

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

Transcontinental Gas Pipeline Company, LLC) Docket No. CP13-551-000

REQUEST FOR REHEARING OF DELAWARE RIVERKEEPER NETWORK

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.713 (2010), Delaware Riverkeeper Network (“DRN”) hereby request rehearing and rescission of the Commission’s December 18, 2014 Order (“Order”) granting a Certificate of Public Necessity and Convenience (“Certificate”) to Transcontinental Gas Pipeline Company, L.L.C. (“Transco”) to construct the Leidy Southeast Expansion Project (“Project”). DRN seeks rehearing and rescission of the Commission’s Order because the environmental review underlying the conclusions in the Order fails to meet the requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. (2006), and its implementing regulations, 40 C.F.R. Pts. 1500-08. Based on this flawed environmental review, the Commission improperly determined that the public benefits of the Project outweigh its adverse impacts, thus violating the Natural Gas Act (“Act”), 15 U.S.C. §§ 717f (2006) and its implementing regulations, 18 C.F.R. Part 157 (2011).

I. STATEMENT OF RELEVANT FACTS

Transco filed an application on September 30, 2013, for a Certificate authorizing the company to construct, install, modify, operate, and maintain the components of the Project in Pennsylvania and New Jersey. Transco seeks approval to construct and operate pipeline facilities including approximately 29.6 miles of new 42-inch diameter pipeline loop¹ in four separate segments in Mercer, Somerset, and Hunterdon Counties, New Jersey, and Monroe and Luzerne

¹ A loop is a segment of pipe that is usually installed adjacent to an existing pipeline and connected to it at both ends. The loop allows more gas to be moved through the system.

Counties, Pennsylvania. Transco's stated purpose of the Project is to provide 525,000 dekatherms per day (Dth/d) of natural gas transportation capacity to various delivery points.

On May 24, 2013, the Commission issued a "Notice of Intent to Prepare an Environmental Assessment for the Planned Leidy Southeast Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings." In response, DRN submitted comments to the Commission on June 26, 2013. *See Response to Notice of Intent to Prepare an Environmental Assessment and Request for Comment on Environmental Issues*, Docket No. PF13-5-000 (Submittal No. 20130626-5065) (June 26, 2013) ("Scoping Comments"). In these scoping comments DRN raised a number of specific concerns and emphasized that the Commission must consider the full extent of the environmental impact of the Project, and given the significance of the impact, that the Commission prepare a full Environmental Impact Statement ("EIS"). Among other issues, DRN specifically identified that the Commission should not allow Transco to circumvent heightened environmental scrutiny by segmenting its analysis of the upgrading of Transco's Leidy line system, given that the Project is one of a series of interlocking, alternating, and functionally reliant loop upgrades for the same system.

On September 27, 2013 Transco submitted its Application for a Certificate of Public Convenience and Necessity for the Leidy Southeast Project. In response to this filing, DRN submitted comments on the application on October 30, 2013. *See Comment Letter: Transcontinental Gas Pipe Line Company's Certification Application – The Leidy Southeast Expansion Project* (Docket No. CP13-551) (Submittal No. 20131031-5009) (October 30, 2013) ("September 2013 Comment Letter"). This letter reiterated many of the issues raised in the Scoping Comments and also identified new issues, many of which have yet to be addressed by

the Commission (i.e. that Transco’s application is vague and provides insufficient information for proper review, and flow velocity questions). No specific response was submitted by the Commission to this letter.

DRN submitted an additional comment on February 25, 2014 addressing the announcement by Transco of the Atlantic Sunrise Project. *See Comment Letter: Transcontinental Gas Pipe Line Company’s Certification Application – The Leidy Southeast Expansion Project* (Docket No. CP13-551) (Submittal No. 20140225-5119) (February 25, 2014) (“February 2014 Comment Letter”). In addition to a new greenfields pipeline, the Atlantic Sunrise project was also planned to add looping sections of pipeline filling in gaps along Transco’s Leidy line system, which would be located along the same geographic corridor as the Project. DRN specifically requested that the Commission include a consideration of impacts resulting from the Atlantic Sunrise project, and its potential overlapping zones of impact, in its review of the Project. No specific response was submitted by the Commission to this letter.

On March 24, 2014 DRN submitted a comment identifying that it had hired a pipeline engineering expert to review gas flow velocities impacted by the Project. *See Comment Letter: Transcontinental Gas Pipe Line Company’s Certification Application – The Leidy Southeast Expansion Project* (Docket No. CP13-551) (Submittal No. 20140325-5005) (March 24, 2014) (“March 2013 Comment Letter”). The expert’s analysis suggested that gas velocities at several locations along Transco’s system that pose direct threats to the safety of the system; and as a result, would require additional future looping of Transco’s system. Furthermore, the letter identified 10 specific questions that needed to be answered by the Commission, and provided to the public, to more accurately determine what the gas flow velocities in the system were going to

be once the system is operational. No specific response was submitted by the Commission to this letter.

On April 2, 2014 DRN submitted a comment to the Commission stating that the Commission had yet to respond to DRN's March 2014 comment letter. *See* Comment Letter: Transcontinental Gas Pipe Line Company's Certification Application – The Leidy Southeast Expansion Project (Docket No. CP13-551) (Submittal No. 20140402-5127) (April 2, 2014) ("April 2, 2014 Comment Letter"). This letter renewed DRN's request for an answer to the 10 specific questions provided in the March 2014 letter. No specific response was submitted by the Commission to this letter.

DRN followed up its April 2, 2014 Comment letter with an additional comment letter on April 10, 2014 again renewing DRN's request. *See* Comment Letter: Transcontinental Gas Pipe Line Company's Certification Application – The Leidy Southeast Expansion Project (Docket No. CP13-551) (Submittal No. 20140410-5050) (April 10, 2014) ("April 10, 2014 Comment Letter"). This letter repeated that the Commission had failed to respond to the 10 questions posed in DRN's March 2014 Comment Letter and again asked for an answer to the questions. No specific response was submitted by the Commission to this letter.

On April 17, 2014 DRN submitted another comment letter to the Commission. *See* Comment Letter: Transcontinental Gas Pipe Line Company's Certification Application – The Leidy Southeast Expansion Project (Docket No. CP13-551) (Submittal No. 20140417-5152) (April 17, 2014) ("April 17, 2014 Comment Letter"). This letter, for a third time, identified that the Commission had failed to respond to the 10 questions posed in DRN's March 2014 Comment Letter and again renewed DRN's request for an answer to the questions.

