

**BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Big Bend Conservation Alliance (BBCA),)
)
PETITIONER)
)
 v.)
)
Federal Energy Regulatory Commission,)
)
RESPONDENT)

DOCKET No. 17-1002

PETITION FOR REVIEW

The Big Bend Conservation Alliance (BBCA), a non-profit corporation organized under the laws of Texas for the purpose of celebrating and preserving the natural, cultural and economic resources of the Big Bend region of Texas, hereby files this Joint Petition for Review of the following two orders of the Federal Energy Regulatory Commission granting to the Trans-Pecos Pipeline LLC a Presidential Permit and authorization under Section 3 of the Natural Gas Act, 15 U.S.C. §717b authorizing construction and operation of the Presidio Border Crossing Project, FERC Docket No. CP15-550:

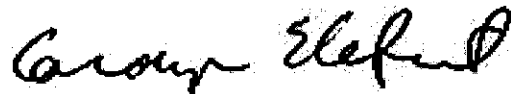
1. *Trans-Pecos Pipeline LLC*, Order Issuing Presidential Permit and Granting Authorization Under Section 3 of the Natural Gas Act, FERC Docket No. 15-500, 155 FERC ¶61,140 (May 5, 2016) and

2. *Trans-Pecos Pipeline LLC*, Order Dismissing and Denying Rehearing, FERC Docket No. 15-500, 157 FERC ¶61,081 (November 1, 2016).

BBCA was granted intervenor status in the Commission proceeding below, and filed a timely rehearing request of the Commission's initial order. A Rule 26.1 Corporate Disclosure and Declaration in Support of BBCA's Standing are attached to this Petition.

This petition for review is timely filed within sixty days of the Commission's order denying rehearing pursuant to 15 U.S.C. §717r.

Respectfully submitted,



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January 3, 2017

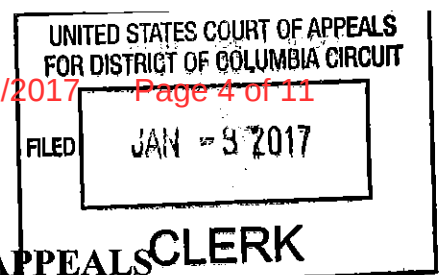
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2017, I have caused to be served a copy of the foregoing Petition for Review on all of the parties on the Commission's Official Service List for the Proceeding in Docket CP15-500 in accordance with the Commission's regulations governing electronic service and this Court's rules. The FERC service list is attached.

Carolyn Elefant

Carolyn Elefant,

Law Offices of Carolyn Elefant



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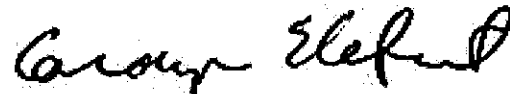
RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF BBCA

Pursuant to Local Rule 15 of the D.C. Circuit Rules and Federal Rule of Appellate Procedure 26.1, Petitioner, the Big Bend Conservation Alliance (BBCA) submits this Corporate Disclosure Statement. BBCA is a volunteer-driven, non-profit corporation organized under the laws of Texas for the purpose of celebrating and preserving the natural, cultural and economic resources of the Big Bend region of Texas -- which encompasses Brewster, Jeff Davis, and Presidio Counties including the adjacent portion of the Rio Grande. BBCA has approximately 100 members who reside within the Big Bend region, or hail from outside the region, but who routinely use and enjoy the region's

myriad recreational opportunities or who study the region's nationally-acclaimed pre-historic and historic cultural resources.

As a non-profit corporation, BBCA has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in BBCA.

Respectfully submitted,



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202-297-6100
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Counsel to Petitioner BBCA
January 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2017, I have caused to be served a copy of the foregoing Rule 26.1 Corporate Disclosure Statement on all of the parties on the Commission's Official Service List for the Proceeding in Docket CP15-500 in accordance with the Commission's regulations governing electronic service and this Court's rules. The FERC service list is attached.

