

162 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

DTE Midstream Appalachia, LLC

Docket No. CP17-409-000

ORDER ISSUING CERTIFICATE

(March 15, 2018)

1. On May 1, 2017, DTE Midstream Appalachia, LLC (DTE) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations² for authorization to construct and operate approximately 14 miles of new interstate pipeline and related facilities in Berks County, Pennsylvania (Birdsboro Pipeline Project). The proposed pipeline is designed to provide up to 79,000 dekatherms per day (Dth/d) of firm transportation service. DTE also requests a blanket certificate under Part 284, Subpart G of the Commission's regulations to provide open-access transportation services, and a blanket certificate under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and operations.

2. For the reasons discussed below, we will grant the requested authorizations, subject to certain conditions.

I. Background and Proposal

3. DTE, a limited liability company organized and existing under the laws of Michigan, is an indirect, wholly-owned subsidiary of DTE Energy Company (DTE Energy), a diversified energy company involved in the development and management of energy-related businesses and service nationwide. DTE does not currently own any pipeline facilities, nor is it engaged in any natural gas transportation operations. Upon commencement of operations proposed in its application, DTE will become a natural gas

¹ 15 U.S.C. § 717f(c) (2012).

² 18 C.F.R. pt. 157 (2017).

company within the meaning of section 2(6) of the NGA,³ and, as such, will be subject to the jurisdiction of the Commission.

A. Facilities and Services

4. DTE proposes to construct and operate approximately 14 miles of new 12-inch-diameter natural gas pipeline, extending from a single receipt point on Texas Eastern's pipeline in Rockland Township, Berks County, Pennsylvania, to a single delivery point at a new 485-megawatt (MW) natural gas-fired electric generating facility under construction in Birdsboro, Pennsylvania (Birdsboro Facility). Birdsboro Power, LLC (Birdsboro Power) is developing the Birdsboro Facility and has contracted for 100 percent of the capacity of the Birdsboro Pipeline, pursuant to a Precedent Agreement dated August 19, 2016.

5. DTE also proposes to construct and operate: one new pig receiver at the Birdsboro Facility; one new meter site adjacent to the Texas Eastern right-of-way; one new pig launcher at the Texas Eastern interconnect; two new taps on the Texas Eastern pipeline; and valves at approximately four locations along the Birdsboro pipeline route. The Birdsboro Pipeline Project will enable DTE to provide 79,000 Dth/d of firm transportation service to the Birdsboro Facility. DTE estimates that the cost of the proposed facilities will be approximately \$47,219,408.⁴

6. DTE requests approval of its proposed *pro forma* tariff. DTE proposes initial maximum and minimum recourse reservation and usage rates set forth under Rate Schedules FT (Firm Transportation Service) and IT (Interruptible Transportation Service).

7. Birdsboro Power has elected to pay negotiated rates for service on the proposed facilities, and DTE states that it will file tariff records reflecting its negotiated rate agreements with Birdsboro Power 30 to 60 days prior to the project's in-service date. DTE also requests that the Commission approve certain non-conforming terms in the proposed negotiated rate agreement it intends to execute with Birdsboro Power.

B. Blanket Certificates

8. DTE requests a blanket certificate of public convenience and necessity pursuant to section 284.221 of the Commission's regulations authorizing DTE to provide transportation service to customers requesting and qualifying for transportation service under its proposed FERC Gas Tariff, with pre-granted abandonment authorization.⁵

³ 15 U.S.C. 717a(6) (2012).

⁴ See DTE's December 1, 2017 Response to Data Request at 1.

⁵ 18 C.F.R. § 284.221 (2017).

9. DTE also requests a blanket certificate of public convenience and necessity pursuant to section 157.204 of the Commission's regulations authorizing future facility construction, operation, and abandonment as set forth in Part 157, Subpart F of the Commission's regulations.⁶

II. Notice, Interventions, Comments, and Protests

10. Notice of DTE's application was published in the *Federal Register* on May 16, 2017.⁷ The notice established May 30, 2017 as the deadline for filing comments and interventions. Timely, unopposed motions to intervene were filed by Karen Feridun, Nancy Kauffman, Heather EG Nelson, Janis E Ferry, Nancy Roecker-Coates, and Deborah Rhoads.⁸ The Independent Petroleum Association of America, the Natural Gas Supply Association, and Dyanne Jurin filed comments on the proposed project.

11. On July 7, 2017, the Delaware Riverkeeper Network (Delaware Riverkeeper) filed a late motion to intervene. Rule 214 provides that those seeking to intervene out-of-time "must . . . show good cause why the time limitation should be waived." Delaware Riverkeeper's late intervention is an example of the increasing practice of participants in natural gas certificate proceedings filing late motions to intervene without properly addressing the requirements of our regulations, a trend that we noted in our recent *Tennessee Gas* order.⁹ Here, although Delaware Riverkeeper's motion included an assertion that good cause for late intervention exists on the ground that Delaware Riverkeeper "filed its motion to intervene the day it became aware [some five weeks after the deadline for interventions] an application had been submitted," that excuse is not persuasive. Nevertheless, because the timing of this proceeding falls outside the time line we established in *Tennessee Gas* for implementing our new policy, we will grant the intervention here. However, Delaware Riverkeeper and all other participants are on notice that, going forward as we noted in *Tennessee Gas*, we will be less lenient in the grant of late interventions.¹⁰

⁶ 18 C.F.R. § 157.204 (2017).

⁷ 82 Fed. Reg. 22,537 (2017).

⁸ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2017).

⁹ *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,167, at PP 49-50 (2018) (*Tennessee Gas*).

¹⁰ *Id.* P 51.

III. Discussion

12. Since the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction and operation of the facilities are subject to subsections (c) and (e) of section 7 of the NGA.

A. Application of the Certificate Policy Statement

13. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.¹¹ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

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

15. DTE's proposal satisfies the threshold requirement that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. DTE is a new company without existing customers, and proposes a new pipeline project; therefore, there is no potential for this project to be financially subsidized by existing customers or for existing customers to be otherwise adversely impacted.

¹¹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999); *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

16. We also find that there will be no adverse impact on other existing pipelines in the region or their captive customers. The Birdsboro Pipeline Project will provide additional pipeline infrastructure with the purpose of supplying natural gas to the new Birdsboro Facility. The Birdsboro Pipeline Project will enable DTE to provide 79,000 Dth/d of firm transportation service to the Birdsboro Facility in order to meet its fuel supply needs. As discussed above, DTE has no existing customers and will not replace service on any existing pipeline. There is no evidence that the Birdsboro Pipeline Project will adversely affect other pipelines or their customers. In addition, no pipeline company or their captive customers have protested DTE's proposal.

17. We are additionally satisfied that DTE has taken appropriate steps to minimize adverse impacts on landowners. DTE has entered into options to acquire 100 percent of the property rights necessary to construct and operate the project.¹² In addition, DTE engaged in public outreach during the pre-filing process. It worked with all interested stakeholders, solicited input on any concerns and engaged in re-routes where practicable to minimize impacts on landowners and communities. Accordingly, for purposes of our consideration under the Certificate Policy Statement, we find that DTE has taken sufficient steps to minimize impacts on landowners and surrounding communities.

18. The Birdsboro Pipeline Project will enable the provision of up to 79,000 Dth/d of firm transportation service to a new gas-fired electric generating facility currently under construction and will constitute the facility's sole source of supply. Birdsboro Power, the developer of the facility, has subscribed to 100 percent of the project's capacity for an initial term of 20 years. Based on the benefits the project will provide, the lack of adverse effects on existing customers and other pipelines and their captive customers, and the minimal adverse effects on landowners and surrounding communities, we find, consistent with the Certificate Policy Statement and section 7(c) of the NGA, that the public convenience and necessity require approval and certification of the Birdsboro Pipeline, subject to the environmental and other conditions in this order.

B. Rates

19. DTE proposes to provide firm (Rate Schedule FT) and interruptible (Rate Schedule IT) transportation services under Part 284 of the Commission's regulations at cost-based recourse rates, and also requests the authority to offer service at negotiated rates. DTE utilizes a straight fixed-variable rate design with postage-stamp rates. In its original application, DTE proposes an initial monthly Rate Schedule FT reservation charge of \$8.9974 per Dth. This recourse reservation charge was derived from DTE's cost of service for the first year of \$8,529,510 and an annual design capacity of 948,000 Dth. DTE's proposed cost of service includes a rate of return which utilizes a capital structure

¹² DTE's June 14, 2017 Answer at 2-3.

of 50 percent debt and 50 percent equity, a debt cost of 4.50 percent, and a return on equity of 14.00 percent. DTE proposes to utilize a blended depreciation rate of 2.83 percent.

20. In a January 18, 2018, response to a staff data request, DTE provided an adjusted cost of service and recalculated its initial recourse reservation and interruptible charges to reflect changes in the federal tax code, as per the Tax Cuts and Jobs Act of 2017, which became effective January 2018.¹³ DTE's work papers show that the effect of the tax code change is a reduction in the estimated first year cost of service to \$7,562,506 and a reduction in the initial monthly recourse reservation charge to \$7.9773 per Dth.¹⁴ In addition, DTE proposes an initial Rate Schedule IT rate of \$0.2623 per Dth, based on the 100 percent load factor equivalent of its Rate Schedule FT rate (the daily reservation charge plus the commodity charge). As DTE's January 18, 2018, calculation reflects the federal tax code that will be in effect when the project goes into service, the Commission will require DTE to charge the revised recourse reservation and interruptible charges for the purpose of establishing the initial rates.

21. DTE proposes an initial Rate Schedule FT usage charge of \$0.00 per Dth. DTE states that, as a short pipeline with no compression, DTE does not anticipate that there will be any variable costs associated with its services and has therefore set the initial usage charge for FT service at zero.