The Commission provided a token response to DRN’s March 2014 Comment Letter on April 22, 2014. *See Reference: Request for information (Submittal No. 20140422-3061) (April 22, 2014)* (“April Commission Response Letter”). The Commission stated “[t]here is information responsive to your request available in the record at Accession Nos. 20130930-5056 and 20130930-5026. To obtain documents containing critical energy infrastructure information (CEII), please file a request with the Commission pursuant to section 388.113 of the Commission’s regulations. To the extent the information has been filed as privileged, Transco should provide the requested documents with an executed protective agreement pursuant to section 388.112 of the Commission’s Regulations.” *Id.*

DRN submitted a response to the Commission’s truncated April 22, 2014 letter on June 18, 2014. *See Comment Letter: Transcontinental Gas Pipe Line Company’s Certification Application – The Leidy Southeast Expansion Project (Docket No. CP13-551) (Submittal No. 20140618-5053) (June 18, 2014)* (“June 2014 Comment Letter”). DRN’s response stated that it had submitted a request for the information in Accession Nos. 20130930-5056 and 20130930-5026 on April 17, 2014 and had yet to receive any response from the Commission providing access to that information. DRN also stated that the unreasonable three-month delay in providing the technically complex information to DRN prejudiced DRN’s ability to provide timely and well-informed comments to the Commission regarding the proposed project.

The Commission submitted on July 23, 2014 a letter to Transco to verify that Transco had provided DRN with the requested information. *See Re: Data Request (Docket No. CP13-551) (Submittal No. 20140723-3006) (July 23, 2014)* (“July Commission Response Letter”). Transco responded on July 25, 2014 stating that Transco believed that the information contained in exhibits G and G-II combined with a quarter-page spreadsheet Transco provided to the

Commission on July 14, 2014 sufficiently provided “DRN with the requested information.” *See Reference: Transcontinental Gas Pipe Line Company, LLC* (Docket No. CP13-551) (Submittal No. 20140725-5027) (July 25, 2014) (“July Transco Response Letter”).

On July 25, 2014 DRN submitted a comment letter replying to the July Commission and Transco Response Letters. *See Comment Letter: Transcontinental Gas Pipe Line Company’s Certification Application – The Leidy Southeast Expansion Project* (Docket No. CP13-551) (Submittal No. 20140725-5058) (June 25, 2014) (“July 2014 Comment Letter”). DRN stated that as noted in DRN’s previous comment letters dated March 24, April 2, April 10, April 17, and June 18, 2014, DRN already had access to, and indeed based its initial expert conclusions on, Exhibits G and G-II, and that Transco’s limited additional submission of inadequate data on flow velocities in 5 segments was insufficient to answer any of the very basic 10 questions asked in DRN’s initial March 2014 Comment Letter. *Id.* Furthermore, the letter clarified that DRN did not have the license for the specific hydraulic modeling software used by Transco, and therefore any offer by Transco to provide information to DRN using the proprietary software had no value to DRN or the public. *Id.* DRN again renewed its request for the Transco and the Commission to answer its 10 questions presented in the March 2014 Comment Letter, which to this day remain outstanding and unanswered. *Id.*

The Commission issued the Environmental Assessment (“EA”) for the Project on August 11, 2014, in which Commission staff recommended that the “Order contain a finding of no significant impact” (“FONSI”) for the Project. Environmental Assessment at 212. During the public comment period for the Environmental Assessment, a number of interested parties, including individuals, federal and state agencies, and organizations submitted comments on the proposed Project. On September 10, 2013 DRN submitted comments in which DRN reiterated its

previous comments, identified new issues, and again demanded that the scope and significance of the environmental impacts of the Project necessitated a full EIS. *See Comments on Environmental Assessment of the Leidy Southeast Expansion Project*, Docket No. CP-13-551-000 (Submittal No. 20140910-5084) (Sept. 10, 2014) (“DRN Environmental Assessment Comment”).

On December 18, 2014, the Commission ordered that a Certificate be issued to Transco for construction of the Project. The Order agreed with the staff recommendation, memorialized in the Environmental Assessment, that the Project would not constitute a major federal action significantly affecting the quality of the human environment, and therefore, that an EIS was not required. *See Order at ¶ 43* (footnotes omitted). The Order also granted DRN’s timely motion to intervene in the proceedings. *See Order at Appendix A*. For the reasons set forth below, DRN now seek a rehearing and rescission of the Commission’s decision to grant the Certificate without first preparing an EIS.

II. BASIS FOR REHEARING

The Commission violated NEPA by granting the Certificate for construction of the Project without properly applying the NEPA regulations in evaluating the significance of the Project’s impacts. NEPA is a planning statute that requires the Commission, prior to undertaking a major federal action such as issuing the Certificate on the Project, to evaluate that project’s impacts on the natural environment. 42 U.S.C. § 4332. It emphasizes the importance of a comprehensive environmental analysis to ensure informed decision making and that “the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). The twin goals of NEPA are to 1) obligate federal agencies to consider every significant aspect of the environmental impact of a

proposed action and 2) ensure that the agency will inform the public that it has truly considered environmental concerns in its decision-making process. *Balt. Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Under NEPA, federal agencies are required to take a “hard look” at environmental consequences prior to a major action in order to integrate environmental consequences into the decision making process. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). NEPA does not mandate that an agency choose a particular alternative course of action. Rather, as a procedural statute, its entire purpose is that the agency – and the public – be informed of an agency’s rationale and the environmental impacts the selected alternative will have. *See Marsh*, 490 U.S. at 370-71.

DRN raised substantial questions, supported by reports from technical experts, as to whether the Project will have significant impacts on the human environment, thus necessitating preparation of an EIS. *See, e.g., Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (“An agency must prepare an EIS if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.”) (internal quotation marks omitted; emphasis in original); *see also Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997) (“When the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared.”) (citations omitted). The Order’s adoption of the deficient analysis in the Environmental Assessment through its Order and Finding of No Significant Impact and its inadequate response to comments raising substantial questions on the significance of the Project’s impacts proves that the Commission failed to take the “hard look” at the Project’s impacts, in violation of NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Contrary to the findings made by the Commission, DRN assert that the Project is not required for the public convenience and necessity. Based on its flawed and incomplete Environmental Assessment and unjustified Finding of No Significant Impact, the Commission violated the Natural Gas Act and its implementing regulations by improperly determining that the public benefits of the Project outweigh its adverse environmental impacts. *See Order at ¶ 17.*

A. Concise Statement of the Alleged Errors in the Order

1. *The Commission erred in unlawfully segmenting consideration of the Project's environmental impacts from those of inter-related projects on Transco's Leidy line system.* Transco separately submitted three applications to the Commission – the Leidy Southeast Upgrade Project, the Northeast Supply Diversification Project, and the Atlantic Sunrise Project applications to the Commission (“Leidy Upgrades”) – which each involve interrelated projects that leap-frog on the Leidy Pipeline system along the same geographic corridor. Furthermore, Transco announced yet another upgrade project two weeks after the Environmental Assessment for the Project was released, the Diamond East Project. This fourth project is also planned to upgrade loops of pipeline along Transco’s Leidy line system. By considering the environmental impacts of these four inter-related and functionally inter-dependent projects in separate NEPA documents, rather than completing a full Environmental Impact statement to review upgrading the Leidy line system as a whole, the Commission unlawfully segmented its analysis in violation of its obligations under NEPA.