Carolyn Elefant

Carolyn Elefant,
Law Offices of Carolyn Elefant

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**28 U.S.C. §1746 DECLARATION OF COYNE A. GIBSON
IN SUPPORT OF BBCA STANDING**

My name is Coyne A. Gibson. I am over the age of 18, competent to testify and have personal knowledge of the facts set forth in this declaration. Under penalty of perjury, I declare the following:

1. I am a resident of Jeff Davis County, Texas. I have been a member of, and volunteer with the Big Bend Conservation Alliance (BBCA) since April of 2015. I joined the BBCA due to my interests in conservation, and education opportunities within the Big Bend region, including environmental, socioeconomic, and cultural concerns, and in the larger interests of preserving the

region, and protecting it from the adverse effects of large-scale industrial development.

2. BBCA is a volunteer organization and Texas non-profit corporation headquartered in Alpine, Texas. Founded in July of 2014, and incorporated as a non-profit in May 2015, the BBCA's mission is to preserve and protect the natural and cultural resources of the Big Bend region of Texas (specifically Brewster, Jeff Davis, and Presidio Counties including the adjacent portion of the Rio Grande) as well as the rights of those living in the Big Bend area.

3. The BBCA has more than 100 members who reside in, or use and enjoy the resources of the Big Bend Region. BBCA serves its members and protects their interest in preserving the natural and environmental characteristics of the region through education, public advocacy, and participation in legislative, executive, and judicial processes of local, state, and federal government.

4. In June 2015, on behalf of its members, BBCA filed a motion to, and was granted the right to intervene in a proceeding before the Federal Energy Regulatory Commission involving review of an application filed by the Trans-Pecos Pipeline LLC for a presidential permit and authorization under Section 3 of the Natural Gas Act to site, construct and the Presidio Border

Crossing Project (“Project”) which is the subject of BBKA’s Petition for Review. In addition to the BBKA, I filed a motion to intervene, as an individual, and was granted intervenor status on CP15-500. I also timely filed a motion, as an individual, for rehearing on CP15-500, regarding FERC's decision in granting the permits associated with CP15-500. The Project is comprised of a pipeline that originates at natural gas hub near Coynosa in Pecos County, Texas and crosses 143-miles through the Big Bend region of Texas to its termination point at the cross-border facilities (also part of the project) at the international boundary between the United States and the Republic of Mexico.

4. The Project will impact my interests in the region. As a resident of the Big Bend (Trans-Pecos) region, with diverse interests, my activities include nature photography, landscape photography, cultural photography, wildlife observation, bird-watching, dark-sky related activity including astronomy, night sky photography, public outreach astronomy. I am a frequent, and active user of the area park and preserve systems at the Federal and State level, including Big Bend National Park, the Fort Davis National Historical Site, the Big Bend Ranch State Park, the Davis Mountains State Park, and the scenic River Road, FM 170

that runs parallel to the Rio Grande River. I enjoy, use, and exercise the many opportunities in the Big Bend region on a daily basis.

I regularly visit the border, documenting migratory birds, and taking part in landscape photography – the so-called “jurisdictional site” impacts the natural environment, scenery, and quiet formerly enjoyed in that location. The level of industrial, and consequent human activity at the Presidio Crossing site is driving away migratory birds, as well as larger species, including Pronghorn Antelope, Mountain Lions, Bobcats, and various species of deer that formerly frequented the area impacted by the crossing. I am in the vicinity of the Presidio Crossing, “jurisdictional facility” on average twice monthly, and have seen the formerly quiet and pristine area virtually destroyed as a result of construction activity. I am concerned that operation of the facility will result in permanent damage to, and destruction of that ecosystem, and impact the natural environment there.

5. Through my interaction with other members of BBCA, I am aware that the project will also similarly and adversely affect their interests. Some BBCA members own property such as ranches, farms or small businesses along the pipeline route that serve the area’s burgeoning tourist population. Other members do not live directly along the pipeline route but avail themselves of recreational

activities such as nature photography, bird-watching, astronomy, camping and hiking at area park and preserve systems, including the Big Bend National Park, the Fort Davis National Historic Site, the Big Bend Ranch State Park and the Davis Mountains State Park. Still other members are archeology scholars, hobbyists or “heritage tourists” who are drawn by the Big Bend region’s rich pre-historic and cultural resources. Installation of the cross-border facilities of the pipeline will destroy seven acres of wetlands as well as migratory bird-habitat, while construction of the 143-mile pipeline will sully scenic vistas and result in removal of native vegetation that may never fully recover. The destruction of pristine wildlife habitat, cultural resources and open space will deprive BBCA members of enjoyment of these resources and reduce tourism in the region - which will harm those BBCA members whose financial livelihood depends on tourism.

