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BRIEF OF *AMICUS CURIAE* SIERRA CLUB IN SUPPORT OF APPELLANT

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*Motion for Pro Hac Vice submitted
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I. Statement of Amicus Interest

As permitted by App.R. 17, this Amicus Curiae Brief is being conditionally submitted together with a Motion for Leave of Court.

Sierra Club is a non-profit organization dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club has over 780,000 members nationwide and over 21,000 members in Ohio.

Sierra Club works to protect Ohio's natural resources and seeks to promote effective regulation of water pollution in Ohio. Sierra Club routinely comments on National Pollutant Discharge Elimination System ("NPDES") permit applications in Ohio, including, recently, draft permits for the PTT Global Chemical ethane cracker and Avon Lake coal-fired power plant. Sierra Club has an interest in ensuring reliable implementation of Ohio's NPDES and other delegated Clean Water Act programs consistent with the public's needs. The decision below adversely impacts Sierra Club's ability to safeguard the public health and safety interests of its Ohio members by restricting Sierra Club's ability to intervene on their behalf to implement the baseline protections traditionally available under Ohio's water pollution control programs.

Sierra Club is particularly concerned with the environmental impact of interstate gas pipelines, and in ensuring that communities impacted by these pipelines have a say in their oversight and regulation, both directly and through state representatives. To this end, Sierra Club has an interest in ensuring that the Natural Gas Act's savings clause, 15 U.S.C. 717b(d), which explicitly preserves state authority under the Clean Water Act, is not disregarded or given an unreasonably narrow interpretation. In addition, Sierra Club has significant experience with and

expertise in the Federal Energy Regulatory Commission (“FERC”) administration of the Natural Gas Act, including FERC’s coordination with state and federal agencies. In the past five years, Sierra Club has participated as a party more than a dozen FERC dockets for natural gas infrastructure projects, and Sierra Club has litigated more than a dozen cases brought under the Natural Gas Act’s judicial review provision, 15 U.S.C. 717r.

II. Assignment of Error

I. The trial court erred as a matter of law in concluding that Ohio waived its authority to enforce the obligations underlying claims 1 through 6 of Ohio’s third amended complaint (“complaint”) by failing to enumerate those obligations in a timely certification under Clean Water Act section 401, 33 U.S.C. 1341. Order at 9.

II. The trial court further erred as a matter of law in concluding that, in the alternative, defendants would be entitled to dismissal of claims 1 through 6 on the basis of preemption and other un-enumerated “alterative grounds.” Order at 9 n.2.

III. Issues Presented

1. Does the Natural Gas Act, 15 U.S.C. 717 et seq, have any impact on Ohio’s rights, authorities, and obligations under the Clean Water Act, 33 U.S.C. 1251 et seq., whether by preempting those authorities or by imposing or modifying procedural requirements Ohio must fulfill to avoid waiving those authorities?

2. Where Ohio has a right to impose, condition, or deny certification of a federally permitted project under Clean Water Act section 401, 33 U.S.C. 1341, does section 401 displace Ohio’s exercise of all other Clean Water Act authority over the project, and/or become a predicate for exercise of that authority?

IV. Statement of the Case

Plaintiff-appellant Ohio's complaint alleges six causes of action arising out of discharge of water pollution in connection with construction of the Rover interstate gas pipeline. These claims allege that defendants engaged in unpermitted discharges of drilling fluids and stormwater into Ohio waterways; that these discharges led to violations of state law establishing Ohio's water quality standards; that Rover violated a state order directing it to obtain a stormwater National Pollution Discharge Elimination System ("NPDES")¹ permit; and that Rover violated the terms of its NPDES permit for hydrostatic test water discharge. The authorities Ohio invokes in these claims are part of programs approved by the United States Environmental Protection Agency as delegated Clean Water Act authority. *See* 33 U.S.C. 1251(b), 1313(c), 1342(b), 1370.

Defendant-appellees, Rover and various contractors involved in the construction, moved to dismiss. The trial court held that Ohio had waived these claims. In reaching this conclusion, the trial court first held that Ohio had waived the right to impose a "certification" on the pipeline pursuant to Clean Water Act section 401, 33 U.S.C. 1341. This statute applies to any federally permitted project that will discharge pollution into a state's waters, and provides the state with authority to veto the project or to impose conditions that are then incorporated in the federal permit. The trial court held that Ohio waived its section 401 authority by failing to use it within the required timeline. Order at 8. The trial court then held that all of the limits Ohio seeks to enforce in claims 1 through 6 could have been imposed as conditions on the pipeline through section 401. *Id.* at 9. Finally, the trial court concluded that by waiving the opportunity to impose these limits through the 401 process, Ohio waived the right to enforce them at all. *Id.* In a footnote, the trial court further held that "even if such waiver had not occurred, the defendants

¹ These permits are issued pursuant to the state's authority, pursuant to the federal Clean Water Act, to authorize discharges of pollutant's into Ohio's waterways.

would be entitled to dismissal on the alternative grounds presented by the motions to dismiss, including, but not limited to, preemption.” *Id.* at 9 n.2. The trial court addressed these claims collectively, without any discussion of their factual or legal particulars. *Id.* at 8-10.

The trial court also dismissed Ohio’s seventh claim, which alleged that Rover undertook activities that required a section 401 certification before that certification became effective. The trial court held that waiver of section 401 authority disposed of this claim as well. Order at 8. Sierra Club takes no position on the trial court’s dismissal of this claim.

V. Statement of Facts

This case concerns the construction of an interstate gas pipeline subject to regulation by the Federal Energy Regulatory Commission (“FERC”) under the Natural Gas Act, 15 U.S.C. 717f. In Ohio, this project involved construction of 369 miles of new pipeline. FERC, Final Environmental Impact Statement for the Rover Pipeline Project, Accession No. 20160729-4001, page 2-6 (July 29, 2016).²

In February 2015, defendant-appellee Rover Pipeline LLC (“Rover”) applied to FERC for permission to construct the pipeline at issue here. *Rover Pipeline LLC*, Order Issuing Certificate, 158 FERC ¶ 61,109 P1 (Feb. 2, 2017).³ From the beginning, Rover recognized that, notwithstanding FERC’s role as the lead agency for review of project, Ohio state government oversight of the project would be fundamental because construction of the project would entail

² Available <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14318414> (last accessed May 11, 2019). Judicial notice of this and other documents from the Rover FERC proceeding that are available on FERC’s official “elibrary” website is proper under Evid.R. 201(B)(2). *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St. 3d 92, 95 (2015). Pertinent excerpts of all documents of which Sierra Club seeks judicial notice are included in an addendum to this brief.

³ Available at <https://www.ferc.gov/CalendarFiles/20170202210009-CP15-93-000a.pdf> (last accessed May 11, 2019).

discharges of water pollution that would require several permits issued by the Ohio Environmental Protection Agency (“Ohio EPA”). To ensure the mechanical integrity of the pipeline, Rover would conduct hydrostatic tests, wherein installed pipeline segments would be filled with pressurized water. Rover Pipeline LLC, Resource Report 1: General Project Description, FERC Dkt. CP15-93, at 1-32 (Feb. 23, 2015).⁴ After these tests, the water used would be discharged into Ohio waterways. *Id.* Rover accordingly informed FERC that Rover would need to secure and comply with a “NPDES Hydrostatic Test Water Discharge Permit” issued by Ohio EPA pursuant to Ohio Adm. Code 3745-33. *Id.* at Appendix 1A page 111.⁵ Similarly, Rover explained that it would require an Ohio “NPDES Stormwater Permit,” *id.*, which concerns discharge of runoff that carries sediment or other pollution. Finally, Rover would depend on Ohio EPA issuance of a “Section 401 Water Quality Certification” pursuant to Ohio Adm. Code 3745-32. *Id.*⁶

FERC agreed that the pipeline would result in discharges of hydrostatic test water and stormwater, and that the pipeline would require corresponding NPDES permits issued by Ohio EPA as well as Ohio’s Water Quality Certification. FERC, Draft Environmental Impact Statement for the Rover Pipeline Project, Accession No. 20160219-4004, pages 1-14 to 1-15 (Feb. 19, 2016);⁷ Final Environmental Impact Statement for the Rover Pipeline Project, Accession No. 20160729-4001, pages 1-16 to 1-17 (July 29, 2016). FERC explained that “Water used for

⁴ Available at <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=13782577> (last accessed May 11, 2019).

⁵ Available at <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=13782578> (last accessed May 11, 2019).

⁶ Ohio law also provides full authority to enforce permit violations in state courts independent of federal law, *see e.g.*, R.C. 6111.07 prohibiting permit violations and authorizing enforcement actions by the Ohio attorney general.

⁷ Available at <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14149958> (last accessed May 11, 2019).

hydrostatic testing of pipelines that is point-source⁸ discharged into waterbodies requires a National Pollutant Discharge Elimination System (NPDES) permit (Section 402 of the CWA) issued by the state, with EPA oversight,” and that Rover “would obtain appropriate National Pollutant Discharge Elimination System discharge permits prior to conducting hydrostatic testing.” Final EIS at 1-5, 5-5; *see also id.* at 4-89 (discussing stormwater). As to the third category of discharge at issue in Ohio’s complaint, drilling fluids, FERC explained that Rover would work to avoid such discharges entirely. *Id.* at 4-130. Nonetheless, FERC recognized the risk of drilling fluid release, and summarized measures that would be taken to reduce the impact of such releases if they were to occur. *Id.*

Ohio EPA received Rover’s application for Clean Water Act section 401 certification on November 16, 2015. Order at 8. Thus, during the months in which Ohio EPA evaluated the certification application, FERC had already repeatedly and explicitly affirmed its understanding that Ohio would exercise NPDES authority over the discharges FERC expected to occur.

On February 2, 2017, FERC issued its order approving the Rover pipeline. *Rover Pipeline LLC*, Order Issuing Certificate, 158 FERC ¶ 61,109 (Feb. 2, 2017). FERC’s order adopted the final EIS and recommendations therein, *id.* P6, prohibited Rover from commencing construction until it had “received all applicable authorizations required under federal law (or evidence of waiver thereof),” *id.* Appendix B P9, and further reiterated that “the applicant is required to meet all necessary permit requirements regarding stormwater management,” *id.* P180.

Shortly after FERC issued its certificate order, on February 23, 2017, Rover submitted a renewed 401 certification application to Ohio EPA. Order at 8. The next day, fifteen months after

⁸ “Point source” is defined in Ohio Adm. Code 3745-33-01(P)(2) as “any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container ... from which pollutants are or may be discharged.”

Rover's initial application for 401 certification, Ohio issued the certificate. Construction of the pipeline, and the discharges giving rise to counts 1 through 6 of Ohio's complaint, began shortly thereafter. Complaint ¶¶ 68-70, 101-123, 144-149.

