

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

El Paso Natural Gas Company)	Docket Nos. CP10-470-000
)	
)	
Application for Certificate)	(San Francisco River Crossing)
_____)	

PETITION FOR REHEARING OF THE CENTER FOR BIOLOGICAL DIVERSITY

Pursuant to Rules 101(e) and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission or FERC), 18 C.F.R. §§ 385.101(e), 385.713, the Center for Biological Diversity (Center) hereby files this Petition for Rehearing of the Commission’s September 16, 2010 Order authorizing a Certificate of Public Convenience and Necessity (Certificate) to El Paso Natural Gas Company (El Paso) for the San Francisco River Crossing Project (Project) in the above-captioned proceedings. The Project would construct and operate replacement segments of natural gas pipeline across the San Francisco River in Greenlee County, Arizona.

The Center, a party in these proceedings by Commission Order of September 16, 2010, seeks to file this Petition for Rehearing for two basic reasons. First, the Order granting a Certificate to El Paso is based on a deficient Environmental Assessment (EA) that fails to consider alternatives or cumulative impacts in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, and its implementing regulations, 40 C.F.R Part 1500. Second, the Commission failed to prepare an environmental impact statement (EIS) as required by the NEPA.

Accordingly, due to the Center’s demonstrated interest in this proceeding, and because granting a rehearing at this stage will not cause undue delay or otherwise prejudice the

proceeding or other parties, there is good cause to grant this Petition for Rehearing. *See* 18 C.F.R. §§ 385.101(e), 385.713. The Center respectfully requests that the Commission (1) withdraw, vacate or modify its Order, (2) withdraw its September 20, 2010 letter to El Paso authorizing construction activities in the Project, and (3) prepare an EIS that considers the issues outlined in this petition.

I. COMMUNICATIONS AND CORRESPONDENCE

All communications, correspondence, and documents related to this Petition for Rehearing shall be served upon the following person:

Jay Lininger, Ecologist
Center for Biological Diversity
P.O. Box 25686
Albuquerque, NM 87125
Email: jlininger@biologicaldiversity.org
Tel: 928-853-9929

II. RELEVANT FACTS

On July 13, 2010, El Paso filed an application with the Commission pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717, and the Commission's regulations at 18 C.F.R. Part 157, for a Certificate of Public Convenience and Necessity regarding the Project.

On July 22, 2010, the Commission published a Notice of Application for the Project in the *Federal Register* stating that it will, within 90 days, complete an EA or issue a Notice of Schedule for Environmental Review, which "will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's [Final EIS] or EA." 75 Fed. Reg. 42727.

On July 30, 2010, the U.S. Fish and Wildlife Service (FWS) issued a formal Biological Opinion regarding the Project to the U.S. Army Corps of Engineers (Army Corps) pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1531. The Biological Opinion states that on March 16, 2009, the FWS informed the Army Corps that it declined to concur with a determination that the Project is “not likely to adversely affect” the threatened loach minnow or the species’ critical habitat. The Biological Opinion discusses measurable effects of the Project to the loach minnow including effects to three primary constituent elements of critical habitat. It further states that loach minnow are likely present in the Project area.

On August 5, 2010, the Army Corps issued formal verification to El Paso stating that the Project is subject to Nationwide Permits No. 12 (Utility Line Activities), No.13 (Bank Stabilization), and No. 33 (Temporary Construction, Access, and Dewatering) under Section 404 of the Clean Water Act, 33 U.S.C. 1251.

On August 16, 2010, Commission staff entered an EA for the Project into the record for this proceeding. The EA consists of seven pages of analysis and one map.

On August 26, 2010, the Center filed a Motion to Intervene in this proceeding. That Motion described the Center’s concerns regarding consideration and disclosure of environmental information, including alternatives and cumulative impacts, and requested delay of the Project pending completion of an EIS.

On September 16, 2010, the Commission issued an Order granting El Paso a Certificate for the Project. The Order further recognized the Center as a party to the proceeding, and noted that granting party status to the Center “will not disrupt this proceeding or place additional burdens on existing parties.” Order at 3.

In its Order, the Commission stated its belief that “our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.” *Id.* at 9.

III. STANDARD OF REVIEW

The Natural Gas Act does not include any specific standard of review for Commission reconsideration of its own orders. The Court of Appeals will review the decision under the Administrative Procedures Act standard, overturning it if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A); *Cal. Dep’t of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007); *Jupiter Energy Corp. v. FERC*, 407 F.3d 346, 349 (5th Cir. 2005); *Fla. Muni. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003).