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge.

 /s/ Coyne A. Gibson /s/

[Coyne A. Gibson, January 2, 2017]

157 FERC ¶ 61,081
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Trans-Pecos Pipeline, LLC

Docket No. CP15-500-001

ORDER DISMISSING AND DENYING REHEARING

(Issued November 1, 2016)

I. Introduction

1. In a May 5, 2016 order,¹ the Commission granted Trans-Pecos Pipeline, LLC (Trans-Pecos) a Presidential Permit and authorization under section 3 of the Natural Gas Act (NGA),² to site, construct, and operate a border-crossing facility (Presidio Border Crossing Project) for the import and export of natural gas at the international boundary between the United States and the Republic of Mexico in Presidio County, Texas. Environmental Intervenors³ filed requests for rehearing of the May 2016 Order. They argue that the Commission too narrowly defined its jurisdiction over the Presidio Border Crossing Project and related facilities, which resulted in a truncated environmental review that failed to comply with the National Environmental Policy Act of 1969 (NEPA).⁴ For the reasons discussed below, we deny the requests for rehearing.

II. Background

2. The Presidio Border Crossing Project consists of approximately 1,093 feet of 42-inch-diameter pipeline extending from a point approximately 12.5 miles northwest

¹ *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140 (2016) (May 2016 Order).

² 15 U.S.C. § 717b (2012).

³ The intervenors that filed a timely rehearing request are listed in the appendix. This order collectively refers to them as the Environmental Intervenors.

⁴ 42 U.S.C. §§ 4321-4370f (2012).

of the City of Presidio, Texas to the middle of the Rio Grande River at the international boundary. At the border, the Presidio Border Crossing Project will interconnect with a new stub pipeline of a Mexican affiliate, which will extend to an interconnection with the existing Mexican pipeline grid. Initially, these new facilities are expected to be used to export natural gas that will supply electric generation plants and meet industrial market needs in Mexico.⁵ On the United States' side of the border, Trans-Pecos will construct the Trans-Pecos Pipeline, a 148-mile-long and 42-inch-diameter pipeline connecting the Presidio Border Crossing Project to natural gas supplies in Pecos County, Texas.⁶ The Trans-Pecos Pipeline will be a non-jurisdictional intrastate pipeline⁷ subject to the jurisdiction of the Railroad Commission of Texas.⁸

3. When it goes into service, the upstream Trans-Pecos Pipeline will only provide intrastate service. However, at some point in the future, Trans-Pecos states this pipeline may be expanded to interconnect with interstate pipelines,⁹ and may also provide transportation services under section 311 of the Natural Gas Policy Act (NGPA).¹⁰ However, unless and until the Trans-Pecos Pipeline begins providing service under NGPA section 311, the pipeline will not transport any natural gas volumes in interstate commerce.

⁵ January 4, 2016 Environmental Assessment (EA) at 1; May 2016 Order, 155 FERC ¶ 61,140 at P 4.

⁶ May 2016 Order, 155 FERC ¶ 61,140 at P 5.

⁷ At its terminal near the Waha Hub, the Trans-Pecos Pipeline will interconnect with other Texas intrastate pipelines and processing plants. However, the Trans-Pecos Pipeline will not actually connect to the Waha Hub, and the Trans-Pecos Pipeline will not transport any natural gas in interstate commerce. *See* Trans-Pecos July 8, 2015 Data Request Response at 2 (“As Trans-Pecos stated in its May 28, 2015 Application in this proceeding, the Trans-Pecos pipeline system is located entirely within the State of Texas, and Trans-Pecos initially will flow only natural gas produced in Texas.”). *See also* Trans-Pecos June 21, 2016 Answer at 4 n.11; May 2016 Order, 155 FERC ¶ 61,140 at P 5.

⁸ May 2016 Order, 155 FERC ¶ 61,140 at P 5.

⁹ *Id.*

¹⁰ 15 U.S.C. § 3371 (2012). *See* May 2016 Order, 155 FERC ¶ 61,140 at P 5.

