

HOOSIER ENVIRONMENTAL COUNCIL

IBLA 89-109

Decided June 8, 1989

Appeal from a decision of the Milwaukee District Office, Bureau of Land Management, approving the issuance of a natural gas pipeline right-of-way, ES-37986 (IN).

Affirmed.

1. Rights-of-Way: Oil and Gas Pipelines--Rules of Practice: Appeals: Generally--Rules of Practice: Protests

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--Rights-of-Way: Oil and Gas Pipelines

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

APPEARANCES: Jeffrey T. St. Clair, National Forest Project Director, Indianapolis, Indiana, for appellant; Nicholas W. Hetman, Esq., Owensboro, Kentucky, for Texas Gas Transmission Corporation; Shelly L. Russell, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE BURSKI

Hoosier Environmental Council (HEC) <sup>1/</sup> has appealed from a decision of the District Manager, Milwaukee District Office, Bureau of Land Management (BLM), dated October 20, 1988, announcing his decision to issue a natural gas pipeline right-of-way across 6.29 miles of the Hoosier National Forest and 11.3 miles of the Camp Atterbury Military Reservation to Texas Gas Transmission Corporation (Texas Gas). The right-of-way in question was part of a proposed 140-mile natural gas pipeline traversing northern Kentucky and southern Indiana for the purpose of providing 30 billion cubic feet (bcf) of natural gas annually to Citizens Gas & Coke Utility (Citizens Gas) which services the Indianapolis area. <sup>2/</sup>

Under a contract with an expiration date of October 31, 1988, Citizens Gas received all of its interstate pipeline gas (approximately 61 bcf) from Panhandle Eastern Pipe Line Company (Panhandle). In order to diversify its source of supply, Citizens Gas determined to seek firm service for roughly half of its annual requirement from Texas Gas commencing on November 1, 1988. Accordingly, Citizens Gas and Texas Gas signed a letter of intent so providing. At some time during this process, Texas Gas contracted with WAPORA, Inc. (WAPORA), of Cincinnati, Ohio, for the preparation of an environmental assessment (EA) of the proposal. The initial assessment by WAPORA issued in January 1987. On February 13, 1987, Texas Gas petitioned the Federal Energy Regulatory Commission (FERC) for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act, 15 U.S.C. | 717(f) (1982). See FERC Docket No. CP87-205-000; 52 FR 7655 (Mar. 12, 1987).

As originally submitted, Texas Gas planned to construct a total of 122.11 miles of pipeline from Hardinsburg, Kentucky, to a point of interconnection with facilities of Citizens Gas in Johnson County, Indiana. The proposed route, however, generated a great deal of adverse public reaction, especially with respect to a segment of the line which passed through an area in Brown County, Indiana, which consisted of heavily wooded, steep terrain. An organization called Stop the Objectionable Pipeline (STOP) proposed an alternate route which would avoid the most environmentally

<sup>1/</sup> According to its statement of reasons (SOR) in support of its appeal, HEC is a nonprofit corporation dedicated to the preservation of the natural environment with over 1,000 individual members and 60 group members. See SOR at 6.

<sup>2/</sup> The pipeline consists of 94.2 miles of "loop" pipeline and 37 miles of new pipeline to be constructed by Texas Gas from Breckenridge County, Kentucky, to the Citizens Gas interconnection point in Johnson County, Indiana. Citizens Gas would be responsible for constructing an additional 9.1 miles of new pipeline from the point of delivery in Johnson County to its existing pressure/flow control station in Indianapolis. As noted in the Federal Energy Regulatory Commission environmental assessment, "'looping' refers to the practice of constructing new sections of pipeline adjacent and parallel to an existing pipeline" (FERC EA at 5 n.4). Evidence in the case file suggests that the Citizens Gas segment has already been constructed.

sensitive areas in Brown County. Subsequent to these objections, Texas Gas filed an amended application with FERC on September 4, 1987, generally following the route proposed by STOP. See FERC Docket No. CP87-205-001; 52 FR 35471 (Sept. 21, 1987). On November 5, 1987, FERC filed a notice of intent to prepare an EA for the Texas Gas pipeline 3/ and solicited public comment on the proposed pipeline. See 52 FR 43229 (Nov. 10, 1987). Approximately 100 letters were received in response thereto.