2. *The Commission's erred by mischaracterizing and undercounting Project impacts, thus failing to provide an adequate baseline from which a NEPA review can proceed.* The Commission failed to properly designate wetlands pursuant to the Pennsylvania state code, failed to properly identify and classify wetland types, and failed to accurately account for the expected

ground disturbance impacts that will result from the construction activity of the project in violation of NEPA.

3. *The Commission erred by failing to require Transco to submit flow velocity and other technical data, which is necessary to determine the full extent of the Project's interrelatedness to previous, pending, and future projects and also to determine the operational safety of the Project.* The Commission's failure to provide critical information on flow velocities renders it impossible for the public to accurately determine the safety ramifications of the project, and also how quickly Transco will need to complete upgrading the Leidy line system to address system inefficiencies.

4. *The Commission improperly relied on the representation of mitigation measures without adequate evidentiary support.* The Commission has failed to properly implement and require the mitigation procedures outlined in the Commission's *Waterbody Construction and Mitigation Procedures* to be followed by Transco.

5. *The Commission violated the Clean Water Act by issuing the Certificate prior to the issuance of Pennsylvania's Section 401 Water Quality Certification.* The Clean Water Act clearly prohibits FERC from issuing the Order in advance of the grant of the required Section 401 Certification.

6. *The Commission's evaluation of the no action alternative is fatally flawed and incorporates an impermissibly narrow definition of the Projects' purpose and need.*

B. Statement of Issues

The subsections below correspond to the numbered paragraphs in Part II.A., above, and set forth DRN's position with respect to the identified issues. DRN submitted substantial comments to the Commission during the scoping phase as well as the comment period, and hereby incorporate by reference all arguments, evidence, and reasoning contained in DRN's

Scoping Comments, DRN’s letters submitted to the Commission, letters submitted by other parties to the Commission, DRN’s Environmental Assessment Comments, and the exhibits thereto as grounds for this request for rehearing.

1. The Commission Improperly Approved Transco’s Unlawfully Segmented Pipeline Expansion Project

The Commission has unlawfully violated its NEPA responsibilities by granting the Certificate and Order for the Project. Transco has split the overall expansion of its Leidy line system into smaller components, which has allowed it to avoid a finding of significant impact. The issue of improper segmentation was clearly flagged for the Commission in DRN’s various comments on the Project.

NEPA requires an Environmental Impact Statement for proposed “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C)(i). When scoping the range of actions to include in an Environmental Impact Statement, agencies must consider whether proposed actions are connected, cumulative, or similar. 40 C.F.R. § 1508.25(a)(1)-(3). An agency may avoid preparation of an Environmental Impact Statement by preparing an Environmental Assessment supporting a finding of no significant impact, or by determining the proposed action is not a major Federal action significantly affecting the environment. 40 C.F.R. §§ 1501.4(e)(1), 1508.9.

NEPA requires federal agencies to take environmental considerations into account “to the fullest extent possible.” 42 U.S.C. § 4332; 40 C.F.R. § 1500.2; *Bentsen*, 94 F.3d at 684. NEPA ensures that a federal agency, “in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts” and “guarantee[s] that the relevant information [on impacts] will be made available to the larger audience.”

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); 40 C.F.R. § 1500.1(b).

The D.C. Circuit in *Delaware Riverkeeper v. FERC*, identified two tests for evaluating whether an agency has improperly segmented its review of a project. *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission*, 753 F.3d 1304, at 1314-1315 (D.C. Cir. 2014). In the *Delaware Riverkeeper* case – as here – the Commission failed both tests. First, the Court stated that for the purpose of segmentation review, an agency’s consideration of the proper scope of its NEPA analysis should be guided by the “governing regulations,” which were 40 C.F.R. § 1508.25(a). *Id.* The same analysis is required in the instant matter. Second, the Court in *Delaware Riverkeeper*, also stated that even if the segmentation analysis was guided instead by the test articulated in *Taxpayers Watchdog v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987), the Commission still unlawfully segmented its review of the projects. *Id.* As shown below, the Commission here similarly fails both tests for improper segmentation review of the proposed Project.

a. The Commission Has Unlawfully Segmented Its Review Of Transco’s Interconnected And Interdependent Pipeline Upgrade Projects Pursuant to 40 C.F.R. § 1508.25(a).

The Commission violated NEPA by segmenting review of Transco’s new pipeline upgrade into at least four separate projects. These projects are part of a unified whole with functional interdependence, common timing, and geographic proximity. Transco’s upgrades to its Leidy line system – which stretches from Wharton, Pennsylvania to Hunterdon County, New Jersey – is one master project divided into segments that have significant adverse environmental impacts and should have been evaluated in a programmatic NEPA document.

An agency should prepare a single programmatic Environmental Impact Statement for actions that are “connected,” “cumulative,” or “similar,” such that their environmental effects are best considered in a single impact statement. *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027,

1032 (D.C. Cir. 2008); 40 C.F.R. § 1508.25(a). “Actions are ‘connected’ or ‘closely related’ if they: ‘(i) Automatically trigger other actions which may require environmental impact statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; [or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.’” *Hammond v. Norton*, 370 F. Supp. 2d 226, 247 (D.D.C. 2005) (quoting 40 C.F.R. § 1508.25(a)(1)). Similar actions have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. *Id.* at 246; 40 C.F.R. § 1508.25(a)(3). NEPA requires “agencies to consider the cumulative impacts of proposed actions.” *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988) (“Hodel”). *See also TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006). An agency must analyze the impact of a proposed project in light of that project’s interaction with the effects of “past, current, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7.

“Piecemealing” or “segmentation” is the unlawful practice whereby a project proponent avoids the NEPA requirement that an EIS be prepared for all major federal actions with significant environmental impacts by dividing an overall plan into component parts, each involving action with less significant environmental effects. *Taxpayers*, 819 F.2d 294, 298 (D.C. Cir. 1987). Federal agencies may not evade their responsibilities under NEPA by “artificially dividing a major federal action into smaller components, each without a ‘significant’ impact.” *Coal. on Sensible Transp. v. Dole*, 826 F. 2d 60, 68 (D.C. Cir. 1987). *See also* 40 C.F.R. § 1508.27(b)(7).