22. DTE states it will recover Fuel, Lost, and Unaccounted for (FL&U) gas through a FL&U percentage, which will be subject to a retention and tracking mechanism. DTE proposes to set an initial FL&U charge at zero percent. DTE states that going forward, it will use actual fuel and unrecovered volumes to calculate the FL&U adjustment, which will be trued-up and updated through an annual filing made to the Commission.

23. The Commission has reviewed DTE's proposed cost of service, initial rates, and initial FL&U percentage and generally finds them reasonable. Therefore, the Commission accepts DTE's proposed initial recourse rates and FL&U percentage for service on the pipeline.

1. Three-Year Filing Requirement

24. Consistent with Commission precedent, DTE is required to file a cost and revenue study no later than three months after the end of its first three years of actual operation to justify its existing cost-based firm and interruptible recourse rates.¹⁵ In its filing, the

¹³ Pub. L. No. 115-97, 131 Stat. 2054.

¹⁴ DTE January 18, 2018, Response to Data Request at 5.

¹⁵ *Bison Pipeline, LLC*, 131 FERC ¶ 61,013, at P 29 (2010); *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224, at P 57 (2009); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165,

projected units of service should be no lower than those upon which DTE's approved initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the Commission's regulations to update cost of service data.¹⁶ DTE's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, DTE is advised to include as part of the eFiling description, a reference to Docket No. CP17-409-000 and the cost and revenue study.¹⁷ After reviewing the data, the Commission will determine whether to exercise its authority under NGA section 5 to investigate whether the rates remain just and reasonable. In the alternative, in lieu of this filing, DTE may make a NGA general section 4 rate filing to propose alternative rates to be effective no later than three years after the in-service date for its proposed facilities.

2. Negotiated Rates

25. DTE states that it will provide service to the project shipper under a negotiated rate agreement pursuant to negotiated rate authority in its General Terms and Conditions (GT&C). DTE must file either its negotiated rate agreement or tariff records setting forth the essential terms of the agreement in accordance with the *Alternative Rate Policy Statement*¹⁸ and the Commission's negotiated rate policies.¹⁹ Consistent with Commission policy, DTE must file the negotiated rate agreement or tariff records at least 30 days, but not more than 60 days, before the proposed effective date for such rates.

at P 34 (2008).

¹⁶ 18 C.F.R. § 154.313 (2017).

¹⁷ *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 17 (2010).

¹⁸ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996); *clarification granted*, 74 FERC ¶ 61,194 (1996), *order on reh'g*, 75 FERC ¶ 61,024 (1996).

¹⁹ *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006), *reh'g dismissed and clarification denied*, 114 FERC ¶ 61,304 (2006).

3. Pro Forma Tariff – General Terms and Conditions

a. Rate Schedules FT and IT

26. Sections 5.5 of Rate Schedules FT and IT provide that the Excess Overrun Price is “three (3) times the daily Gas Daily posting for the Day on which excess overruns quantities occurred for the high “Common” price for Texas Eastern M-3.” The Commission requires that, when a pipeline makes a tariff filing proposing to use a new price index in its tariff, the pipeline bears the burden of showing that the index price satisfies certain liquidity standards set forth by the Commission in its Price Discovery in Natural Gas and Electric Markets. The Commission found that, if a pipeline or utility proposes to use an index location that meets or exceeds the minimum liquidity standards, the Commission will apply a presumption that the proposed index location will result in just and reasonable charges. As such, the Commission directs DTE to file supplemental information with the Commission, at the time it files its tariff, to ensure that any price indices it proposes to incorporate into its tariff meet or exceed one or more of the minimum criteria for liquidity set forth in the Price Discovery in Natural Gas and Electric Markets.

b. Table of Contents

27. On the Table of Contents for its General Terms and Conditions (GT&C), DTE titles GT&C section 30: “North American Industries Standards Board (NAESB) Standards.” We direct DTE to modify this title to its correct name: “North American Energy Standards Board (NAESB) Standards.”

c. Scheduling of Receipts and Deliveries

28. Section 9.1(d) of DTE’s proposed GT&C provides that: “Unless and until Transporter notifies Shipper that it has installed or otherwise commissioned the use of an interactive electronic information service, nominations and confirmations for transportation service on Transporter’s system shall be communicated in writing by e-mail or other agreed-upon means.” The Commission requires pipelines to incorporate into their tariffs certain NAESB Version 3.0 Standards related to Electronic Data Interchange (EDI) and Electronic Delivery Mechanism (EDM). These standards require a pipeline to maintain and operate an interactive website for performing certain business practices and electronic communications, including the processing of nominations and confirmations. DTE incorporates the EDI and EDM standards into section 30 of its GT&C, as opposed to asking for a waiver or extension time to implement them. Therefore, DTE is required to have its interactive website fully operational when its system goes into operation, and thus section 9.1(d) of its GT&C is unnecessary. Accordingly, we direct DTE to remove section 9.1(d) from its GT&C.

d. Miscellaneous Corrections

29. Several sections of DTE's *pro forma* tariff appear to set forth incorrect references. They include:

- Section 7.2(b) of the GT&C (reference to section 16);
- Section 27.2(a) of the GT&C (reference to sections 26.1 and 26.2);
- Section 29.3 of the GT&C (reference to section 28.2);
- Section 31.2 of the GT&C (reference to section 30.1); and
- Several areas referencing the negotiated rates section are labeled as GT&C section 26.

30. DTE is directed to correct these cross-references in its GT&C.

4. Non-Conforming Agreement

31. DTE states that its agreement with Birdsboro Power includes certain deviations from the pro forma Rate Schedule FT service agreement set forth in DTE's tariff. DTE requests approval of these non-conforming provisions which it states are consistent with Birdsboro Power's status as an anchor shipper.

32. In a data request response, DTE states that the three non-conforming provisions included in its agreement with Birdsboro Power are: (1) a negotiated rate structure in Exhibit A with a preliminary rate based on the project's construction budget that is subject to adjustment based upon actual construction costs; (2) a provision that would require Birdsboro Power to reimburse DTE for a proportionate share of certain economic burdens related to certain changes in law; and, (3) credit requirements for Birdsboro Power that reflect its anchor shipper status for a new construction project that DTE states is consistent with the Commission's credit policies.

33. DTE states that these non-conforming provisions are key to the arrangement for Birdsboro Power to provide contractual support for the project, and are critical to enabling the project to go forward consistent with the Commission's precedent that allow project sponsors to develop rate incentives to encourage potential shippers to commit to a project. DTE asserts that none of the non-conforming provisions affect the actual terms or quality of service on the project, and they provide no risk of undue discrimination.

34. In *Columbia Gas Transmission Corp. (Columbia Gas)*, the Commission clarified that a material deviation is any provision in a service agreement that (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.²⁰ However, not all material deviations are

²⁰ 97 FERC ¶ 61,221 (2001) (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224 (2001) (*ANR*).

impermissible. As explained in *Columbia Gas*, provisions that materially deviate from the corresponding pro forma service agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.

35. The Commission has found that non-conforming provisions may be necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of a project. While we find that DTE's proposed negotiated rate structure, cost reimbursement, and creditworthiness provisions are non-conforming, we find that they are permissible because they do not present a risk of undue discrimination, do not affect the operational conditions of providing service and do not result in any customer receiving a different quality of service.

36. At least 30 days, but not more than 60 days, before providing service to the project shipper under a non-conforming agreement, DTE must file an executed copy of the non-conforming agreement disclosing and reflecting all non-conforming language as part of DTE's tariff and a tariff record identifying this agreement as non-conforming, consistent with section 154.112 of the Commission's regulations.²¹ When DTE files its non-conforming service agreement, we require DTE to identify and disclose all non-conforming provisions affecting the substantive rights of the parties under the tariff or service agreement. This required disclosure includes any such transportation provision or agreement detailed in a precedent agreement that survives the execution of the service agreement.

C. Accounting

37. DTE proposes to capitalize a total allowance for funds used during construction (AFUDC) of \$2,399,734 as part of its Birdsboro Pipeline Project. DTE explains that construction of the project will begin in January 2018 and that the proposed in-service date is June 30, 2018.²²

²¹ 18 C.F.R. § 154.112 (2017).

²² Application at 1.

38. DTE's proposed AFUDC calculation appears to be generally consistent with Commission policy.²³ However, we find that DTE has overstated the amount of AFUDC that is included in the estimated cost of the project because it took a full month's AFUDC on current month construction expenditures beginning with the second month of construction and continued to accrue AFUDC beyond the proposed in-service date.²⁴ Since current month construction expenditures occur throughout the month, only one-half month's AFUDC should be accrued on current month's construction expenditures to reflect the fact that, on average, these expenditures are outstanding for only half the month.²⁵ Additionally, the Commission's regulations require that accruals of AFUDC shall cease when the property is placed into service or is ready for service.²⁶

39. In order to assure that its costs of construction are not overstated, we will require DTE to revise its procedures for calculating AFUDC to reflect the fact that, on average, these expenditures are outstanding for only half the month and that AFUDC accruals cease when the subject property is placed into service or is ready for service.

D. Environmental Analysis

40. On January 18, 2017, the Commission issued a Notice of Intent to Prepare an Environmental Assessment for the planned Birdsboro Pipeline Project, and Request for Comments on Environmental Issues, and Notice of Public Scoping Session (NOI). The NOI was published in the Federal Register and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest

²³ The Commission will allow natural gas pipelines to begin accruing AFUDC when the following conditions are met: (1) capital expenditures for the project have been incurred; and (2) activities that are necessary to get the construction project ready for its intended use are in progress. *See Florida Gas Transmission Co. LLC*, 130 FERC ¶ 61,194 (2010); *Southern Natural Gas Co.*, 130 FERC ¶ 61,193 (2010).