Prior to the September 4 amendment, the only Federal land traversed by the proposed pipeline was located in the Hoosier National Forest, under the jurisdiction of the United States Forest Service, Department of Agriculture. The amendment, however, in addition to adding approximately 8-1/2 miles to the length of the pipeline, also required the crossing of lands in the Camp Atterbury Military Reservation, within the jurisdiction of the Department of Defense and presently leased to the Indiana National Guard.

Under 30 U.S.C. | 185(c)(1) (1982), where an individual or corporation seeks a right-of-way for a pipeline crossing Federal lands, and the Federal lands involved are under the jurisdiction of one Federal agency, that agency is authorized to grant the right-of-way. However, where the proposed pipeline crosses land under the jurisdiction of two or more Federal agencies, the Department of the Interior is responsible for issuance of the requested right-of-way. See 30 U.S.C. | 185(c)(2) (1982). Thus, in the instant case, since the Federal lands involved were under the jurisdiction of the Department of Agriculture and the Department of Defense, respectively, the authority to issue the right-of-way devolved upon the Department of the Interior, even though none of the lands were under its jurisdiction.

Pursuant to 43 CFR 2882.3(g), BLM convened a meeting on January 26, 1988, attended by representatives of BLM, FERC, the Forest Service, and the Army Corps of Engineers (Corps) for the purpose of coordinating the efforts of the various Federal agencies involved. At this meeting, it was determined that FERC would continue as the lead agency for compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. | 4321 (1982), though BLM, the Forest Service, and the Corps would be deemed to be cooperating agencies (40 CFR 1501.6) and allowed to review the EA prior to its release and to propose such terms, conditions and stipulations as they deemed appropriate. 4/

On February 29, 1988, Texas Gas filed a formal application for a natural gas pipeline right-of-way with BLM. On March 11, 1988, BLM published a notice of the application for a right-of-way. See 53 FR 7984 (Mar. 11, 1988). This notice provided, inter alia, that:

3/ By notice dated Dec. 30, 1987, FERC announced that it had decided to include the 9.1 mile segment to be constructed by Citizens Gas (see note 2, supra) in its review of the environmental impact of the proposal. See 53 FR 271 (Jan. 6, 1988).

4/ BLM notes that, under the Council on Environmental Quality's regulations, numerous factors dictated the choice of FERC as the lead agency for NEPA compliance. See 40 CFR 1501.5(c); BLM's Answer at 7-8.

FERC has agreed to continue to be the lead agency for NEPA compliance on the proposed natural gas pipeline, including the proposed right-of-way. As the lead agency, FERC is preparing an EA of the proposed pipeline. BLM, FS, and [the Corps] (for Camp Atterbury) are participating in the preparation of the EA as cooperative agencies.

The EA, when completed, will be the basis for BLM's decisions. Those decisions include: (1) Whether a Finding of No Significant Impacts is appropriate for the right-of-way grant, (2) If so, whether the right-of-way grant should be issued, and (3) If so, under what terms and conditions will the grant be issued.

53 FR 7985 (Mar. 11, 1988). Interested parties were directed to submit written comments to the District Manager, Milwaukee District Office, BLM.

As the lead agency for NEPA compliance, FERC proceeded to develop its EA. See 18 CFR 380.5(b)(1). As the EA neared completion, BLM, the Forest Service, and the Corps were afforded the opportunity to comment upon and review the EA prior to its issuance. See Memorandum to File, dated July 28, 1988. The FERC EA was issued on August 29, 1988. It should be noted that, based on numerous specific mitigation measures proposed, the EA determined that there would be no significant impact on the quality of the human environment (FERC EA at 76). In light of this finding of no significant impact (FONSI), the EA concluded that an Environmental Impact Statement (EIS) would not be needed.

On September 6, 1988, the Forest Service provided BLM with the terms and conditions which it wished to be included in the right-of-way grant with reference to the segment crossing the Hoosier National Forest. BLM had already obtained a copy of the terms and conditions which the Corps wished included with respect to the Camp Atterbury crossing. On October 13, 1988, the Forest Supervisor, Hoosier National Forest, submitted his final comments on the proposed pipeline. In this letter, he responded to a number of concerns raised by interested parties relating to the traversing of the national forest. He concluded that, subject to the terms and conditions which the Forest Service had recommended, the proposal was consistent with the Forest Plan and that issuance of the right-of-way by BLM was appropriate.