4. On January 4, 2016, the Commission issued a 61-page environmental assessment (EA). As noted in the May 2016 Order,¹¹ the EA addressed geology; soils; groundwater; surface waters; wetlands; vegetation; wildlife and aquatic resources; special status species; land use, recreation, special interest areas, and visual resources; cultural resources; air quality and noise; safety and reliability; and alternatives. The EA also addressed cumulative impacts from other potential projects within a one-mile radius of the Presidio Border Crossing Project, including cumulative impacts related to the Trans-Pecos Pipeline. The EA, in the cumulative impacts section also evaluated the Trans-Pecos Pipeline outside the region of influence of the Presidio Border Crossing Project utilizing the best available data provided by Trans-Pecos. The EA evaluated the pipeline's impacts on geology and soils, water resources, vegetation and wildlife, land use, cultural resources, air quality and noise, and safety.¹² The EA concluded that if constructed in accordance with the application and supplements, approval of the Presidio Border Crossing Project would not constitute a major federal action significantly affecting the quality of the human environment.¹³

III. Procedural Matters

5. Margaret Shugart filed a request for rehearing electronically at 5:56 p.m. on June 6, 2016. Because Ms. Shugart's request was submitted after 5:00 p.m. Eastern time, the end of the Commission's regular business hours, we consider the rehearing request to have been filed on the next business day, June 7, 2016.¹⁴ Section 19(a) of the NGA,¹⁵ requires an aggrieved party to file a request for rehearing within 30 days after the

¹¹ May 2016 Order, 155 FERC ¶ 61,140 at P 25.

¹² EA at 37-44. *See* May 2016 Order, 155 FERC ¶ 61,140 at P 35 (observing that the "cumulative, indirect, and secondary environmental impacts of the intrastate pipeline are comprehensively evaluated in the EA").

¹³ *Id.* at 46.

¹⁴ *See* 18 C.F.R. § 385.2001(a)(2) (2016) ("Any document received after regular business hours is considered filed on the next regular business day."); *id.* § 375.101(c) ("the offices of the Commission are open each day, except Saturdays, Sundays, and Holidays, from 8:30 a.m. to 5:00 p.m.").

¹⁵ 15 U.S.C. § 717r (2012). *See also* 18 C.F.R. 385.713(b) (2016).

issuance of a Commission decision, in this case no later than June 6, 2016.¹⁶ Accordingly, we dismiss Ms. Shugart's rehearing request as out of time.¹⁷

6. On June 21, 2016, Trans-Pecos filed an answer. Although the Commission's rules do not permit answers to requests for rehearing,¹⁸ this provision may be waived for good cause.¹⁹ Good cause exists to do so in this instance because Trans-Pecos' answer provides information that will assist in the decision-making process.

IV. Analysis

A. The Trans-Pecos Pipeline is not subject to the Commission's Natural Gas Act jurisdiction.

7. Environmental Intervenors assert that the Commission erroneously identified the segment of pipeline that crosses the international border, i.e. the approximately 1,093-foot-long Presidio Border Crossing Project, as the sole facility subject to the Commission's jurisdiction to the exclusion of the 148-mile-long upstream Trans-Pecos Pipeline. By misidentifying the extent of the jurisdictional facilities, Environmental Intervenors state the Commission inappropriately narrowed the scope of direct impacts under the NEPA environmental review, causing the Commission to conclude erroneously that the project would not result in a significant impact to the environment. Key to Environmental Intervenors arguments is their allegation that the Trans-Pecos Pipeline will transport natural gas commingled with interstate sources, thereby rendering the upstream pipeline subject to the Commission's jurisdiction under NGA section 7. In the

¹⁶ Pursuant to Rule 2007 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2007(a)(2) (2016), when a deadline falls on a weekend or legal public holiday, the deadline is extended to the close of the next business day. The 30th day after the May 2016 Order was Saturday, June 4, 2016. Therefore, NGA section 19 requires rehearing requests to have been filed by Monday, June 6, 2016.

¹⁷ The rehearing request filed by Ms. Shugart is substantially similar to those filed by the Environmental Intervenors. Thus, this order fully addresses Ms. Shugart's arguments.

¹⁸ 18 C.F.R. § 385.213(a)(2) (2016).

