sound, historically boasted the largest of Puget Sound's 18 known stocks of Pacific herring. Doc-213 at 3-71. However, those stocks have experienced a dramatic 91% decline over the last 25 years. Id. Herring, an important food source for endangered salmon and orca, may be further harmed by increased environmental noise from pipeline activities, because "[f]ish are acutely sensitive to sound in the low-frequency range [of the kind proposed by

GSX]…herring are the commercial fish species most sensitive to noise, detecting sound in a broad frequency." Doc-213, App'x O at CO4-94.

In addition, the potential harm to both land and marine resources by geologic hazards is amplified due to the active tectonic of the region.[8] Doc-213 at 3-2. The project crosses ten potentially active offshore faults that could severely damage the pipeline. Doc-213 at 3-2, 3-4, 3-151.

SUMMARY OF THE ARGUMENT

FERC's assertion of jurisdiction over the construction and operation of the GSX pipeline under the Section 7 of the NGA, impermissibly extends FERC's authority to the construction and operation of a non-jurisdictional natural gas pipeline. The GSX pipeline is not subject to Section 7 because the pipeline does not transport gas in "interstate commerce" and it is exempt under the Hinshaw Amendment.

Having exceeded the statutory authority delegated to it in Section 7, FERC then failed to adequately consider and respond to comments from, and issues raised by FSW, the US EPA, several Washington State agencies, two Washington State Counties, and numerous interested groups and individuals—all of whom consistently informed FERC of the inadequacies

[8] This activity, manifest by earthquakes, can result in significant ground vibrations, tsunamis, ground upheaval, marine and terrestrial landslides, and liquefaction. Doc-213 at 3-3.

of its environmental analysis under NEPA. More specifically, FERC failed to: (i) adequately address all reasonable impacts; (ii) adequately consider transboundary impacts; (iii) adequately address cumulative acoustic impacts; and (iv) consider the impact of reasonably foreseeable earthquakes.

ARGUMENT

I. FERC ERRED IN ASSERTING JURISDICTION OVER THE CONSTRUCTION AND OPERATION OF THE GSX PIPELINE UNDER SECTION 7 OF THE NGA

The NGA, 15 U.S.C. § 717 et seq. (2000), grants FERC jurisdiction over the transportation and sale for resale of natural gas in interstate commerce. 15 U.S.C. § 717(b). Section 7 of the NGA, bars the transportation, or sale for resale, of natural gas subject to FERC jurisdiction without certificate of "public convenience and necessity." See 15 U.S.C. § 717f(c)(1)(A) ("No natural-gas company… shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore… unless there is… a certificate of public convenience and necessity issued by the Commission [FERC] authorizing such acts or operations.").

In this case, GSX applied to FERC for a CPCN to construct and operate the GSX pipeline. Doc-1. FERC asserted jurisdiction over the

Project pursuant to Section 7(c) of the NGA. Section 7(c) grants FERC jurisdiction over the construction of pipelines that transport natural gas in "interstate commerce." 15 U.S.C. § 717f(c); Doc-222 at 14 n.31.

FERC's assertion of jurisdiction over the construction and operation[9] of the GSX pipeline, and in particular its assertion based on "backhauls via displacement," was in error. Doc-222 at 3. As explained below, the construction of the GSX pipeline is exempt from FERC's jurisdiction for two reasons. First, the GSX pipeline only transports gas flowing in foreign, not interstate, commerce. 15 U.S.C. § 717a(7); 15 U.S.C. § 717f. Second, and alternatively, the GSX pipeline is exempt from FERC's jurisdiction under the Hinshaw Amendment, Section 1(c) of the NGA, which exempts pipelines subject to State regulation that are not used to transport gas to another state. 15 U.S.C. § 717(c).

A. Standard of Review

In reviewing FERC's decision to assert jurisdiction over the construction of the GSX pipeline, the Court must determine "whether the decision has an adequate basis in law." Fort Morgan v. FERC, 181 F.3d 1155, 1159 (10th Cir. 1999). However, this Court is "under no obligation to defer to the agency's legal conclusions." Northwest Pipeline Corp. v.

[9] The term "construction" will be used in lieu of "construction and operation" for the remaining portion of this Section.

FERC, 905 F.2d 1403, 1408 (10th Cir. 1990). FERC's factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b); Fort Morgan v. FERC, 181 F.3d at 1159.

B. Discussion

1. The construction of the GSX pipeline is not within FERC's jurisdiction under Section 7 because the natural gas flowing in the GSX pipeline is dedicated to foreign, not interstate, commerce

FERC may only assert jurisdiction over the construction of a natural gas pipeline if that pipeline falls within Section 7 of the NGA. 15 U.S.C. § 717f(c). As an initial matter, Section 7 applies only to "natural-gas companies." Id. A "natural gas company" is defined as "a person engaged in the transportation of gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6). The NGA defines "interstate commerce" as:

> commerce between any point in a State and any point outside thereof, or between any points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

15 U.S.C. §717a(7) (emphasis added).

This definition evidences Congress' intent to distinguish interstate commerce (commerce between states) from foreign commerce (commerce between a state and a foreign country). Border Pipeline v. FPC, 171 F.2d

149, 1501 (D.C. Cir. 1948); Distrigas Corp. v. FPC, 495 F.2d 1057, 1062-63 (D.C. Cir. 1974). Congress granted FERC jurisdiction under Section 7 over interstate commerce, but not foreign commerce, by limiting FERC's authority under Section 7 to natural-gas companies.[10]

Thus, FERC only has jurisdiction over the construction of a pipeline where it is engaged in transportation of natural gas in "interstate commerce." Border Pipeline, 171 F.2d at 151; Distrigas, 495 F.2d at 1062-63. [11] Accordingly, FERC may not assert Section 7 jurisdiction over the construction of a pipeline that transports natural gas solely in foreign commerce. Border Pipeline, 171 F.2d at 151, 152.

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[10] Additional evidence for this distinction is found in the Department of Energy Reorganization Act (DOERA). 42 U.S.C. § 7101 et. seq. (2000)(prohibiting FERC from asserting jurisdiction over the importation and exportation of natural gas, instead assigning that power to the Department of Energy's Economic Regulatory Administration). 42 U.S.C. § 7151(b)(Dissolving the FPC and distributing its powers between the Secretary of Energy and FERC); 42 U.S.C. § 7172(f)(Transferring the FPC's powers under Section 3 to the Secretary of Energy and excluding Section 3 functions from FERC's jurisdiction). Unlike Section 7, ERA's Section 3 jurisdiction is not limited to "natural-gas companies." 15 U.S.C. § 717b.

[11] FERC has jurisdiction over the construction of "border facilities" under Section 3 of the NGA, 15 U.S.C. § 717b. Department of Energy Delegation Order No. 0204-112 (Assigning to FERC the authority to approve or disapprove the construction of border facilities, subject to ERA's disapproval). Section 3 jurisdiction does not, however, extend FERC's jurisdiction to the remaining intrastate facilities. See Distrigas, 495 F.2d at 1062,1065-66.

Although FERC's Order below properly acknowledged the distinction between foreign and interstate commerce, See Doc-222 at 14 n.31, FERC erred in finding that the GSX pipeline was engaged in "interstate commerce."

a. GSX Pipeline is not engaged in "interstate commerce"

FERC found that the GSX pipeline was capable of transporting gas in "interstate commerce." Doc-222 at 14. This finding is not supported by the law or the facts.

First, as initially proposed and approved, the GSX pipeline does not provide for the physical transportation of natural gas in "interstate commerce." Once natural gas enters the GSX pipeline, whether from the connection at the U.S./Canada border with Westcoast (Canada) or from the proposed connection with Northwest (an interstate pipeline), that gas can, and will, only flow to Canada. Doc-222 at 14, 15; Doc-1 at 20. To be clear, the current configuration of the GSX pipeline does not allow for physical delivery of natural gas to consumers in the United States except via theoretical modes of transportation such as "backhauls via displacement." See Doc-222 at 3. Thus, as designed and approved, the GSX pipeline is dedicated solely to the physical transportation of natural gas in foreign commerce. As such, the GSX pipeline is not engaged in the transportation

of gas between states, and therefore, is not properly subject to FERC's Section 7 jurisdiction.