²⁴ *See* DTE's December 1, 2017 Response to Data Request at Attachment A.

²⁵ *See Florida Gas Transmission Co. LLC*, 132 FERC ¶ 61,040 (2010); *Rockies Express Pipeline LLC*, 128 FERC ¶ 61,036 (2009); *Kern River Gas Transmission Co.*, 98 FERC ¶ 61,205 (2002).

²⁶ *See Amendments to Uniform System of Accounts for Public Utilities and Licensees and for Natural Gas Companies (Classes A, B, C, and D) to Provide for the Determination of Rate for Computing Allowance for Funds Used During Construction and Revisions of Certain Schedule Pages of FPC Reports*, Order No. 561, 57 FPC 608 (1977), *reh'g denied*, Order No. 561-A, 59 FPC 1340 (1977), *order on clarification*, 2 FERC ¶ 61,050 (1978). *See also Ingleside Energy Center, LLC*, 112 FERC ¶ 61,101 (2005); *Wyoming Interstate Company, Ltd.*, 130 FERC ¶ 61,251 (2010).

groups; Native American tribes; local libraries and newspapers; and affected property owners. In response to the NOI, the Commission received comments from two federal agencies, one tribe, two state agencies, two county/municipal entities, ten non-governmental organizations, seven landowners, and 37 interested members of the public. Many individuals/entities provided multiple comments.

41. The primary issues raised during the scoping period were related to cultural and historic resources, the non-jurisdictional Birdsboro Power Facility (being developed by Birdsboro Power, LLC), surface water and groundwater quality, wetlands, farmland soils, blasting adjacent to the pipeline, bog turtles, karst terrain and sinkholes, property values, and safety.

42. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA),²⁷ staff prepared an Environmental Assessment (EA) for the project. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. All substantive comments received in response to the NOI were addressed in the EA.

43. The EA was issued for a 30-day comment period and placed into the public record on November 15, 2017. In response to the EA, the Commission received comments from nine interested members of the public, the U.S. Environmental Protection Agency (EPA), the Delaware Tribe of Indians of Oklahoma (Delaware Tribe), the Berks County Planning Commission (Planning Commission), the Oley Township Municipal Authority, the Sierra Club, Berks Gas Truth, Delaware Riverkeeper, and DTE. A summary of the comments and our responses is provided below.

1. Notice and Comment Period

44. Berks Gas Truth submitted a petition signed by over 100 individuals requesting public hearings on DTE's proposal in order to give members of the public another opportunity to submit comments. It also requests an extension of the 30-day public comment period on the EA, and states that given the length of the EA (over 200 pages), and the fact that it was issued for public comment in late November just before the holiday season, additional time to file comments is appropriate. The comment letter also states that a notice of the EA was not included in the Reading Eagle, a local newspaper.

45. CEQ regulations do not require a public comment period or a public meeting for an EA.²⁸ In this proceeding, we established a scoping period in advance of the EA and

²⁷ 42 U.S.C. §§ 4321 *et. seq.* (2012). *See also* 18 C.F.R. pt. 380 (2017) (Commission's regulations implementing NEPA).

²⁸ 40 C.F.R. §1506.6 (2017).

provided a designated comment period following its issuance. Moreover, this order addresses comments that were filed well after the close of the comment period, and as such, we find no reason to extend it.

2. Environmental Impact Statement

46. Berks Gas Truth and Delaware Riverkeeper assert that, due to the project's location, its proximity to the Birdsboro Power Facility, and its potential environmental impacts, the Commission must prepare an Environmental Impact Statement (EIS) instead of an EA. In support of this position, the commenters cite the project's potential to cumulatively impact the environment, the potential for contamination in the project area, and proximity to the Birdsboro Power Facility.

47. Under NEPA, federal agencies must prepare an EIS for major federal actions that may significantly impact the environment.²⁹ However, under NEPA, an agency may elect to first prepare an EA for a proposed action to determine whether an EIS will be required.³⁰ In this proceeding, Commission staff, guided by its regulations implementing NEPA,³¹ and experience with past proposals to construct pipelines of similar length, determined that it would be appropriate to initially undertake an EA to determine whether the Birdsboro Pipeline Project would have a significant impact on the human environment, thus requiring the preparation on an EIS. The EA assesses the project effects that could occur on a variety of resources. Based on the EA's analysis and recommended mitigation measures, the EA concludes, and we agree, that approval of the Birdsboro Pipeline Project would not constitute a major federal action significantly affecting the quality of the human environment. Therefore, preparation of an EIS is not required. Where commenters raise specific objections to the EA's analysis, we address them below.

3. Upstream and Downstream Impacts

48. Berks Gas Truth raised concerns regarding the upstream impacts of natural gas extraction, including hydraulic fracturing and its potential health impacts, and methane leaks. Sierra Club contends that the EA's analysis of the project's downstream natural gas emissions was insufficient, and that staff should have conducted a more thorough analysis of burning the natural gas that the pipeline will transport.

²⁹ See 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. § 1502.4 (2017).

³⁰ 40 C.F.R. § 1501.3-1501.4 (2017) (detailing when to prepare an EIS versus an EA). An EA is meant to be a "concise public document...that serves to...[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or finding of no significant impact." 40 C.F.R. § 1508.9(a) (2017).

³¹ See 18 C.F.R. § § 380.6(b) (2017).

49. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.³² Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."³³ Further, indirect effects "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."³⁴ Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

50. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"³⁵ in order "to make an agency responsible for a particular effect under NEPA."³⁶ As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."³⁷ Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if the causal chain is too attenuated.³⁸ Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."³⁹

³² 40 C.F.R. § 1508.25(c) (2017).

³³ *Id.* § 1508.8(b).

³⁴ *Id.*

³⁵ *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, at 767 (2004) (*Public Citizen*) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, at 774 (1983) (Metro. Edison Co.)).

³⁶ *Id.*

³⁷ *Id.*; see also *Sierra Club v. FERC*, 827 F.3d 36 at 46 (D.C. Cir. 2016) (*Freeport LNG*) (FERC need not examine everything that could conceivably be a but-for cause of the project at issue); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (*Sabine Pass LNG*) (FERC order authorizing construction of liquefied natural gas export facilities is not the legally relevant cause of increased production of natural gas).

³⁸ *Metro. Edison Co.*, 460 U.S. at 774.

³⁹ *Pub. Citizen*, 541 U.S. at 770; see also *Freeport LNG*, 827 F.3d at 49 (affirming that *Public Citizen* is explicit that FERC, in authorizing liquefied natural gas facilities, need not consider effects, including induced production, that could only occur after

51. An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”⁴⁰ NEPA requires “reasonable forecasting,” but an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”⁴¹

a. Impacts from Upstream Natural Gas Production

52. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.⁴² A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).⁴³ To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. The same is true here.

intervening action by the DOE); *Sabine Pass LNG*, 827 F.3d at 68 (same); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955-56 (D.C. Cir. 2016) (same).

⁴⁰ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). See also *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).

⁴¹ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

⁴² See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh’g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion).

⁴³ See cf. *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project). See also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport expansion plan was not an indirect, “growth-inducing” impact); *City of Carmel-by-the-Sea v. U.S. Dep’t of Transportation.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the proposed freeway’s potential to induce additional development).

53. The record in this proceeding does not demonstrate the requisite reasonably close causal relationship between future incremental natural gas production and the proposed project. The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. This does not mean, however, that approving this particular project will induce further shale gas production. Rather, as we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs drive new drilling.⁴⁴ We also note that in the case of this particular project, where the proposed pipeline will function as a delivery lateral from an existing interstate pipeline to the Birdsboro Power Facility, the connection to upstream natural gas production is even more attenuated. There is no proposal to add additional capacity on the upstream pipeline to serve the power plant, thus the interstate pipeline grid is not being expanded to accommodate incrementally larger receipts of natural gas into the grid.

54. Even if a causal relationship between the proposed action here and upstream production were presumed, the scope of the impacts from any such production is not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production.⁴⁵ Moreover, there are no forecasts in the record which would enable the Commission to meaningfully predict production-related impacts,

⁴⁴ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015). *See also Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

⁴⁵ That states, however, not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting) supports the conclusion that information about the scale, timing, and location of such development and potential environmental impacts are even more speculative. *See Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017) (DOE's obligation under NEPA to "drill down into increasingly speculative projections about regional environmental impacts [of induced natural gas production] is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects") (citing *Pub. Citizen*, 541 U.S. at 768).

many of which are highly localized. Here, where the project is a lateral that will deliver gas from the larger interstate pipeline network to an end-user and there is not even an identified general supply area for the gas that will be transported on the project, a meaningful analysis of production impacts is infeasible.⁴⁶ Accordingly, the impacts of natural gas production are not reasonably foreseeable because they are “so nebulous” that we “cannot forecast [their] likely effects” in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.⁴⁷ A broad analysis, based on generalized assumptions rather than reasonably specific information, will not provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to a specific proposal.⁴⁸

55. Based on the foregoing, upstream impacts of the type described by Berks Gas Truth do not meet the definition of indirect effects, therefore, they are not mandated as part of the Commission’s NEPA review. As stated in the EA, the exploration and development of

⁴⁶ Even where there is a general source area the Commission would still need more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depending on the applicable regulations in the various states, to develop a meaningful impacts analysis.

⁴⁷ *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with enough specificity to make their consideration meaningful need not be included in the environmental analysis). *See also Sierra Club v. DOE*, 867 F.3d 189, 200 (D.C. Cir. 2017) (accepting DOE’s “reasoned explanation” as to why the indirect effects pertaining to induced natural gas production were not reasonably foreseeable where DOE noted the difficulty of predicting both the incremental quantity of natural gas that might be produced and where at the local level such production might occur, and that an economic model estimating localized impacts would be far too speculative to be useful). We note that there is publically available information that identifies potential environmental impacts associated with unconventional natural gas production. U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48,132(Aug. 15, 2014) (DOE Addendum), <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf>.