¹⁹ 18 C.F.R. § 385.101(e) (2016).

face of a contrary finding in the underlying order,²⁰ Environmental Intervenors insist there is no way for the Commission to be confident that the natural gas flowing through the Trans-Pecos Pipeline will be totally free of volumes originating from locations outside Texas.

8. Section 1(b) of the NGA provides that the NGA “shall apply to the transportation of natural gas *in interstate commerce*,” but not “to any other transportation ... of natural gas.”²¹ Under section 2(16) of the NGPA,²² an “intrastate pipeline” is “any person engaged in natural gas transportation (not including gathering) which is not subject to the jurisdiction of the Commission under the NGA.” Generally, an intrastate pipeline exists within the borders of one state and delivers gas produced in the same state to end-users or a local distribution company (LDC) to be consumed within the same state.²³ In this case, the export or import of natural gas constitutes foreign commerce, which is distinct from, and mutually exclusive of, interstate commerce.²⁴ Thus, if the Trans-Pecos Pipeline transports only Texas-sourced gas that will not enter interstate commerce, the Trans-Pecos Pipeline is an intrastate pipeline not subject to the Commission’s NGA jurisdiction.

9. Environmental Intervenors assume that because the Trans-Pecos Pipeline will terminate near the Waha Hub it necessarily will transport natural gas that has been comingled with all other gas transported by pipelines located near the hub, including any interstate pipelines. To the contrary, the record demonstrates that the Trans-Pecos Pipeline initially will only transport natural gas produced in Texas and received from other Texas intrastate pipelines or Texas processing plants.²⁵ This is possible because the

²⁰ See May 2016 Order, 155 FERC ¶ 61,140 at P 31 (“Trans-Pecos’s 148-mile upstream pipeline initially will only transport Texas gas production received from other Texas intrastate pipelines or processing plants and none of the gas will enter jurisdictional interstate commerce.”).

²¹ 15 U.S.C. § 717 (2012) (emphasis added).

²² 15 U.S.C. § 3301 (2012).

²³ *Three Rivers Pipeline Co.*, 84 FERC ¶ 61,238, at 62,208 (1998).

²⁴ See *Comanche Trail Pipeline, LLC*, 155 FERC ¶ 61,182, at P 18 (2016) (*Comanche Trail*) (“As the NGA provides separate treatment of these subjects, interstate commerce and foreign commerce are distinct terms and one is not inclusive of the other.”).

²⁵ See Trans-Pecos July 8, 2015 Data Request Response at 2. See also Trans-Pecos June 21, 2016 Answer at 4 n.11; May 2016 Order, 155 FERC ¶ 61,140 at P 5.

Trans-Pecos Pipeline will have direct connections with intrastate pipelines.²⁶ Thus, it is not true, as Environmental Intervenors assert, that the Commission cannot be sure that the Trans-Pecos Pipeline initially will only transport intrastate volumes.

10. Environmental Intervenors argue that, even if the Trans-Pecos Pipeline does not immediately flow interstate gas, it should nonetheless be treated as an interstate pipeline because its purpose is to flow interstate gas,²⁷ and is “likely to provide interstate service at or very near the commencement of operations.”²⁸ According to Sierra Club, “the broader context here” requires the Trans-Pecos Pipeline to be deemed jurisdictional even if there were an initial period when the pipeline transports only intrastate gas.²⁹ Sierra Club contends that Trans-Pecos is taking advantage of regulatory and administrative gaps to avoid environmental and cultural impact compliance.

11. Even if the Trans-Pecos Pipeline will later provide qualifying transportation service for interstate gas supplies under section 311 of the NGPA,³⁰ such service would not subject the facility to the Commission’s NGA jurisdiction.³¹ Further, this is not a

²⁶ Trans-Pecos June 21, 2016 Answer at 6 (“Any alleged commingling of gas at the existing Waha Hub or alleged storage for gas moving through the Waha Hub is not relevant to analyzing the initial flow of gas on the Upstream Facilities because Trans-Pecos is constructing the proposed Header System with *direct connections* to intrastate pipelines in this area that are independent of the existing Waha Hub.”) (emphasis added).

²⁷ For example, Sierra Club points out that Trans-Pecos has stated its intention to flow interstate gas. Sierra Club Rehearing Request at 2, 11.

²⁸ *Id.* at 3.