2. The fact that the GSX pipeline is designed to connect with an interstate pipeline does not grant FERC jurisdiction under Section 7 because the GSX pipeline is exempt under the Hinshaw Amendment

In addition to falling outside of FERC's Section 7 jurisdiction because the GSX pipeline only operates in foreign commerce, the GSX pipeline is also exempt from FERC's Section 7 jurisdiction under the Hinshaw Amendment. 15 U.S.C. § 717(c). Congress passed the Hinshaw Amendment in 1954 in response to the United State Supreme Court's decision in East Ohio Gas Co., which held that an otherwise intrastate pipeline was engaged in "interstate commerce" if it received gas from an interstate pipeline. FPC v. East Ohio Gas, 338 U.S. 464, 468-9 (1950). Finding this contrary to the intent of the NGA, Congress passed the Hinshaw Amendment to explicitly exempt from FERC's jurisdiction any pipeline that receives natural gas from an interstate pipeline within a State, where two conditions are met. 15 U.S.C. § 717(c). First, all of the gas received from the interstate pipeline must be consumed within the State. Id. Second, there must be no regulatory gap; the rates service and operation of the receiving pipeline must be subject to regulation by a State Commission. Id.

Consistent with the NGA's distinction between interstate and foreign commerce, FERC has held that the first prong of the Hindshaw Amendment, that the gas be consumed "within the State," allows the consumption of natural gas in foreign commerce, as long as the gas is not transported to another state. San Diego Gas & Elec. Co., 64 FERC ¶ 61,221 at 6 (FERC 1993) (Allowing company to maintain Hinshaw exemption even where it proposed to build pipeline to export natural gas to Mexico). See also Doc-222 at 14 n.33 (indicating that it is the displacement of gas to other U.S. consumers, rather than deliveries to Canada that is inconsistent with Hinshaw).

As explained supra, none of the natural gas received by the GSX pipeline, whether from Westcoast (Canada) or Northwest (an interstate pipeline), will be physically transported to another state. The gas only travels to Canada through Washington. Doc-1 at 20; Doc-222 at 14. Additionally, the rates, service and operation would be subject to regulation by the Washington State Utilities and Transportation Commission (UTC), the Washington State Energy Facilities Site Evaluation Council (EFSEC) and the Department of Energy's Economic Regulatory Administration

("ERA").[12] Wash. Rev. Code ch. 80.28; Wash. Rev. Code ch. 80.50; 15 U.S.C. § 717b. Thus, the GSX pipeline is exempt under the Hinshaw Amendment because it cannot be used for the transportation of natural gas to another state and there is no regulatory gap.

3. FERC's reliance on backhaul via displacement transactions to assert jurisdiction over the construction and operation of the pipeline under Section 7 is in error.

FERC's stated rationale for finding that the GSX pipeline did not meet the requirements of the Hinshaw Amendment was that the GSX pipeline was capable of engaging in "backhauls via displacement" resulting in delivery to other U.S. customers in other states.[13] Doc-222 at 3. FERC contends that "backhauls via displacement" would allow the GSX pipeline to transport natural gas to interstate consumers - presumably by GSX not accepting gas that would be bound for Canada and directing that the gas instead remain in the interstate pipeline for delivery to some other consumer.

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[12] The rates and service charged for the importation and exportation of natural gas would be subject to ERA's jurisdiction under Section 3. 15 U.S.C. § 717b. To the extent that the GSX pipeline serves any Washington consumers in the future, the UTC will have authority to regulate the rates and service for these consumers. Wash. Rev. Code ch. 80.28.

[13] The design of the GSX pipeline only allows the gas to flow from Northwest to GSX, therefore, 'backhauling via displacement', as used in this proceeding, is a transaction whereby GSX instructs Northwest to reduce the flow of natural gas across the Northwest / GSX interconnect, and deliver the natural gas to other customers served by Northwest.

Id. Based upon these transactions, FERC held that it must regulate the construction of the GSX pipeline. See, Doc-222 at 15 n.33. FERC erred. Nothing in the design of the GSX pipeline allows it to physically transport gas in interstate commerce because the gas can only flow one way – to Canada. Doc-1 at 20; Doc-222 at 14. To the extent that FERC relies on transactions involving the theoretical transportation of gas to assert jurisdiction over the GSX pipeline, neither the NGA nor the subsequent case law, support FERC's contention.

FERC has jurisdiction over only two types of interstate activities: (i) the transportation of natural gas in interstate commerce; and (ii) the sale for resale in interstate commerce. 15 U.S.C. § 717(b). FERC's jurisdiction over each of these activities is a separate and distinct grant of jurisdiction. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 636 (1972). FERC has jurisdiction over the construction and operations of a pipeline when it physically transports gas in interstate commerce. Alternatively, FERC has jurisdiction over the agreement when an entity engages in a sale for resale or enters into a transportation agreement. 15 U.S.C. § 717f; Louisiana Power & Light, 406 U.S. at n.1; Associated Gas Distrib. v. FERC, 899 F.2d 1250, 1255 (D.C. Cir. 1990). Importantly, jurisdiction over the agreement; does not confer jurisdiction over the construction and operation of the pipeline.

Additionally this Court made clear in Fort Morgan,[14] that a natural gas company may engage in both jurisdictional and non-jurisdictional activities and that engaging in one does not convert all of the activities engaged in by that company into one or the other. Fort Morgan, 181 F.3d at 1161; see also, Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301, et seq. (2000) (Allowing non-jurisdictional pipelines to enter into agreements for the transportation of natural gas in interstate commerce without being subject to Section 7 of the NGA).

This division between jurisdiction over construction and operations on the one hand, and over agreements on the other hand, is consistent with Congress' intent to grant FERC jurisdiction only over those activities that the States cannot regulate. Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 514-21 (1947); Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412, 1416 (10th Cir. 1992). In contrast, FERC's contention that "backhauls via displacement" grant FERC jurisdiction over the construction of the GSX pipeline is without basis in law. To understand why FERC's

[14] In Fort Morgan, FERC asserted that status as a "natural-gas company" automatically granted FERC jurisdiction under the NGA jurisdiction over any facilities it constructed. The court held that this assertion was not supported by the law and remanded the matter. FERC subsequently decided the facilities were exempted from its jurisdiction under the Hinshaw Amendment. KN Wattenberg Transmission LLC, 90 FERC ¶ 61,321.

contention is incorrect, it is necessary to define some basic terminology. Because natural gas pipelines generally flow in only one direction, a "backhaul" is a transaction whereby a person may transfer gas to another person even though the gas does not physically flow in that direction. The phrase "backhauling via displacement" is generally used to describe two different ways that such a backhaul can occur. In the first situation, a company physically injects gas into a pipeline at one point, and an equivalent amount is diverted to a customer upstream from the point it is injected. See, e.g., Oklahoma Natural Gas v. FERC, 906 F.2d 708, 709 (D.C. Cir. 1990) (Oklahoma I). In the second situation, a company does not take delivery of natural gas which it is entitled to, instead instructing that the gas be diverted to a customer elsewhere on the pipeline route. Importantly, in either scenario, "backhauling via displacement" does not involve the physical transportation of gas by the supplier to the customer.