VI. Argument

A. Standard of Review

This matter was dismissed below based on the trial court's determination that it lacked jurisdiction to hear the state's complaint and that dismissal was proper pursuant to Civ.R. 12(B)(1). Jurisdiction is a legal question that courts review de novo, *City of Akron v. Ohio Department of Insurance*, 2014-Ohio-96, ¶21 (10th Dist.). A trial court's ruling on subject matter jurisdiction under Civil Rule 12(B)(1) is also reviewed de novo, *Wells Fargo Bank, National Association v. Elliott*, 2013-Ohio-3690, ¶17 (5th Dist.). An appellate court has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15, 784 N.E.2d 753 (10th Dist.).

B. The Natural Gas Act Does Not Support The Trial Court's Waiver or Preemption Holdings

Nothing in the text or structure of the Natural Gas Act, or FERC's application thereof, supports dismissal of Ohio's claims 1 through 6 here.

1. The Natural Gas Act's Explicit Savings Clause Preserved Ohio's Clean Water Act Authority from Preemption

The Natural Gas Act does not preempt Ohio's exercise of the delegated Clean Water Act authority underlying these claims. To the contrary, the Natural Gas Act provides that "Except as specifically provided in this [Act], nothing in this [Act] affects the rights of States under ... the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)," also known as the Clean Water

Act. 15 U.S.C. 717b(d). *See Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 388 (4th Cir. 2018), *Delaware Riverkeeper Network v. Secretary Pa. Dep't of Env'tl. Prot.*, 833 F.3d 360, 368 (3d Cir. 2016) (affirming that this savings clause applies to interstate gas pipelines). This savings clause capaciously refers to the Clean Water Act in its entirety, rather than to section 401 specifically. “Absent ambiguity, the court must give effect to the plain meaning of a statute.” *McKinney v. Omni Die Casting, Inc.*, 91 N.E.3d 124, 129 (Ohio Ct. App. 5th Dist. 2017) (citing *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St.3d 541, 639 N.E.2d 1154 (1994)). Here, permitting and enforcement authority Ohio invokes in claims 1 through 6 are rights “under” the Clean Water Act and therefore within the scope of this savings clause. 33 U.S.C. 1251(b), 1313(c), 1342(b), 1370. This fact distinguishes the cases defendant-appellees cited in their preemption arguments before the trial court, none of which concerned delegated Clean Water Act squarely within the scope of the Natural Gas Act’s savings clause. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 307-08 (1988) (holding that state regulation of securities preempted), *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (discussing potential preemption of zoning and land use requirements), *N. Nat. Gas Co. v. Iowa Utilities Bd.*, 377 F.3d 817, 819 (8th Cir. 2004) (requirements for pipeline inspection and reporting, and for restoration of agricultural land, preempted), *Nat’l Fuel Gas Supply Corp. v. Pub. Serv. Comm’n of State of N.Y.*, 894 F.2d 571, 579 (2d Cir. 1990) (state law calling for “site-specific review” of general environmental impacts preempted). Many of these cases are further inapposite because they predate the 2005 enactment of the Natural Gas Act’s savings clause. *See Energy Policy Act of 2005*, Pub.L. No. 109–58, § 311, 119 Stat. 594 , 685 (2005) (adding 15 U.S.C. 717b(d)).

The Natural Gas Act’s savings clause entitles states to exercise Clean Water Act authority even when doing so creates a conflict with FERC, notwithstanding FERC’s designation as the

“lead” agency under 15 U.S.C. 717n(b), *contra* Order at 9 (stating that the “deference” the Natural Gas Act gives to the Clean Water Act is “[l]imited” by 15 U.S.C. 717n(b)). To be clear, there is no indication that a conflict exists in this case: the exercise of delegated Clean Water Act authority Ohio seeks to undertake would not create any specific actual conflict or disagreement with FERC’s orders. However, even if there were such a conflict, Ohio’s Clean Water Act authorities would not be preempted. At the extreme, a state may exercise Clean Water Act authority over a pipeline even when the state’s decision would effectively veto a project FERC has approved. *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 726, 732, 734 (4th Cir. 2009), *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 161–62 (2d Cir. 2008). *See also, e.g., Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61157, PP138-139 (Sept. 6, 2016) (FERC authorization conditioned on, *inter alia*, state issuance Clean Air Act permits and applicants’ compliance therewith). FERC’s “lead” role does not require states to accept FERC’s factual determinations regarding impacts to water quality or compliance with state standards, even when the fact at issue is the predicate for a state’s permit denial.⁹ *AES Sparrows Point LNG*, 589 F.3d at 726, 732, 734, *Islander E. Pipeline Co.*, 525 F.3d at 143 n.2, 161–62.

Finally, the trial court’s result leads to a policy outcome that is extremely deleterious for Ohioans’ health and safety. It cannot be denied that the trial court’s preemption finding functionally repeals the totality of Ohio’s state water pollution control laws enacted to protect water quality during all interstate pipeline construction, even in the extreme situation alleged here where millions of gallons of illegally discharged drilling fluids destroyed several of the state’s high quality wetlands.¹⁰ If the trial court’s decision is allowed to stand, Ohio EPA employees

⁹ See R.C. 6111.05, authorizing the director of Ohio EPA to investigate permit violations “on the director’s own initiative” without limitation.

¹⁰ Third Amended Complaint, Counts One, Three and Four, ¶ 103, 131, 136.

acting pursuant to their independent authority in R.C. 6111.05 to investigate such discharges would have their hands tied and could no longer act to prevent even blatant illegal discharges occurring right before their eyes. Stripped of their long-standing authority to enforce NPDES permit violations in R.C. 6111.04 in pipeline cases and to initiate prosecution by the Ohio attorney general for injunctive and civil penalty relief in R.C. 6111.07 and .09 (and criminal penalties in R.C. 6111.99), Ohio's state government would be helpless to protect the state's water sources, including sources of public drinking water.

There is no logical end point to the trial court's preemption finding. As a result, even Ohio's centuries old public nuisance¹¹ authority and the power of local police authorities would also be stripped away. This result not only is at complete odds with the system of dual federal-state oversight that has been the foundation of our national environmental laws for fifty years, but also places Ohioans safety exclusively in the hands of a distant federal bureaucracy whose priorities may not meet Ohioans expectations nor their budget meet Ohioans needs.

To adopt such a shocking reduction in the protections of Ohioans should be done for only the clearest of legal justifications based on the most explicit legislative directive. Nothing in the trial court record remotely establishes such an overriding legal imperative. Claims 1 through 6 of Ohio's complaint are not preempted by the Natural Gas Act.

2. Ohio Participated in FERC's Natural Gas Act Proceedings, but Even if It Had Not, This Would Not Have Waived Ohio's Clean Water Act Authority

Nor does any provision of the Natural Gas Act support a finding of waiver. The trial court

¹¹ See R.C. 3767.13(C) defining "prohibited acts" under Ohio's nuisance law to include defendants actions herein: "(C) No person shall unlawfully obstruct or impede the passage of a navigable river, harbor, or collection of water, or corrupt or render unwholesome or impure, a watercourse, stream, or water, or unlawfully divert such watercourse from its natural course or state to the injury or prejudice of others."

observed that section 15 U.S.C. 717n(b) designates FERC as a “lead” agency (although the statute does not explain what, if anything, this entails outside of federal agencies’ NEPA coordination with one another), and that it requires Ohio to “comply with deadlines established by FERC.” Order at 7. This latter provision is inapplicable here. First, this section applies to “State agency consider[ation] of an *application* for Federal authorization,” 15 U.S.C. 717n(b)(2) (emphasis added). Ohio’s third, fourth, and sixth claims are not about applications for permits, but rather about post-authorization conduct that violated an existing permit and state water quality standards. Second, there is no evidence indicating that FERC established, and that Ohio then violated, any deadlines for Ohio’s exercise of the authority at issue in any of the six claims at issue. Notably, it is FERC’s “common ... practice” to allow states additional time, after issuance of the FERC certificate, to complete their review under delegated federal permitting programs. *Dominion Transmission, Inc.*, 143 FERC ¶ 61148, 62000 (May 16, 2013) (explaining this practice, and how resulting FERC authorization is conditioned on receipt of outstanding permits). More generally, Ohio cooperated with FERC in development of the EIS, and this EIS instructs Rover to submit to Ohio’s NPDES permitting authority, as discussed above.

Even if Ohio had failed to meet a pertinent deadline established by FERC, the consequence, as specified in 15 U.S.C. 717n(c), would be exposure to a lawsuit alleging failure to act in the D.C. Circuit Court of Appeal, wherein the Court would have the power to “remand the proceeding to the [State] agency to take appropriate action consistent with the order of the Court” and “set a reasonable schedule and deadline for the agency to act on remand.” 15 U.S.C. 717n(c), 717r(d)(2)-(3). This is a remedy far short of outright waiver of the authority at issue.

In summary, nothing in the Natural Gas Act supports the trial court’s conclusion that Ohio waived the delegated Clean Water Act authorities Ohio seeks to enforce in claims 1 through 6, or

that those claims are preempted.

C. Waiver under Clean Water Act Section 401 Does Not Waive Ohio's Other Clean Water Act Authority

Nor does the Clean Water Act support trial court's conclusion that, because Ohio did not enumerate the limits and requirements at issue in claims 1 through 6 as conditions of a timely Clean Water Act section 401 certification, Ohio waived the authority to enforce those requirements. This conclusion is contrary to the express savings provision codified in section 401(b), 13 U.S.C. 1341(b), and to the caselaw holding that section 401 provides an optional expansion of state authority.

Section 401(a)(1) of the Clean Water Act requires an applicant for a federal permit for activity which may result in any discharge into the navigable waters to obtain from the State a certification that such discharge will not violate any effluent limitation, water quality standard, or standard of performance adopted under the Clean Water Act. 33 U.S.C. 1341(a)(1). Section 401 provides states with authority to deny the certification, thereby blocking the project; to grant the certification outright; or to grant the certification while imposing additional limitations the project, in which case those limitations will become conditions attached to the federal permit. Authority for the latter arises under Clean Water Act section 401(d), 33 U.S.C. 1341(d), which provides:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations ..., standard of performance ..., or prohibition, effluent standard, or pretreatment standard under [the Clean Water Act], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. 1341(d). The Ohio General Assembly has granted broad authority to Ohio EPA to implement the section 401 program in R.C. 6111.03(O).

Alternatively, a state may waive its certification authority for an individual project.