On October 17, 1988, the District Manager, Milwaukee District, formally adopted the FERC EA as "sufficiently analyzing the environmental impacts of constructing the pipeline across the Federal lands." On that same date, the District Manager issued a record of decision (ROD) in which he determined to issue the proposed right-of-way for the crossing of 6.29 miles of the Hoosier National Forest and 11.3 miles of the Camp Atterbury Military Reservation. This right-of-way was to be expressly subject to the stipulations proposed by the Forest Service and the Corps, respectively. Moreover, the decision provided that the right-of-way grant

will not become effective until the completion of a 30 days public comment period that will commence upon the publishing of a notice

announcing this decision in the Federal Register AND the issuance of a Certificate of Public Convenience and Necessity by the Federal Energy Regulatory Commission (FERC) to Texas Gas \* \* \*.

(ROD at 1). Notice of the decision was duly published in the Federal Register on October 21, 1988. See 53 FR 41422.

By various form letters dated October 20, 1988, BLM notified interested parties of its decision. These letters further informed the interested parties that the decision to issue the right-of-way grant was subject to appeal to this Board. On November 23, 1988, HEC filed a notice of appeal. 5/ Thereafter, pursuant to a March 23, 1989, request from Texas Gas which noted the need for an early decision in light of proposed construction schedules, the Board, by Order of April 11, 1989, agreed to expedite consideration of the subject appeal. 6/

[1] In its statement of reasons (SOR) and supplemental filings, HEC argues that the EA is flawed in a number of respects. Before examining the substance of these complaints, however, it is necessary to examine a procedural problem which is presented by this appeal. We note that the ROD provided, what it termed, "a 30 days public comment period." Obviously, to the extent that the District Officer was providing for a public comment period, the ROD must be construed as an interlocutory ruling because the opportunity to tender submissions would be worthless if the District Manager did not intend to take any comments submitted into consideration in making his ultimate decision. Yet, by including an appeals paragraph in its letter to interested parties, the District Office implicitly held that the ROD was a final decision ripe for administrative review. See, e.g., Robert C. LeFaivre, 95 IBLA 26 (1986); Kenneth W. Bosley, 91 IBLA 172 (1986). Thus, to the extent that BLM was attempting to offer a 30-day public comment period, affording interested parties the right to appeal during that same period was improper.

Faced with similar circumstances, the Board has, on occasion, remanded the matter to BLM with directions to treat the purported "appeal" as a "protest" under 43 CFR 4.450-2 and issue a decision thereon. See Duncan Miller (On Reconsideration), 39 IBLA 312 (1979). In our view, however, such action would be inappropriate in this case for a number of reasons.

5/ On Oct. 24, 1988, subsequent to the issuance of its decision, BLM received comments from HEC with respect to deficiencies which HEC perceived in the FERC EA as it related to the Hoosier National Forest and the Camp Atterbury Military Reservation. This submission, however, was clearly not in response to either the ROD or the Oct. 20, 1988, letter, since it is dated Oct. 14, 1988, prior to BLM's adoption of the FERC EA and its issuance of the ROD.

6/ Texas Gas had earlier requested that the Secretary assume jurisdiction over this appeal under 43 CFR 4.5. By letter dated Mar. 15, 1989, the Director, Office of Hearings and Appeals, on behalf of the Secretary, denied this request.

First, there appears no question but that BLM would reaffirm its original decision, in light of the fact that counsel for BLM has filed an extensive answer, responding to appellant's allegations of error. Certainly, as of this point, BLM has considered HEC's objections and rejected them. A remand to BLM would result only in increased delays in the ultimate resolution of this matter and is unlikely to prove beneficial to any party before the Board. This consideration is particularly telling since the Board has determined, based on Texas Gas' motion, that expedition of this appeal is warranted. Adjudication of the case on its merits at the present time would, therefore, seem most in accord with prompt and complete resolution of the issues involved in this appeal. See Beard Oil Co., 97 IBLA 66 (1987); United States v. Napouk, 61 IBLA 316 (1982).

Second, and more compellingly, our review of the record convinces us that, contrary to the intimation given by the use of the phrase "30 days public comment period," the District Manager intended his decision to be final, rather than subject to revision upon receipt of comments from the public. Thus, the case file discloses that the question of the length of the "comment" or "review" period after the issuance of the ROD was one which received considerable attention beginning as early as March 30, 1988. At that point, a controversy developed as to what period of time should be granted for "public review." By letter dated March 18, 1988, the District Manager, in the course of discussing procedures which he intended to follow in the consideration of the Texas Gas right-of-way application, had informed FERC that "[t]he ROD will be issued by BLM and will also be signed by appropriate personnel for FS. The public will be provided a 45 days review period prior to the issuance of the right-of-way grant." A copy of this letter was sent to Texas Gas which subsequently inquired as to why a 45-day period had been selected.