This is not the first time that FERC has attempted to expand its Section 7 jurisdiction over the construction of a pipeline based upon theoretical transportation such as "backhauling via displacement." For example, the D.C. Circuit Court of Appeals heavily criticized FERC for asserting that interstate backhauling granted FERC jurisdiction over the construction of a pipeline. Oklahoma I at 710-11; and Oklahoma Natural

Gas v. FERC, 940 F.2d 699, 703-4 (D.C. Cir. 1991) (Oklahoma II). (overruled on other grounds 28 F.3d 1281). In each case, the D.C. Circuit remanded FERC's decisions for further explanation, citing a lack of explanation of how theoretical transportation can grant jurisdiction. Id.; Oklahoma II, 940 F.2d at 702 ("[FERC] does not even attempt to find support for its 'backhaul' notion in the statute or legislative history...").[15]

Finally, there are good policy reasons to foreclose FERC's authority to rely upon theoretical transportation transactions such as backhauling and displacement to establish jurisdiction over the construction of a pipeline. Congress was careful to limit FERC's jurisdiction to transportation of natural gas from state-to-state and sale for resale of natural gas interstate commerce. 15 U.S.C. § 717(b),(c). Allowing FERC to expand its Section 7 jurisdiction to include all pipelines that are may engage in backhauling or displacement (i.e., accepting gas from an interstate pipeline and having it diverted to consumer in another state), ignores Congress' carefully crafted limitation and would largely render the Hinshaw Amendment a nullity.

[15] In Oklahoma Natural Gas v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (Oklahoma III) the court providing *Chevron* deference to FERC's interpretations held that the common ownership and the integrated nature of the lateral and interstate pipeline converted the lateral into an interstate pipeline subject to FERC's jurisdiction under Section 7. The court did not however find that backhauling allowed FERC to assert jurisdiction.

Moreover, there is no reason why the construction of the GSX pipeline should be subject to FERC's jurisdiction under Section 7. There is no regulatory gap. Washington State has authority to regulate the construction and operation of the GSX pipeline, the ERA has the authority to set the rates that GSX charges for the importation and exportation of natural gas, and to the extent backhauling transactions occur, FERC will regulate the transactions under the NGA and NGPA. No aspect of the GSX pipeline is left unregulated. This division of responsibility between state and federal regulatory agencies comports well with Congress' intent it passing both the NGA and the Hinshaw Amendment. In contrast, FERC's assertion of jurisdiction over the construction of the GSX pipeline oversteps its authority under the NGA and disregards the regulatory scheme Congress established.

4. Section 19(b) of the NGA does not preclude FSW's jurisdictional challenge.

Because FSW did not squarely raise the question of FERC's jurisdiction in the proceeding below, FSW takes this opportunity to address the application of the exhaustion requirement in Section 19(b) of the NGA. 15 U.S.C. § 717r(b). Section 19(b) generally requires a party to raise its objections to a final order in the application for rehearing in order to secure judicial review, unless there are "reasonable ground[s]" not to do so. This court has applied Section 19(b) to preclude review of substantive matters

such as contractual disputes, permitting, and rate regulation. See, Phillips Petroleum Co. v. Fed. Power Comm'n, 556 F.3d 466 (10th Cir. 1977); Skelly Oil Co. v. Fed. Power Comm'n, 401 F.2d 726 (10th Cir. 1968); Pan American Petroleum Co. v. Fed. Power Comm'n, 268 F.2d 827 (10th Cir. 1959). None of these cases, nor any other cases that the FSW was able to find, precludes a challenge to an agency's subject matter jurisdiction, where the substantive matter on appeal has been properly preserved. In fact, the lone case to address the subject in any detail, Union Elec. Co. v. Fed. Power Comm'n, 326 F.2d 535, 541 (8th Cir. 1964), the court stated that an objection to FERC's jurisdiction cannot be waived under Section 313 of the FPA, 16 U.S.C. § 825l, (an identical rehearing requirement) stating that "it has always been regarded as fundamental that jurisdiction over subject matter cannot be waived by the parties by either action or lack of action." But see, Aquaenergy Systems, Inc. v. FERC. 857 F.2d 227, 230 (4th Cir. 1988) (summarily declining in dicta to consider a challenge to the FERC's jurisdiction because it had neither been, "presented to, or considered by, the Commission.").

C. Conclusion

Because the GSX pipeline cannot physically transport gas in "interstate commerce" and theoretical transportation such as backhauling via

displacement does not grant FERC jurisdiction over the construction of a pipeline, FERC erred in asserting Section 7 jurisdiction over the GSX pipeline. Accordingly, FSW respectfully requests that FERC's Order granting the CPCN should be vacated. Alternatively, the matter should be remanded to FERC for additional explanation of the bases for its jurisdiction.

II. FERC'S ANALYSIS OF THE PROJECT UNDER THE NEPA WAS ARBITRARY AND CAPRICIOUS.

A. STANDARD OF REVIEW

A reviewing court has the power to set aside agency actions and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377 (1989). This Court applies a rule of reason standard to determine if an agency took a "hard-look" at the environmental consequences of a proposed action, or if inadequacies in an EIS defeat NEPA's goals of informed decision-making and public review. Utahns for Better Transp. v. U.S. Dept. of Transp.,305 F.3d 1152, 1163 (10th Cir. 2002). Marsh, 490 U.S. 360, 377 ("this 'reasonableness' review does not materially differ from an 'arbitrary and capricious' review."). An agency must also "articulate a satisfactory explanation for its action including a

'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962)).

In considering FSW's challenge to the adequacy of FERC's EIS in this case, the Court must "'ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decision maker to take a hard look at environmental factors, and to make a reasoned decision." All Indian Pueblo Council v. U.S., 975 F.2d 1437, 1445 (10th Cir. 1992)(internal quotations and citations omitted). If, as here, the EIS's deficiencies "are significant enough to defeat the goals of informed decision-making and informed public comment," Lee v. U.S. Air Force, 354 F.3d 1229, 1237 (10th Cir. 2004), the EIS should be remanded for further action consistent with the Court's opinion.

B. DISCUSSION

NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a); see 42 U.S.C. § 4321. NEPA does not set out substantive environmental standards but instead establishes "action-forcing" procedures that require agencies to take a "hard look" at the environmental consequences of their actions. Robertson v. Methow Valley Citizens

Council, 490 U.S. 332, 348 (1989). These action-forcing procedures are not discretionary, and must be followed "to the fullest extent possible" unless there is a clear conflict of statutory authority. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). Thus, for all, "major [f]ederal actions significantly affecting the quality of the human environment," 42 USC § 4332(C), federal agencies must prepare a "detailed" statement, commonly called an EIS, articulating "why they have settled upon a particular plan and what environmental harms (or benefits) their choice entails." Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir.1997). While NEPA, itself sets forth the requirements for an EIS, 42 U.S.C. § 4332(C),

NEPA's implementing regulations[16] elucidate the statutory requirements. See 40 C.F.R. §§ 1502.1-1502.25. For example, an EIS must contain discussion and analysis of alternatives to the project, 40 C.F.R. § 1502.14, direct, indirect and cumulative effects of the project, 40 C.F.R. §1508.25(c),

[16] Although each agency is responsible for its own compliance with NEPA, Congress created a central agency, the Council on Environmental Quality (CEQ)to oversee the implementation of NEPA and promulgate regulations concerning NEPA compliance. 40 C.F.R. §§ 1500-1518; 1507.1 ("All agencies of the Federal government shall comply with these regulations.") Andrus v. Sierra Club, 442 U.S. 347, 353 (1979).

and reasonably foreseeable significant adverse impacts on the human environment, 40 C.F.R. § 1502.22(b).

As the Supreme Court has explained, the process of creating an EIS:

> ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that relevant information will be available to the larger audience [public] that may also play a role in both the decision-making process and the implementation of [the agency] decision.

Robertson, 490 U.S. at 349.

NEPA focuses the agency's attention on the environmental consequences of a proposed project. This "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Id.

In this case, the deficiencies in FERC's EIS defeat the goal of informed decision making and public comment because FERC: (1) failed to adequately address all reasonable alternatives, (2) failed to adequately consider transboundary impacts, (3) failed to adequately address cumulative acoustic impacts, and (4) failed to consider the impact of reasonably foreseeable earthquakes.

1. FERC failed to adequately address all reasonable alternatives

Assuming arguendo that FERC has Section 7 jurisdiction over the GSX pipeline, FERC must prepare an adequate EIS under NEPA. As noted above, NEPA requires federal agencies to assess the environmental impacts of and alternatives to proposed major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). This consideration of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14; see also Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999). Accordingly, federal agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action, 40 C.F.R. § 1502.14 (emphasis added), and "a thorough discussion of the alternatives is imperative." All Indian Pueblo Council, 975 F.2d at 1444. The dismissal of other alternatives, without evaluating their environmental impacts is a violation of the Congressional mandate under NEPA to explore all reasonable alternatives and impermissibly reduces the EIS process into "a foreordained formality." Burlington, 938 F.2d at 196.