⁴⁸ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 at P 40. *See also Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (holding that the

dividing line between what is reasonable forecasting and speculation is the “usefulness of any new potential information to the decision-making process”).

natural gas supplies, including the use of hydraulic fracturing techniques are not regulated by this Commission, and are outside the scope of the EA.⁴⁹

b. Impacts from Downstream Combustion of Project-Transported Natural Gas

56. Sierra Club takes issue with the EA's analysis of impacts from the downstream combustion of natural gas transported by the project. The court in *Sabal Trail* held that where it is known that the natural gas transported by a project will be used for end-use combustion, the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible."⁵⁰ The EA does precisely this.⁵¹ Using the information from the Birdsboro Power Facility's state air permit, the EA conservatively estimates that if the full volume of gas delivered to the Birdsboro Power Facility is combusted, it will produce 1.5 million metric tons of carbon dioxide per year.⁵² The EA states that the Birdsboro Power Facility's total potential to emit GHGs is about 1.3 million metric tons per year of CO_{2e}. This number is based on the facility's Pennsylvania Air Permit (PADEP Permit # 06-05154A), which provides that the cumulative operating hours of the facility's combustion turbine shall not exceed 8,400 hours during any consecutive 12-month period (roughly 23 hours per day).

4. Segmentation

57. Several commenters assert that the EA failed to include a thorough analysis of the environmental impacts that will result from construction of the Birdsboro Power Facility and request additional analysis of the environmental impacts expected to result from construction of the proposed power facility. Specifically, Delaware Riverkeeper argues that under NEPA, the Commission was required to analyze both the federal and non-federal portions of a project when the projects would not exist independently of one another.⁵³

58. We disagree. The requirement that an agency consider connected or cumulative actions in a single environmental document is to "prevent agencies from dividing one project

⁴⁹ EA at 4.

⁵⁰ *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (*Sabal Trail*).

⁵¹ EA at 104.

⁵² *Id.*

⁵³ Delaware Riverkeeper's December 15, 2017 Filing at 1.

into multiple individual actions” with less significant environmental effects⁵⁴ and “to prevent the government from ‘segmenting’ its *own* federal actions into separate projects and thereby failing to address the true scope and impact of the activities that should be under consideration.”⁵⁵ The CEQ’s connected action regulation “does not dictate that NEPA review encompass private activity.”⁵⁶ Thus, while agencies may not conduct separate NEPA reviews of pieces of an agency-action jigsaw puzzle; the same agency is not required to “add a multitude of private pieces to the puzzle and so require [[NEPA] review of a much larger picture.”⁵⁷ The Commission has no authority over the construction, operation, or maintenance of electric generating facilities. As stated in the EA, the Birdsboro Power Facility is a non-jurisdictional project that is not a “federal action” subject to the Commission’s environmental review under NEPA.⁵⁸ Thus, the Commission did not impermissibly segment its environmental review.

59. Nevertheless, in considering the cumulative impacts attributable to the Birdsboro Pipeline Project, the EA identified the Birdsboro Power Facility as one project that may, when its impacts are added to those of the proposed action, result in cumulative environmental impacts.⁵⁹

⁵⁴ *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015) (Court approved FERC’s determination that, although a Dominion-owned pipeline project’s excess capacity may be used to move gas to the Cove Point terminal for export, the projects are “unrelated” for purposes of NEPA); *see also City of W. Chicago, Ill. v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 650 (7th Cir. 1983) (citing *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976)).

⁵⁵ *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (emphasis added) (quoting *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

⁵⁶ *Id.* at 49 (holding that even though portions of a private activity, construction of an oil pipeline, were subject to federal review and approval, the connected action regulation did not dictate that NEPA review would encompass the rest of the pipeline).

⁵⁷ *Id.* at 50 (noting that the connected actions regulation lacks any reference to private parties).

⁵⁸ EA at 4, 28.

⁵⁹ EA at 125, 126, 128, 130.

5. Cumulative Impacts

60. A proposed project's cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."⁶⁰ Below we discuss cumulative impacts as they relate to the proposed Birdsboro Power Facility, as well as other proposed actions that, when combined with the Birdsboro Pipeline Project, may have cumulative impacts on certain resource areas.

61. Birdsboro Power's Birdsboro Power Facility is a new natural gas-fired combined cycle electric generation facility designed to generate up to 485 megawatts of electrical power.⁶¹ The power plant, which would be located on an approximately 99-acre previously-disturbed site adjacent to the pipeline right-of-way, is not subject to the Commission's jurisdiction.⁶²

62. However, in considering cumulative impacts attributable to the proposed Birdsboro Pipeline, the EA identifies the power facility as one project that may, when its impacts are added to those of the proposed action, result in cumulative environmental impacts.⁶³ The EA found that, due to the spatial and temporal overlap of construction and operation of the power facility with the proposed pipeline, the plant would likely impact environmental resources also affected by the project, including soils and geology, water resources, vegetation, wildlife, land use, recreation, visual resources, air, and noise.⁶⁴ However, due to the generally short-term nature of these impacts, the fact that the power facility will be located on previously-disturbed land, and because nearly all construction impacts would be contained within the right-of-way and extra workspaces, the EA concludes that most impacts would be temporary and localized and thus, are generally not expected to contribute to regional cumulative impacts.⁶⁵

⁶⁰ 40 C.F.R. § 1508.7 (2017).

⁶¹ EA at 28.

⁶² The power plant is subject to state and local review. *See* Application at Table 1.8-1, listing all federal, state, and local permits/approvals required for the Birdsboro Power Facility.

⁶³ EA at 121.

⁶⁴ EA at Table B-27.

⁶⁵ EA at 128.

63. After the issuance of the EA, Delaware Riverkeeper provided information about other activities in the vicinity of the proposed project that may, when combined with the impacts from the proposed project, result in cumulative impacts. These include three new water lines, a 230 kilovolt overhead transmission line, and an associated electric substation in Robeson Township. At Commission staff's request, DTE provided additional information on each of these facilities on January 12, 2018.⁶⁶

64. In response to this new information, staff considered the impacts of these additional facilities cumulatively with those of the proposed project and other projects previously identified within the geographic scopes defined in the EA for each resource area.⁶⁷ As we have explained, consistent with CEQ's 1997 Cumulative Effects Guidance, in order to determine the scope of a cumulative impacts analysis for each project, Commission staff established a "geographic scope" in which various resources may be affected by both a proposed project and other past, present, and reasonably foreseeable future actions.⁶⁸

65. The proposed transmission line will originate at the Birdsboro Power Facility and run for approximately four miles, terminating at an electrical substation (discussed below) in Robeson Township, Berks County, Pennsylvania.⁶⁹ The proposed water mains are part of an agreement by the Reading Area Water Authority to provide 2,500 gallons of water per minute to the Birdsboro Power Facility.⁷⁰ The majority of the water main and transmission line project components will be located outside of the geographic scopes for most of the project's affected resource areas. However, because portions of each will be constructed within the same timeframe as the proposed pipeline and other projects in the area, we nonetheless provide a general analysis of potential impacts from those projects. During construction of the water line, there may be a negligible increase in noise and air emissions. However, staff determined that, given its placement within predominantly developed areas, the water line would not significantly impact resources also affected by the project. Staff determined that the transmission line project would result in small amounts of forest clearing within the Sixpenny Creek-Schuylkill River watershed (a HUC-12⁷¹ also crossed by the project) for its permanent right-of-way and monopoles.

⁶⁶ DTE's January 12, 2018 Filing.

⁶⁷ EA at 119.

⁶⁸ *See, e.g., Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

⁶⁹ DTE's January 12, 2018 Filing at Table 1.9-2.

⁷⁰ *Id.*

⁷¹ Hydrologic Unit Code 12 (HUC 12) watersheds typically define the drainage area

66. The proposed 230 kilovolt electrical substation will be located about 3.3 miles to the west of the proposed pipeline.⁷² The substation is within the same HUC-12 sub-watershed for only one project facility – an already developed storage yard. Staff determined that because of the limited use of the existing storage yard, the substation is not anticipated to result in cumulatively significant impacts for any resource. We agree.

67. Delaware Riverkeeper letter also identified the recently-approved development of an auto museum and a conditionally approved turkey farm in the vicinity of the project.⁷³ The auto museum would be about 0.25-mile from Milepost (MP) 0.0 of the Birdsboro Pipeline Project, but outside of any HUC-12 region crossed by the pipeline. The auto museum would not appreciably impact applicable resources, given its placement within predominantly developed areas, although it would result in a negligible increase in noise and air emissions during construction.

68. The proposed turkey farm appears to be about 0.3 mile from the project and within the HUC-12 region in an agricultural area; however, because it is located on an existing agricultural parcel that appears to be separated from any streams, wetlands, wildlife habitat, or natural vegetation, its contribution to cumulative impacts on resources would be negligible. Additionally, the land would remain in agricultural use. Cumulative visual impacts may occur for adjacent landowners and certain travelers on Boyertown Pike if construction of the pipeline were to occur concurrent with construction of the turkey farm, but these impacts would be limited to the duration of pipeline construction in that area.

69. Given the temporary nature of construction disturbances associated with these additional projects, Commission staff has determined that cumulative construction and operational impacts on the resources also affected by the Project would be similar to the general resource impacts described in the EA. We concur.

70. We note that new land development projects may continue to be identified in the Project area. However, staff have determined, and we agree, that the cumulative impacts analysis contained within the EA, as supplemented here, is adequate and includes those major projects that may discernably contribute to cumulative impacts.⁷⁴

upstream of tributaries to major rivers, and range from 10,000 to 40,000 acres in size. The Birdsboro Pipeline would cross four HUC-12 sub-watersheds, including a total area of 84,627 acres.