Although the statute allows a state to explicitly waive authority, that did not happen here. Ohio law requires that any waiver of a 401 water quality certification “shall contain a justification for the action,” and must be made “pursuant to an appealable action,” R.C. 6111.03(O)(1). The trial court record contains nothing on either requirement thus no lawful express waiver existed under Ohio law. A state may also waive certification authority through inaction, by failing to act on a certification request within one year. 33 U.S.C. 1341(a)(1). Here, the trial court concluded that Ohio’s certification was issued after this one year deadline, and that Ohio thereby waived 401 authority. Order at 8. Although Sierra Club takes no position in this appeal on the timeliness of Ohio’s certification, we note that the law regarding section 401 waiver is developing.¹²

Sierra Club takes a broader view of states’ section 401 authority than that espoused by Ohio before the trial court. As a matter of federal law, states are not limited to considering, or imposing limitations on, the specific activity that is the target of the federal permit that triggered the certification request: in this case, the dredge and fill regulated by the Army Corps of Engineers pursuant to Clean Water Act section 404, 33 U.S.C. 1344.¹³ However, a certification

¹² For example, courts disagree on whether the one-year clock starts when an application for certification is “complete,” or whether initial submission of an incomplete application starts the clock. *Compare AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729-30 (4th Cir. 2009) with *New York State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018). Here, Ohio determined that Rover’s application was not complete until July 14, 2016. Ohio EPA, Notice of Complete Section 401 Application (August 9, 2016), *available at* <http://edocpub.epa.ohio.gov/publicportal/ViewDocument.aspx?docid=475383> (last accessed May 11, 2019).

¹³ Sierra Club takes no position on whether, as Ohio appears to have argued before the trial court, Ohio Adm. Code 3745-32-02(A) prevented Ohio EPA from exercising the full scope of authority provided by section 401. Sierra Club’s view is that this question has no bearing on the waiver

for this permit generally operates as a certification for all other federal permits required for construction or operation of the pipeline. 33 U.S.C. 1341(a)(3). Accordingly, U.S. EPA guidance on section 401 encourages states to consider the impact of all associated activity in determining whether to issue certification, and affirms that section 401(d) provides authority to impose limits on these associated activities. U.S. EPA, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, at 14 (April 2010).¹⁴ See *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018) (recognizing Virginia’s authority to consider, and impose limitations on, “upland” construction activities in issuing section 401 certification for similar gas pipeline). Thus, Sierra Club agrees with the trial court that, as a matter of federal law, section 401(d) provided Ohio with the authority to reiterate the limits and requirements underlying claims 1 through 6 here as part of the 401 certification, even though some of those limitations, such as those pertaining to discharge of hydrostatic test water, are not directly related to the specific activities addressed by the Corps of Engineers’ dredge and fill permit. Order at 9.

Section 401(d) provided Ohio with the *option* of causing these limitations to be incorporated as conditions of the federal permits, but does not displace Ohio’s other enforcement authority. Although states “shall” set forth the limitations necessary to ensure compliance with water quality standards, the only consequence the statute provides for failing to set forth a limitation is that that limitation is not incorporated into the federal permit. Section 401 contains a savings clause, section 401(b), that explicitly rejects the trial court’s conclusion that a failure to identify a limit pursuant to 401(d) waives other authority to enforce it: “Nothing in this section

issue.

¹⁴ Available at https://www.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf (last accessed May 11, 2019).

shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements.” 33 U.S.C. 1341(b). Thus, section 401(d) “*expands* the State’s authority,” providing a mechanism by which the State “*may* condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other ‘appropriate requirement of State law.’” *PUD No. 1 of Jefferson Cty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 711, 713-14 (1994) (emphases added). But “the authority provided to the states to control water quality is not usurped by Section 401.” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Engineers*, 453 F. Supp. 2d 116, 134 (D.D.C. 2006) (discussing 33 U.S.C. 1341(b)).

Interpreting 401(d) as an optional source of additional state authority, rather than the exclusive avenue for states to address the water pollution impacts of federally permitted projects, does not render 401(d), or section 401 more broadly, redundant. Because section 401 applies to the federal permitting agency, requiring the federal agency to consult with the state, 401 provides an important expansion of authority where states are unable to regulate the proposed activity directly. States may lack such authority where, unlike Ohio, they have not had Clean Water Act permitting authority delegated to them. States may also lack direct regulatory authority when the federal project is regulated under a statute that, unlike the Natural Gas Act, does not have a savings clause preserving states’ delegated Clean Water Act authority. Notably, the Federal Power Act, 16 U.S.C. 791a et seq, which regulates hydroelectric dams, has broad preemptive effect but contains no analogue to the Natural Gas Act’s savings provision. Perhaps unsurprisingly, much of the caselaw regarding section 401 concerns dams regulated under the Federal Power Act. *See, e.g., PUD No. 1 of Jefferson Cty.*, 511 U.S. 700, *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C.Cir.2011), *North Carolina v. FERC*, 112 F.3d 1175

(D.C.Cir.1997), *California v. FERC*, 966 F.2d 1541 (9th Cir.1992).

On the other hand, interpreting section 401(d) to implicitly displace all other state enforcement authority violates the entrenched policy of state jurisdiction over water resources.

The Clean Water Act begins by stating:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. 1251(b). The statute further provides:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; ... or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370 (emphases added). The trial court's conclusion that section 401(d) implicitly displaces, or serves as an essential predicate for, all other state authority is contrary to section 401(b), the savings clause provided in 33 U.S.C. 1370, and to the general statement of policy provided in 33 U.S.C. 1251(b). Even assuming that, as the trial court concluded, Ohio waived its section 401 authority, such waiver does not impact, and is not a ground for dismissing, claims 1 through 6 of Ohio's complaint.

VII. Conclusion

The trial court erred in dismissing claims 1 through 6 of Ohio's complaint. These claims all seek to assert Ohio's delegated authority under the Clean Water Act, and were therefore within the scope of the Natural Gas Act's explicit savings clause, 15 U.S.C. 717b(d). The trial court's

conclusion that Ohio waived the right to bring these claims by failing to designate the limitations and requirements underlying them as part of a timely Clean Water Act section 401 certificate is contrary to the Clean Water Act's savings provisions and the longstanding policy of recognizing and protecting state authority to manage water resources. Accordingly, this Court should reverse the trial court's decision dismissing these claims.

Respectfully submitted,



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Addendum – Excerpts of Documents Submitted for Judicial Notice

As explained in the body of the brief, Sierra Club requests judicial notice of several pursuant to Ohio Rule of Evidence 201(b). For the convenience of the court, excerpts of these documents are attached. All documents were last accessed May 11, 2019.

1. Rover Pipeline Rover Pipeline LLC, Resource Report 1: General Project Description, FERC Dkt. CP15-93 (Feb. 23, 2015)
available at <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=13782577> bd
2. Rover Pipeline Rover Pipeline LLC, Resource Report 1 Appendix 1A, FERC Dkt. CP15-93 (Feb. 23, 2015)
available at <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=13782628>
3. FERC, Draft Environmental Impact Statement for the Rover Pipeline Project, Accession No. 20160219-4004 (Feb. 19, 2016)
available at <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14149958>
4. FERC, Final Environmental Impact Statement for the Rover Pipeline Project, Accession No. 20160729-4001 (July 29, 2016).
available <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=14318414>
5. Ohio EPA, Notice of Complete Section 401 Application (August 9, 2016)
available at <http://edocpub.epa.ohio.gov/publicportal/ViewDocument.aspx?docid=475383>



ROVER PIPELINE

An ENERGY TRANSFER Company

ROVER PIPELINE LLC

Rover Pipeline Project

RESOURCE REPORT 1
General Project Description

FERC Docket No. CP15-____-000

February 2015

Pipe Lowering

The completed section of pipe will be lifted off the temporary supports and lowered into the trench by side-boom tractors or equivalent equipment. Prior to lowering the pipe, the trench will be inspected to ensure that it is free of rocks and other debris that could damage the pipe or the coating and that the trench and pipe configurations are compatible, and then the pipe will be lowered in. In rocky areas, if the bottom is not smooth, a layer of soil may be placed on the bottom of the trench to protect the pipe. Concrete set-on or saddle-bag type weights will be used if required for negative buoyancy in areas of saturated soils.

Padding and Backfilling

After the pipe is lowered into the trench, the trench will be backfilled. Previously excavated materials will be pushed back into the trench using bladed equipment or backhoes. Where the previously excavated material contains large rocks or other materials that could damage the pipe or coating, the subsoil will be sifted to remove any rock greater than 1 inch from the padding material, or clean fill and/or protective coating (rock shield) will be placed around the pipe prior to backfilling. Segregated topsoil, where applicable, will be placed after backfilling the trench with subsoil. Following backfilling in agricultural land, grassland, and open land, or in specified areas, a small crown may be left in certain areas if requested by a landowner to account for any future soil settling that might occur. Excess soil will only be distributed in upland areas evenly on the right-of-way, while maintaining existing contours.

A caliper pig run will be completed after backfill to ensure there are no dents or damage to the pipe as a result of the construction and backfill process.

Hydrostatic Test and Final Tie-In

Following backfilling of the trench, the pipeline will be hydrostatically tested in a manner that meets or exceeds the requirements of 49 CFR Part 192 to ensure that it is capable of safely operating at the design pressure. Proposed sources, potential water quantities, and discharge locations for hydrostatic test water are provided in Table 1A-6 in Appendix 1A. Test segments of the pipeline will be capped and filled with water. Surface water used for testing will be drawn through a screened intake in accordance with the Rover Procedures. The water in the pipe will be pressurized and held for a minimum of 8 hours in accordance with the Pipeline and Hazardous Materials Safety Administration requirements identified in 49 CFR Part 192. Any loss of pressure that cannot be attributed to other factors, such as temperature changes, will be investigated. Any leaks detected will be repaired and the segment will be retested. In areas where dual pipelines will be installed, the pipelines will be hydrostatically tested at separate times.

Upon completion of the test, the water may be pumped to the next pipe segment for testing, or the water may be discharged. The test water will be discharged at a rate not exceeding 2,000 gallons per minute through an energy-dissipating device in compliance with the Rover Procedures and any state-specific requirements included in the applicable state discharge permits. Once a segment of pipe has been successfully tested and dried, the test cap and manifold will be removed, and the pipe will be connected to the remainder of the pipeline.



Test water will contact only new pipe, and no chemicals will be added. No desiccant or chemical additives will be used to dry the pipe. Rover will implement applicable requirements of the Rover Procedures regarding hydrostatic testing, as well as any specifications listed in individual state permits. Unless expressly permitted or approved, there will be no direct discharge into state-designated exceptional value waters or scenic rivers.