By memorandum dated March 30, 1988, from the BLM Project Manager to the Milwaukee District Manager, the Project Manager attempted to explain why the 45-day period had been chosen:

Normally a ROD issued by us has a 30 days public review period (pursuant to 43 CFR 2884.1 and 43 CFR 4.410-411). However, since the FS will be a signatory to the ROD, we will use their 45 days public review period (pursuant to 36 CFR 251.53(e) and 36 CFR 211.18).

A review of the cited regulations, particularly 43 CFR 4.411 and 36 CFR 211.18(c)(1), discloses that the District Office was using the term "public review period," as the functional equivalent of the appeal period afforded by the regulations of the Board of Land Appeals and the Forest Service, respectively.

The applicable regulation, 43 CFR 4.411(a) provides, inter alia, that:

A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not

served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication.

Similarly, 36 CFR 211.18(c)(1) establishes time limits for filing appeals from initial decisions of the Forest Service Deciding Officer, fixing the time period allowed as "within 45 days of the date of the decision." Clearly, it was the original intention of BLM to use this latter period because the Forest Service was expected to join in the issuance of the ROD. Ultimately, however, once it was decided that the Forest Service would not be an actual signatory to the ROD, it became clear that 43 CFR 4.411 would necessarily control the time period in which an adversely affected party could seek review before this Board. Accordingly, the ROD provided for a "30 days public comment period."

It seems obvious beyond peradventure that, while use of the phrase "public comment period" may have implied that the decision was interlocutory in nature, the intention of the District Manager was to issue a final decision, appealable under the regulations of the Department of the Interior within 30 days after receipt of a decision or of publication. Any inference which might have been drawn from this phrase that the District Manager was seeking further comments, preparatory to making a decision, was clearly inadvertent and unintended. For all of the foregoing reasons, we conclude that the instant appeal is properly before this Board and ripe for adjudication.

Turning to the substantive arguments pressed in this appeal, we think it important, at the outset, to delineate the scope of our review. Much of the thrust of appellant's contentions is directed to an examination of whether or not the FERC EA adequately analyzed the anticipated impacts from and possible alternatives to the proposed pipeline project. The issue properly before this Board, however, is far more focussed. BLM did not purport to approve the pipeline project; FERC approved that. BLM merely approved issuance of the right-of-way across various parcels of Federal land. Thus, the sole question before this Board is whether or not the FERC EA adequately addressed the impacts engendered by those segments of the pipeline crossing Federal lands.

Admittedly, it must be shown that, consistent with this Department's obligations under NEPA, the FERC EA provides an adequate basis both for an assessment of those impacts, as well as an informed consideration of stratagems to mitigate any adverse effects. But, to the extent that appellant seeks to challenge the EA's consideration of impacts generated by other segments of the pipeline, such a challenge is beyond the purview of this Board's jurisdiction. 7/

In its SOR, appellant argues variously that the decision of the District Manager granting the requested right-of-way is not in the public

7/ This is, of course, not to say that the question of the adequacy of the FERC EA as it relates to the entire pipeline project is immune from scrutiny. What we are saying is simply that this Board is not the proper forum in which to raise such a challenge.

interest, but rather is arbitrary and capricious. Further, appellant contends that the FONSI declaration is not in accord with the requirements of NEPA and that approval of the right-of-way violates standards and guidelines established by the Hoosier National Forest Land and Resource Management Plan. Specifically, appellant contends that the decision

might result in activities that imperil individuals and populations of state listed endangered, threatened, and sensitive species; \* \* \* might degrade important historical, cultural, geological, aesthetic, recreational, and biological resources and values on the public lands; and \* \* \* may preempt land management area designations and uses, including the designation of the Little Blue River as [a] National Scenic River.

(SOR at 5). For purposes of this decision, we will first examine appellant's specific challenges to the FERC EA's adequacy, as those challenges relate to the segments crossing Federal lands, and then proceed to a consideration of the EA as a whole in order to determine whether, in light of appellant's expressed concerns, the FONSI declaration is sustainable and the decision to authorize the right-of-way justifiable on the present record.