The general rule is that segmentation should be “avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.” *Town of Huntington v. Marsh*, 859 F.2d

1134, 1142 (2d Cir. 1988). Without this rule, developers and agencies could “unreasonably restrict the scope of environmental review.” *Fund for Animals v. Clark*, 27 F. Supp. 2d 9, 16 (D.D.C. 1998) (“Fund”).

Transco has improperly split the overall expansion of its Leidy line system into smaller components – the proposed Project, Northeast Supply Link project, the Atlantic Sunrise project, and the Diamond East project – thus avoiding a more rigorous environmental review of its construction activity. Transco’s Leidy line system originates at Compressor Station 505 in Hunterdon County, New Jersey and extends to near Wharton, Pennsylvania. This system stretches for a distance of approximately 200 miles. In December of 2011, Transco submitted its application for a Certificate of Public Convenience and Necessity for the Northeast Supply Link project (“Supply Link”). The Supply Link was an upgrade to Transco’s Leidy line of twelve miles of pipeline in three loops, one new compressor station, and an increase in compression at existing stations. The project was put into service in November of 2013. However, despite being in service, construction activity for the Supply Link is not yet completed. The portions of the right of way for the Supply Link that were disturbed during construction activity have yet to be remediated, as a significant amount of site restoration, soil stabilization, soil decompaction, and re-vegetation remains ongoing. Indeed, quarterly status reports for the Supply Link project detail a number of non-compliance and problem areas related to restoration and re-vegetation issues. Therefore, the Commission’s statement in the Environmental Assessment that “the majority of construction [for the proposed Project] would likely occur . . . approximately 18 months after completion of the NSL Project,” is belied not only by the facts on the ground regarding the status of the Supply Link, but also by statements made by the Commission itself in the Environmental Assessment regarding the ongoing status of the Supply Link project.

Transco announced on February 20, 2014 that it had received binding commitments for its Atlantic Sunrise project, which, in addition to greenfields pipeline construction, was planned to add looping sections of pipeline filling in gaps along Transco's Leidy line system. These looping segments would be located along the same exact geographic corridor as the Project and the Supply Link. DRN specifically requested that the Commission include a consideration of impacts resulting from the Atlantic Sunrise project, and its potential overlapping zones of impact, in its review of the Project.

The Commission received notice in January of 2013 in comments submitted by DRN with regard to the Supply Link project that specifically stated that Transco was improperly segmenting its upgrade projects. Therefore, it should be no surprise to the Commission that a new Leidy line system upgrade was announced during the public comment period of the proposed Project for an additional upgrade project, the Diamond East project. On August 26, 2014 – a mere 15 days after the issuance of the Environmental Assessment for the proposed project – Transco stated its intention to build an additional upgrade project to its Leidy line by announcing the Diamond East project. The Diamond East project was stated to include approximately “50 miles of pipeline looping [along the Leidy line] and horsepower additions at existing Transco compressor facilities.”² The Diamond East project represents the fourth in a cavalcade of upgrades to Transco’s Leidy line in less than three years, and it is likely not the last. The Diamond East project, and others, will continue to fill the gaps left in the Leidy line until the lines are fully upgraded.

² See
<http://www.williamslp.com/profiles/investor/ResLibraryView.asp?ResLibraryID=72111&BzID=1296&g=345&Nav=0&LangID=1&s=0>

In *Delaware Riverkeeper, et al. v. FERC*, where the D.C. Circuit Court held that the Commission was required to assess the construction and operational impacts of four natural gas pipeline projects that were designed to upgrade a single pipeline in one environmental review because the projects were “connected, closely related, and interdependent[.]” *Delaware Riverkeeper*, 753 F.3d 1304, 1309 (D.C. Cir. 2014). There the Commission conducted an Environmental Assessment that was incomplete relative to the degree of the Commission’s control over the underlying projects, and the connected actions rule applied because the D.C. Circuit determined that the Commission had improperly *limited* the scope of the review of the actions. Specifically, the court held that “the agency’s determination of the proper scope of its environmental review must train on the governing regulations” which here meant 40 C.F.R. § 1508.25. *Id.* at 1315.

Section 1508.25 defines the scope of actions, alternatives, and impacts to be considered in a NEPA document issued by the Commission. Indeed, courts specifically look to this section to inform NEPA segmentation analysis. See *Delaware Riverkeeper*, 753 F.3d at 1309; see also, e.g., *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008) (reviewing the agency’s application of the regulations in its preparation of an EA); *Allison v. Dep’t of Transp.*, 908 F.2d 1024, 1031 (D.C. Cir. 1990) (reviewing the agency’s application of the regulations in its preparation of an EIS). In order to determine the scope of environmental review for the purposes of segmentation review, agencies “shall” consider 3 types of actions: those that are “connected,” “cumulative,” or “similar.” 40 C.F.R. § 1508.25 (a).

In the Commission’s Order, not only does the Commission articulate a faulty interpretation of what constitutes a “connected” action with regard to a NEPA segmentation analysis, the Commission also entirely fails to even recognize the “cumulative” and “similar”

prongs of the analysis. As noted above, actions are “cumulative” if, “when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* § 1508.25(a)(2). Actions are “similar” if, “when viewed with other reasonably foreseeable or proposed agency actions, [they] have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” *Id.* § 1508.25(a)(3). Therefore, when determining the contents of an environmental assessment or environmental impact statement or an agency must consider all “connected actions,” “cumulative actions,” and “similar actions.” 40 C.F.R. § 1508.25(a).

The Commission attempts to dismiss its responsibility to review the Atlantic Sunrise project and the Diamond East project based on a flawed understanding of NEPA segmentation analysis and its incorporation of the elements of 40 C.F.R. § 1508.25(a). The Commission contests that “[t]he Atlantic Sunrise Project is not a ‘connected action’ here within the meaning of NEPA and the CEQ regulations. The Leidy Project is in no way connected with, or dependent upon, the Atlantic Sunrise Project.” Order at ¶65. However, nowhere has the Commission asserted that the Atlantic Sunrise Project could operate, as designed, absent the operation of the Leidy Southeast Expansion Project or the Supply Link. Indeed, the Atlantic Sunrise project involves the installation of two separate loops along the Leidy line system. The “Unity” loop is a 9 mile section of pipeline that will upgrade a portion of the Leidy line system between compressor station 520 and station 517. The “Grugen” loop is a 5.45 section of pipeline that will upgrade a portion of the Leidy line system between compressor station 535 and station 520. These looping sections of pipeline proposed as part of the Atlantic Sunrise project that upgrade the Leidy line system, rely on, and are specifically designed to work in unison with the Leidy Southeast Expansion Project. Furthermore, the “Unity” loop will physically overlap and directly

connect with the Muncy Loop from the Supply Link. Each loop was designed to upgrade Transco’s Line D, as such, these projects are clearly “connected action” as defined by 40 C.F.R. § 1508.25(a)(1). Therefore, it is clear that each of these projects could not proceed unless other inter-related projects are taken previously or simultaneously. Furthermore, a mere glance at a map showing the leap-frogging segments of pipeline proposed for each project shows that the projects are clearly interdependent parts of a larger action and depend on the large action to justify their existence. This point is discussed further in sections II.B.1.b. and II.B.1.c. below.