²⁹ *Id.* at 4.

³⁰ Section 311(a) of the NGPA permits the Commission to authorize transportation by an intrastate pipeline on behalf of an interstate pipeline or local distribution company. 15 U.S.C. § 3371(a) (2002).

³¹ *See* NGPA section 601(a)(2)(A), 15 U.S.C. § 3431(a)(2)(A) (2012) (“For purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is ... (ii) authorized by the Commission under section 3371(a) of this title.”). *See also* NGPA section 601(a)(1)(C), 15 U.S.C. § 3431(a)(1)(C) (“For purposes of the Natural Gas Act, the term ‘natural-gas company’ (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and

(continued ...)

case where the only possible use of a facility is to provide section 311 service. And there is no evidence that construction of the Trans-Pecos Pipeline would “thwart or frustrate the purposes of the NGA,” or be “beyond the scope of section 311 of the NGPA.”³² There is abundant Texas-sourced natural gas to supply the Trans-Pecos Pipeline without relying on interstate volumes,³³ and Trans-Pecos has demonstrated that its pipeline, upon being placed in service, will carry Texas-sourced gas exclusively. As such, the Commission has no jurisdiction over the construction and operation of the Trans-Pecos Pipeline.³⁴ As noted above,³⁵ the EA in the cumulative impacts section analyzed the Trans-Pecos Pipeline’s impacts along the entire length of the pipeline, including those outside the region of influence of the Presidio Border Crossing Project. Thus, even if it was error to find that the pipeline does not fall within the Commission’s NGA section 7 jurisdiction, it is not true that we ignored the pipeline’s environmental impacts. Accordingly, it was not error to exclude the Trans-Pecos Pipeline from the NEPA direct impacts analysis of the Presidio Border Crossing Project.³⁶

the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A) or (B) of this paragraph.”); 18 C.F.R. § 284.3(c) (2016) (“The Natural Gas Act shall not apply to facilities utilized solely for transportation authorized by section 311(a) of the NGPA.”).

³² *Egan Hub Partners, L.P.*, 73 FERC ¶ 61,334, at 61,931 (1995) (*Egan Hub*).

³³ Trans-Pecos stated that there is substantial Texas supply for transportation on the Trans-Pecos Pipeline. Trans-Pecos October 6, 2015 Data Request Response 5.

³⁴ *See Valero Transmission, L.P.*, 57 FERC ¶ 61,299, at 61,955 (1991).

³⁵ *See supra* P 0.

³⁶ One of the Environmental Intervenors filed a rehearing request that addresses a unique issue, i.e. that the allegedly flawed jurisdictional determination resulted in a violation of the Clean Water Act in addition to violating NEPA. Margaret Dodie Sweeney Rehearing Request at 2, 5. However, this argument, like the NEPA argument, relies on the premise that it was error to exclude the Trans-Pecos Pipeline from the Commission’s jurisdiction. That argument is resolved against the Environmental Intervenors, and its resolution is likewise fatal to the Clean Water Act argument.

B. There is insufficient federal control over the Trans-Pecos Pipeline to warrant environmental analysis under NEPA.

12. As an alternative to arguing that NGA section 7 jurisdiction should apply to the Trans-Pecos Pipeline, Environmental Intervenors state that the pipeline should be “federalized” for purposes of NEPA, and analyzed together with the Presidio Border Crossing Project. Environmental Intervenors point out that the Railroad Commission of Texas only regulates the operation of pipeline systems, but has no regulatory oversight over the alignment, environmental impact, and cultural or socioeconomic impact of such systems.

13. Under the four-factor-test set out in *Algonquin Gas Transmission Co.*, in order to determine whether there is sufficient federal control over a project to require environmental analysis, the Commission considers: (i) whether or not the regulated activity comprises “merely a link” in a corridor type project (e.g., a transportation or utility transmission project); (ii) whether there are aspects of the non-jurisdictional facility in the immediate vicinity of the regulated activity that uniquely determine the location and configuration of the regulated activity; (iii) the extent to which the entire project will be within the Commission’s jurisdiction; and (iv) the extent of cumulative federal control and responsibility.³⁷ Cumulative federal control over the non-jurisdictional portion of a project is determined by the amount of federal financing, assistance, direction, regulation, or approval inherent in a project.³⁸