[2] A consistent thread running throughout appellant's submissions is the expressed belief that the EA inadequately considered the impacts of the proposed pipeline on a wide variety of resources. Yet, when the specifics of its allegations are examined, what is disclosed is not a failure of the EA to consider the impacts but a disagreement between appellant and the authors of the EA as to what those impacts are expected to be.

To take but one example, appellant makes repeated references to the Indiana bat, a Federally recognized endangered species. See 50 CFR 17.11(h). Thus, appellant asserts that "[e]ight of the twenty known hibernacula (winter hibernating colonies) for this species are located in the area of the proposed pipeline crossing," arguing, in effect, that the FERC EA failed to consider the impact of the proposed pipeline on this endangered species. See Supp. SOR at 6. In fact, however, the FERC EA expressly references the Indiana bat and the gray bat, but notes that "[t]he staff has determined, in consultation with the Asheville FWS [Fish and Wildlife Service] field office and Texas Gas' environmental consultant [WAPORA], that neither species would be affected by construction of the proposed pipeline since no summer habitat (mature riparian trees with exfoliating bark) or winter hibernacula (i.e., caves) would be affected" (FERC EA at 40).

We recognize, of course, that the mere fact that the FERC EA considered the impact of the pipeline project on endangered species does not establish that its conclusions are correct. But, if an appellant wishes to challenge the EA on this point, it must affirmatively show in what manner the EA's conclusions are erroneous. Rather than providing this Board with specifics as to the alleged deficiencies of the conclusion reached, HEC merely notes the presence of eight hibernacula "in the area." We must point out that the phrase "in the area" is amorphous in the extreme. Appellant has simply failed to provide any relevant scale in which "the area" of the proposed pipeline can be refined to any finite distance of apparent relevance. We do

not know if appellant considers a hibernacula within 2, 10, or 20 miles of the right-of-way to be "in the area of the proposed pipeline crossing."

We note that two sites within the State of Indiana are listed as areas of critical habitat for the Indiana bat. One of these is in Greene County, which is not traversed by the pipeline route. The other site is Big Wyandotte Cave in Crawford County. See 50 CFR 17.95(a). Our review of the various maps indicates that this cave is at least 5 miles from the pipeline, which is looping an existing pipeline at that point. We have been unable to discern, nor has appellant suggested, what specific impacts would occur from an additional 25-foot right-of-way for a buried natural gas pipeline located more than 5 miles away from this cave. Indeed, as Texas Gas points out, the United States Fish and Wildlife Service (F&WS) expressly found that, while the proposed pipeline was within the range of the Indiana bat and two other endangered species (the fat pocketbook pearly mussel and the bald eagle), "the proposed project will not affect these endangered species" (Letter of Dec. 4, 1986, from Supervisor, Bloomington Field Office, F&WS, to WAPORA).

It is not enough for an appellant to merely assert in conclusory terms that an EA inadequately considered the effects of a proposed action on endangered species. Rather, an appellant must provide some basis in fact to support this assertion. See, e.g., In re Lick Gulch Timber Sale, 72 IBLA 261, 311-13, 90 I.D. 189, 217-18 (1983). This, appellant has simply failed to do. Appellant's references to other endangered species such as the gray bat and the northern blind cavefish are similarly lacking with respect to a showing of species occurrence within relevant proximity to the pipeline route and are totally unaccompanied by any evidence which might support the assertion that F&WS erred in its conclusion that the proposed pipeline right-of-way would have no effect on any endangered species.

Appellant's assertions that the proposed action might degrade important resource values on Federal lands are almost exclusively directed to those segments of the right-of-way traversing the Hoosier National Forest. 8/ In general, appellant attacks the proposed right-of-way as increasing forest fragmentation. Thus, appellant notes that:

Habitat fragmentation is perhaps the most serious threat to the biological diversity of eastern forests. Fragmentation occurs whenever a large, continuous ecosystem is transformed into one or more smaller patches surrounded by disturbed areas or when a disturbance permanently transects forested habitat.

8/ To the extent that the right-of-way crosses Camp Atterbury, it should be noted that it generally parallels the exterior boundary of Camp Atterbury along the 500 West Road, the Ohio Ridge Road, and the Wallace Road. Since, as Texas Gas points out, Camp Atterbury is an active military installation, we find ourselves in general agreement that it is difficult to ascertain how construction of the proposed natural gas pipeline through Camp Atterbury could substantially, or even minimally, increase the negative impacts already being suffered by the lands within Camp Atterbury.