Cleanup and Restoration

Post-construction restoration activities will be undertaken in accordance with the applicable measures in the Rover Plan and Rover Procedures, other permit or agency requirements, and requirements in the landowner easement agreements. After a segment of pipe has been installed, backfilled, and successfully tested, the right-of-way, ATWS, and other disturbed areas will be finish-graded, and the construction debris will be disposed of properly. The surface of the right-of-way disturbed by construction activities will be graded to match original contours and to be compatible with surrounding drainage patterns, except at those locations where permanent changes in drainage will be required to prevent erosion, scour, and possible exposure of the pipeline. Segregated topsoil will be returned to its original horizon, unless otherwise requested by the landowner. In areas where dual pipelines will be installed, topsoil will be segregated and stored through construction of the second pipeline before being returned to the right-of-way. It is Rover's intention to let no more than 20 days pass between backfilling of the first pipe and beginning construction on the second pipe.

Temporary and permanent erosion and sediment control measures, including silt fencing, diversion terraces, and vegetation, will be installed at that time. Private and public property, such as fences, gates, driveways, and roads, which has been disturbed by the pipeline construction, will be restored to original or better condition.

1.6.1.2 Wetland Construction Procedures

Rover has considered minimizing potential impacts to wetlands during selection of its proposed route and will avoid or minimize wetland crossings to the extent practicable. Where wetlands cannot be avoided, crossings of jurisdictional wetlands will be done in accordance with federal and state permits and approvals, and the Rover Procedures, including any deviations requested by Rover and approved by the FERC. In areas where dual pipelines will be constructed, each pipeline will be constructed in wetland areas in accordance with the Rover Procedures.

Operation of construction equipment in wetlands will be limited to that needed to clear the right-of-way, dig the trench, fabricate the pipe, install the pipe, backfill the trench, and restore the right-of-way. Rover will segregate the topsoil over the trench up to 12 inches in depth in wetlands where hydrologic conditions permit this practice. Segregated topsoil will be placed in the trench following subsoil backfilling. In accordance with the Rover Procedures, fuel will not be stored within 100 feet of wetlands or other waterbodies unless otherwise approved by the FERC or the Environmental Inspector. Restoration and monitoring of wetland crossings will be conducted in accordance with the Rover Procedures to ensure successful wetland revegetation.



APPENDIX 1A

Supplemental Tables

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TABLE 1A-9
Permits and Approvals

Agency and Contact Information	Permit/Consultation	Anticipated Submittal Date	Anticipated Receipt of Approval/Permit
PENNSYLVANIA			
Pennsylvania Department of Environmental Protection Southwest (Pittsburgh) Regional Office	Erosion & Sediment Control General Permit (ESCGP)	3 rd quarter 2015	December 2015
	BDWM GP-8 Temporary Road Crossing Permit	3 rd quarter 2015	December 2015
	BDWM GP-5 Utility Line Crossing Permit	3 rd quarter 2015	4 th quarter 2015
	NPDES – Hydrostatic Test Water Discharge Permit/Approval	2 nd quarter 2016	3 rd quarter 2016
	Air Permit	February 2015	1 st quarter 2016
Pennsylvania Department of Conservation and Natural Resources Bureau of Recreation and Conservation	Consultation - State listed species	Initiated June 25, 2014	December 2015
Pennsylvania Fish and Boat Commission	Consultation - State listed species	Initiated June 25, 2014	December 2015
Pennsylvania Game Commission	Consultation - State listed species	Initiated June 25, 2014	December 2015
Pennsylvania Historical & Museum Commission	Consultation Section 106 National Historic Preservation Act	Initiated June 25, 2014	December 2015
OHIO			
Ohio Environmental Protection Agency Division of Surface Water	Section 401 Water Quality Certification	April 2015	December 2015
	Isolated Wetland Permits, if required	April 2015	December 2015
	NPDES Stormwater Permit	3 rd quarter 2015	4 th quarter 2015
	NPDES Hydrostatic Test Discharge Permit	2 nd quarter 2016	3 rd quarter 2016
Division of Air Pollution Control	Air Permit	February 2015	1 st quarter 2016
Ohio Department of Natural Resources	Consultation - State listed species	Initiated June 25, 2014	December 2015
Ohio State Historic Preservation Office Resource Protection and Review	Consultation Section 106 National Historic Preservation Act	Initiated June 25, 2014	December 2015
Stark County Park District	Consultation - Crossing of the Ohio & Erie Canalway at the Tuscarawas River.	Initiated June 25, 2014	December 2015
MICHIGAN			
Michigan Dept. of Environmental Quality Water Resources Division Lansing District Office Jackson District Office	Delegated 401/404.	February 2015	January 2015
	Inland Lakes and Streams (Part 301) and Wetland (Part 303) Permit		
	Soil Erosion & Sedimentation Control (SESC) approval	3 rd quarter 2015	4 th quarter 2015
	Water Withdrawal Permit	2 nd quarter 2016	3 rd quarter 2016
	Groundwater (hydrostatic) Discharge Permit	2 nd quarter 2016	3 rd quarter 2016

companies are planning and building interstate transmission facilities in response to this new source of gas supply. In addition, many production facilities have already been permitted and/or constructed in the region, creating a network through which natural gas may flow along various pathways to local users or interstate pipeline systems.

That is not to say that the environmental impact of individual production facilities is not assessed. The permitting of oil and gas production facilities is under the jurisdiction of other agencies, such as the COE or state agencies. Although we do not examine the impacts of Marcellus Shale production facilities to the same extent as the Project facilities in this EIS, we have identified existing and proposed Marcellus Shale production facilities in proximity to the Rover Project and have considered them within the context of cumulative impacts in the Project area (see section 4.13, Cumulative Impacts).

1.5 PERMITS, APPROVALS, CONSULTATIONS, AND REGULATORY REVIEW

Table 1.5-1 lists the major federal, state, and local permits, approvals, and consultations identified for the construction and operation of the Projects. Table 1.5-1 also provides the dates or anticipated dates when Rover, Panhandle, and Trunkline commenced or anticipate commencing formal permit and consultation procedures. Rover, Panhandle, and Trunkline would be responsible for obtaining all permits and approvals required to implement the proposed Projects prior to construction regardless of whether they appear in this table.

TABLE 1.5-1					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects <u>a</u>					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
Federal					
FERC	Certificate of Public Convenience and Necessity	Determine whether the proposed project is in the public interest, and consider issuance of a Certificate.	Application under review (filed February 2015).	Application under review (filed February 2015).	Application under review (filed February 2015).
COE	Section 404, CWA Permit and Section 10	Issuance of a Section 404 Permit for discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.
	Rivers and Harbors Act Section 10 Permit	Issuance of a Section 10 Permit for disturbances of soils/sediment or modifications of navigable waters of the United States.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.

TABLE 1.5-1 (continued)					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects <u>a</u>					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
State of West Virginia					
WVDEP Division of Water and Waste Management	Water Quality Certification (WQC), Section 401	Review and issuance of WQC.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.
	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Application estimated to be submitted first quarter of 2016.	Not Applicable.	Not Applicable.
	Hydrostatic Test Water Discharge Permit	Issue hydrostatic testing general permit.	Application to be submitted in the second quarter of 2016.	Not Applicable.	Not Applicable.
WVDEP Division of Air Quality	Air Permit	Issue permit for construction and operation of source air pollutant emissions.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
West Virginia Division of Natural Resources Office of Land and Streams	Waterbody Crossing Permits	Issue permits for waterbody crossings.	Application under review (submitted in the first quarter of 2015).	Not Applicable.	Not Applicable.
West Virginia Division of Culture and History	NHPA, Section 106	Review and comment on the project and its effects on historic properties.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
State of Ohio					
OHEPA, Division of Surface Water	WQC, Section 401	Review and issuance of WQC.	Application under review (submitted in April 2015).	Not Applicable.	Not Applicable.
	Isolated Wetland Permits	Issue isolated wetland permit for discharge dredged or fill material into isolated wetlands.	Application under review (submitted in April 2015).	Not Applicable.	Not Applicable.
	NPDES Construction Stormwater Permit	Issue NPDES Construction Stormwater General Permit.	Application estimated to be submitted in the first quarter of 2016.	Application to be submitted at least 30 days prior to construction start.	Not Applicable.

TABLE 1.5-1 (continued)

Major Permits, Approvals, and Consultations Applicable to the Proposed Projects a

Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
	Hydrostatic Test Water Discharge Permit	Issue hydrostatic test water general permit.	Application to be submitted in the second quarter of 2016.	Not Applicable.	Not Applicable.
Division of Air Pollution Control	Air Permit	Issue permit for construction and operation of source air pollutant emissions.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.
Ohio Department of National Resources	State-listed species consultation	Provide comments to prevent impacts on state-listed species.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response received in February 2015.	Not Applicable.
Ohio State Historic Preservation Office Resource Protection and Review	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response is to be determined.	Not Applicable.
Stark County Park District	Consultation for Project crossing of the Ohio and Erie Canalway at the Tuscarawas River	Provide comments to minimize impacts on the Ohio and Erie Canalway.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
State of Michigan					
MIDEQ Water Resources Division Lansing District Office and Jackson District Office	Sections 401 and 404, CWA	Review and issuance of WQC and 404 permit.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
	Part 301, Inland Lakes and Streams Permit and Part 303, Wetland Permit	Issue Part 301 and Part 303 Permits.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
	Soil Erosion and Sedimentation Control Approval	Issue soil erosion and sediment control permit.	Application estimated to be submitted in the first quarter of 2016.	Not Applicable.	Not Applicable.



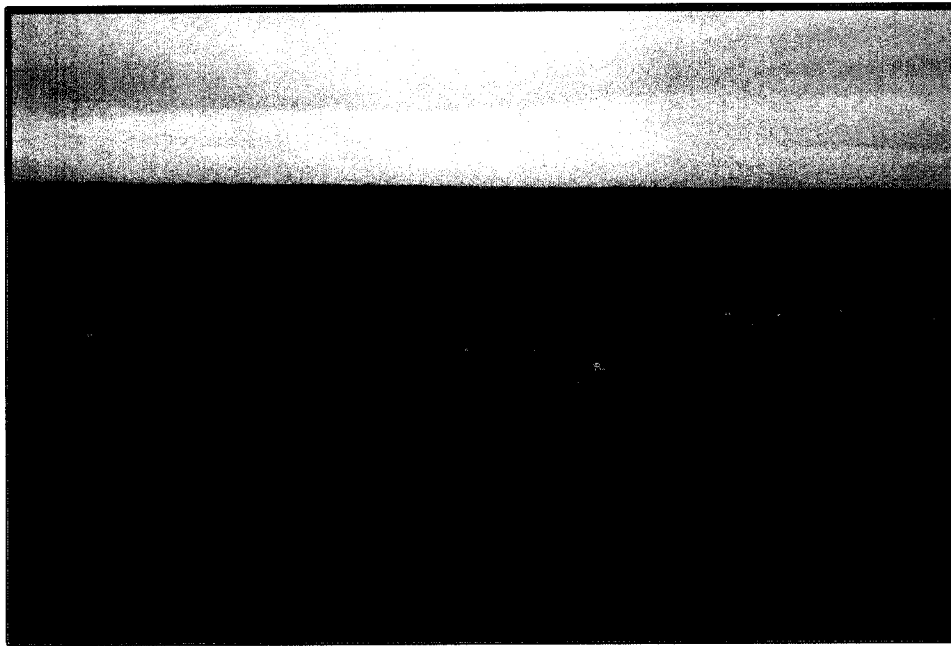
Federal Energy Regulatory Commission
Office of Energy Projects
888 First Street, NE, Washington, DC 20426

FERC/FEIS-0267F

July 2016

Rover Pipeline, Panhandle Backhaul, and Trunkline Backhaul Projects

Final Environmental Impact Statement



**Rover Pipeline, LLC; Panhandle Eastern Pipe Line Company LP;
Trunkline Gas Company, LLC**
FERC Docket Nos.: CP15-93-000, CP15-94-000, and CP15-96-000

Cooperating Agencies:



**U.S.
Environmental
Protection
Agency**



**U.S. Fish &
Wildlife
Service**



**U.S. Army
Corps of
Engineers**



**West Virginia
Department of
Environmental
Protection**



**Ohio
Environmental
Protection
Agency**

Projects, typically with conditions, provided they are otherwise required by the public convenience and necessity.