Even if these three pipeline projects are not “connected” actions pursuant to § 1508.25(a)(1), the projects are undoubtedly “similar” actions pursuant to § 1508.25(a)(3). As discussed above, Transco’s Northeast Supply Link project, Leidy Southeast Expansion Project, Atlantic Sunrise project, and Diamond East project together are “reasonably foreseeable or proposed agency actions, [that] have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” 40 C.F.R. § 1508.25(a)(3). With regard to physical proximity, Transco’s projects are along the same linear geographic corridor, impact the same sub-watersheds, abut one another, and present overlapping construction zones. Functionally, the proposed Project, the Supply Link, the Atlantic Sunrise Project, and the Diamond East project will work in concert to increase deliverable gas volumes on Transco’s Leidy line by nearly 2.5 billion cubic square feet of natural gas per day to the same markets. Lastly, with regard to common timing, similar to the pipeline upgrade projects in *Delaware Riverkeeper*, all four of Transco’s upgrade projects also have been announced in less than three years. As such, the clear physical, functional, and temporal nexus between Transco’s interrelated and interconnected pipeline upgrade projects easily meets the standard for “similar” actions pursuant to 40 C.F.R. § 1508.25(a)(3).

Additionally, a review of the way in which Transco has sequenced its projects further evinces the way in which these projects must be considered “similar actions” pursuant to segmentation review. For example, Transco lines A, B, and C span the entire length of Monroe County and Lycoming County, Pennsylvania. Transco is now in the process of adding the D line across each of those two counties. In December of 2011, Transco initiated the Certification process at Commission for the Supply Link project, which was the first step in Transco’s plan to upgrade line D in both counties. The portion of the Supply Link project within Monroe County, called the Palmerton Loop, is a 3.17 mile stretch of pipeline that was installed along the southern tier of the county. In other words, as a result of the Supply Link, line D now extends from the southeastern border of the state in a northwestern direction across Monroe County towards compressor station 515. A portion of the proposed Project – like the Supply Link – also extends Transco’s D line across Monroe County. The portion of the proposed Project in Monroe County is known as the Franklin Loop, and is composed of an eleven mile stretch of pipeline that extends Transco’s D line southeast from compressor station 515 towards the Supply Link’s Palmerton Loop. The completion of both projects would leave a roughly ten to fifteen mile gap in Transco’s D line in the center of Monroe County that Transco will need to seek to complete in a forthcoming upgrade project (potentially as part of the announced Diamond East project).

In Lycoming County, the Supply Link resulted in the addition of the “Muncy Loop,” which is a 2.2 mile upgrade of Transco’s Leidy system extending Transco’s line D from compressor station 520 towards compressor station 517. The Atlantic Sunrise project proposes to physically overlap and directly connect the Supply Link’s Muncy Loop pipeline with a nine mile pipeline loop called the “Unity Loop.” The completion of both projects will leave a roughly 2 mile gap between line D and compressor station 517. Again, the announced the Diamond East

Project may, in fact, fill this gap thus completing line D in Lycoming County. If the Commission approves these projects, Transco will successfully have proposed four different projects for Certification, in four distinct dockets, over an extremely short period of time, to complete functionally dependent pipeline upgrade of its Leidy Line system without a proper review of the environmental impacts of those proposed projects. Such a result is at odds with the Commission's mandate pursuant to NEPA.

Even if the upgrade projects are not considered "connected actions" or "similar actions," the Commission still improperly segmented its review by failing to provide a meaningful analysis of the "cumulative actions" represented by Transco's upgrade projects. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* A finding of "[s]ignificance cannot be avoided by terming an action temporary." 40 C.F.R. § 1508.27(b)(7). "[A] meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions--past, present, and proposed, and reasonably foreseeable--that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002). NEPA requires such an analysis because "[e]ven a slight increase in adverse conditions . . . may sometimes threaten harm that is significant . . . may represent the straw that breaks the back of the environmental camel." *Id.* at 343.

NEPA's cumulative impact analysis requirement is not satisfied where the "analysis" merely announces that there may be risks or impacts, but does not provide the kind of information about those risks or impacts that would be "useful to a decisionmaker in deciding

whether, or how, to alter the program to lessen cumulative environmental impacts.” *Hodel*, 865 F.2d at 299 (“perfunctory references” do not constitute “analysis”). A cumulative impact section that merely “recites the history of [project] development” in the area and then offers the “conclusory statement” that “the cumulative direct impacts have been minimal” does not satisfy NEPA requirements. *FOE v. United States Army Corps of Eng’rs*, 109 F. Supp. 2d 30, 42 (D.D.C. 2000) (citing *Hodel*, 865 F.2d at 298). More generally, an agency must provide a reasoned explanation to support its assertions and conclusions; otherwise, its decision is arbitrary and capricious. *Alpharma, Inc.v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (“Alpharma”).

Here, the Commission failed to take a hard look at the cumulative impacts of the interconnected projects completing an upgrade to Transco’s Leidy line system. In addition, the Commission also failed to provide a reasoned basis for excluding the PennEast pipeline project from its environmental review.

The Environmental Assessment for the Project fails to include any analysis of Transco’s recently announced Diamond East project; this project adds a significant amount of new pipeline and other facilities along the same geographic corridor and upgrading the same pipeline system, as the proposed Project.³ Transco announced its “open season” for the Diamond East project on August 26, 2014, which has provided the Commission over four and a half months to supplement its Environmental Assessment with a review of the potential impacts of the Diamond East project. Once an open season is successfully completed, the likelihood of a Certification application to be submitted before the Commission is sufficiently high to make the project reasonably foreseeable in the context of a cumulative action review. Any analysis of cumulative

³ See
<http://www.williamslp.com/profiles/investor/ResLibraryView.asp?ResLibraryID=72111&BzID=1296&g=345&Nav=0&LangID=1&s=0>

actions absent this entirely foreseeable project renders the Environmental Assessment substantially and legally deficient.