⁷² *Id.*

⁷³ Delaware Riverkeeper's January 22, 2018 Filing.

⁷⁴ The cumulative impacts analysis is limited to reasonably foreseeable projects at the time the EA is issued. There is no on-going obligation to continually update the EA

71. Sierra Club requests that we require mitigation measures to reduce the cumulative impacts of the project. As discussed in the EA, staff recommended additional mitigation measures to minimize the impacts of the Birdsboro Pipeline Project and has determined that the cumulative impacts of the project would be negligible to minor.⁷⁵ The EA recommendations are now included as conditions in the appendix to this order; therefore, we conclude no additional mitigation is necessary to mitigate cumulative impacts.

6. Air Quality and Greenhouse Gas (GHG) Emissions

72. Dyanne Jurin and David DeWalt, two members of the local community, express concern that the proposed project will impair air quality. Dyanne Jurin states that based on the estimated annual emissions of CO₂ for the project, it would have a significant impact on air quality and health in the area and should not be approved. Sierra Club requests that the Commission use the Social Cost of Carbon to assess the significance of project impacts.

73. The EA concludes that construction and operation of the proposed project could potentially affect local and regional air quality.⁷⁶ However, it concludes that those impacts would not be significant.⁷⁷

74. Emissions associated with the project's construction-related activities would primarily result from exhaust emissions from construction equipment, fugitive dust emissions associated with construction vehicles, and fugitive dust associated with earth-moving activities.⁷⁸ The EA finds that each of these would be temporary in nature and would not cause, or significantly contribute to a violation of any applicable ambient air quality standard.⁷⁹ To minimize these emissions, DTE has committed to operating gasoline and diesel engines consistently with both the manufacturers' specifications and

if new projects are subsequently proposed. *See generally Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97 at 112-13 (D.C. Cir. 2014), n.11 (D.C. Cir. 2014) (upholding the Commission's cumulative impacts analysis where the Commission was unable to analyze the impacts from two potential future projects given the lack of firm details about either).

⁷⁵ EA at 128.

⁷⁶ EA at 97.

⁷⁷ EA at 104.

⁷⁸ EA at 102.

⁷⁹ EA at 103.

EPA's mobile source emission regulations and to implementing the measures included in its Fugitive Dust Plan.⁸⁰

75. DTE does not propose any new compression facilities or operating emission sources as part of its proposal, and no air permitting actions are required.⁸¹ However, the EA finds that fugitive emissions of natural gas are possible, and may occur at valve components during pipeline operations.⁸² Increased emissions associated with the project are not expected to have significant health or environmental impacts in the immediate project area.⁸³

76. Sierra Club cites to the D.C. Circuit's decision in *Sabal Trail*,⁸⁴ and argues that the EA should have used the Social Cost of Carbon tool to quantitatively estimate the project's greenhouse gas emissions.

77. The Social Cost of Carbon tool estimates the monetized climate change damage associated with an incremental increase in CO₂ emissions in a given year. It can also be thought of as the cost today of future climate change damage, represented as a series of annual costs per metric ton of emissions discounted to a present-day value. To provide a consistent approach for agencies to quantify damage in dollars from estimated emissions, the Obama Administration created the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG). In 2010, and updated in 2016, the IWG released a methodology for estimating the Social Cost of Carbon values across a range of assumptions about future socioeconomic systems and physical earth systems that incorporated cost estimates based on global damages.⁸⁵

⁸⁰ EA at 102.

⁸¹ EA at 103.

⁸² *Id.*

⁸³ EA at 98.

⁸⁴ *Sierra Club v. FERC*, 867 F.3d 1357 (requiring the Commission explain in its NEPA document whether it still adheres to its position that the Social Cost of Carbon tool is "not useful for NEPA purposes," and why).

⁸⁵ Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 - Interagency Working Group on Social Cost of Greenhouse Gases, United States Government, August 2016

78. On March 28, 2017, the Trump Administration disbanded the IWG and withdrew its reports and supporting documents as no longer representative of government policy.⁸⁶ In place of the IWG Social Cost of Carbon methodology, agencies were required to follow the 2003 OMB Circular A-4, which states that when agencies conduct cost-benefit analyses regarding GHG emissions, they should use Social Cost of Carbon values based on domestic, rather than global, damage costs and to use discount rates of 3 and 7 percent.⁸⁷

79. The Commission's policy on the use of the Social Cost of Carbon has been to recognize the availability of this tool, while concluding that it is not appropriate for use in project-level NEPA reviews. The court in the *Sabal Trail* decision did not state that NEPA required the Commission to calculate the Social Cost of Carbon, but rather required the Commission to "explain . . . whether the position on the Social Cost of Carbon that [the Commission] took in *EarthReports* still holds, and why."⁸⁸ In its remand order following the *Sabal Trail* decision, the Commission clarified its reasoning not to use the Social Cost of Carbon, finding that the tool is not meaningful for its decision-making under the NGA or compliance with NEPA.⁸⁹

80. The Commission stated that the Social Cost of Carbon is not pertinent to project decisions under the NGA because the Commission's authority under NGA section 7 has no direct connection to the production or end-use of natural gas.⁹⁰ The Commission also explained that the CEQ does not require a monetary cost-benefit analysis for NEPA review.⁹¹ Indeed, CEQ states that such an analysis should not be undertaken when there are important qualitative considerations, such as those involved in siting infrastructure.⁹² In order to appropriately use the SCC tool for a project such as the Birdsboro Pipeline, not only would we need to quantify all of the negative impacts of the project, but we also would need to calculate the project's benefits, including, but not limited to, replacement of coal and oil by natural gas, a task no easier than calculating costs. Rather, the Commission uses a balancing process to determine whether a proposed natural gas transportation project is required by "the public convenience and necessity." In *Sabal Trail*, the court

⁸⁶ Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

⁸⁷ 68 Fed. Reg. 58,366 (Sept. 17, 2003).

⁸⁸ *Sabal Trail v. FERC*, 867 F.3d 1357, 1375.

⁸⁹ *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018).

⁹⁰ *Id.* P 38.

⁹¹ *Id.* P 40.

⁹² *Id.*

upheld the Commission's use of this process to determine that the project sponsors had shown market demand for the project because shippers entered long-term binding contracts for transportation service using most of the project's incremental capacity.

81. The Commission also explained, as it has in other orders, that there is no widely-accepted standard – established by international or federal policy, or by a recognized scientific body – to ascribe significance to a given rate or volume of GHG emissions.⁹³ Additionally, the appropriate discount rate to be used in the SCC calculations remains a contentious issue. As we have previously stated, “the U.S. Environmental Protection Agency (EPA) states that “no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations” and that consequently, significant variation in output can result.”⁹⁴ Specifically, we continue to believe that the choice between a high discount rate of 7 percent (or higher) or a lower discount rate of 3 percent introduces substantial variation in Social Cost of Carbon tool outputs.

82. Finally, the Commission explained that if it were to use the Social Cost of Carbon, any two projects with the same capacity (or multiple smaller projects with an equivalent cumulative capacity), but which are designed to serve end users in different states or multiple states, will contribute identically to global climate change. Accordingly, we find that the Social Cost of Carbon is not an appropriate and meaningful tool for estimating a specific project's impacts or informing our analysis under NEPA.

7. Contamination

83. Several commenters express concern with and request additional analysis of contamination at and around the Birdsboro Power Facility. They note that Birdsboro Power recently filed a lawsuit against the federal government under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) alleging insufficient cleanup of hazardous materials at the site and requesting compensation for costs incurred remediating the site.⁹⁵

⁹³ *Id.* P 27 (citing the Supplemental EIS for *Sabal Trail* at 7).

⁹⁴ *Id.* P 49 (citing *EarthReports, Inc. v. FERC*, 828 F.3d at 956.).

⁹⁵ *See Birdsboro Power, LLC v. U.S.*, No. 5:17CV05245 (E.D. Pa.) (proceeding stayed pending mediation). The complaint states that during and after World War II and the Korean War, the U.S. military used what is now the site of the Birdsboro Power Facility to produce steel castings, and disposed of hazardous substances, including petroleum products, asbestos, polychlorinated biphenyls, volatile organic compounds, and semi-volatile organic compounds, on and near the site. Between 2004 and 2009, the U.S. Army Corps of Engineers, in conjunction with Pennsylvania DEP, conducted investigations and remediation activities at multiple areas in and around the Birdsboro

84. Delaware Riverkeeper recommends that either Birdsboro Power commission an environmental site assessment under CERCLA in order to determine the level of contamination in soils outside of its facility boundaries, or the Commission require DTE to fully characterize the level of contamination beyond the pipeline corridor and the potential for contaminants to move into the clean fill.⁹⁶ It also states that the mitigation described in the EA – removal and replacement of up to 6 feet of soil within the 50-foot-wide permanent right-of-way – is not adequate to address contaminated soils in the path of the pipeline.⁹⁷

85. Based on the known historic contamination at the site, DTE conducted a soils investigation in its right-of-way adjacent to the Birdsboro Power Facility.⁹⁸ The investigation assessed soils and groundwater south of the Schuylkill River in all areas that would be affected by the Birdsboro Pipeline Project outside of the boundaries of the power facility. The results of the soil and limited groundwater investigation identified contaminated fill material to a depth of up to 6 feet.⁹⁹ As mentioned above, DTE agreed to remove and replace up to 6 feet of soil within the 50-foot-wide permanent right-of-way from Station Numbers 0+00 to 15+95. The EA states that if additional contamination is identified in the right-of-way during construction, DTE will halt construction and notify the applicable agencies.¹⁰⁰ However, we note that DTE has not developed a formal construction plan to address the discovery of unanticipated contamination. Therefore, we are including as a condition to this order (environmental condition 20) a requirement that DTE file for approval an Unanticipated Discovery of Contamination Plan prior to the commencement of construction.