1.2 PURPOSE AND SCOPE OF THE EIS

Our principal purposes for preparing the EIS are to:

- identify and assess the potential impacts on the natural and human environment that would result from implementation of the proposed Projects;
- describe and evaluate reasonable alternatives to the proposed Projects that would avoid or substantially lessen adverse effects of the Projects on the environment while still meeting the Project objectives;
- identify and recommend specific mitigation measures, as necessary, to avoid or minimize environmental effects; and
- encourage and facilitate involvement by the public and interested agencies in the environmental review process.

The topics addressed in the EIS include alternatives; geology; soils; groundwater; surface waters; wetlands; vegetation; wildlife and aquatic resources; special-status species; land use, recreation, special interest areas and visual resources; socioeconomics; cultural resources; air quality and noise; reliability and safety; and cumulative impacts. The EIS describes the affected environment as it currently exists based on available information, discusses the environmental consequences of the proposed Projects, and compares the Projects' potential impacts to those of various alternatives. The EIS also presents our conclusions and recommended mitigation measures.

Our description of the affected environment is based on a combination of data sources, including desktop resources such as scientific literature and regulatory agency reports as well as field data collected by Rover, Panhandle, and Trunkline. Rover has field surveyed approximately 97 percent of the total Project route (approximately 498 miles). Completion of field surveys is primarily dependent upon acquisition of survey permission from landowners. If the necessary access cannot be obtained through coordination with landowners, and the proposed Projects are certificated by the FERC, Rover may use the right of eminent domain granted to it under Section 7(h) of the NGA to obtain a right-of-way. Therefore, if the Projects are certificated by the Commission, then it is likely that a portion of the outstanding surveys for Rover's Project (and associated agency permitting) would have to be completed after issuance of the Certificate. Construction and operation of the Panhandle and Trunkline Projects would take place entirely upon land owned or leased by the applicants; as such, the need for eminent domain is not anticipated for these Projects.

1.2.1 Federal Energy Regulatory Commission

The FERC is the federal agency responsible for evaluating applications filed for authorization to construct and operate interstate natural gas pipeline facilities. If the Commission determines that a project is required by the public convenience and necessity, Certificates would be issued under Section 7(c) of the NGA and Part 157 of the Commission's regulations. The Commission bases its decision concerning a proposed project not only on environmental impact but also on technical competence, financing, rates, market demand, gas supply, long-term feasibility, and other issues. As such, the FERC is the lead federal agency for the preparation of this EIS in compliance with the requirements of NEPA, the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (Title 40 Code of Federal Regulations [CFR] Parts 1500–1508), and the FERC's regulations implementing NEPA (18 CFR 380).

As the lead federal agency for the Projects, the FERC is required to comply with Section 7 of the Endangered Species Act of 1973 (ESA), the Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act (NHPA), and Section 307 of the Coastal Zone Management Act of 1972. These and other statutes have been taken into account in the preparation of the EIS.

1.2.2 U.S. Environmental Protection Agency

The EPA has delegated water quality certifications under Section 401 of the Clean Water Act (CWA) to the jurisdiction of individual state agencies, but the EPA may assume this authority if no state program exists, if the state program is not functioning adequately, or at the request of a state. Water used for hydrostatic testing of pipelines that is point-source discharged into waterbodies requires a National Pollutant Discharge Elimination System (NPDES) permit (Section 402 of the CWA) issued by the state, with EPA oversight. In addition, the EPA has the authority to review and veto the COE decisions on Section 404 permits. The EPA oversees the Michigan Department of Environmental Quality's (MIDEQ's) CWA Section 404 permitting in Michigan.

The EPA also has jurisdictional authority to control air pollution under the Clean Air Act of 1970 (CAA) (42 United States Code [USC] Chapter 85) by developing and enforcing rules and regulations for all entities that emit toxic substances into the air. Under this authority, the EPA has developed regulations for major sources of air pollution. The EPA has delegated the authority to implement these regulations to state and local agencies, who are also allowed to develop their own regulations for non-major sources. The EPA also establishes general conformity applicability thresholds, with which a federal agency can determine whether a specific action requires a general conformity assessment.

In addition to its permitting responsibilities, the EPA is required under Section 309 of the CAA to review and publicly comment on the environmental impacts of major federal actions, including actions that are the subject of draft and final EISs, and is responsible for implementing certain procedural provisions of NEPA (e.g., publishing the Notices of Availability of the draft and final EISs in the *Federal Register*) to establish statutory timeframes for the environmental review process.

1.2.3 U.S. Fish and Wildlife Service

The FWS has responsibilities under the ESA, Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (BGEPA). The FWS also has special expertise regarding effects on fish and wildlife and other environmental values and works to conserve, protect, and recover species under the ESA.

1.2.4 U.S. Army Corps of Engineers

The COE has jurisdictional authority pursuant to Section 404 of the CWA (33 USC 1344), which governs the discharge of dredged or fill material into waters of the United States (including wetlands), except in Michigan where the COE has delegated authority to the MIDEQ; and Section 10 of the Rivers and Harbors Act (33 USC 403), which regulates any work or structures that potentially affect the navigable capacity of a waterbody. Because the COE must comply with the requirements of NEPA before issuing permits under this statute, it has elected to cooperate in the preparation of the EIS. The COE would adopt the EIS per 40 CFR 1506.3 if, after an independent review of the document, it concludes that its comments and suggestions have been satisfied.

As an element of its review, the COE must consider whether the proposed Projects represent the least environmentally damaging practicable alternative pursuant to the CWA Section 404(b)(1)

Commentors recommended that the impacts associated with producing natural gas from the Marcellus Shale be included in the environmental review of the Rover Project. Our authority under the NGA and the NEPA review requirements relate only to natural gas facilities that are involved in interstate commerce. Thus, the facilities associated with the production of natural gas are not under FERC's jurisdiction. The development of the Marcellus Shale, which is regulated by the states, continues to drive the need for takeaway interstate pipeline capacity to allow the gas to reach markets. Therefore, companies are planning and building interstate transmission facilities in response to this new source of gas supply. In addition, many production facilities have already been permitted and/or constructed in the region, creating a network through which natural gas may flow along various pathways to local users or interstate pipeline systems.

That is not to say that the environmental impact of individual production facilities is not assessed. The permitting of oil and gas production facilities is under the jurisdiction of other agencies, such as the COE or state agencies. Although we do not examine the impacts of Marcellus Shale production facilities to the same extent as the Project facilities in this EIS, we have identified existing and proposed Marcellus Shale production facilities in proximity to the Rover Project and have considered them within the context of cumulative impacts in the Rover Project area (see section 4.13, Cumulative Impacts).

1.5 PERMITS, APPROVALS, CONSULTATIONS, AND REGULATORY REVIEW

Table 1.5-1 lists the major federal, state, and local permits, approvals, and consultations identified for the construction and operation of the Projects. Table 1.5-1 also provides the dates or anticipated dates when Rover, Panhandle, and Trunkline commenced or anticipate commencing formal permit and consultation procedures. Rover, Panhandle, and Trunkline would be responsible for obtaining all permits and approvals required to implement the proposed Projects prior to construction regardless of whether they appear in this table.

TABLE 1.5-1					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects <u>a</u>					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
Federal					
FERC	Certificate of Public Convenience and Necessity	Determine whether the proposed project is in the public interest, and consider issuance of a Certificate.	Application under review (filed February 2015).	Application under review (filed February 2015).	Application under review (filed February 2015).
COE	Section 404, CWA Permit and Section 10	Issuance of a Section 404 Permit for discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.

TABLE 1.5-1 (continued)					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects <u>a</u>					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
State of West Virginia					
WVDEP Division of Water and Waste Management	Water Quality Certification (WQC), Section 401	Review and issuance of WQC.	Application under review (submitted in April 2016).	Not Applicable.	Not Applicable.
	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Application to be submitted June 2016.	Not Applicable.	Not Applicable.
	Hydrostatic Test Water Discharge Permit	Issue hydrostatic testing general permit.	Application to be submitted October 2016.	Not Applicable.	Not Applicable.
WVDEP Division of Air Quality	Air Permit	Issue permit for construction and operation of source air pollutant emissions.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
West Virginia Division of Natural Resources Office of Land and Streams	Waterbody Crossing Permits	Issue permits for waterbody crossings.	Application to be submitted June 2016.	Not Applicable.	Not Applicable.
West Virginia Division of Culture and History	NHPA, Section 106	Review and comment on the project and its effects on historic properties.	Consultation initiated on June 25, 2014; response dated February 25, 2015; ongoing.	Not Applicable.	Not Applicable.
State of Ohio					
OHEPA, Division of Surface Water	WQC, Section 401	Review and issuance of WQC.	Application under review (submitted in November 2015).	Not Applicable.	Not Applicable.
	Isolated Wetland Permits	Issue isolated wetland permit for discharge dredged or fill material into isolated wetlands.	None required to date.	Not Applicable.	Not Applicable.
	NPDES Construction Stormwater Permit	Issue NPDES Construction Stormwater General Permit.	Application estimated to be submitted June 2016.	Application to be submitted at least 30 days prior to construction start.	Not Applicable.