The Commission complains in the Order that the “The Diamond East Project is not currently before the Commission and there are no publicly available, quantifiable details about the project (e.g., exact location or pipeline routes, environmental resources affected, land requirements, etc.).” However, NEPA demands reasonable forecasting by the agency, which it has refused to perform. Furthermore, more than enough information is available to the Commission for it to include the Diamond East project in its Environmental Assessment. First, the Commission knows: 1) the proposed amount of pipeline mileage 2) the expected capacity, 3) the specific Transco pipeline system that is proposed to be upgraded (the Leidy Line system), and 4) the size of the pipeline. That information is more than sufficient for the Commission to provide at least some degree of analysis on the potential cumulative impact resulting from the Diamond East project. Further, the Commission is well equipped to engage in elementary hydraulic modeling to predict where the Diamond East project is likely to be constructed. Indeed, with the information described above, and the hydraulic data that has already been submitted to the Commission pursuant to the Project’s application, an engineer would easily be able to predict the most likely locations for the Diamond East’s new looping segments. This is particularly true considering the system inefficiencies and safety issues that will be created by the proposed Project and Transco’s subsequent need to alleviate these issues. Similarly, the Commission failed to include an appropriate analysis of the Atlantic Sunrise project despite its foreseeability, close proximity, and accessible construction details. Rather, the Commission in the Environmental Assessment conjures a multitude of reasons excusing the Commission from including any kind of project specific analysis.

DRN is requesting a programmatic environmental review document that will take into account exactly these types of future upgrade project to the Leidy line system. The Diamond East project and Atlantic Sunrise project are further evidence of Transco's clear intention to continue to upgrade its Leidy line system in short succession, which therefore demands that a proper programmatic environmental review of the Leidy line system is entirely necessary.

The Environmental Assessment also did not include a review of the PennEast pipeline project, which is proposed to be constructed parallel to Transco's Leidy line system, starting in Luzerne County and extending down into New Jersey.⁴ In several places the PennEast project will only be separated from the Transco Leidy line system by a few miles. Yet, the environmental impacts of this foreseeable project are not mentioned in the Environmental Assessment. The Commission complains, similar to the Diamond East project, that the Commission does not have sufficient detail to review the PennEast pipeline. In addition to having access to similar open season data as the Diamond East pipeline, the Commission has also had detailed route maps for the PennEast pipeline for over three months that show the exact preferred route proposed by PennEast. *See Request for Approval of Pre-Filing Review (Docket No. PF15-1-000)* (Oct. 7, 2014). This data provides more than enough information for the Commission to include a supplementary analysis of the project. Natural gas pipeline projects that enter the pre-filing process at the Commission have an final approval rate of over 90%, thereby cementing the foreseeability of the project.

⁴ See http://www.nj.com/mercer/index.ssf/2014/08/proposed_penneast_pipeline_through_mercer_hunterdon_counties_runs_into_opposition.html

Moreover, the pipeline loops added by the proposed Project physically abut sections added by the Supply Link in at least one location,⁵ the Supply Link loops overlap with the Atlantic Sunrise project, and it is likely that the Diamond East project will include more sections that are physically connected to the segments of either the proposed Project, the Supply Link, or the Atlantic Sunrise project. At these locations, the same uplands, streams, and local wildlife will be re-disturbed by a second round of construction. These overlapping construction zones are not analyzed anywhere in the Environmental Assessment, indeed, they are not even *mentioned* anywhere in the record. These facts belie the Commission's statement that the "time" and "distance" between project segments renders their cumulative impacts insignificant. This same argument for not analyzing the impacts of pipeline segments that are adjacent to one another has also already been considered and rejected in *Delaware Riverkeeper*. *Delaware Riverkeeper*, 753 F.3d at 1319-1320. The announced time schedules of both of these projects reveal that the project applicants will submit Certificate applications well before the Commission issues a decision on the proposed Project. As such, the Environmental Assessment for the Project must account for these two projects.

Furthermore, there is also no analysis of the impact of the construction and operation of each of the projects on the same sub-watersheds and tributary basins. For example, the Palmerton Loop (Supply Link) and the Franklin Loop (proposed Project) occur in the same sub-watershed, therefore while the same waterbodies may not be crossed by both projects, each impacted waterbody eventually flows into the Lehigh River. The same sub-watershed is also impacted by the physically connected portions of the project in Hunterdon County, New Jersey. Also, at no point does the Environmental Assessment consider or analyze whether the individually

⁵ Intersection of the Stanton Loop and the Pleasant Run Loop.

insignificant post-mitigation impacts on wetlands from multiple pipeline projects in the same corridor could have a cumulatively significant impact.

In addition to the re-disturbance of wildlife, waterbodies, and wetlands in the same sub-watersheds and abutting construction zones, the Environmental Assessment fails whole-sale to mention any of the numerous violations of permitting conditions, non-compliance issues, failed stormwater controls, failed restoration, and insufficient re-vegetation efforts that plagued the Supply Link project. Despite the close physical relationship of the Supply Link, and the fact that the Supply Link was riddled with documented failures of mitigation measures, the Environmental Assessment of cumulative impacts analysis lacks *any* analysis of the aggregate or synergistic impacts of re-disturbing these areas that were harmed by the Supply Link construction activity.

For example, in Monroe County alone, the local conservation district issued no less than six Notices of Violation to Transco for failures to follow the terms and conditions of its permits for the construction of the Supply Link. *See* DRN Environmental Assessment Comment Letter, Exhibit F (“Exhibit F”). At least two of those Notices of Violations recorded unpermitted direct discharges from construction sites into waterbodies and wetlands. *Id.* The impact these unpermitted discharges had on the same sub-watershed as the proposed Project are not analyzed or mentioned anywhere in the record. Moreover, the Commission’s docket itself for the Supply Link is littered with inspection reports and project status updates that detail numerous non-compliance issues and problem areas. *See* DRN Environmental Assessment Comment Letter, Exhibit C. Indeed, there are at least sixteen of these reports, none of which are analyzed or mentioned in the Environmental Assessment of the proposed Project despite the close geographic proximity of the resulting impacts. More generally, the Environmental Assessment neither

included nor incorporated by reference any fact-based analysis of impacts on the individual waterways crossed by the proposed Project. Nothing in the administrative record, including the Order itself, acknowledges these issues, and as such, it is legally and factually deficient.

The remainder of the cumulative impacts section of the Environmental Assessment lumps in the Supply Link project with other nearby Commission jurisdictional projects, which it discusses summarily and without any of the necessary detail derived from the specific facts of those projects. The Commission's unsubstantiated and abbreviated treatment of cumulative impacts in the Environmental Assessment for the proposed project closely mimics the Commission's truncated, and ultimately unlawful, treatment of cumulative impacts in the *Delaware Riverkeeper* case, where the court found that the Commission failed to provide a sufficient hard look at these issues.