FERC's consideration of alternatives here was deficient in two ways. First, the scope of the project arbitrarily abbreviated the alternative analysis. Second, FERC inappropriately eliminated alternatives that were evaluated in its EIS.

a. The EIS project purpose is unreasonably narrow and arbitrarily abbreviates the alternatives analysis

An EIS must, "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13 (emphasis added). Though an agency need only analyze alternatives that fulfill the statement of purpose and need, Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1041 (10th Cir. 2001), an agency's discretion over the definition of that purpose and need is not unfettered. For example, an agency may not define a project's underlying purpose so narrowly that it would foreclose a reasonable consideration of alternatives. Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2003)(citing Simmons, 120 F.3d at 666-7). Perhaps the clearest explanation of this principle is set forth in Simmons, where the Seventh Circuit observed that:

> [T]he "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definitions. One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what are truly reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.

Simmons, 120 F.3d at 666.

In Simmons, the Army Corps of Engineers (Corps) prepared an EIS for a dam construction project that would provide water to a city and water district. The Corps defined the purpose as finding or creating a single source of water, and therefore looked only at single-source alternatives for providing water. Id. at 669. In holding that the Corps's purpose statement was impermissibly narrow the Court explained that because the underlying purpose of the project was to provide water—not to build the specific project—NEPA required the Corps to look at other reasonable alternative sources of water. Id. at 667, 669. The Court further stated that the Corps' failure to look at "an entire category of reasonable alternatives" that could satisfy the demand for water "ruined" the EIS. Id. at 670.

Here, FERC committed a similar error. FERC defined the purpose and need for the GSX Project as "Provid[ing] a transportation system for natural gas to supply the growing demand for natural gas on Vancouver Island." Doc-213 at 1-1 (emphasis added). This statement of purpose is misleading. The natural gas transported in the proposed GSX pipeline gas is planned for use at electric generation plants on Vancouver Island. Doc-213 at 1-1. As the British Columbia Utilities Commission (BCUC) has made clear, the underlying purpose of the GSX Project is the provision of

additional electrical power for Vancouver Island, not the provision of natural gas. BCUC Decision at 1 (stating that the GSX pipeline's capacity is to secure a reliable electricity supply for Vancouver Island and the Gulf Islands). See also Doc-213, App'x O at SA5-26 ("Because virtually all of the natural gas transmitted by the proposed pipeline is to be used to generate electricity, it would seem reasonable to expand discussion of direct transmission of electrical energy to Vancouver Island from the mainland.")[17]

Like the Corps in Simmons, FERC has failed to adequately consider multiple ways to satisfy public demand for the underlying commodity, in this case electricity. Just as there were multiple ways to provide water in Simmons, there are also multiple ways to provide electricity to Vancouver Island. Having narrowly defined the project as "a transportation system for natural gas," Doc-213 at 4-3, FERC never seriously or adequately considered other alternatives that could meet the same electrical or power demands. Instead, FERC only focused its alternatives analysis on natural gas pipelines. For example, FERC only briefly mentioned that replacing or upgrading the underwater electric transmission cables serving Vancouver

[17] The Washington State Department of Ecology (WDOE) found 39 deficiencies in FERC's final EIS that made an supplemental EIS necessary to satisfy the requirements of the State Environmental Policy Act. State of Washington Department of Ecology, Georgia Strait Crossing Project: Final Supplemental Impact Statement, January 19, 2004. Pamphlet Tab F, pg 1-7—1-15.

Island could reduce the near-term need for electric generation capacity on the island, Doc-213 at 4-3, ("No-Action" section). Likewise, FERC never seriously considered or evaluated the environmental impacts of that or any other option to upgrade or make improvements to the electrical system on Vancouver Island. FERC instead summarily dismissed these options stating that, "the direct transmission of electricity to Vancouver Island does not meet the stated objectives of the proposed project to provide a transportation system for natural gas." Doc-213 at 4-3.

FERC also failed to seriously consider alternative energy sources (i.e. other fuels, solar power, the Vancouver Island Green Project, hydroelectric power, wind-powered electricity, and wave energy). Again, FERC mentioned these alternative options in the no-action section of the EIS, Doc-213 at 4-1–4-3, and then promptly disregarded them stating, "[a]dopting the no-action alternative would not allow the project objectives to be met and the market for natural gas on Vancouver Island would remain underserved." Doc-213 at 4-3 (emphasis added).

FERC's dismissal of seven alternatives that would provide electricity, but not natural gas, to Vancouver Island demonstrates FERC's failure to comply with NEPA in considering alternatives that meet the underlying goal of the project.

b. FERC inappropriately eliminated from consideration reasonable route and system alternatives that meet the stated purpose and need

FERC inappropriately eliminated from consideration route and system alternatives that meet the stated purpose and need of the GSX Project. Route alternatives must be considered to determine if new pipeline routes can avoid or reduce environmental impacts associated with the proposed route. Doc-213 at 4-10. System alternatives must be considered to determine if existing, modified, or planned pipeline systems can avoid or reduce environmental harm while still meeting the project objectives. Doc-213 at 4-4. FERC completely omitted analysis of Canadian route alternatives. Further, FERC's analysis of system alternatives is inherently flawed because FERC failed to consider the distinction between environmental impacts that occur solely in Canada and those that occur in the United States.

i. Failure to consider Canadian route alternatives

Despite the fact that this pipeline is transporting natural gas from Canada through Washington State to Canada, FERC refused to analyze a single new Canadian route alternative. Indeed, the only route alternative that FERC evaluates is the Stanwood to Victoria Route, which is located in the United States. Doc-213 at 4-10-4-11. In the draft EIS, there were three

alternative route proposals located in Canada but FERC summarily dropped those alternatives from the final EIS because:

> the expansion of existing systems would result in far less environmental impact than constructing an entirely new pipeline route, [FERC] no longer consider[s] the all-Canadian routes as reasonable alternatives that are worth further consideration.

Doc-213 at 4-10

Thus, FERC justifies the decision to eliminate from consideration all Canadian route alternatives by stating that modifying existing Canadian systems would be less environmentally damaging than creating new pipelines. Id. Whether or not correct as a general matter, FERC's reasoning ignores the fact that the GSX pipeline—the preferred alternative—is a new pipeline route. If FERC analyzes route alternatives in the United States, at the very least it must look at reasonable route alternatives in Canada. NEPA requires that FERC has a duty to "rigorously explore and objectively evaluate all reasonable alternatives" to a proposed action, and not just those that are in the United States. 40 C.F.R. § 1502.14.

ii. Failure to accurately describe Canadian and American system alternatives

In addition to FERC's failure to consider and analyze the impacts from a single Canadian route alternative, FERC failed to accurately describe the environmental and socio-economic impacts of several reasonable

Canadian and American system alternatives. The "requisite level of detail necessary" when describing an alternative is: "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." All Indian Pueblo Council, 975 F.2d at 1444 (citation omitted). In the instant case, FERC not only failed to provide the requisite level of detail regarding environmental consequences, it omitted a major distinction between the impacts of system alternatives—whether the impacts would be in the United States or Canada.

In the final EIS, FERC discounts the BC Gas System alternative (BC Alternative) stating that:

> Adoption of either the GSX Project or the BC Gas system alternatives would involve a tradeoff of environmental impacts….Because the BC Gas system alternative via Tsawwassen does not provide a clear environmental advantage over the GSX Project, we do not consider the BC Gas system alternative to be preferable to the proposed project.

Doc-213 at 4-8 (emphasis added). As written, this description of environmental tradeoffs ignores an important distinction between the BC Alternative and the GSX Project—the GSX Project impacts are located in the United States and the BC Alternative's impacts are not. As seen from the description of the BC Alternative, this distinction is not made in the EIS.