86. The EPA's Brownfield Property Progress Profile states that, while the site of the power facility was previously contaminated with hazardous substances resulting from its

Power Facility site before it was purchased by Birdsboro Power in 2016. In its claim against the federal government, Birdsboro Power states that it completed extensive environmental remediation work at the site.

⁹⁶ *Id.* In a second comment letter, the Delaware Riverkeeper requests a map identifying the overlap between the Birdsboro Pipeline Project and the Birdsboro Power Facility; a map was filed in the public record by DTE on December 15, 2017.

⁹⁷ Delaware Riverkeeper's December 15, 2017 Filing at 3.

⁹⁸ EA at 43.

⁹⁹ *Id.*

¹⁰⁰ DTE's July 12, 2017 Filing at 1.

prior use as a U.S. military facility, cleanup at the site is now complete.¹⁰¹ Moreover, the lawsuit mentioned by a number of commenters states that Birdsboro Power completed additional remediation at the site pursuant to applicable state and federal regulations and that the lawsuit itself is for the recovery of funds spent in that effort. As a result, we are satisfied that the site has been sufficiently remediated.¹⁰²

8. Waterbodies, Wetlands, and Restoration

87. The project will cross 22 waterbodies: 12 that are classified as minor (less than 10 feet wide), eight that are classified as intermediate (10 to 100 feet wide), and two that are classified as major waterbodies (greater than 100 feet wide).¹⁰³ A total of 21 wetlands will either be crossed by the project or within the construction workspace.¹⁰⁴

88. In order to protect waterbody crossings and wetlands during construction, the EPA recommends that DTE clean equipment used for in-stream construction to avoid the transfer of invasive species between waterbodies, use an environmental inspector with stop-work authority during all horizontal directional drilling (HDD) activities, and outline the frequency at which revegetation success will be monitored.¹⁰⁵ EPA also recommends that DTE file approval from the Berks County Conservation District regarding seed mixes in DTE's Erosion and Sediment Control Plan (E&SCP). It also questions the EA's dismissal of the conventional bore method (which doesn't use drilling mud and, the EPA maintains, reduces the likelihood of inadvertent release) to cross Wetland GF-2 as infeasible, and suggests that the EA should have included additional explanation for this decision.

¹⁰¹ EPA Brownfields Property Progress Profile for Property ID 148181, <https://obipublic11.epa.gov/analytics/saw.dll?PortalPages>

¹⁰² If any contamination is identified at the Birdsboro Power Facility site, either during construction or in the future, it must be remediated by the liable party in accordance with applicable law.

¹⁰³ EA at 48. We note that the EA considered the crossing of the Schuylkill River as two crossings. The Delaware Riverkeeper comments that 28 streams were reported to the state as being crossed, but that the EA only discusses 22 stream crossings. Staff conducted a thorough review of DTE's application and affirmed the EA's analysis that the project, with the addition of the waterbody at MP 3.9 (discussed below) would cross 22 waterbodies.

¹⁰⁴ EA at 52.

¹⁰⁵ See EPA's December 15, 2017 Filing.

89. DTE has committed to following EPA's recommendations and states that it will clean in-stream construction equipment in accordance with its Noxious Weeds/Invasive Plant Species Control and Mitigation Plan.¹⁰⁶ Additionally, the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan) requires at least one environmental inspector for each of the three construction spreads, including one inspector dedicated to the HDDs and conventional bores. All environmental inspectors are required by the Plan to have stop-work authority.¹⁰⁷

90. DTE will follow the measures included in the Commission's Plan, described above, and DTE's *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures) and E&SCP, regarding restoration and monitoring of revegetation along the project right-of-way. Restoration monitoring inspections will be conducted at six-month intervals for the first year once the initial restoration activities are complete; followed by annual inspections. At a minimum, DTE's monitoring inspections will occur after the first and second growing season. In addition, DTE is required to file with the Commission quarterly reports documenting the restoration and revegetation of the project areas for at least two years following construction. DTE includes a list of PADEP-approved seed mixes in its E&SCP and has indicated that those mixes will be submitted to the Berks County Conservation District for review and approval.¹⁰⁸ We conclude that this is sufficient to address the EPA's recommendation.

91. DTE originally proposed to cross Wetland GF-2 at mile post (MP) 12.5 by HDD. However, based on a review of the underlying geology and karst following geologic investigations, DTE and Commission staff determined that an HDD crossing had a high probability of failing and resulting in an inadvertent return of drilling fluids.¹⁰⁹ At the request of the EPA, DTE evaluated other trenchless methods but determined that they are technically infeasible due to crossing distance and equipment constraints.¹¹⁰ To minimize impacts at the MP 12.5 crossing, DTE will decrease the construction right-of-way width by

¹⁰⁶ DTE's December 22, 2017 Filing at 7.

¹⁰⁷ The Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* establishes baseline mitigation measures that project sponsors must implement, except when specifically exempted by Commission staff, to minimize erosion and enhance revegetation associated with their proposed projects. It is available at <https://www.ferc.gov/industries/gas/enviro/plan.pdf>.

¹⁰⁸ EA at 60.

¹⁰⁹ See DTE's September 26, 2017 Filing at 5-6.

¹¹⁰ *Id.*

30 feet, impose timing restrictions, and cross the waterbody using the dry-ditch method.¹¹¹ In addition, we note that DTE conducted Phase II and III bog turtle surveys at this wetland to ensure compliance with the Endangered Species Act. No bog turtles were found. Thus, the U.S. Fish and Wildlife Service (FWS) concluded that the project would not affect bog turtles in this location.¹¹²

92. Berks Gas Truth and Delaware Riverkeeper state that the proposed HDDs could result in spills of drilling mud and contamination. Delaware Riverkeeper also states that the EA should have assessed the impact to the floodplain caused by raising the ground surface level by four feet at the Birdsboro Power Facility.

93. DTE will be required to follow its Inadvertent Return Contingency Plan, which includes measures to monitor for inadvertent returns and to prevent, contain, and mitigate any inadvertent returns from HDD activities.¹¹³ This plan includes measures to immediately halt drilling activities if an inadvertent return to the surface is identified and procedures to consult with the PADEP if an inadvertent return affects a waterbody or wetland. Finally, as discussed elsewhere in this order, the Birdsboro Power Facility is not a FERC-jurisdictional project. Nonetheless, the EA considered it in its evaluation of the proposed project's cumulative impacts and concluded that DTE's commitment to remediate contaminated soils adjacent to the proposed power facility would adequately minimize impacts on soils.¹¹⁴ We agree with the EA's conclusion that DTE has proposed sufficient measures to ensure that any impacts of an inadvertent return on the environment, including groundwater, wetlands, surface waterbodies, and soils will not be significant.

9. Agricultural Easements

94. The Planning Commission filed comments regarding the Agricultural Conservation Easement (ACE) and Agricultural Security Area (ASA) programs located in the project area. It explains that two of the proposed four mainline valves (MLVs), those at MP 6.2 and 9.7, are located on ACE program lands, each of which would encumber 0.1 acre of land.¹¹⁵ The Planning Commission also indicates that a third MLV (MP 10.9), as well as a

¹¹¹ EA at 137.

¹¹² EA at 70.

¹¹³ DTE's revised Inadvertent Return Contingency Plan is available on FERC's eLibrary website, located at <http://www.ferc.gov/docs-filing/elibrary.asp>, by searching Docket Number CP17-409 and accession numbers 20180112-5142.

¹¹⁴ EA at 44.

¹¹⁵ Berks County Planning Commission's December 13 2017 Filing.

Texas Eastern Transmission Company meter station and pig launcher at MP 13.2, are located on farms enrolled in the ASA.

95. In its comments on the EA, DTE indicates that it no longer proposes to install a valve at MP 9.7.¹¹⁶ However, the remaining aboveground facilities described above may be located on ACE or ASA lands. In order to ensure that DTE appropriately considers additional mitigation of impacts on affected ACE and ASA lands, we are including as a condition to this order (environmental condition 18) a requirement that DTE consult with the Planning Commission and re-consult with the U.S. Dep't of Agriculture - Natural Resources Conservation Service, regarding the presence of ACE and ASA lands in the vicinity of the aboveground facilities. .

10. Foreign Utility Crossing

96. In response to scoping comments, DTE indicated that Oley Township's 18-inch-diameter sewer line would be crossed by HDD.¹¹⁷ In its comments on the EA, Oley Township requested additional information including: the location and depth of HDD entry and exit points; the depth of the pipeline where it crosses beneath the sewer line; whether any construction equipment will cross above the sewer line; drawings, details, and specifications for the HDD crossing; and whether DTE would participate in the cost of replacement of the crossed portion of the sewer line with a ductile iron sewer line.¹¹⁸

97. While the EA found that the design of DTE's proposed HDDs did not pose any issues, DTE committed to meeting with Oley Township in the first quarter of 2018 regarding its HDD crossing concerns.¹¹⁹ This order contains a condition (environmental condition 19) requiring DTE to consult with Oley Township regarding the crossing of the sewer line.

11. Cultural Resources

98. In its comments on the EA, the Planning Commission states that it had not yet received a copy of DTE's Draft Determination of Effect Report, as recommended in the EA. In a filing on December 22, 2017, DTE documented that on December 15, 2017 it provided copies of the revised Determination of Effect Report to the Planning Commission, the Oley Township Historic Architectural Review Board, and the Oley

¹¹⁶ DTE's December 22, 2017 Filing at 8.

¹¹⁷ See DTE's August 28, 2017 Filing in Docket No. PF17-1.