IV. STATEMENT OF REASONS

A. The Commission’s Order Granting a Certificate to El Paso for the Project Violates the National Environmental Policy Act.

1. The Relevant Statutory and Regulatory Scheme

The NEPA is our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. Its fundamental purposes are to guarantee that: (1) agencies take a “hard look” at the environmental impacts of their actions by ensuring that they “will have available, and will carefully consider, detailed information concerning significant environmental impacts”; and (2) “the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The NEPA “emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed

decisionmaking to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (citation omitted).

To accomplish these purposes, the NEPA requires all federal agencies to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental impact statement (EIS). *See* 40 C.F.R. Part 1502. An EIS must provide a “full and fair discussion of significant environmental impacts” of a proposed action, “supported by evidence that the agency has made the necessary environmental analyses.” *Id.* at § 1502.1. A limited discussion of impacts is permissible only where the EIS demonstrates that no further inquiry is warranted. *Id.* at § 1502.2(b). Agencies may elect to prepare an environmental assessment (EA) to determine if a proposed action may have significant impacts, or “when necessary under the procedures adopted by individual agencies to supplement these regulations as described in Sec. 1507.3.” 40 C.F.R. § 1501.3. An EA “shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” *Id.* at § 1508.9(b). Agencies shall make a determination whether to prepare an EIS “based on the environmental assessment.” *Id.* at § 1501.4(c).

2. The Commission’s Order and EA Failed to Consider Alternatives.

The Commission’s Order of September 16, 2010, and the EA prepared by Commission staff for the Project violate the NEPA and its implementing regulations by failing to adequately analyze and consider a reasonable and viable range of alternatives, including no action. *See* 40

C.F.R. § 1502.14 (requiring agencies to “explore and objectively evaluate all reasonable alternatives,” “devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits,” “include reasonable alternatives not within the jurisdiction of the lead agency,” and *inter alia*, “include the alternative of no action”). The NEPA process and documents should “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(e).

The EA contains one relevant sentence stating, “FERC staff has not identified any preferred alternatives to the proposed action.” EA at 4. The Center reads this statement to mean that the Commission did not consider any alternative to the proposed action, including no action. The EA does not consider an alternative of no action that would afford reviewers an opportunity to evaluate comparative merits of the proposed action relative to the merits of not undertaking it. Therefore, the EA merely rubber-stamps El Paso’s application for a Certificate, contrary to the purpose of the NEPA to foster informed decision making. NEPA documents “shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. § 1502.2(g). “(G)udging *pro forma* compliance [with NEPA] will not do.” *Lathan v. Brinegar* 506 F.2d 677, 693 (9th Cir. 1974).

3. The Commission’s Order and EA Failed to Disclose Cumulative Impacts.

The Commission’s Order of September 16, 2010, and the EA prepared by Commission staff for the Project violate the NEPA and its implementing regulations by failing to adequately analyze and consider cumulative impacts of the Project. *See* 40 C.F.R. §§ 1508.7, 1508.8 (requiring analysis of cumulative impacts and defining cumulative impacts). A federal agency must consider the proposed action along with other actions, “which when viewed with other

proposed actions have cumulatively significant impacts.” 40 C.F.R. § 1508.25(a)(2). A cumulative impact is defined as “the impact on the environment which results from the incremental impact of the actions when added to other past, present, and reasonably foreseeable future actions regardless of what agency...or person undertakes such actions.” *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988). Under the NEPA, cumulative impacts include direct as well as indirect effects, “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(a).

Potentially significant cumulative impacts to the aquatic environment of the San Francisco River, and specifically to its floodplain and streambed comprising primary constituent elements of critical habitat for the threatened loach minnow, will result from the Project. In its July 30, 2010 Biological Opinion on the Project (2010 Opinion), the FWS stated:

We have completed one Section 7 consultation (BLM grazing program; File No. 02-21-96-F-0160) that includes the action area for this consultation. The aquatic environment in the action area is subject to the indirect effects from within the watershed, including livestock grazing, mining, and runoff from urban areas, roads, and trails. The action area is also occupied by non-native fishes that prey upon and/or compete with loach minnow.