FERC ignores the fact that, in the GSX Project will impact United States property and environmental resources while the BC Alternative, or other Canadian system alternatives, few if any of the direct impacts would occur in the United States. For example, the GSX project alternative disturbs 636 acres of land and seafloor in the United States. Doc-213 at 2-4. In contrast, the all-Canadian alternatives would not disturb any United States land, property or resources. To the American public, there is a "clear environmental advantage" to not having the project in the United States because the risks and environmental impacts associated with the pipeline would burden Canada, the ultimate beneficiary of the GSX project. Likewise, there are likely to be very different socio-economic impacts, depending on whether the pipeline was constructed in the United Stares or in Canada. FERC's decision makers should consider and the American public should be informed of alternative scenarios where there is no or little impact to American citizens or the local environment.

c. Multiple commentators recognized FERC's failure to adequately address alternatives

FSW was not the only commenter to raise concerns regarding FERC's analysis of alternatives. See Doc-213, App'x O at CO4-135–CO4-137. EPA and WDOE also informed FERC that its alternatives evaluation was inadequate. Similarly, EPA, pursuant to its statutory obligation to

review and comment publicly upon EISs, see 42 U.S.C. § 7609(a), informed FERC that the alternatives section in the draft EIS was unacceptable, bluntly stating:

> The evaluation of alternatives in the draft EIS appears to have been conducted more from the perspective of developing the rationale for eliminating alternatives than from the direction of the implementing regulations for the National Environmental Policy Act (NEPA) to "rigorously explore and objectively evaluate all reasonable alternatives," and to "devote substantial treatment to each alternative considered in detail... so that reviewers may evaluate their comparative merits" (see 40 C.F.R. § 1502.14).

Doc-213, App'x O at FA1 p. 3 (emphasis added).

And FERC's failure to improve its analysis in the Final EIS led the EPA to remark that it:

> remains concerned that the approach used to develop the EIS has inappropriately eliminated reasonable alternatives, in both the United States and Canada, that could meet the stated purpose and need for the project. We do not believe that the EIS has provided sufficient or compelling reasons for the elimination of alternatives….

Doc-219 at 1-2 (emphasis added).

This Court, "may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency apparently ignored the conflicting views of other agencies having pertinent

expertise." Davis, 302 F.3d at 1123. Here the EPA, among other agencies, had relevant environmental expertise regarding the final EIS and FERC ignored its commentary. These "expert agency comments" are "essential to implementing NEPA." See 40 C.F.R. § 1500.1(b). And, "where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not be simply ignored. There must be a good faith, reasoned analysis in response." Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973); see also Forty Questions, 46 Fed. Reg. at 18,026-01, 18027.

Here, FERC had a duty to identify reasonable alternatives and evaluate their environmental impacts to ensure that the public and the ultimate decision maker are kept informed. By failing to discuss or analyze new Canadian route alternatives and other existing system alternatives, FERC draws a skewed picture of the relative impacts and fails to provide a fair appraisal of the proposed projects alternatives. Further, FERC's review of alternatives could not have been "fully informed" and well considered without an examination or consideration of new Canadian route alternatives and other existing system alternatives. Accordingly, the Court should

remand the matter to FERC for additional analysis of alternative routes and systems.

2. The agency failed to adequately address transboundary effects as required under NEPA.

In addition to examining impacts to the environment in the United States, NEPA requires agencies to include an analysis of the reasonably foreseeable transboundary effects of proposed actions in the EIS. See Transboundary Impacts, at Pamphlet Tab H, p. 3. CEQ's interpretation of NEPA is entitled to substantial deference. Andrus, 442 U.S. at 358. As CEQ's Transboundary Impact Guidance makes clear, in preparing an EIS, FERC has a "responsibility to undertake a reasonable search for relevant, current information associated with an identified potential effect." Transboundary Impacts, at Pamphlet Tab H, p. 3. FERC must be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the natural ecosystem that cross international borders, as well as to interrelated social and economic effects. Id.

Though FERC's final EIS contains a section entitled "Canadian Impacts," FERC's analysis in that section does not satisfy either NEPA or CEQ's guidance. To begin with, FERC's analysis of the transboundary impacts of the GSX Project's 37.4 miles of pipeline in Canada is a total of

four and a quarter pages, Doc-213 at 3-160–3-164. This stands in sharp contrast to the 154 pages of analysis for the 47.3 miles of pipeline to be built in the United States. Doc-213 at 3-1–3-154. Worse, the small fraction of analysis devoted to Canadian Impacts fails to present information related to how any Canadian review processes are proceeding, if any decisions have been made, and what environmental analyses have been completed in Canada. Instead, the EIS explicitly states that FERC did not independently analyze the Canadian portion of the GSX Project. At best the "Canadian Impacts" section is merely a summary of the application that GSX-Canada provided to the Canadian government in their permitting application. Doc-213 at 3-161.

Though, "agencies may rely on available professional sources of information and should contact agencies in the affected country with relevant expertise," in analyzing transboundry effects, Transboundary Impacts, at Pamphlet Tab H, p. 3, plainly, a four page summary of the pipeline proponent's Canadian application--with no further independent analysis--is not a "hard look" that adequately informs either the agency or the public of the project's transboundary effects. Canada's National Energy Board (NEB) and the Canadian Environmental Assessment Agency (CEAA) were both evaluating the Canadian portion of the GSX project concurrent

with FERC's analysis. However, nothing in the EIS indicates that FERC formally consulted with either of these agencies. In fact, the only Canadian documents FERC referenced are a CEAA news release and backgrounder,[18] Doc-213, App'x M at M-2, and the NEB's Public Registry web-page.[19] Doc-213, App'x M at M-8. This lack of meaningful consultation with the Canadian agencies to evaluate the transboundary impacts of the project further demonstrates that FERC did not fulfill its obligations under NEPA.

In keeping with a now familiar pattern, both EPA and the WDOE informed FERC of its failure to include a meaningful analysis of transboundary effects in the EIS. For example, prior to the publication of the final EIS, EPA stated it was:

> extremely concerned with what appears to be a lack of coordination of the analyses and information being developed by the Canadian government for project components in Canada.
>
> * * *
>
> While the EIS does indicate that the Canadian components of the project are being reviewed by the Canadian government, it does not present information related to 1) how the Canadian review processes are proceeding, 2) what, if any, decisions have been made, and 3) what environmental

[18] Neither document, which total four pages, deals with environmental issues or information.

[19] FERC does not specifically cite to or incorporate by reference any documents on this website except GSX Canada's Application and the CEAA news release and backgrounder.

> analyses have been completed (and integrated into the EIS).

Doc-213, App'x O at FA 1-5. And, after the publication of the final EIS, EPA again expressed its concern with FERC's lack of coordination with the Canadian government for the project. Doc-219 at 2-3, (repeating EPA's prior concerns). The WDOE expressed similar concerns stating:

> The DEIS should analyze the impacts of the complete proposal, not just [the] US portion. Clearly the US and Canadian portions of the proposal are interdependent and are part of the same proposal. While FERC would not regulate the Canadian portion of the proposal, the impacts in Canada should be analyzed and considered when making decisions on the proposal.

Doc-213, App'x O SA 5-2.

As stated above, this Court, "may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise." Davis, 302 F.3d at 1123. Here, the EPA and the WDOE had relevant expertise regarding the final EIS, and FERC ignored their commentary. Instead, FERC presented a cursory description of the Canadian process that relied completely upon the pipeline proponent's Canadian application, and failed to consult with Canadian agencies. FERC failed to analyze the relevant material needed for informed decision-making

and as such failed to comply with NEPA. The EIS should be remanded so that FERC can properly analyze the effects of the GSX Project in Canada.

3. The EIS failed to take a "hard look" at the project's acoustic effects in violation of NEPA and NEPA's implementing regulations.