TABLE 1.5-1 (continued)

Major Permits, Approvals, and Consultations Applicable to the Proposed Projects a

Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
Division of Air Pollution Control	Hydrostatic Test Water Discharge Permit	Issue hydrostatic test water general permit.	Application to be submitted October 2016.	Not Applicable.	Not Applicable.
	Air Permit	Issue permit for construction and operation of source air pollutant emissions.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.
Ohio Department of Natural Resources	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response received in February 2015.	Not Applicable.
Ohio State Historic Preservation Office Resource Protection and Review	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response dated February 23, 2015. Consultation complete.	Not Applicable.
Stark County Park District	Consultation for Project crossing of the Ohio and Erie Canalway at the Tuscarawas River	Provide comments to minimize impacts on the Ohio and Erie Canalway.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
State of Michigan					
MIDEQ Water Resources Division Lansing District Office and Jackson District Office	Sections 401 and 404, CWA	Review and issuance of WQC and 404 permit.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
	Part 301, Inland Lakes and Streams Permit and Part 303, Wetland Permit	Issue Part 301 and Part 303 Permits.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
	Soil Erosion and Sedimentation Control Approval	Issue soil erosion and sediment control permit.	Application to be submitted June 2016.	Not Applicable.	Not Applicable.
	Water Withdrawal Permit	Issue a water withdrawal permit.	Application to be submitted July 2016.	Not Applicable.	Not Applicable.
	Groundwater (Hydrostatic) Discharge Permit	Issue hydrostatic test general permit.	Application to be submitted July 2016.	Not Applicable.	Not Applicable.

TABLE 1.5-1 (continued)					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects <u>a</u>					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Not Applicable.	Application to be submitted at least 30 days prior to construction start.	Not Applicable.
Michigan Department of Natural Resources	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response is to be determined.	Not Applicable.
	Pinkney State Recreation Area crossing consultation	Provide comments to minimize impacts on state special interest and recreation areas.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
	Holly State Recreation Area crossing consultation	Provide comments to minimize impacts on state special interest and recreation areas.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
	Horseshoe Lake State Game Area crossing consultation	Provide comments to minimize impacts on state special interest and recreation areas.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
	Polly Ann Trail crossing consultation	Provide comments to minimize impacts on state special interest and recreation areas.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
Michigan State Housing Development Authority Historic Preservation	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response dated February 18, 2015. Consultation complete.	Not Applicable.

TABLE 1.5-1 (continued)

Major Permits, Approvals, and Consultations Applicable to the Proposed Projects a

Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
State of Indiana					
Indiana Department of Natural Resources, Division of Historical Preservation and Archaeology	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Not Applicable.	Consultation initiated on December 17, 2014; response dated January 19, 2015. Consultation complete.	Not Applicable.
Indiana Department of Natural Resources, Division of Water	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Not Applicable.	Consultation initiated on December 17, 2014; response received December 29, 2014.	Not Applicable.
Indiana Department of Environmental Management	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Not Applicable.	Application to be submitted at least 30 days prior to construction start.	Not Applicable.
State of Illinois					
Illinois Historic Preservation Agency	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Not Applicable.	Consultation initiated on December 17, 2014; response dated January 12, 2015. Consultation complete.	Consultation initiated on December 22, 2014; response dated January 12, 2015. Consultation complete.
Illinois Department of Natural Resources	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Not Applicable.	Consultation with EcoCat on December 12, 2014; no record response.	Consultation initiated on December 15, 2014; response received December 15, 2014.
Illinois Environmental Protection Agency	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Not Applicable.	Application to be submitted at least 30 days prior to construction start.	Application not required due to Energy Act Exemption.

TABLE 1.5-1 (continued)					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects ^a					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
State of Tennessee					
Tennessee Historical Commission	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Not Applicable.	Not Applicable.	Consultation initiated on December 22, 2014; response dated January 8, 2015. Consultation complete.
Tennessee Wildlife Resources Agency	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Not Applicable.	Not Applicable.	Consultation initiated on December 22, 2014; response is pending.
Tennessee Department of Environment and Conservation	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Not Applicable.	Not Applicable.	Application to be submitted at least 30 days prior to construction start.
State of Mississippi					
Mississippi Department of Archives and History	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Not Applicable.	Not Applicable.	Consultation initiated on December 22, 2014; response dated January 23, 2015. Consultation complete.
Mississippi Department of Wildlife, Fisheries, and Parks	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Not Applicable.	Not Applicable.	Consultation initiated on December 22, 2014; response is pending.
Mississippi Department of Environmental Quality	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Not Applicable.	Not Applicable.	Application not required due to Energy Act Exemption.
^a Consultations with Native American tribes are discussed in section 4.10.1.					

2.0 PROJECT DESCRIPTION

2.1 PROPOSED FACILITIES

The proposed Projects evaluated in this EIS include the Rover Pipeline Project, the Panhandle Project, and the Trunkline Project. The Rover Project would involve construction and operation of new pipeline, 10 compressor stations, 21 meter stations, and associated aboveground facilities as described below. The Panhandle Project would consist of modifications at four existing compressor stations and three valve sites along Panhandle's existing pipeline system. The Trunkline Project would consist of modifications at four existing compressor stations and one meter station along Trunkline's existing pipeline system. Overview maps depicting the locations of these facilities are provided in figures 2.1-1, 2.1-2, and 2.1-3. Detailed maps showing the pipeline routes, aboveground facilities, and contractor yards are contained in the figures referenced in the sections below. The non-jurisdictional facilities associated with the Projects are addressed in section 1.4.

2.1.1 Pipeline Facilities

The proposed Rover Project pipeline facilities would include three main components; nine supply laterals, dual 42-inch pipelines, and a 42-inch single pipeline segment. The Rover Project would cross a total of 510.3 miles through four states, including:

- Nine supply laterals consisting of about 219.2 miles of 24- to 42-inch-diameter pipe, including 18.7 miles of dual 42-inch-diameter pipeline, 1.2 miles of a 24- inch-diameter pipeline and a 42-inch-diameter pipeline installed 20 feet apart within the same right-of-way, and 660 feet of a dual 42-inch-diameter pipeline and a 36-inch-diameter pipeline installed within the same right-of-way. Additionally, 0.2 mile of pipe would be needed from the Seneca Compressor Station to the Rockies Express (REX) Interconnect. Collectively, these nine supply laterals would gather gas from supply sources in Pennsylvania, West Virginia, and Ohio as summarized in table 2.1.1-1 below.
- A dual pipeline mainline consisting of about 191.0 miles of 42-inch-diameter pipeline, including Mainline B consisting of 183.7 miles of 42-inch-diameter pipe installed adjacent to Mainline A. These pipes would be installed 20 feet apart within the same right-of-way. Both would originate in Carroll County, Ohio. Mainline A would terminate at the Defiance Compressor Station, and Mainline B would terminate 7.3 miles east of the Defiance Compressor Station.
- A Market Segment would consist of 100.0 miles of 42-inch-diameter pipe originating at the end of Mainline A in Defiance County, Ohio, and extending north and east through Michigan to the Vector Pipeline in Livingston County, Michigan.

Neither the Panhandle nor Trunkline Projects include any interstate pipeline facilities.