2010 Opinion at 8. The other Section 7 ESA consultation referenced above (02-21-96-F-0160) relates to the livestock grazing program of the Bureau of Land Management’s Safford and Tucson Field Offices in southeastern Arizona. In that September 26, 1997 Biological Opinion (1997 Opinion), the FWS noted, “Although the loach minnow is currently listed as threatened, the Service has found that it warrants uplisting to endangered status.” 1997 Opinion at 148 (attached to this Petition for Rehearing for convenience).¹ The regulatory agency further identified two livestock grazing allotments that occur “on the San Francisco River,” and noted

¹ The FWS reiterated its finding that “uplisting” the loach minnow from threatened status to endangered is warranted in its July 30, 2010 Biological Opinion on the Project at issue in this proceeding. *See* 2010 Opinion at 6.

that in one of them, “where livestock grazing along the river is authorized, there is virtually no herbaceous cover.”² *Id.* at 149. It also described numerous sources of cumulative impact to the aquatic environment of the San Francisco River, including “Timber harvest, road, and grazing activities” that “continue to contribute erosion, vegetation change, and alteration of the hydrologic regime...” *Id.* Moreover, according to the FWS, “Take of loach minnow is anticipated as a result of ... trampling, ingestion, and other direct effects of grazing or trailing in the riparian zone of the San Francisco River...” *Id.* at 157.

The Commission’s Order and EA contain no mention of potentially significant cumulative impacts to aquatic habitat in the Project area that may result from livestock grazing or other activities that merited formal consultation and an incidental take statement regarding effects to the threatened loach minnow and its critical habitat in the San Francisco River “in the action area” at issue in these proceedings. Clearly, the direct and indirect impacts of the Project to the loach minnow and to primary constituent elements of its critical habitat, including permanent removal of 0.3 acre of floodplain habitat and temporary disturbance of an additional 10.15 acres of floodplain and streambed habitat, will not be spatially or temporally isolated from other past, ongoing, or reasonably foreseeable activities that adversely affect aquatic habitat at the same location simultaneously with the Project. Therefore, evidence in the record of these proceedings shows that the Project will result in cumulative impacts to the aquatic environment of the San Francisco River at the specific location where pipeline replacement would occur, that those cumulative impacts may be significant by virtue of their documented adverse effects to the threatened loach minnow and its critical habitat, and that the Commission completely overlooked them in the EA.

² The two livestock grazing allotments that occur “on the San Francisco River” include the Red Rickey Hills and San Francisco allotments. One additional allotment (Metcalf) occurs within the San Francisco River watershed. *See* 1997 Opinion at 148.

As the Ninth Circuit of the U.S. Court of Appeals has stated, “a proper consideration of the cumulative impacts of a project requires ‘some quantified or detailed information;...[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.’” *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 993-994 (9th Cir. 2004) (citing *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 361 F.3d at 1128 (9th Cir. 2004) and quoting *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998)); see also, *Lands Council v. Powell*, 379 F.3d 738, 745 (9th Cir. 2004), *Or. Natural Res. Council v. United States BLM*, 470 F.3d 818 (9th Cir. 2006). The EA at issue in this case fails to comport with these requirements.

4. The Commission Failed to Prepare an Environmental Impact Statement.

The Commission erred in its dismissal of potentially significant impacts to the human environment resulting from the Project. The EA states that soil “erosion potential would be minimized through the installation of the bank stabilization structure.” EA at 2. This assertion of “minimized” impact cannot mask “residual and permanent effects to substrates and fluvial function from the placement of 0.30 acre of riprap” on floodplain soils that constitute primary constituent elements of critical habitat for the threatened loach minnow. 2010 Opinion at 9 [emph. added]. Floodplain soils at that location “would permanently be removed for operation of the bank stabilization structure.” *Id.* [emph. added]. Moreover, the Project “will result in measurable effects to loach minnow critical habitat via ... temporary disturbance of 10.15 acres of streambed and floodplain.” *Id.* at 8.

These potentially significant impacts to floodplain and streambed habitats comprising primary constituent elements of critical habitat for the threatened loach minnow form the basis of

the FWS' refusal to concur with a determination that the Project is "not likely to adversely affect" the loach minnow and its concomitant requirement of formal consultation regarding the Project under Section 7 of the ESA. As stated by the Commission,

El Paso's consultations with the FWS and [U.S. Army Corps of Engineers] determined that the project location was within the designated critical habitat for the federally listed threatened loach minnow. Consequently, El Paso was unable to secure a 'not likely to adversely affect' determination from the FWS at that time and the project could not be performed under El Paso's blanket certificate authority.