FERC violated NEPA when it: 1) failed to consider the acoustic effects of pipeline repair and maintenance activities; 2) failed to adequately assess the potential acoustic impacts of the project before resources are committed; and 3) failed to consider the project's cumulative impact on the marine environment.

a. FERC ignored the direct and indirect acoustic effects of pipeline maintenance and repair activities in the marine environment

FERC violated NEPA when it failed to properly analyze the direct and indirect effects of pipeline repair and maintenance activities within the EIS. To comply with NEPA, an EIS must include an analysis of "the environmental impact of the proposed action," including direct and indirect effects. 42 U.S.C. § 4332(2)(c)(i)-(ii)(2000). "Direct effects" are effects that are caused by the project and that occur at the same time and place. 40 C.F.R. § 1508.8(a). "Indirect effects" are reasonably foreseeable effects that are caused by the project but that occur later in time and further removed in

distance. 40 C.F.R. § 1508.8(b). An agency must make a "reasonable, good faith, objective presentation of [direct and indirect] impacts sufficient to foster public participation and informed decision making." Colorado Envtl. Coalition, 185 F.3d at 1177; see also Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1522 (10th Cir. 1992).

Although the EIS disclosed the direct and indirect acoustic effects of off-shore pipeline construction (expected to last 47 days, 24 hours per day), and the chronic noise associated with pipeline operation, it failed to consider the separate category of noise associated with repair and maintenance activities. See Doc-213 at 3-58, 3-3-69; 3-73. The acoustic effects of these activities reasonably include direct and indirect effects. Doc-213, App'x O at SA3-20. Direct effects may include changes to migratory patterns, disturbance, displacement, and interference with the communication and foraging behaviors of endangered and threatened animals. See Doc-213 at 3-96, App'x O at CO1-12. Marine species may also be affected indirectly, for example, by interference with the basic food web structure. Doc-213, App'x O at CO4-110. The direct and indirect effects of pipeline repair and maintenance are both reasonably foreseeable, and may be significant depending on the time of year these activities take place. Doc-213, App'x O at SA3-20.

This deficiency was not unknown to FERC. The Washington State Department of Fish and Wildlife (WDFW), in a letter dated February 3, 2002, commented on the draft EIS stating "[o]ften pipeline repairs occur as emergency measures and impacts are greater than during construction. This is due to repairs occurring during times of the year when construction isn't normally allowed…." Doc-213, App'x O at SA3-20. WDFW further explained that these unplanned and unavoidable activities could have profound direct and indirect effects on ecosystem structure and function and must therefore be analyzed within the EIS. See 40 C.F.R. § 1508.8(b); Doc-213, App'x O at SA3-20.

In its response to the WDFW comment, FERC stated that "repairs associated with typical operation and maintenance would likely result in impacts similar to pipeline construction." Doc-213, App'x O at SA3-20. This admission alone indicates that these activities are significant enough to be considered and analyzed within the EIS, and not merely acknowledged and dismissed. FERC also acknowledged that "the environmental impacts associated with emergency pipeline repair could exceed those during original pipeline construction," yet chose not to evaluate them contending that these occurrences are rare. Doc-213, App'x O at SA3-20.

FERC's contention that emergency repair activities are rare is both conclusory and inconsistent with data presented in the record. For example, on page 2-24 of Doc-213, FERC states that "[e]ven with proper installation, operation, and routine maintenance of the pipeline system, repairs to the pipeline, including replacement of portions of the system, are reasonably foreseeable actions in the long term." In addition, Section 3.13.3 of Doc-213 reports that there have been: 2 reportable leaks and 12 reportable ruptures in the Northwest Pipeline system (operated by Williams) since 1991; 5 reportable leaks and 20 reportable ruptures in the Williams Gas Pipeline-Central (operated by Williams) since 1991; 5 reportable incidents on the Transcontinental Gas Pipeline Corporation (Transco) pipeline (owned by Williams) since 1995; and 2 reportable incidents along the Texas Gas system (owned by Williams) since 1995.[20] Doc-213 at 3-152. Moreover, FERC fails to cite any data to suggest that emergency or routine repair will occur less frequently within a water body than on land.

[20] Williams has a less than exemplary safety record. DOC-213 at CO2-3. Most recently, the United States Department of Transportation's Office of Pipeline Safety ordered Williams to take corrective action on its natural gas pipeline that runs from Sumas to Washougal, Washington. This pipeline had ruptured twice in the last year (near Auburn, Washington on May 1, 2003 and near Toledo Washington on December 13, 2003). The federal and state agencies issued the December 18, 2003 shut down order out of concern for "life, property and the environment." See the Federal Order at Pamphlet Tab E.

FERC's failure to consider or discuss repair and maintenance activities in the final EIS prevents informed public review of the pipeline's acoustic environmental impact. FERC acknowledges that the effects of pipeline repair and maintenance are "reasonably foreseeable," Doc-213 at 2-24, and could equal or exceed the effects of pipeline construction, Doc-213, App'x O at SA3-20. FERC's inability to pinpoint the location that these activities will take place should not remove consideration of their effects within this EIS. See Doc-213 at 2-24. Merely stating that a significant effect may occur does not qualify as adequate analysis to fulfill an agency's obligation under NEPA, and violates FERC's duty to provide a good faith, objective analysis of the project's environmental effects. Colorado Envtl. Coalition, 185 F.3d at 1177.

b. FERC's post-approval plan to assess the acoustic effect of the pipeline violates NEPA

FERC's post-approval, long-term monitoring plan to determine the effect of the pipeline on marine mammals, fish, and invertebrates neither comports with NEPA's purpose nor replaces a satisfactory NEPA analysis. As discussed above, the purpose of NEPA is to force federal agencies to weigh and consider the consequences of proposed agency actions in their decision-making (the "hard-look"), and to disclose this information to the public. 40

C.F.R. § 1500.1(a), (b). NEPA mandates that "environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added); see also Marsh, 490 U.S. at 371; Robertson, 490 U.S. at 349. At the very least, an EIS must disclose environmental information to the public to provide notice and an opportunity for meaningful public participation in the decision-making process, before a project is initiated. 40 C.F.R. § 1500.1(b).

Here, FERC's recommendation that GSX-US will perform a non-mandatory, post-approval analysis of acoustic impacts neither satisfies the hard look test nor allows the public to meaningfully participate in the decision-making process. The final EIS states "we have recommended that GSX-US gather data on the sound that is emitted from the operation of the offshore pipeline to assist in better understand[ing] the potential impacts it could have on marine organisms." Doc-213 at 3-96. In pertinent part, this plan requires GSX-US to "establish the level of sound emitted from the pipeline in relation to ambient noise levels in the southern Strait of Georgia and the distance this sound is propagated in the water column." Doc-213 at 3-60.

FERC's failure to provide adequate information of the pipeline's potential noise impacts to marine mammals, fish, and invertebrates and other

wildlife violates FERC's duty to provide acoustic information to citizens and public officials "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). FERC failed to comply with this requirement and, instead, offered to collect these data post-approval. Without these data, the public and decision maker could not make a reasoned and informed decision on environmental noise impacts. FERC's plan, further, deprives the public of their right to meaningfully participate in the decision-making process "before decisions are made and before actions are taken." Id. FERC's failure to take a "hard look" at the consequences of the proposed project during NEPA review is not obviated by its plan to fulfill its responsibilities in the future. The agency's decision should be remanded for further consideration of the project's potential acoustic effects.

c. The EIS failed to adequately consider the project's cumulative acoustic impact on marine resources, in violation of NEPA

NEPA requires every proposal for major federal action to address cumulative impacts. 40 C.F.R. § 1508.25(c). CEQ's implementing regulations define a cumulative impact 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." 40 C.F.R. § 1508.7. CEQ regulations are entitled to substantial deference by the Courts. Robertson, 490 U.S. at 355 (citation omitted).