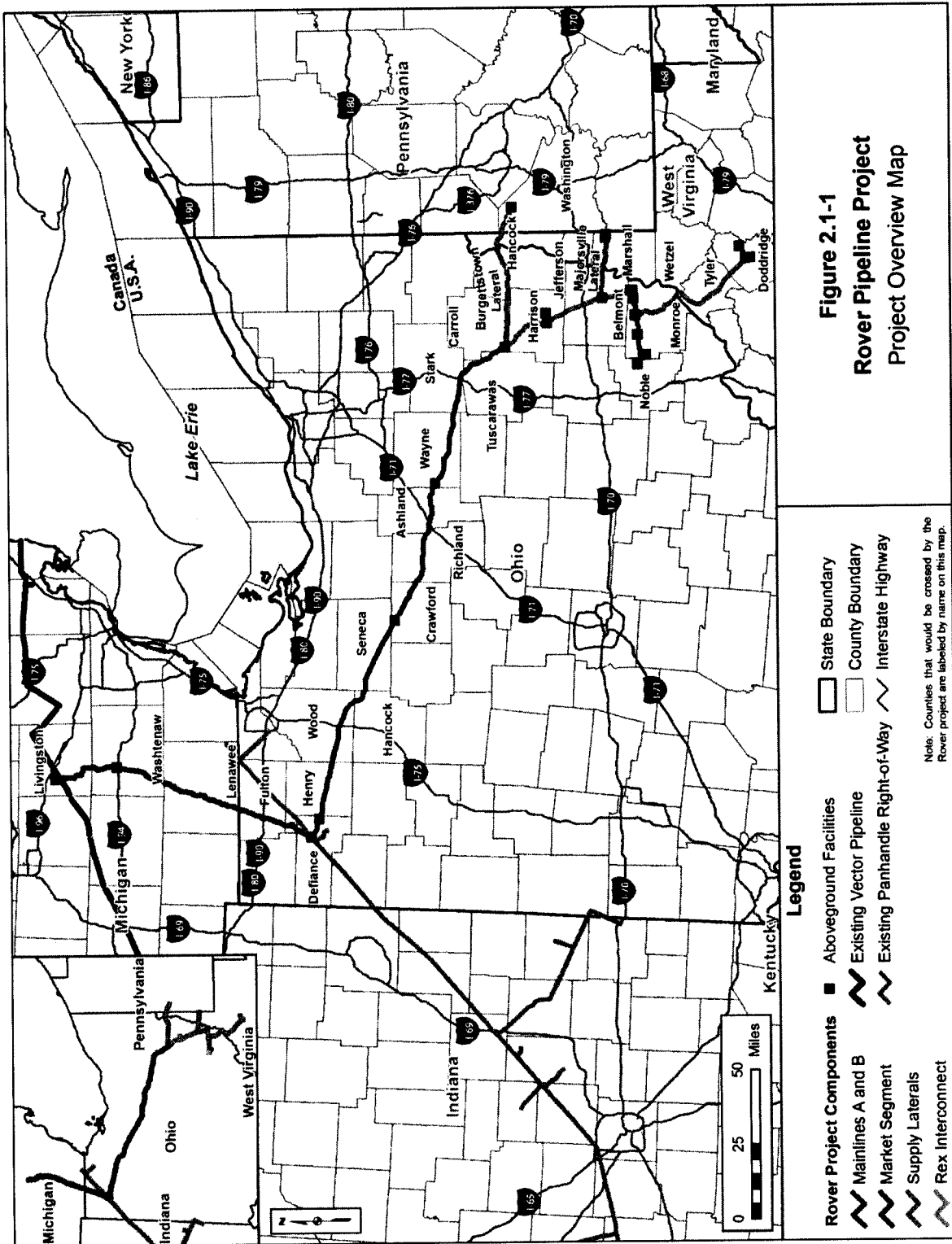


TABLE 2.1.1-1			
Pipeline Facilities Associated with the Rover Pipeline Project			
State / County	Pipe Diameter	Milepost Range	Length (miles) <u>a</u>
PENNSYLVANIA			
<u>Washington County</u>			
Burgettstown Lateral	36 inches	0.0 - 10.4	10.2
Pennsylvania (subtotal)			10.2
WEST VIRGINIA			
<u>Doddridge County</u>			
CGT Lateral	24 inches	0.0 - 5.7	5.9
Sherwood Lateral	36 inches	0.0 - 8.8	9.9
<u>Hancock County</u>			
Burgettstown Lateral	36 inches	10.4 - 15.8	5.5
<u>Marshall County</u>			
Majorsville Lateral	24 inches	0.0 - 12.3	12.3
<u>Tyler County</u>			
Sherwood Lateral	36 inches	8.8 - 32.2	23.4
<u>Wetzel County</u>			
Sherwood Lateral	36 inches	32.2 - 34.7	2.5
West Virginia (subtotal)			59.4
OHIO			
<u>Ashland County</u>			
Mainlines A and B	42 inches	79.4 - 95.7	16.4
<u>Belmont County</u>			
Clarrington Lateral	42 inches	1.4 - 26.1	24.7
Majorsville Lateral	24 inches	12.3 - 23.5	11.3
<u>Carroll County ^b</u>			
Burgettstown Lateral	36 inches	35.7 - 51.3	16.0
Supply Connectors A and B	42 inches	17.3 - 18.7	1.4
Mainlines A and B	42 inches	18.7 - 22.6	3.9
<u>Crawford County</u>			
Mainlines A and B	42 inches	113.1 - 130.8	17.7
<u>Defiance County</u>			
Mainline A	42 inches	201.1 - 209.4	8.3
Mainline B	42 inches	201.1 - 202.1	1.0
Market Segment	42 inches	0.0 - 5.5	5.5
<u>Fulton County</u>			
Market Segment	42 inches	10.5 - 27.4	17.1
<u>Hancock County</u>			
Mainlines A and B	42 inches	154.3 - 159.8	5.6

TABLE 2.1.1-1 (continued)			
Pipeline Facilities Associated with the Rover Pipeline Project			
State / County	Pipe Diameter	Milepost Range	Length (miles) <u>a</u>
<u>Harrison County</u>			
Clarington Lateral	42 inches	26.1 - 32.7	6.8
Cadiz Lateral	30 inches	0.0 - 3.4	3.5
Supply Connectors A and B	42 inches	0.0 - 17.3	17.2
<u>Henry County</u>			
Mainlines A and B	42 inches	182.5 - 201.1	18.6
Market Segment	42 inches	5.5 - 10.5	5.2
<u>Jefferson County</u>			
Burgettstown Lateral	36 inches	15.9 - 35.7	20.1
<u>Monroe County</u>			
Berne Lateral	24 inches	0.0 - 2.0	2.5
Clarington Lateral	42 inches	0.0 - 1.4	1.5
Seneca Lateral	42 inches	1.5 - 25.6	24.2
Sherwood Lateral	36 inches	34.7 - 52.4	18.3
<u>Noble County ^c</u>			
Berne Lateral	24 inches	2.0 - 3.7	1.8
REX Interconnect	42 inches	N/A	0.2
Seneca Lateral	42 inches	0.0 - 1.5	1.6
<u>Richland County</u>			
Mainlines A and B	42 inches	95.6 - 113.1	17.5
<u>Seneca County</u>			
Mainlines A and B	42 inches	130.8 - 154.3	23.5
<u>Stark County</u>			
Mainlines A and B	42 inches	37.2 - 51.4	14.3
<u>Tuscarawas County</u>			
Mainlines A and B	42 inches	22.7 - 37.2	14.5
<u>Wayne County</u>			
Mainlines A and B	42 inches	51.4 - 79.4	27.9
<u>Wood County</u>			
Mainlines A and B	42 inches	159.8 - 182.5	22.6
Ohio (subtotal)			369.0

water could experience degradation in water quality. Acute and chronic toxic effects to aquatic organisms could also result from such a spill.

None of the applicants anticipate the need for blasting along the Project route or within streams; therefore, any associated impacts on water resources (e.g., injury or death aquatic organisms, displacement of organisms during blast-hole drilling operations, and temporary increases in stream turbidity) would not occur. Although it does not plan to conduct blasting activities along the pipeline route, Rover developed a Blasting Plan to minimize potential adverse impacts on the environment, nearby water sources, structures, and utilities, should blasting be required (see appendix G).

Seasonal and flash flooding hazards are a potential concern where the pipeline would cross or be near major streams and small watersheds. Additional discussion regarding flooding and flash floods is also provided in section 4.1.3. Although flooding itself does not generally present a risk to pipeline facilities, bank erosion and/or scour could expose the pipeline or cause sections of pipe to become unsupported. All pipeline facilities are required to be designed and constructed in accordance with DOT's regulations in 49 CFR 192. These regulations include specifications for installing the pipeline at a sufficient depth to avoid possible scour at waterbody crossings. The trench would be sufficiently deep to provide for a minimum of 5 feet of cover over the pipeline at waterbodies.

To address these general impacts, Rover would implement several mitigation measures within floodplains to minimize potential impacts from flood events. These measures include:

- adherence to its Spill Procedures to minimize the likelihood of the occurrence of any spills and the extent of impacts if a spill were to occur;
- clearing only the vegetation needed for safe construction of the pipeline;
- installing and maintaining erosion and sediment control structures;
- installing concrete pipe coating or concrete weights on pipe within waterbodies and/or floodplains to prevent possible floating of the pipe;
- restoring floodplain contours and waterbody banks to their pre-construction condition; and
- conducting post-construction monitoring to ensure successful revegetation.

Operation of aboveground facilities would result in a minor increase in impervious surfaces. Rover would implement appropriate stormwater management measures in accordance with federal and state requirements. With implementation of these measures, the impacts from increased stormwater runoff are expected to be minor.

Open-cut Crossings

Rover proposes to cross the majority of waterbodies and drainages using the open-cut method. Section 2.3.2.2 provides a description of waterbody crossing methods. Construction-related impacts associated with the use of open-cut crossings would be limited primarily to temporary periods of increased turbidity during the crossing and the resultant sedimentation. Increases in turbidity could affect aquatic flora and fauna, but any impacts would be temporary and limited to the duration of construction activities. Sedimentation would occur when the sediments suspended during Project construction resettle. Sedimentation can cause smothering of aquatic biota and habitat degradation. Mobile organisms would be expected to avoid the area during construction and would therefore not be impacted by construction activities. Less mobile and sessile organisms would not be able to avoid the construction area and could be adversely impacted by changes in water quality. Rover would minimize impacts on waterbodies,

- completing waterbody crossings during appropriate in-stream construction windows and completing open-cut crossings within 24 to 48 hours for minor and intermediate crossings, respectively;
- installing temporary erosion controls and maintaining flow rates;
- dispersing any downstream discharges to minimize scour and downstream siltation;
- using clean gravel or native cobbles for the upper 1 foot of trench backfill in all waterbodies that contain coldwater fisheries;
- crossing waterbodies perpendicular to the channel or as close as practicable; and
- restoring stream channels to their original contour and stabilizing banks.

Following construction, Rover would allow a 25-foot-wide riparian strip along each waterbody bank to revegetate with native flora in order to stabilize banks, reduce erosion impacts, and provide shading and cover for fisheries resources. While stream temperature changes are possible temporarily following clearing of riparian vegetation, the reduction in shading across the permanently maintained corridor would not likely influence a temperature change (Beschta and Taylor, 1988).

Horizontal Directional Drill Crossings

Rover proposes to cross 45 waterbodies using HDDs as described in sections 2.3.2 and 4.3.3. The use of an HDD allows the pipeline to be installed beneath the bed of a waterbody without affecting aquatic resources. Potential impacts associated with HDD crossings include erosion or sedimentation associated with the onshore operation of the HDD equipment and inadvertent releases of drilling fluids and associated impacts on water quality and aquatic organisms.

Drilling entry and exit points and workspaces are locations with an increased likelihood of inadvertent releases of drilling fluids and are typically located away from the waterbodies crossed to minimize potential impacts. Although drilling mud consists of non-toxic materials, it may leak through unidentified fractures below the streambed, either along the path of the HDD or in adjacent areas. The majority of inadvertent releases occur close to the HDD entry or exit points; however, drilling mud could also be released into a waterbody and settle on the stream bed, temporarily inundating the habitats used by these species. Benthic and less mobile resources as well as spawning and nursery habitat could be impacted from the settling of drilling mud. In addition, increased sedimentation and turbidity within waterbodies could impact predator/prey interactions and reproductive success. During the HDD process, Rover personnel and the contractor would conduct visual and pedestrian inspections along the drill path and continuously monitor drilling mud pressures and return flows. As detailed in the HDD Plan, if drilling mud were released into a waterbody, Rover's contractor would take immediate action to control any inadvertent releases, clean up the affected area, and make adjustments to minimize or prevent recurrence.

Dry-ditch Crossings

Rover would cross perennial coldwater fishery waterbodies using dry-ditch methods (19 waterbodies). In addition, Rover would use dry-ditch methods to cross ephemeral or intermittent tributaries to these perennial coldwater fishery waterbodies as well as tributaries to exceptional warmwater perennial waterbodies, if there was flow present in the tributaries at the time of construction (11 tributaries). Captina Creek is the only exceptional warmwater perennial waterbody that would be crossed by the Rover Project, and it would be crossed using HDD methods.

Surface Waters

Rover's pipeline right-of-way would cross 864 waterbodies (365 perennial waterbodies, 312 intermittent waterbodies, 181 ephemeral waterbodies, and 6 lakes/ponds), and 140 drainage features (17 perennial, 32 intermittent, and 91 ephemeral). In addition to the waterbody and drainage crossings that would cross the pipes' trenchline, another 160 waterbody crossings and 43 drainage crossings would be within Rover's construction right-of-way (but would not be crossed by the pipeline). The pipeline would cross eight major waterbodies (greater than 100 feet wide). The Panhandle and Trunkline Projects do not cross any waterbodies or drainage features.

Rover is proposing to use the HDD method to install its pipeline at 45 waterbody crossings and 8 drainages, which are comprised of federally or state-designated sensitive waterbodies (not including those that are considered sensitive solely due to their impairment status) and all major waterbodies. In response to our recommendation in the draft EIS, Rover has stated that it would use a dry crossing method for perennial waterbodies classified as designated fisheries or exceptional habitats and ephemeral and intermittent tributaries to the designated fisheries if there is water flow. The open-cut method would be used to install the pipeline at the remaining waterbodies and drainage features. Due to the impacts that would result in crossing waterbodies using the open-cut method, we are recommending that Rover cross all waterbodies identified as coldwater fisheries or exceptional warmwater habitat using dry-ditch crossing methods, except those already proposed for HDD. Rover's proposed aboveground facility and contractor yard sites encompass one waterbody. Access roads associated with Rover's Project would require construction of four new access roads through waterbodies. Rover would install equipment bridges or bridges with flumes for each of those crossings, as depicted in appendix D. Implementation of the mitigation measures outlined in Rover's Procedures and other Project-specific plans, as well as our recommendation regarding dry-ditch crossings, would aid in the effective avoidance or minimization of impacts on surface water resources.