Order at 2 [emph. added]. The EA further disclosed:

Although the Project would normally fall under the Commission's automatic blanket regulations under Section 157.208, consultations with the United States Fish and Wildlife Service (FWS) and Army Corp of Engineers (COE) determined that the Project location was within designated critical habitat for the federally listed threatened loach minnow (*Tiaroga cobitis*). Because the installation of the permanent bank stabilization structure would be located within the critical habitat, El Paso was unable to secure a "not likely to adversely affect" determination from the FWS.

EA at 1 [emph. added]. As evidenced by the Commission's Order and its EA, the FWS found the initial finding proposed by El Paso that the Project is "not likely to adversely affect" loach minnow and its critical habitat to be implausible. By definition, the Project is likely to adversely affect the loach minnow and its critical habitat. *See* 50 C.F.R. §§ 402.12(k), 402.14(b)(1).

The Commission errantly dismisses these facts in its Order, citing a FWS finding that "the action, as proposed, is neither likely to jeopardize the continued existence of the loach minnow, nor likely to destroy or adversely modify designated critical habitat for the species." Order at 7. The EA similarly focuses on this narrow finding of the FWS without disclosing that actual effects of the Project to critical habitat of the loach minnow, as documented by the FWS, include disturbance of 10.15 acres of floodplain and streambed habitat. *See* EA at 3-4; *see also* 2010 Opinion at 8-9.

The Project need not jeopardize the continued existence of the loach minnow or “adversely modify” critical habitat, such that its value for survival and recovery of the loach minnow is diminished, in order to “significantly” impact the environment within the meaning of the NEPA regulations. Federal agencies are prohibited by Congress from approving actions that would jeopardize listed species or cause adverse modification of critical habitat. *See* 16 U.S.C. § 1536(a)(2). The Commission’s analysis, *arguendo*, inevitably leads to a conclusion that no proposed action affecting threatened or endangered species ever would significantly impact the environment unless it is found to jeopardize their continued existence or “adversely modify” critical habitat within the limited meaning of that phrase as defined at 50 C.F.R. §§ 402.2. Thus, it is difficult to imagine any instance when the Commission might prepare an EIS for an action affecting listed species or their critical habitat short of a jeopardy opinion or finding of adverse modification of critical habitat from the FWS.

The Commission’s position is inconsistent with the plain language of the NEPA and its implementing regulations set forth by the Council on Environmental Quality, in which one relevant criterion for “significant” impact to the environment is:

The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

40 C.F.R. § 1508.27(b)(9) [emph. added]. The Commission, in its Order and EA, applied an unreasonably high standard to dismiss potentially significant impacts of the Project to the environment. The facts of this proceeding show that the Project will permanently remove 0.3 acre of floodplain habitat, and it will directly, indirectly, and cumulatively impact an additional 10.15 acres of streambed and floodplain habitat of the San Francisco River with adverse impacts to the loach minnow and its critical habitat. Therefore, an EIS is required to adequately consider

and disclose potentially significant impacts of the Project before implementation may occur. *See* 40 C.F.R. § 1508.27(b)(3), 1508.27(b)(7), and 1508.27(b)(9).

IV. STATEMENT OF INTEREST AND POSITION

The Center is a non-profit conservation organization dedicated to the protection of native species that are at-risk of extinction and their habitats through science, policy, and environmental law. The Center represents over 255,000 members and activists throughout the United States and the world, with offices in Alaska, Arizona, California, Illinois, Minnesota, Nevada, New Mexico, Oregon, Vermont, and Washington, D.C. The Center also works to reduce greenhouse gas emissions and to protect biological diversity, our environment, and public health.

RESPECTFULLY SUBMITTED this 21st day of September, 2010.

A handwritten signature in black ink, appearing to read "Jay Lininger", with a stylized flourish at the end.

Jay Lininger, Ecologist
Center for Biological Diversity
P.O. Box 25686
Albuquerque, NM 87125
Email: jlininger@biologicaldiversity.org
Tel: 928-853-9929

CERTIFICATE OF SERVICE

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

DATED at Albuquerque, New Mexico, this 21st day of September, 2010.

A handwritten signature in black ink, appearing to read "Jay Lininger", with a stylized flourish at the end.

Jay Lininger, Ecologist
Center for Biological Diversity
P.O. Box 25686
Albuquerque, NM 87125
Email: jlininger@biologicaldiversity.org
Tel: 928-853-9929