Here, FERC failed to analyze cumulative impacts as required by 40 C.F.R. § 1508.25(c). Specifically, FERC failed to: 1) analyze the cumulative acoustic effect of the project in light of noise already in the marine environment; 2) analyze the cumulative acoustic effect of the pipeline in light of reasonably foreseeable future projects; and 3) analyze the pipeline's cumulative environmental (non-acoustic) effect in the marine environment in light of past, present, and reasonably foreseeable future actions.

i. FERC fails to analyze cumulative acoustic effect of the project in light of noise already in the marine environment

CEQ regulations explicitly require an agency to consider the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. This requirement obligates agencies "to consider the 'incremental impact' of a project for possible cumulative effects by incorporating the effects of other projects into the background 'data base' of the project at issue." Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 70-71 (D.C. Cir. 1987).

Courts will find a NEPA violation where the agency fails to consider the total additive effect of a project in combination with stressors already in place, or where this analysis is merely cursory. See Grand Canyon Trust v. Federal Aviation Admin., 290 F.3d 339 (D.C. Cir. 2002) (failure to disclose

or discuss the combined noise effect of the new airport together with existing noise sources i.e., the environmental baseline); Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998) ("very general" cumulative impacts analysis does not satisfy the hard look required by NEPA); Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1228 (D. Wyo. 2003) (finding inadequate a two sentence "general, predictable, and unhelpful" cumulative impacts analysis).

Here, FERC failed to properly analyze the additive effect of both constant (pipeline operation) and intermittent (pipeline repair, construction, maintenance) noise sources in combination with vessel traffic and other stressors already in place in the marine environment. Instead, FERC provided a list of existing activities, including recreational/commercial fishing, industrial activity, and commercial (vessel) traffic, which were most likely to have cumulative adverse impacts on marine resources. Doc-213 at 3-155. FERC then completed its analysis of the synergistic acoustic effect of these stressors in two sentences. Doc-213 at 3-158. In full, FERC's analysis states:

> Visual and acoustic disturbances associated with pipeline construction and operation may add to other commercial, public, and recreational vessel disturbances to affect marine mammals, fish, birds, and invertebrates. The magnitude of the impact would probably be insignificant relative to the total marine environment available to, and used by, these species,

> particularly given the short-term nature of the construction activities.

Doc-213 at 3-158.

In essence, FERC's analysis is that the sum of all present and future projects in the area will not combine to affect marine resources to any significant degree because these resources may go elsewhere. This analysis may be correct, but is unsubstantiated and fails to address legitimate concerns raised by commentators.

Several commentators to the draft EIS objected to FERC's unsupported assertion that fish may simply relocate to avoid potential harm. For example, the WDFW, in a letter dated February 3, 2002, commented:

> The reasoning that fish are mobile is incorrect. Fish that are still in an egg stage can not actively relocate. Many juvenile fish are not capable of moving quickly enough to escape dangerous conditions. Additionally, adult fish have died in association with pipeline leaks and with rapidly changing stream conditions.

Doc-213, App'x O at SA3-21.

Another commentator advised that "[s]tating the pipeline will not adversely affect [fishery resources] because they 'can swim away' is close to absurd," Doc-213, App'x O at CO1-11. In general, these commentators were concerned that many fish and other organisms may not be able to avoid adverse impacts. Doc-213, App'x O at SA3-21. In addition, many species

are territorial or may depend on particular Cherry Point resources for food, mates, nursery, and spawning grounds. Doc-213, App'x O at CO1-11.

Although NEPA does not require a particular outcome, it does require that an agency take a hard look at the environmental consequences of a proposed action. Here, FERC's failure to properly consider the effect of the project in light of the environmental baseline violates NEPA regardless of whether the agency failed to conduct ambient monitoring in the marine environment, or failed to disclose and discuss its findings. FERC failed to mention, much less analyze the additive effect of pipeline operation, maintenance, or repair in combination with prior stressors, and mischaracterizes these effects as "short-term." As other courts have held, an EIS must analyze the combined effects in sufficient detail to be "useful to the decision maker in deciding whether, or how to alter the program to lessen cumulative impacts." See e.g., Muckelshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 810 (9th Cir. 1999). Perfunctory references or analyses "do not constitute useful analysis in deciding whether, or how, to alter the program to lessen cumulative impacts." Natural Res. Defense Council v. Hodel, 865 F.2d 288, 299 (D.C. Cir. 1988). FERC's cursory and unhelpful treatment of cumulative acoustic impacts related to pipeline construction is not sufficient to warn a decision maker of the environmental

consequences of the proposed action. As such, FERC's analysis does not fulfill the "hard look" NEPA requires.

ii. FERC failed to analyze the cumulative acoustic effect of the pipeline in light of reasonably foreseeable future projects

The CEQ regulations also require FERC to analyze the project's acoustic effects in light of reasonably foreseeable future actions. 40 C.F.R. § 1508.7. In analyzing acoustic effects, here again FERC simply provided a list of the reasonably foreseeable future projects that are most likely to have cumulative adverse impacts on marine resources but fails to perform meaningful analysis. See Doc-213 at 3-155-3-156. The projects on the list include an 11 mile lateral off-shore pipeline that will transport natural gas from the GSX pipeline to the San Juan Islands (OPALCO Pipeline Project), and the construction of the Gateway Pacific Terminal, a 1,092-acre deepwater marine terminal facility off Cherry Point. Doc-213 at 3-156.

Because both the Gateway Pacific Terminal project and the OPALCO pipeline would be constructed in the same geographic region as the GSX pipeline, they will affect many of the same marine resources and environmental values as the proposed project, potentially in many of the same ways. As such, these projects are relevant to the cumulative analysis inquiry required by 42 U.S.C. § 4332; 40 C.F.R. § 1508(c). Despite these facts, FERC failed to properly consider the cumulative effect of these

projects on the marine resources off Cherry Point. FERC's cumulative impacts analysis regarding these future projects is the same two sentences referenced above. Doc-213 at 3-158. Such superficial, unsupported, and unhelpful analysis does not fulfill FERC's obligations to take a hard look at environmental consequences before engaging in major action. See generally, Grand Canyon Trust, 290 F.3d 339 (D.C. Cir. 2002). FERC's decision-making in this instance is neither fully informed nor well-considered as required by NEPA. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). FERC's conclusion that the pipeline will have an insignificant cumulative acoustic effect on marine resources is therefore arbitrary and capricious and should be remanded for further consideration of the project's cumulative effects.

iii. FERC fails to analyze the cumulative environmental (non-acoustic) effect of the pipeline

FERC devotes a total of five additional sentences to the analysis of the project's non-acoustic cumulative impacts. Doc-213 at 3-158. And, instead of analyzing the cumulative (non-acoustic) effect of the project in combination with the other present and reasonably foreseeable stressors, FERC compares the relative effect of the pipeline project to other activities. FERC's approach, which looks at the pipeline's effect in isolation, violates NEPA. See Grand Canyon Trust, 290 F.3d at 346 (EA inadequate for failing

to consider the aggregate noise impacts of a proposed and existing airport on Zion National Park); Hodel, 865 F.2d at 297-299 (FEIS inadequate for failure to consider the cumulative effect of simultaneous inter-regional oil and gas development on "species, particularly whales and salmon, that migrate through the different planning areas"). In addition, FERC fails to address the effect of pipeline construction, operation, and repairs in addition to pier construction, commercial fishing, and other environmental stressors, as required by statute. FERC's failure to properly consider the cumulative acoustic effects of other projects and activities in the area is fatal to the EIS. Indeed, it is impossible to assess the likely environmental effects on marine resources and biodiversity from this EIS. FERC's analysis does not allow the public, or a Court, to independently assess FERC's reasoning, or to develop an informed opinion of the project's environmental consequences, and does not satisfy the hard look required by NEPA. See Hodel, 865 F.2d at 294. The agency's conclusion that the project will have no significant environmental impact is therefore arbitrary and capricious, and should be remanded for further consideration of the project's cumulative effects.

iv. This Circuit's independent utility test for cumulative actions does not apply to the instant case.

Pursuant to 40 C.F.R. § 1508.25, an agency must consider three types of actions and three types of impacts within the scope of an EIS. The types

of actions that must be included within an EIS include direct, indirect and cumulative actions. 40 C.F.R. § 1508.25(a). The types of impacts that must be considered include direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.25(c).