¹¹⁸ Oley Township Municipal Authority's December 8, 2017 Filing.

¹¹⁹ DTE's December 22, 2017 Filing at 8.

Valley Heritage Association, which are all consulting parties.¹²⁰ On January 17, 2018, the Planning Commission filed comments on the Determination of Effects Report, recommending that DTE revise its report to address the Planning Commission's comments.¹²¹ Therefore, environmental conditions 16 and 17 in the EA are replaced with a new condition (environmental condition 15 of this order) that reflects the updated status of the consultation.

99. Recommended condition 17 in the EA required that DTE document that the Stockbridge-Munsee Community and the Delaware Tribe had an opportunity to review and comment on DTE's Unanticipated Discovery Plan. This portion of the recommended condition is no longer necessary because DTE documented in its EA comments additional communications with these tribes. On December 15, 2017, DTE's cultural resources consultant conveyed copies of the revised Unanticipated Discovery Plan (dated May 2017) and Archaeological Site Avoidance Plans to the New York Office of the Stockbridge-Munsee Community and the Delaware Tribe Historic Preservation Office in Pennsylvania. Copies of this correspondence were filed with the Commission on December 22, 2017. In response, the Delaware Tribe requested specific changes to the Unanticipated Discovery Plan.¹²² On January 9 2018, DTE filed a revised Unanticipated Discovery Plan that specifically addressed the Delaware Tribe's comments. Staff concluded, and we concur, that the revised Unanticipated Discovery Plan is acceptable and there is no need to include the recommendation in this order.

100. The EA states that the Pennsylvania State Historic Preservation Office (SHPO) had not yet commented on DTE's Rural Historic Landscape Report (dated October 10, 2017).¹²³ On November 9, 2017, DTE filed the SHPO's review of that report. Commission staff agrees with the SHPO that the Limekiln Valley Rural Historic District is eligible for nomination to the National Register of Historic Places, and the Jacob De Turk

¹²⁰ *Id.* at 10.

¹²¹ The Planning Commission's comments refer to mitigation of the visual impacts of certain above-ground facilities and request clarification on several aspects of the Report.

¹²² *See* Delaware Tribe's December 27, 2017 Filing.

¹²³ EA at 93.

Farm and the Jacob Strunk Farm¹²⁴ are contributing elements to that district. Those two farms were addressed in the December 2017 Determination of Effect Report, that DTE submitted to the SHPO on December 15, 2017. The report found that the farms would not be adversely affected by the Project. On February 6, 2018 the SHPO reviewed the report and agrees with the conclusions. However, as noted in the SHPO comments, DTE still needs to provide additional information to the SHPO in order to complete section 106 consultation

101. The December 2017 Determination of Effect Report also found that the Birdsboro Pipeline Project would have adverse effects on the Oley Township Historic District. As indicated in the EA,¹²⁵ our staff's June 12, 2017 Environmental Information Request directed DTE to file a treatment plan for the Oley Township Historic District. Once the treatment plan is reviewed by the SHPO and consulting parties, Commission staff will issue an Adverse Effect Finding letter to the Advisory Council on Historic Preservation, and formulate a Memorandum of Agreement (MOA) to resolve adverse effects. Environmental condition 15 of this order includes a requirement that DTE file the outstanding treatment plan for Commission review and approval.

12. Alternatives

102. Delaware Riverkeeper and Sierra Club allege that the EA's alternatives analysis is flawed. They argue that, in order to truly consider a "no-action" alternative, it would need to evaluate the possibility that the proposed pipeline is never built, which would, in their estimation, result in fewer emissions.

103. We disagree. Because the power plant is being developed,¹²⁶ it is reasonable to expect that, even if the proposed pipeline project is never built, demand for natural gas to generate electricity at the facility would result in proposals from other natural gas transmission companies to supply the facility with natural gas. Such actions would result in similar, if not greater, environmental impacts than that proposed by the current project.¹²⁷

¹²⁴ It should be noted that the Project would extend through both the Jacob De Turk Farm and the Jacob Strunk Farm.

¹²⁵ EA at 96.

¹²⁶ Construction of the Birdsboro Power Facility began in 2017 and is anticipated to be completed in April, 2019.

¹²⁷ EA at 130-131.

13. DTE's Response to EA and Comments

104. DTE's own comments on the EA include updates on their progress towards satisfying staff's recommendations in the EA, updated agency consultation, minor modification of the proposed action and corrections/clarifications to statements in the EA.¹²⁸ DTE also provides various cultural resource plans and additional consultation letters.

105. Additionally, since the issuance of the EA, DTE indicated that Section 7 consultation under the Endangered Species Act is now complete.¹²⁹ We agree and therefore we have eliminated from this order staff's recommended condition 15 in the EA requiring completion of the Section 7 consultation prior to construction.

106. As discussed above, DTE has determined that the previously-proposed MLV at MP 9.7 is no longer necessary.¹³⁰ As a result, DTE has removed a previously proposed permanent access road (AR-7). Because both the MLV and AR-7 were located in the permanent right-of-way for the pipeline; their removal from the project does not decrease in the overall acreage affected by the project. Staff has confirmed that even with the removal of the MLV at MP 9.7, the pipeline's design will still comply with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration pipeline strength regulations.

107. DTE plans to switch the entry and exit locations for HDD 1 at MP 0.3.¹³¹ Although the change does not affect the conclusions in the EA with regard to noise impacts, DTE has not identified an Additional Temporary Workspace (ATWS) for the pull-string at the new exit location and has not clarified its intent for the previously proposed pull-string ATWS (ATWS-01) within the Birdsboro Power Facility. Therefore, this order contains a condition (Environmental Condition 21) that requires DTE to clarify its need for both the previously proposed ATWS-01 and a new ATWS at MP 0.6 for the pull-string. Authorization to utilize any such additional workspace is conditioned upon review and approval of the required information by the Director of OEP.

108. DTE, in coordination with the PADEP and the U.S. Army Corps of Engineers, has identified one additional intermittent waterbody at MP 3.9 (an unnamed tributary to

¹²⁸ See DTE's December 15, 2017 Filing.

¹²⁹ FWSs' Nov. 28, 2017 Filing.

¹³⁰ See *supra* P 89.

¹³¹ DTE's December 15, 2017 Filing at 1.

Monocacy Creek).¹³² The unnamed tributary is within a previously surveyed wetland area. The tributary is a minor waterbody (3.7 feet wide) that has a state water quality designation as a warmwater fishery. It is not impaired and has no special fisheries designation, such that no in-stream timing restrictions are required. DTE would cross this stream using dam-and-pump or flume methods, as described in the EA.¹³³

109. DTE suggests corrections or clarifications to various statements in the EA, including route variation naming.¹³⁴ We have reviewed these comments and maintain that the information represented in the EA is accurate with respect to these items.

110. In addition, DTE indicates that the amount of prime farmland affected by the project is slightly higher than what was reported in the EA (123.0 acres as opposed to the reported 119.2 acres).¹³⁵ This discrepancy resulted from not reflecting that an HDD drill rig on both the entry and exit sides of an HDD (as is noted in section 8.2 of the EA), and minor errors in the distance and direction of two noise sensitive areas (NSA) listed in table B-20 of the EA.¹³⁶ These corrections do not materially alter the assessment or conclusions in the EA.

111. DTE indicates that a tributary to Manatawny Creek (stream SCH1 at MP 8.1) has an additional timing restriction, such that in-stream work is restricted between October 1 and December 31, and between March 1 and June 15.¹³⁷ Although DTE submitted correspondence records (accession number 20170719-5131) from the Pennsylvania Fish and Boat Commission that specifically indicates stream SCH1 did not require the March 1 to June 15 restriction, we acknowledge that DTE, through its comments on the EA, intends to adhere to the more stringent timing restrictions.

112. In addition to its comments filed on the EA, DTE submits supplemental correspondence and updates to table A-6 of the EA entitled Environmental Permits, Approvals, and Consultations for the project. DTE's supplemental filing also includes updated correspondence from the Pennsylvania Game Commission regarding special

¹³² *Id.* at Table 2.2-1.

¹³³ EA at 21.

¹³⁴ DTE's December 15, 2017 Filing at 11.

¹³⁵ *Id.*

¹³⁶ NSA-01 should be noted as 275 feet East of HDD-2 (not 75 feet west) and NSA-02 should be noted as 375 feet west of HDD-2 (not 375 feet southwest).

¹³⁷ *Id.* at Table 2.2-1.

status species at recently identified yards (as identified in the EA), and from the PADCNR approving the proposed mitigation to minimize impacts on the scenic and recreational value of the Schuylkill River during its crossing. These updates do not result in material changes to the assessment in the EA.

113. On January 22, 2018, DTE provided an HDD Sound Level Mitigation Plan in response to staff's recommendation 18 in the EA.¹³⁸ Although DTE did include an HDD Sound Level Mitigation Plan in its response, the plan does not specify the mitigation that it would use at each applicable HDD to minimize noise to acceptable levels. Rather, it provides a list of potential mitigation measures that may be used. Based on our review of the plan, additional information is needed regarding site-specific mitigation. Therefore, we have modified staff's recommendation in the EA to identify the need for site-specific noise mitigation at HDDs 2, 3, and 4 (see environmental condition 16 in the appendix to this order).

114. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with DTE's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

115. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹³⁹

¹³⁸ See DTE January 22, 2018 Filing.

¹³⁹ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline*

116. At a hearing held on March 15, 2018, the Commission on its own motion received and made part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience is issued to DTE Midstream Appalachia, LLC to construct and operate the Birdsboro Pipeline Project, as described and conditioned herein, and as more fully described in the application.