As discussed previously, 160 waterbodies and 43 drainage features along the pipeline route would be within Rover's construction workspaces, but would not be crossed by the pipeline directly. Rover would adhere to its Procedures to avoid impacts on waterbodies and drainages within the proposed construction rights-of-way, to the extent possible. We have reviewed Rover's proposed mitigation measures and find them acceptable.

Surface Water Uses during Construction

Rover is proposing to use both surface water and municipal water sources for hydrostatic testing. Rover may also use municipal water to create HDD drilling mud or purchase the drilling mud from another contractor. After completion of the HDD, disposal of the recovered drill cuttings and fluids would be recycled or disposed of at an approved disposal facility. All water used for hydrostatic testing for the Panhandle and Trunkline Projects would be obtained from municipal sources and would be transported to the respective Projects' sites by truck. Rover would require a total of 266 million gallons of water for hydrostatic testing and HDD drilling operations, where Panhandle and Trunkline anticipate the need for a maximum of 400,000 and 490,000 gallons, respectively.

The Projects would also require municipal and/or surface water for dust suppression. The applicants would obtain all appropriate permits and authorizations required prior to conducting any dust control activities. Given the length of the pipeline and that weather conditions would play a large role in determining need, the amount of water that Rover would need for dust suppression would be determined at the time of construction. However, because use of certain water sources could result in adverse impacts on federally listed or other sensitive species, we are recommending that Rover submit information on the amount and source of the water prior to construction.

Impacts associated with the withdrawal and discharge of water would be effectively minimized by the implementation of the mitigation measures outlined in Rover's CMPs and FERC's Procedures. In addition, the applicants would obtain appropriate National Pollutant Discharge Elimination System discharge permits prior to conducting hydrostatic testing. Accidental spills during construction and operations would be prevented or adequately minimized through implementation of the applicants' Spill Plan or SPAR Plan.

Based on the avoidance and minimization measures developed by Rover for its CMPs, as well as implementation of FERC's Plan and Procedures by Panhandle and Trunkline, we conclude that the Projects would not have significant impacts on surface water resources.

Wetlands

Construction of the Rover pipeline would impact a total of 160.0 acres of wetlands, including 33.4 acres of forested wetlands, 97.4 acres of herbaceous wetlands, and 29.3 acres of shrub-scrub wetlands. Rover would maintain a 10- and 30-foot-wide corridor in wetlands for areas with single pipeline and dual pipelines, respectively. Rover would also selectively remove trees and shrubs within 15 feet of the pipeline centerline, impacting a total of 71.5 acres through the operational life of the Project. All environmental surveys are complete as of February 2016, except where landowner permission has not been acquired. No wetlands would be impacted by construction or operation of the Panhandle and Trunkline Projects.

Construction and operation-related impacts on wetlands would be mitigated by Rover's implementation of the wetland protection and restoration measures contained in Rover's CMPs, including its Procedures as well as compliance with any additional conditions imposed by the COE Section 404 and the respective states' permits. Rover would conduct annual post-construction monitoring of all wetlands affected by construction to assess the condition of revegetation and the success of restoration until revegetation is successful.

Rover requested alternative measures from FERC's Procedures in several areas where it concluded that site-specific conditions do not allow for a 50-foot setback of extra workspace from wetlands or where a 75-foot-wide right-of-way is insufficient to accommodate wetland construction. Based on our review, we concluded that Rover's justifications for the larger right-of-way were insufficient. Therefore, we are recommending that Rover limit its construction right-of-way width in areas of dual pipeline to 95 feet and to 75 feet for single pipeline in all wetlands.

Rover would also avoid wetland impacts at 18 locations to be crossed by HDD. At these locations, Rover proposed to clear vegetation within a 10-foot-wide corridor between the HDD entry and/or exit location along the centerline for the purposes of accessing water to support drilling operations or for use as a travel lane. However, to further reduce impacts and to limit disturbance to the minimum area needed to construct the HDD crossings, we are recommending that Rover limit vegetation clearing between entry and exit points. Additionally, Rover would be required to develop a compensatory mitigation plan as part of its CWA Section 404 permit.

Based on the avoidance and minimization measures developed by Rover, compensatory mitigation to be developed in coordination with appropriate federal and state agencies, as well as our recommendations, we conclude that impacts on wetland resources would be effectively minimized or mitigated.



John R. Kasich, Governor
Mary Taylor, Lt. Governor
Craig W. Butler, Director

**Re: Rover Pipeline Project
Permit - Intermediate
Correspondence
401 Wetlands
DSW401154852
Counties:**

**Crawford, Seneca, Hancock, Wood, Henry, Defiance, Fulton, Ashland, Noble,
Monroe, Harrison, Carroll, Tuscarawas, Stark, Wayne, Richland, Belmont, Monroe,
and Jefferson.**

August 9, 2016

Buffy Thomason
Energy Transfer Company
1300 Main St., Houston, TX 77002

**Subject: Complete Section 401 Water Quality Certification Application
Rover Pipeline Project
Ohio EPA ID No. 154852**

Dear Ms. Thomason:

The Ohio Environmental Protection Agency (Ohio EPA) has reviewed the Section 401 Water Quality Certification application received by the Agency on November 16, 2015, and subsequent information provided on July 14, 2016, and has determined that it is administratively complete.

As per Section 6111.30 of the Ohio Revised Code (ORC), Ohio EPA will act on this application within 180 days of the date of this letter. To determine the action that should be taken by the director, Ohio EPA may ask for additional information. You are encouraged to provide information requested during the technical review process in a timely manner as the lack of complete or inadequate plans may be grounds for a proposal to deny this certification.

Public Notice Requirements

As a part of the Antidegradation review process, Ohio EPA must provide for public participation and intergovernmental coordination prior to taking action on all activities for which a Section 401 Water Quality Certification is required. In some instances, a public hearing may be required.

In accordance with Section ORC 6111.30(C) the applicant is responsible for issuing a public notice regarding the application. In this specific case, Information contained in the application indicates that a public hearing is mandatory pursuant to Ohio Administrative Code (OAC) 3745-1-05. The public notice will announce the receipt of the application by Ohio EPA and that a public hearing will be held regarding this project.

Attached is a draft public notice that Ohio EPA has prepared for this project. This notice must be published in a newspaper of general circulation for the region in which the impacts are proposed to occur **within 21 days of the date of this letter**. Guidance for preparing the final public notice and getting it published in the correct newspaper is available at:

[http://www.epa.ohio.gov/Portals/35/401/APPLICANT_PUBLIC_NOTICE_INSTRUCTION SHEET.pdf](http://www.epa.ohio.gov/Portals/35/401/APPLICANT_PUBLIC_NOTICE_INSTRUCTION_SHEET.pdf)

You may find a copy of Ohio EPA's rules and laws online at <http://www.epa.ohio.gov/dsw/rules/index.aspx>. Information regarding Ohio's Section 401 and Isolated Wetlands Permitting programs is also available online at <http://www.epa.ohio.gov/dsw/401/index.aspx>.

If you have any questions, please contact me at (330) 963-1255 or via email at todd.surrena@epa.ohio.gov

Sincerely,



Todd Surrena
Application Coordinator
401/Wetlands Section

TS/cs
Attachment

cc: Audrey Richter, Department of the Army, Huntington District, Corps of Engineers
Shawn Blohm, Department of the Army, Buffalo District, Corps of Engineers
Nancy Mullen, Department of the Army, Pittsburgh District, Corps of Engineers
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401/DSW File

Date of Public Notice: **[DATE]** Crawford, Seneca,
Hancock, Wood, Henry, Defiance, Fulton, Ashland, Noble, Monroe, Harrison, Carroll,
Tuscarawas, Stark, Wayne, Richland, Belmont, Monroe, Jefferson Counties

PUBLIC NOTICE
NOTICE OF RECEIPT OF 401 APPLICATION AND PUBLIC HEARING

Public notice is hereby given that the Ohio Environmental Protection Agency (Ohio EPA) Division of Surface Water (DSW) has received an application for, and has begun to consider whether to issue or deny, a Clean Water Act Section 401 water quality certification for a project to install a new natural gas pipeline. Rover Pipeline, LLC is proposing a new natural gas pipeline system to move natural gas from producer processing plants in the Marcellus and Utica shale areas of Ohio to interconnections with the existing pipeline system in western Ohio and Michigan. The project will include approximately 369 miles of pipeline in Ohio. The application was submitted by Rover Pipeline, LLC. The project is located in Crawford, Seneca, Hancock, Wood, Henry, Defiance, Fulton, Ashland, Noble, Monroe, Harrison, Carroll, Tuscarawas, Stark, Wayne, Richland, Belmont, Monroe, Jefferson Counties. The Pittsburgh, Buffalo and Huntington District Corps of Engineers are reviewing the project under the Nationwide Permit 12. The Ohio EPA ID Number for this project is 154852.

As required by the Antidegradation Rule, 3745-1-05, of the Ohio Administrative Code (OAC), three alternatives have been submitted for the project. The applicant's proposed preferred alternative, if approved, would impact approximately 90 acres of wetlands and approximately 3,940 feet of streams. This will include impacts to Category 1, 2 and 3 wetlands. The applicant's proposed minimal degradation alternative, if approved, would impact approximately 90 acres of wetlands and approximately 3,940 feet of streams. This will include impacts to Category 1, 2 and 3 wetlands. The applicant's proposed non-degradation alternative, if approved, would have no direct impacts on waters of the state.

Discharges from the activity, if approved, would result in degradation to, or lowering of, the water quality of the following water bodies: Tiffin, Lower Maumee, Cedar-Portage, Sandusky, Upper Ohio, Upper Ohio Wheeling, Little Muskingum-Middle Island, Tuscarawas, Mohican, Walhonding, and Wills. Ohio EPA will review the application, and decide whether to grant or deny the application, in accordance with OAC Chapters 3745-1 and 3745-32. In accordance with OAC rule 3745-1-05, an antidegradation review of the application will be conducted before deciding whether to allow a lowering of water quality. All three proposed alternatives will be considered during the review process. No exclusions or waivers, as outlined by OAC rule 3745-1-05, apply or may be granted.

Proof of Service

I hereby certify that a true and accurate copy of the foregoing *Brief of Amicus Curiae Sierra Club in Support of Appellant* has been filed with the Fifth Appellate District of Ohio and has been served upon the following parties by email in accordance with Appellate Rule 13(c)(6) on June 4, 2019, or, where no email address is provided, by United States mail on this date as well.

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*Motion for Pro Hac Vice submitted
concurrently (May 14, 2019)*

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