In Airport Neighbors, this Court explained that cumulative actions must be included in the same EIS as the proposed action if they are "so interdependent [with the proposed action] that it would be unwise or irrational to complete one without the other." Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426, 430 (10th Cir. 1996)(citation omitted). This is the independent utility test. This test is properly applied to determining which actions must be included within the scope of the EIS.

In the instant case, FSW does not contend that the Gateway Pacific Terminal and OPALCO Pipeline project need be included within the scope of a single comprehensive EIS with the proposed project. The scope of the EIS with regard to these existing and future activities is not in dispute. Rather, FSW contends that FERC failed to comply with its obligation to analyze the cumulative impacts of the project in light of other past, present, and reasonably foreseeable future projects, pursuant to 40 C.F.R. § 1508(c). For such cumulative impacts, the CEQ regulations provide the proper test. 40 C.F.R. § 1508.7 (2000). NEPA's action-forcing procedures require

agency's to consider both cumulative actions, 40 C.F.R. § 1508.25(a), and a project's cumulative impacts, 40 C.F.R. § 1508.26(c)(3), within the scope of the EIS.

4. FERC failed to analyze all "reasonably foreseeable" earthquakes.

NEPA's implementing regulations require agencies to include, "a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment." 40 C.F.R. § 1502.22(b)(3)(1987). Citing with approval to these regulations, the Department of Energy (DOE), the agency within which FERC is located, issued policy guidance regarding the agency's obligations to address impacts from accidents, including natural phenomena such as earthquakes. Recommendations for Analyzing Accidents under the Nat'l. Envtl. Policy Act § 6.4 (Dep't. of Energy 2002) (Accident Analysis). These guidelines address potentially catastrophic accidents, and require an assessment of the probability and impact of this class of accidents, even if the probability of such accidents is low. Id. at § 1.2. That policy says that documents prepared under NEPA must contain sufficient information to facilitate: 1) informed decision-making by the agency and the public, and, in the context of risk analysis of accidents,

provide 2) an assessment of the chances of a reasonably foreseeable accident, and 3) the potential adverse consequences of those accidents. Id.

As more fully explained below, FERC violated NEPA, CEQ's regulations, and DOE's guidance when it failed to consider the environmental consequences of reasonably foreseeable earthquakes. Specifically, FERC's reliance on the Uniform Building Code's (UBC) design standard is inappropriate to identify earthquakes that need to be analyzed in the EIS.

a. FERC's use of the UBC to identify earthquakes for consideration in the EIS is inappropriate because the UBC does not identify all reasonably foreseeable earthquakes.

GSX-US plans to construct the pipeline to withstand earthquakes identified by the UBC, a design standard. Doc-213 at 3-3. Importantly, this standard is only intended to provide, "minimum standards … regulating … the design [and] construction … of all … structures." Unif. Bldg. Code § 101.2 (Int'l. Conference of Bld'g. Officials 1998)(emphasis added). The UBC uses a standard of a 10% chance of potential failure over the next 50 years from seismic impacts.[21] Doc-213 at 3-3. As FERC notes, the use of this 10% risk standard is, "common practice for buildings as summarized in

[21] This means that if the pipeline were to exist 50 years, there would be a 1 in 10 chance that there would be an earthquake that would exceed the design standards to which the pipeline was built.

the 1997 Uniform Building Codes." Id. Because a design standard only provides minimum thresholds, it does not identify all reasonably foreseeable earthquakes.

The UBC draws a line on the spectrum of possible earthquakes, mandating that a structure must withstand 90% of probable earthquakes over a 50 year period. However, the UBC does not account for larger reasonably foreseeable earthquakes that have less than a 10% chance of occurrence over 50 years. These reasonably foreseeable earthquakes must be considered in the EIS.

Predictably, FERC ignored comments from both the EPA and the State of Washington Department of Natural Resources[22] regarding the foreseeable nature of larger earthquakes. Doc-213, App'x O at FA1-16, SA2-7. The EPA voiced their concern that:

> We interpret the information presented on page 3-3 of the EIS to indicate that there is a 10% chance over the next 50 years that design standards would be exceeded by seismic motion, resulting in failure (a rupture) of the pipeline. This seems like an extraordinarily high rate of risk that cannot be addressed by simply converting the risk statement to a recurrence interval of once in 475 years. Given the proposed project's lifespan, this recurrence interval provides a misleading characterization of the project's real potential risk based on its working lifespan. "

[22] The State of Washington Department of Natural Resources questioned why the pipeline was not designed to the higher standard of withstanding earthquakes with a 2% chance of exceedance to which critical facilities are built. Doc-213, App'x O at SA2-7.

Id. at FA1-16 (emphasis added). As a result, FERC never properly considered the consequences of all reasonably foreseeable earthquakes, some of which will exceed the design standard applied by FERC.

The availability of alternative design standards, with more stringent requirements, suggests that the UBC may be an inappropriate design standard for a pipeline where the risk of a rupture is coupled with catastrophic consequences to human life, property and the environment. The 2000 Edition National Earthquake Hazards Reduction Program Recommended Provisions for Seismic Regulations for New Buildings and Other Structures (NEHRP) identifies not only minimum design criteria, but specifically considers the sustained functionality of essential structures after design earthquakes. NEHRP § 1.1 (Bldg. Seismic Safety Council, Nat'l Inst. of Bldg. Sciences 2000).[23] In fact, all projects funded by the Department of Energy are required to be built to the standards in the NEHRP. 10 C.F.R. § 600.12(b). The project here is a pipeline transporting toxic and explosive gases under Interstate 5 and through a sensitive marine environment, yet it is

[23] To do this, the NEHRP also considers larger credible earthquakes to which the structure may be subjected. NEHRP § 4.1.1. The NEHRP suggests that the maximum considered earthquake ground motion is one that has a 2% chance of exceedance in 50 years. NEHRP § 4.1.3.1.

being built with less environmental analysis than FERC would use to build its own regional offices.

The UBC standard is intended to identify a minimum threshold to which a structure should be built. An analysis under NEPA is intended to discern and analyze reasonably foreseeable earthquakes to which a structure will be subjected, which includes larger earthquakes not identified by the UBC standard. The difference between the two standards means that the UBC standard does not consider earthquakes that require analysis under NEPA.

b. Because FERC failed to consider all reasonably foreseeable earthquakes, the EIS lacked a meaningful mitigation analysis as required by NEPA's implementing regulations.

NEPA's implementing regulations require agencies to consider mitigation measures to minimize adverse environmental impacts. 40 C.F.R. §§ 1502.14(f), 1502.16(h). There is insufficient information to provide a meaningful mitigation analysis because FERC failed to consider all reasonably foreseeable earthquakes. The EIS should be remanded so that FERC can properly analyze all reasonably foreseeable earthquakes and provide a meaningful mitigation analysis.

CONCLUSION

For the forgoing reasons, Petitioner Fuel Safe Washington requests that FERC's Final Order be vacated. In the alternative Fuel Safe Washington requests that the case be remanded to FERC for further proceedings on this matter.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner, Fuel Safe Washington, respectfully requests oral argument in this matter. This appeal raises important questions concerning: (i) FERC's regulatory powers under the Natural Gas Act; and (ii) FERC's obligation under NEPA to take into account reasonable alternatives, and cumulative impacts, including impacts in another country. FERC has seriously misconstrued its jurisdiction under the NGA and its obligations under NEPA. Oral argument will assist the Court's review and analysis of the administrative actions and decision below, and will help to elucidate the complex legal issues in question.

Respectfully submitted this 17th day of February, 2004

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Michael J. Robinson-Dorn
Assistant Professor of Law &
Director, Kathy and Steve Berman
Environmental Law Clinic
Counsel for Petitioner
(206) 616-7729

_____

Angela Coats
Student Intern
(206) 543-3434

_____

Brett Durbin
Student Intern
(206) 534-3434

Kathy & Steve Berman Environmental Law Clinic
University of Washington School of Law
William H. Gates Hall
Box 353020
Seattle, WA 98195