Moreover, the Commission concludes that the Supply Link and the proposed Project "would be constructed and maintained in accordance with our approved procedures and other construction, operation, and mitigation measures that may be required by federal, state, or local permitting authorities, further reducing the potential for cumulative impacts we expect that there would be no cumulative impacts associated with construction of the projects." Environmental Assessment, at 183. It is shocking that this *same exact sentence, word for word*, also appeared in the cumulative impacts section of the Environmental Assessment for the *Delaware Riverkeeper case*, justifying its review, a section that was specifically found to be substantially and legally deficient. The Commission has not learned its lesson that such a truncated and cavalier cumulative impacts review is simply not acceptable pursuant to the requirements of NEPA.

The Commission's reliance on this statement as the basis for concluding that cumulative impacts of the multiple projects will be insignificant guts the purpose of a cumulative impacts

analysis, which is to consider whether a series of individually minimal impacts may nonetheless collectively create significant impacts. The fact that the impacts of the individual projects may have been minimized by imposition of procedures required by the Commission and other agencies does not constitute an analysis of whether the *sum* of the “minimized” impacts from each project is significant. For this reason, and those articulated above, the cumulative impacts review for the proposed Project is deficient and fails to meet the standard of review articulated in NEPA.

b. The Commission Has Unlawfully Segmented Its Review Of Transco’s Interconnected And Interdependent Pipeline Upgrade Projects Pursuant To The Factors Identified in *Taxpayers Watchdog*.

In addition to failing to meet the requirements of 40 C.F.R. § 1508.25(a), the Commission also fails to satisfy the three of the factor test articulated in *Taxpayers*, thus demonstrating that the Commission impermissibly segmented its NEPA analysis. *Taxpayers*, 819 F.2d 294 (D.C. Cir. 1987). To determine whether a project has been unlawfully segmented, “courts have considered such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives[.]” *Taxpayers*, 819 F.2d at 298. In *Delaware Riverkeeper*, the court held that even if the court were to expand its analysis from Section 1508.25(a) to the factors in articulated in *Taxpayers*, the Commission’s defense of its action was still deficient. *Delaware Riverkeeper*, 753 F.3d at 1314-16 (the court held that the projects did not have “(1) has logical termini; [or] (2) . . . substantial independent utility.” (the court’s examination did not reach the remaining factor)). The Commission failed to satisfy each of the factors identified in the *Taxpayers*’ test.

A project lacks “independent utility” if it could not function or would not have been constructed in the absence of another project. *Wetlands Action Network v. U.S. Army Corps of*

Engineers, 222 F.3d 1105, 1118 (9th Cir. 2000). See also *W. N.C. Alliance v. N.C. DOT*, 312 F. Supp. 2d 765, 774-775 (E.D.N.C. 2003) (project widening highway section lacked independent utility because it would leave a “bottleneck” of narrow highway to north, such that traffic congestion between the termini of the project would be worsened until construction of later project widening bottleneck section).

The proposed Project functionally relies on the operation of the Supply Link. In other words, if the Supply Link facilities were to be deactivated, the proposed Project would not be able to operate as designed and fulfil its contracted-for volumes of gas. Additionally, as discussed above, the Atlantic Sunrise project would not be able to operate, as designed without the operation of the proposed Project and the Supply Link. And, as logically follows, the Diamond East project would not be able to operate as designed absent the Supply Link project, the proposed Project, and the Atlantic Sunrise project. Therefore, identical to the projects in the *Delaware Riverkeeper* case, the projects here rely on one other to function.

Furthermore, an expert report issued by Accufacts, included by DRN in its comments on the Environmental Assessment, concludes that Transco’s projects “appear to be part of a master plan to incrementally complete a full or nearly full 42-inch pipeline loop.” DRN Environmental Assessment Comment Letter, Exhibit D, at 7 (“Exhibit D”). Tellingly, the Commission can point to nothing in the administrative record demonstrating its independent analysis of any engineering principles that would show that these projects could operate independently of one another. There is simply no data on the record showing the Commission did any sort of independent work to come to its conclusion. Indeed, the only data on the record is that provided in Exhibit D by the DRN.

The Commission has previously relied, and continues to rely, upon the flawed argument that because pipeline upgrade projects are designed to serve different customers, at different points in time, they have independent utility, and thus warrant individual review. In the Commission’s Order, this position is parroted where the Commission states, “[t]he Leidy Project has been proposed to meet a distinctly-identified market demand for additional transportation service.” Order at ¶ 64. However, such an argument improperly rests entirely on the economic independent utility of each project. Taken to its logical conclusion, this argument suggests that if a project sponsor could find individual shippers interested in small volumes of gas that would require only half-mile stretches of looped pipeline along an existing pipeline, the Commission could certificate each one of those small individual half-mile loops. Thus, under those circumstances, the Commission could theoretically certificate over 400 individual projects along Transco’s Leidy line system. Such a result undermines the design, purpose, and intent of NEPA.

Indeed, this specious argument was specifically addressed and rejected in *Delaware Riverkeeper*, where the court rightly identified that the project sponsor “could have proposed two-mile segments, or one-mile segments, or one-hundred-yard segments for NEPA review, so long as it produced shipping contracts in anticipation of the increased capacity attributable to each of these new segments. To interpret the ‘substantial independent utility’ factor to allow such fractionalization of interdependent projects would subvert the whole point of the rule against segmentation.” *Delaware Riverkeeper*, 753 F.3d. at 1315.

The proposed Project also does not have logical termini. When pipeline operators add new loops along a pipeline corridor to increase gas delivery capacity to the end point of that corridor, the location of the start and end points of individual loops is not fixed by the contracted-for quantity of natural gas. Where the contracted-for quantity of gas could be satisfied

by adding new loops and compressors in a variety of configurations, pipeline owners add loops in locations based on factors including cost and difficulty of construction, environmental considerations, short- and long-term safety, and avoiding the need to acquire additional property rights. This is a critical fact as it shows that the Project simply does not have a logical termini.

In *Delaware Riverkeeper*, the court cited this exact scenario for finding that the projects under review did not have a logical termini. Specifically, the court noted that “[t]o the extent that the [projects are] comparable to a highway, it is more analogous to a highway that connects two major points than one section of a web of metropolitan roadways for which the logical termini criterion loses significance.” *Id.* at 1316. The proposed Project presents an identical factual scenario, where a single pipeline corridor, the Leidy pipeline system, is being upgraded piecemeal and avoiding proper environmental scrutiny. Therefore, because the selection of the termini for each segment for upgrading the Leidy line system does not turn on the projects’ individual contract, the existence of that separate contract cannot establish the independence of the project from the expansion of capacity on the Leidy Line system as a whole. Furthermore, the Accufacts report also has found that Transco’s selected locations for the upgrade segments are irrational:

Transco appears to be attempting to increase system capacity largely through incremental quick horsepower additions and their related inefficiencies that result in high gas velocities in certain segments of the Leidy loop mainlines rather than more extensive and proper pipe looping. *Apparently Transco is willing to accept higher system inefficiencies and operating risks associated with high actual gas velocities in order to get segmented project completed in a quicker time frame* than that which might be required if pipe looping had been submitted as one master loop project effort.