Fragmentation can also introduce alien components and species (such as increases in sunlight or increased parasitism by cowbirds) into forested habitats that will further threaten biological diversity.

(HEC Comments on the Texas Gas Transmission Proposed Pipeline before FERC, dated December 8, 1987, at 5-6).

In point of fact, however, virtually no increase in forest fragmentation will occur within the Hoosier National Forest as a result of the proposed right-of-way. With one exception, discussed infra, the proposed pipeline loops an existing line with a 25-foot eastern offset throughout the National Forest. Thus, with the exception noted, no new isolated forest fragments are being created by this proposal within the Hoosier National Forest.

The one exception occurs between M.P. 12.6 N. and M.P. 14.6 N. This deviation is referenced in the EA at page 9. At that point, a 25-foot eastern offset would result in the digging of a ditch on a 45-degree slope, creating severe erosion problems. While HEC suggests that this deviation was unjustified, the Forest Supervisor argues that it was necessary in order to minimize erosion and prevent soil from entering an intermittent stream at the bottom of the hill. See Letter from the Forest Supervisor, Hoosier National Forest, to the Milwaukee District Manager, BLM, dated October 13, 1988, at 6. This is the only area in the National Forest where any increase in forest fragmentation will result from the right-of-way.

However, while we disagree with appellant's assertion that a significant increase in forest fragmentation could be expected within the Hoosier National Forest, we do recognize that an increase in forest "edging" will occur. To the extent that an additional 25 feet adjacent to the prior existing right-of-way will be cleared, it can be anticipated that negative edge effects will invade an additional 25-foot swath. While appellant suggests that this impact is unacceptable, we must point out that the increase in negative edge effect, assuming the correctness of appellant's factual assertion that the impact extends about 500 meters into the forest canopy, would only be felt on approximately 138 acres of the National Forest. 9/

Appellant suggests that this impact was totally ignored in assessing the anticipated impacts related to the proposed pipeline project. We do

9/ Of the 6.2 miles of national forest land being crossed by the proposed pipeline, the new line is immediately adjacent to the existing pipeline for 4.2 miles. Thus, the only increase in impact for this linear extent is an additional 25 feet, or a total of 12.7 acres. For the 2-mile segment where the new pipeline diverges from the existing pipeline, we note that the maximum distance of separation between the two pipelines is 1,000 feet. Assuming an average separation of 500 feet along the length of that 2-mile segment, the total acreage affected is approximately 125 acres. And, it would be expected, of course, that the severity of any impact would diminish the further away any specific parcel is located from the forest "edge."

not agree. Forest fragmentation and edging were referenced both in the FERC EA at page 36-37 and the WAPORA EA at page 133. We recognize, of course, that both of these studies balanced the detriment to species dependent upon large, unfragmented tracts with the increase in habitat which would be made available for wildlife adapted to open areas. Indeed, the FERC EA expressly noted that "the ROW would provide additional amounts of early successional stage habitat and increase the amount of habitat diversity in the area, which would benefit a variety of wildlife species" (FERC EA at 36). This does not mean that the impact of forest fragmentation and increased negative edge effect was ignored. Rather, it merely establishes that the authors of the EA may have weighed the merits of this alteration on a scale different from that which appellant might desire. Appellant may disagree with the policy choice ultimately made with respect to this impact, but that does not establish that the analysis of this impact was deficient.

Appellant also questions the adequacy of the analysis as it relates to specific areas within the National Forest. Thus, HEC notes that the right-of-way crosses the Little Africa area in Orange County, 3,000 acres of which, HEC avers, had been proposed by the Forest Service as a "6A" or primitive area in which timber cutting would be prohibited. HEC argues that increasing the right-of-way through this area would lessen the likelihood that the "6A" designation could be achieved. This precise question, however, was directly addressed by the Forest Supervisor in his October 13, 1988, letter. In answer to a question challenging the consistency of Forest Service approval with Hoosier Plan negotiations, the Forest Supervisor stated:

This area may eventually become a 6A area, but there are no standards adopted for it at this time, and there are no decisions made of that portion of the area. The proposal is consistent with the existing plan and that portion is not appealed or stayed. Regardless of future designation, a pipeline presently exists and the 25 foot width addition will not significantly alter the present situation.