14. The Environmental Intervenors do not persuasively challenge the *Algonquin* four-factor analysis in the May 2016 Order. First, Environmental Intervenors do not dispute that the Presidio Border Crossing Project is merely a link in a corridor type project that links two non-jurisdictional facilities, i.e. the Trans-Pecos Pipeline and the facilities on the Mexican side of the border. Second, as the May 2016 Order explained, and the Environmental Intervenors do not dispute, the location of the Presidio Border Crossing Project was not controlled by the Trans-Pecos Pipeline, but rather the location of the downstream Mexican interconnect. Third, because the Trans-Pecos Pipeline and Mexican facilities will not be subject to the Commission’s NGA jurisdiction, the Commission will have very little control over the entire project.

³⁷ *Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,255, at 61,934 (1992) (*Algonquin*).

³⁸ *Impulsora Pipeline, LLC*, 153 FERC ¶ 61,204, at P 24 (2015).

15. Finally, the entire project will be subject to very little federal control and responsibility. As explained in the May 2016 Order, there will be no federal financial involvement with the Trans-Pecos Pipeline, nor will that pipeline or the facilities at the border cross federal lands.³⁹ Certain stream-cross permits will be required from the U.S. Army Corps of Engineers (Corps).⁴⁰ But because of the “xeric nature of this region in Texas, lack of intermittent and perennial stream flows, and by avoiding spring locations, the project will have *no compensatory mitigation requirements*.”⁴¹ Further, Trans-Pecos stated that it anticipates no obstacles to obtaining the Corps’ written concurrence of authorization for a Clean Water Act section 404 permit under Nationwide Permit 12.⁴² Accordingly, the May 2016 Order correctly concluded that the stream-crossing permits from the Corps and consultation with the U.S. Fish and Wildlife Service for compliance with the Endangered Species Act are insufficient to federalize the much larger non-jurisdictional Trans-Pecos Pipeline.⁴³

16. Analysis of the *Algonquin* four factors demonstrates that the May 2016 Order was correct to conclude that the Commission’s control and responsibility over the Presidio Border Crossing Project are not sufficient to render the Trans-Pecos Pipeline a federal action. Again, as noted above,⁴⁴ the EA in the cumulative impacts section analyzed the Trans-Pecos Pipeline’s impacts along the entire length of the pipeline, including those outside the region of influence of the Presidio Border Crossing Project. Thus, even if it was error to find that there is insufficient federal control over the pipeline to warrant environmental analysis under NEPA, it is not true that we ignored the pipeline’s environmental impacts.

³⁹ May 2016 Order, 155 FERC ¶ 61,140 at P 34.

⁴⁰ EA at 38.

⁴¹ Trans-Pecos October 6, 2015 Data Request Response, Attachment C, discussion of Trans-Pecos Pipeline at 4 (emphasis added). *See also* EA at 38.

⁴² Trans-Pecos October 6, 2015 Data Request Response, Attachment C, discussion of Trans-Pecos Pipeline at 4. The Corps issues nationwide permits for activities that have only minimal impacts on the waters of the United States. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 833 F.3d 1274, 1278, *5 (11th Cir. 2016).

⁴³ *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015).

⁴⁴ *See supra* P 4.

C. The San Elizario Crossing Project is not a connected action.

17. Environmental Intervenors also argue that Comanche Trail’s San Elizario Crossing Project is a connected action that should have been analyzed along with the Presidio Border Crossing Project.

18. The San Elizario Crossing Project is a border crossing facility at the international boundary near the City of San Elizario, Texas—approximately 250 miles from the Presidio Border Crossing Project. The Comanche Trail Pipeline will transport natural gas west from the Waha Hub area in Pecos County, Texas to the San Elizario Crossing Project, whereas the Trans-Pecos Pipeline will transport natural gas south to the Presidio Border Crossing Project. The Comanche Trail Pipeline is an intrastate pipeline subject to the jurisdiction of the Railroad Commission of Texas. The Commission approved the San Elizario Crossing Project on May 19, 2016—two weeks after the issuance of the initial order in these proceedings.⁴⁵

19. CEQ regulations define “connected actions” to include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; (c) are interdependent parts of a larger action and depend on the larger action for their justification.⁴⁶ Courts apply a “substantial independent utility” test to determine whether different projects constitute connected actions. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”⁴⁷ For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. Similar to a highway network, “it is inherent in the very concept of” the interstate pipeline grid “that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”⁴⁸

⁴⁵ *Comanche Trail Pipeline, LLC*, 155 FERC ¶ 61,182 (2016) (*Comanche Trail*).