(B) The authorization in Ordering Paragraph (A) is conditioned on DTE's:

(1) Compliance with all applicable regulations under the NGA including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;

(2) Constructing and making available for service the facilities described herein within two years of the date of the order, in accordance with section 157.20(b) of the Commission's regulations;

(3) Compliance with the environmental conditions in the appendix to this order.

(C) DTE must execute firm contracts equal to the level of service and in accordance with the terms of service represented in its precedent agreement prior to commencement of construction.

(D) DTE's initial rates, FL&U percentage and *pro forma* tariff are approved, as conditioned and modified in this order.

Co., 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

(E) DTE shall file actual tariff records that comply with the requirements contained in the body of this order no less than 30 days and no more than 60 days prior to the commencement of interstate service consistent with Part 154 of the Commission's regulations.

(F) DTE must file at least 30 days, but not more than 60 days before the in-service date of the proposed facilities an executed copy of the non-conforming agreement with Birdsboro Power reflecting the non-conforming language and a tariff record identifying the agreement as a non-conforming agreement consistent with section 154.112 of the Commission's regulations.

(G) Within three (3) months after its first three years of actual operation, as discussed herein, DTE must make a filing to justify its existing cost-based firm and interruptible recourse rates. DTE's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, DTE is advised to include as part of the eFiling description, a reference to Docket No. CP17-409-000 and the cost and revenue study.¹⁴⁰

(H) DTE must revise its AFUDC procedures, as discussed in the body of this order.

(I) Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁴¹

¹⁴⁰ *Electronic Tariff Filings*, 130 FERC ¶ 61,047 at P 179, (2010).

¹⁴¹ *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

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

By the Commission. Commissioners LaFleur and Glick are dissenting in part with a joint separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Environmental Conditions for the Birdsboro Pipeline Project

1. DTE shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the order. DTE must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Federal Energy Regulatory Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP, or the Director's Designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the order, and take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the Project. This authority shall allow:
 - a. The modification of conditions of the order;
 - b. stop work authority; and
 - c. the imposition of any additional measures deemed necessary to assure continued compliance with the intent of the conditions of the order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from Project construction and operation.
3. **Prior to any construction**, DTE shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EIs' authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, DTE shall file with the Secretary any revised detailed survey

alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the order. All requests for modifications of environmental conditions of the order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

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

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

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

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

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

6. **Within 60 days of the acceptance of the authorization and before construction begins**, DTE shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. DTE must file revisions to the plan as schedules change. The plan shall identify:
- a. how DTE will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the order;
 - b. how DTE will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - c. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions DTE will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change);
 - f. the company personnel (if known) and specific portion of DTE's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) DTE will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) completion of all required surveys and reports;
 - (2) the environmental compliance training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. DTE shall employ at least one EI per construction spread. The EIs shall be:

- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of that order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, DTE shall file updated status reports with the Secretary on a **biweekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on DTE's efforts to obtain the necessary federal authorizations;
 - b. the construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the order, and the measures taken to satisfy their concerns; and

- g. copies of any correspondence received by DTE from other federal, state, or local permitting agencies concerning instances of noncompliance, and DTE's response.
9. DTE must receive written authorization from the Director of OEP **before commencing construction of any Project facilities**. To obtain such authorization, DTE must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
10. DTE must receive written authorization from the Director of OEP **before placing the Project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.
11. **Within 30 days of placing the authorized facilities in service**, DTE shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed and installed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the conditions in the order DTE has complied with or will comply with. This statement shall also identify any areas affected by the Project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
12. **Prior to construction**, DTE shall file with the Secretary, for review and approval by the Director of OEP, an updated Karst Mitigation Plan that considers any Pennsylvania Department of Conservation and Natural Resources concerns or comments.
13. DTE shall remove construction debris (e.g., stumps, brush, excess rock) in the construction right-of-way during restoration, **unless specifically approved in writing** by the landowner or land managing agency for beneficial reuse, stabilization, or habitat restoration.
14. DTE shall conduct vegetation clearing activities between September 1 and March 31, or file mitigation measures to avoid impacts on migratory birds (e.g., pre-construction nest surveys in suitable habitat) and documentation, for review and approval by the Director of OEP, indicating that clearing outside of this timeframe is acceptable to the U.S. Fish and Wildlife Service.
15. DTE **shall not begin construction** of facilities **and/or use** of all staging, storage, or temporary work areas and new or to-be-improved access roads **until**:

- a. DTE files with the Secretary:
 - (1) avoidance and/or treatment plans for the historic districts and rural landscapes that may be affected by the Birdsboro Pipeline Project;
 - (2) comments on the December 2017 Determination of Effect Report, and avoidance and/or treatment plans, from consulting parties; and
 - (3) revised reports and plans that address the comments of the Pennsylvania State Historic Preservation Office and other consulting parties.
- b. The Advisory Council on Historic Preservation is afforded an opportunity to comment on the undertaking.
- c. The FERC staff reviews and the Director of OEP approves the cultural resources investigation reports and plans, and notifies DTE in writing that treatment plans/mitigation measures may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: **“CUI//PRIV- DO NOT RELEASE.”**

16. **Prior to construction of horizontal directional drills 2, 3, and 4**, DTE shall file with the Secretary, for the review and written approval by the Director of OEP, the site-specific noise mitigation measures that will be implemented to reduce the projected noise level attributable to the proposed drilling operations. The filing shall include a revised noise modeling evaluation indicating that the projected noise level with mitigation will be no more than a day-night average sound level (L_{dn}) of 55 a-weighted decibels (dBA) or 10 dBA over ambient levels at any nearby noise-sensitive areas (NSAs). During drilling operations, DTE shall implement the approved plan, monitor noise levels, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than an L_{dn} of 55 dBA or 10 dBA over ambient levels at the NSAs.
17. DTE shall file a noise survey with the Secretary **no later than 60 days after placing the Texas Eastern Transmission Company (TETCO) Meter Station in service**. If a full flow/load condition noise survey is not possible, DTE shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at the TETCO Meter Station under interim or full flow/load conditions exceeds an L_{dn} of 55 dBA at any nearby NSAs, DTE shall file a report on

what changes are needed and shall install the additional noise controls to meet the level **within 1 year of the in-service date**. DTE shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

18. **Prior to construction**, DTE shall consult with the Natural Resources Conservation Service and the Berks County Planning Commission on the presence of Agricultural Conservation Easement and Agricultural Security Area lands in the vicinity of the Project's aboveground structures and to identify any specific construction, restoration, and/or operational mitigation measures that would be implemented to promote compatibility with use of the easements. DTE shall file all correspondence and any resulting mitigation measures with the Secretary.
19. **Prior to construction**, DTE shall coordinate with Oley Township regarding the potential for the horizontal directional drill to impact it's sanitary sewer interceptor. DTE shall file all correspondence and any resulting mitigation measures to further protect the sewer interceptor with the Secretary.
20. **Prior to construction**, DTE shall file with the Secretary, for review and approval by the Director of OEP, an Unanticipated Discovery of Contaminated Material Plan that states the steps that DTE will follow should contaminated soils or groundwater be discovered during construction.
21. **Prior to construction**, DTE shall verify the need for additional temporary workspace (ATWS)-01, and identify the need for any ATWS required on the north side of the Schuylkill River for the horizontal directional drill pull-string. Updated alignment sheets omitting ATWS-01 and depicting any newly identified ATWS needed for the horizontal directional drill construction at this location shall be submitted to the Secretary. Authorization to utilize any such additional temporary workspace is conditioned upon review and approval of the required information by the Director of OEP.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

DTE Midstream Appalachia, LLC

Docket No. CP17-409-000

(March 15, 2018)

GLICK and LaFLEUR, Commissioners, *dissenting in part*:

In today's order, the Commission grants DTE Midstream Appalachia, LLC's request for authorization to construct the Birdsboro Pipeline Project in Berks County, Pennsylvania, as well as certain blanket authorizations.¹ But, in doing so, the Commission declines to use the Social Cost of Carbon to consider the significance of the project's environmental impacts, relying on the Commission's order on remand in *Sabal Trail*.² Consistent with the views expressed in our respective dissents to *Sabal Trail*, we disagree with the Commission's conclusion that the Social Cost of Carbon is not an appropriate and meaningful tool for estimating a specific project's impacts or informing the Commission's analysis of the Project. We are hopeful that the recently announced generic proceeding on pipeline review will allow the Commission and its stakeholders to consider these issues in a meaningful and comprehensive way.

In addition, we have serious concerns with the Commission's "new policy" approach towards motions to intervene out of time.³ In a recent order, *Tennessee Gas Pipeline Co., L.L.C.*, the Commission indicated a renewed adherence to our regulations regarding late intervention, but the Commission's statement that we will be "less lenient in the grant of late interventions" left room for intervenors to show good cause.⁴ However, today's order suggests that good cause for late intervention does not exist where an entity seeking to participate as a party in the proceeding submits a motion on the same day it learned that the application had been submitted. Further, the order declares, "all other participants are on notice" of this new policy going forward.⁵ While

¹ *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at P 2 (2018).

² *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018) (*Sabal Trail*).

³ *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238 at P 11.

⁴ *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,167, at PP 49-50 (2018); *see* 18 C.F.R. § 385.214(d)(1)(i)-(v) (2017)

⁵ *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238 at P 11.

we agree that late interventions should be limited to parties that demonstrate good cause, we are concerned by the potential consequences of the Commission's pronouncement, particularly as it would apply to landowners and community organizations that lack sufficient resources to keep up with every docket. As we highlighted in our separate statements on *Sable Trail*, we are concerned about public confidence in the Commission's pipeline siting process and increased efforts to limit interventions can only accelerate this trend.

For these reasons, we respectfully dissent, in part.

Cheryl A. LaFleur
Commissioner

Richard Glick
Commissioner

Document Content(s)

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