(Letter from the Forest Supervisor, dated Oct. 13, 1988, at 2). Later in the same letter, responding to an inquiry as to the effect of the proposal on cultural artifacts associated with the Little Africa historical area, the Forest Supervisor pointed out that:

The entire route was intensively studied by archaeologists from WAPORA, Inc. Those results were reviewed by my archaeologist and by the State Historical Preservation officer. This issue was also discussed on pages 35 through 56 of the FERC EA. I am convinced that on Hoosier National Forest land that no important known cultural resources will be impacted by this project.

Id. at 3.

Once again, our review of the record discloses not a failure by the appropriate officials to consider impacts associated with the proposed pipeline but rather a disagreement between appellant and those officials as to

the proper weight to be ascribed to such impacts. As indicated above, however, as the appellant before this Board, HEC must do more than convince us of the sincerity of its beliefs. HEC bears the affirmative obligation of establishing that BLM failed to consider significant impacts with respect to resource values on the Federal lands. This burden it has failed to discharge.

HEC also argues that approval of the proposed pipeline may preempt future land use decisions. In particular, appellant focusses on the crossing of the Little Blue River at M.P. 28.9 L. Appellant notes that this river is currently listed on the National Inventory of Potential Wild and Scenic Rivers. Arguing that there is a "high degree of similarity" between wilderness areas and wild and scenic rivers, appellant contends that "there is no question that an EIS would be required before the trenching and clearing of vegetation along the Little Blue River could be allowed, especially if other alternatives were available that would not involve such activities" (SOR at 12). Appellant is simply mistaken, however, in its assumption that wild and scenic rivers are analogous to wilderness areas.

In our recent decision in John R. Lynn, 106 IBLA 317 (1989), we had reason to examine the limitations imposed on activities within the management boundaries of the Upper Missouri Wild and Scenic River. Therein, we quoted from S. Rep. No. 502, 94th Cong., 1st Sess. 9, as follows:

Because the word "wild" is a part of the Wild and Scenic Rivers Act, many assume that the wild and scenic river areas are treated like wilderness areas. It is erroneous, however, to make an analogy between the Wild and Scenic Rivers Act and the Wilderness Act. The Wild and Scenic Rivers Act should more properly be considered a multiple-use act, save one use. The only use prohibited is impoundment; the river segment must remain free flowing.

Thus, appellant's assertion that the Little Blue River should be treated as a wilderness area has no basis in law.

Moreover, even if it were a wilderness area, it would not necessarily follow that an EIS would be required before approval of the crossing could be granted. Indeed, only actions which impair the wilderness characteristics are forbidden within a wilderness area and, if on the basis of an environmental analysis, it could be determined that the proposed action would not significantly affect the environment, there would simply be no need for preparation of an EIS.

In any event, a review of the record discloses that particular attention was paid to possible impacts of pipeline construction on the Little Blue River. Specialized stipulations were formulated requiring, inter alia, that the crossing be bored rather than trenched (FERC EA at 32). Additionally, as the EA noted:

At the staff's request, Texas Gas has agreed to implement several specific construction and restoration measures including: location of staging areas at least 50 feet (or the width of the riparian zone, whichever is less) back from each bank to minimize the

clearing of vegetation immediately adjacent to the stream; adoption of riprap and reseeding specifications to stabilize and restore the banks; and the planting of shallow-rooted trees, such as streamco willow, red osier dogwood, or silky dogwood across the permanent ROW on both banks at the crossing location.

(FERC EA at 44).

As can be seen, far from ignoring the possible effects of pipeline construction across the Little Blue River, the EA took positive steps to protect the stream from adverse impacts. While appellant suggests that these actions are inadequate, appellant has provided no specific examples of further mitigation measures which might be utilized nor has appellant made a showing that the mitigation actions imposed will be insufficient to prevent the Little Blue River from being adversely impacted by construction activities.

We have discussed above what we perceive to be the major focal points of appellant's specific concerns. We are aware that, in addition to the points expressly addressed, appellant has raised a number of other particularized criticisms of the EA. We have fully considered those objections. While we do not, for a moment, doubt that these views are sincerely held, appellant has failed to establish, on the basis of the present record, that they were not considered by the appropriate decisionmakers. Mere disagreement with conclusions reached, absent an affirmative showing that those conclusions are in error, is an insufficient basis upon which to predicate reversal of a decision under review. 10/

Thus, we come to the essential nub of the present controversy, *i.e.*, the adequacy of the FONSI as it relates to approval of the right-of-way across Federal lands. Appellant argues strenuously that the EA which BLM adopted is woefully inadequate in its consideration both of the impacts of the proposal and of alternatives to the proposal. Appellant insists that, at a minimum, an EIS is needed in order to adequately assess the environmental impacts of the proposed pipeline.