⁴⁶ 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2016).

⁴⁷ *Coal. for Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). See also *O’Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project “can stand alone without requiring construction of the other [projects] either in terms of the facilities required or of profitability”); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1316 (D.C. Cir. 2014) (*Delaware Riverkeeper*) (applying the substantial independent utility test).

⁴⁸ *Coal. for Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

20. The concept of “connected actions” only applies to federal actions.⁴⁹ The pipelines that will interconnect with these border crossing projects are not subject to the Commission’s jurisdiction.⁵⁰ Thus, for purposes of evaluating connected actions, the only relevant actions are the comparatively small Presidio Border Crossing Project and the San Elizario Crossing Project. Both exhibit substantial independent utility. Assuming cancellation of the San Elizario Crossing Project, the Presidio Border Crossing Project would continue to have utility because it would continue to be used to transport gas across the border.⁵¹

⁴⁹ *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 49-50 (“The point of the connected actions doctrine is to prevent the government from ‘segment[ing]’ its own ‘federal actions into separate projects and thereby fail[ing] to address the true scope and impact of the activities that should be under consideration.’”) (quoting *Delaware Riverkeeper*, 753 F.3d at 1313).

⁵⁰ *See supra* PP 7-11. *See also Comanche Trail*, 155 FERC ¶ 61,182 at PP 17-20.

⁵¹ Coyne Gibson and Big Bend Conservation Alliance attach to their rehearing requests an amended Request for Proposals for the Development of a Natural Gas Pipeline from the Waha Hub to Presidio, Texas (Request for Proposals) issued by the Comision Federal de Electricidad. *See, e.g.*, Gibson June 1, 2016 Rehearing Request, Exhibit A. According to these rehearing requests, the Request for Proposals demonstrates how the San Elizario Crossing Project is a connected action to the Presidio Border Crossing Project. *Id.* at 2. However, the Request for Proposals’ own terms belie the point when they make clear that the Comanche Trail Pipeline “is not part of the [Trans-Pecos Pipeline] and will be developed under a separate request for proposals.” Request for Proposals at 2. Furthermore, the specific provision identified in the rehearing request addressing cross default of the two projects applies only if the two projects happen to be “designed, operated and owned by the same company or affiliates thereof,” implying that it was contemplated at the time that the two projects may *not* be designed, operated, and owned by the same company. Request for Proposals, Appendix C, Material Terms for Foundational Shipper Transportation Service Agreement, paragraph 8. *See* May 2016 Order, 15 FERC ¶ 61,140 at P 48 (“Although both projects may transport gas to the same end user, Comision Federal de Electricidad, Mexico’s dominant electric company, they are not directly related to the other nor are they contingent on the other’s success or failure – they have no functional or financial interdependence.”).

21. Environmental Intervenors contend that these projects are “connected” because they may share financing,⁵² be operated by the same parent companies, serve the same customer, and transport gas from the same location.⁵³ These factors, however, have no bearing upon the analysis developed under NEPA for determining when two federal actions should be considered in the same environmental document. Accordingly, we reject the Environmental Intervenors’ contention that the projects are connected actions.

The Commission orders:

- (A) The rehearing request late-filed by Margaret Shugart is dismissed.
- (B) The requests for rehearing are denied as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵² See Gibson June 1, 2016 and Big Bend Conservation Alliance June 6, 2016 Rehearing Requests, Exhibit B, Press Release, Milbank, Tweed, Hadley & McCloy LLP, Milbank Advises Lender Syndicate in \$1.1 Billion Gas Pipeline Projects (November 18, 2015).

⁵³ See, e.g., Baker Rehearing Request at 2.

Appendix

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John Tuck
Lynette Melnar
Martha Gannon
Kathryn Nowell
Pilar Pedersen
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Mary Etherington
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William Salmon
Elizabeth Baker
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Margaret Dodie Sweeney
Adrienne Evans-Stark
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