This Board has reviewed numerous appeals from decisions of BLM officials determining that an EIS was not needed as a precondition to approval of a wide variety of proposed actions. We have noted that a FONSI will be affirmed if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been

10/ We also note that appellant has asserted that the approval of the right-of-way application violates the Forest Plan. The consistency between the Forest Plan and the right-of-way is expressly examined in the FERC EA at page 38-39. Moreover, we note that the Forest Supervisor explicitly declared that "the actions in this project comply fully with the Forest Plan, Chapter 4 management direction, including that contained under management prescription(s) 2.1, 3.1, 3.2, and under the Forest-wide Standards and Guidelines" (Letter from the Forest Supervisor, dated Oct. 13, 1988, at 7).

identified, and the final determination that no significant impact will occur is reasonable in light of the environmental analysis. See, e.g., Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1984). A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. United States v. Husman, 81 IBLA 271, 273-74 (1984).

While not unmindful of the concerns which appellant has expressed, we are convinced that HEC has failed to establish error in the Milwaukee District Manager's FONSI determination with respect to the Federal lands traversed by the right-of-way. Thus, we note that both the Corps and the Forest Service were active in proposing mitigation measures with respect to those portions of the pipeline traversing land within their respective jurisdictions. As approved, the total pipeline project would require the clearing of approximately 275 acres of woodlands, of which 85 acres would be allowed to revert to their original condition after construction. See FERC EA at 42. Of this acreage, however, only 19.12 acres of national forest land would be permanently affected. See Letter from the Forest Supervisor, dated October 13, 1988, at 2. Assuming a full 50-foot right-of-way for the segment crossing Camp Atterbury, the additional amount of Federal acreage permanently affected approximates 67 acres. As noted above, however, in view of the present utilization of the Camp Atterbury acreage, it is difficult to apprehend how the grant of a right-of-way for a buried natural gas pipeline along the perimeter of the Camp can be deemed particularly detrimental.

Appellant suggests that the EA reflected inadequate consideration of alternatives. In fact, however, three alternative routes, two alternative systems, and a "no action" alternative were considered. See FERC EA at 66-75. Most were rejected because of infeasibility or lack of interest by necessary parties. Clearly, appellant was favorably disposed to the "no action" alternative. The fact that this alternative was considered and rejected, however, does not, ipso facto, render the consideration of that alternative inadequate.

This Board has, in the past, noted the essentially procedural nature of NEPA. See, e.g., Colorado Environmental Coalition, 108 IBLA 10 (1989); State of Wyoming Game & Fish Commission, 91 IBLA 364 (1986). Indeed, we have pointed out that "[p]recisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA." State of Wyoming Game & Fish Commission, supra at 367. But it is a mistake to assume, as appellant implicitly does, that the mere fact that one alternative may result in more negative environmental impacts than another requires rejection of that alternative. In this regard, the "no action" alternative would almost always result in the least adverse effects. There is, however, no structural bias in NEPA in favor of the "no action" alternative. Rather, NEPA is designed to assure that the decisionmaker will be fully aware of the environmental consequences attendant upon

a proposed course of action so as to make the election to proceed or not to proceed with a proposal the product of an informed choice.

In the instant case, the Milwaukee District Manager determined that the proposed right-of-way, as conditioned by the stipulations and mitigation measures proposed by the Forest Service and the Corps, would not significantly affect the quality of the human environment. We believe that the record provides a more than adequate basis on which to support this conclusion.

Appellant argues that it was improper for the District Manager to premise his approval of the right-of-way application on the determination of FERC to issue a certificate of public convenience and necessity for the natural gas pipeline. We do not agree. Under 30 U.S.C. | 185(c)(2) (1982), the District Manager was responsible for issuing the right-of-way across Federal lands, assuming FERC eventually authorized the pipeline project. The District Manager, however, was not vested with authority to actually authorize the project. Congress has deemed it appropriate to vest that authority in FERC. See 15 U.S.C. | 717(f) (1982). Thus, while determination of the route of the pipeline was eminently within the authority of the District Manager to make, whether the pipeline would be authorized at all was a question solely for FERC to decide. We believe that granting the right-of-way contingent upon ultimate FERC approval was entirely proper and in accord with the statutory division of authority.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski  
Administrative Judge

I concur:

Bruce R. Harris  
Administrative Judge