Exhibit D, at 7 (emphasis added). The Commission has simply provided no answer to this assertion anywhere in the record.

Lastly, Transco's projects have also foreclosed the alternative of leaving the Leidy line system not fully looped. A project may be impermissibly segmented from future projects if it eliminates the “no build” alternatives for those future projects. *See Alliance*, 312 F. Supp. 2d at 775 (project that would exacerbate traffic due to existing bottleneck foreclosed no build option for future widening of bottleneck). Transco's projects have made the *completion of looping the Leidy line inevitable*. Once Transco completes the segments for the proposed Project and begins shipping additional gas under contracts for the Project, gas velocities in the remaining unlooped segments along the Leidy line begin to substantially exceed the 60 ft/sec maximum velocity, increasing the long-term potential for pipeline failure due to increased internal erosion. Exhibit D, at 1-5. Such bottlenecks also create significant pipeline and system inefficiencies which demand future looping to alleviate. *Id.* By exceeding its own design thresholds, Transco risks the long-term safety of its system, and also creates its own emergency by consciously constructing inefficient pipeline systems that will later need to be upgraded.

The Commission should be well aware of gas velocity erosional limit ranges as the Commission rejected a pipeline alternative in an application “where transporting the current and proposed gas volumes through only the existing pipeline would result in gas velocity significantly above TGP’s recommended maximum design velocity of approximately 40 feet per second. This increased velocity could compromise the pipeline’s integrity and safety.”⁶ Nowhere in the record does the Commission explain why it has chosen to allow Transco to operate at velocities higher than its stated design threshold of 60 ft/sec, while it denied Tennessee Gas and Pipeline Company for exceeding their design threshold of 40 ft/sec. Despite devoting eight full

⁶ Tennessee Gas Pipeline Company (“TGP”), “Northeast Upgrade Project (Docket No. CP11-161-000), Environmental Assessment,” November 2011, p. 3-3.

paragraphs to this issue in the Order, Order at ¶¶ 25-31, the Commission fails to address the fact that in previous pipeline Certification matters involving substantially similar facilities the Commission came to the conclusion such velocities are unsafe, yet here, the Commission completely ignores its previous findings and states that these velocities are indeed safe. This irreconcilable position alone demonstrates a dispositive deficiency of the Commission's Environmental Assessment.

Consequently, completion of the Project irretrievably committed Transco to completing the entire 200 mile Leidy line. As in *Alliance*, the Project has eliminated the option of no further future construction by creating safety problems and inefficiencies that necessitate future upgrade projects. Furthermore, the construction of the proposed Project will create a situation where the crossing of the Delaware River would be unavoidable if Transco ever entered into contracts to provide additional capacity. Rather than evaluating these projects in isolation, the Commission must initiate a programmatic Environmental Impact Statement that provides a comprehensive *corridor wide* review to examine the impact of upgrading the entire 200 mile Transco Leidy line system. As discussed above, and throughout Exhibit D, Transco's proposed Project necessitates the completion of upgrading the rest of its Leidy line system to avoid long-term safety issues related to erosion of the aging pipeline due to velocities exceeding the 60 ft/sec threshold, and also to relieve the inefficiencies created by incremental pipeline expansion. It is clearly Transco's intention to have this entire Leidy line eventually fully looped for lines C and D; therefore, NEPA demands that a proper review of the environmental impacts of such an upgrade occurs.

Additionally, the Commission's reliance on the Mineral Management Service study to address gas velocity issues is nonresponsive to the issues raised and inappropriate. *See Exhibit D,*

at 5-6. The Commission in the Environmental Assessment comment that “Transco, citing a study funded by and prepared on behalf of the Mineral Management Service and American Petroleum Institute, states that a flow velocity of 100 feet per second is a conservative (low) design guideline for protecting pipelines from a metal loss due to droplets of condensate or water, neither of which are typically present in mainline transmission piping such as those that would be expanded under this Project (Svederman and Arnold, 1994).” *Id.* at 5. However, this study is not relevant to natural gas transmission pipelines, and any reliance on the conclusions of the study to justify Transco exceeding its design thresholds must be rejected.

The study cited by Transco relies on an evaluation of flow lines as opposed to transmission lines for its findings. As noted in DRN’s expert report, “[i]t should be obvious to the Commission that gas transmission pipelines, by their nature, warrant substantially different design/operational/maintenance approaches than production flow lines.” *Id.* at 5. For example, the study notes that “natural gas as transmission pipelines are by their very nature larger diameter, thinner walled, higher inventory, longer life pipelines, often moving massive volumes of gas (oftentimes multiple billions of cubic feet of gas per day), in areas that can affect large segments of the public. Flowlines tend to be much shorter, lower inventory, usually but not always considerably smaller diameter pipelines that do not move anywhere near the volume of gas on a daily business as transmission pipelines. Production pipelines usually have smaller footprints and most are located in more sparsely populated regions.” *Id.* at 5. The report concludes by stating that the citation of the study “in an attempt to justify high gas velocities in a gas transmission pipeline is very inappropriate, and FERC should know and recognize this important difference.” *Id.* at 6. The only response the Order offers is, “[t]he fact that the American Petroleum Institute/Minerals Management Service study looked at production

pipelines instead of transmission lines is not germane to our conclusion.” Order at ¶ 30, fn. 37. However, the Order wholly fails to explain why the differences identified above are not “germane.” The Commission relies not on its own analysis of the flow velocities, but instead entirely relies on an outdated study involving completely different types, sizes, diameters of pipelines that are designed for entirely different purposes.

Also, the Commission’s analysis of the impact of corridor width on wildlife migration fails to consider the continuity of the linear disturbance from the three projects, and fails to specifically address the cumulative impact on vegetation and wildlife from the long-term deforestation of a 100-foot wide corridor. Without an evaluation of the impacts of creating a continuous linear disturbance over more than 200 miles the Environmental Assessment must be found to be deficient.

2. The Commission’s Mischaracterization And Serial Undercounting Of Project Impacts Fails To Provide An Adequate Baseline From Which A NEPA Review Can Proceed

The Commission has not properly identified the acreage of impacted resources, the types of resources impacted, or the extent to which the resources are impacted. Specifically, the Commission has failed to properly designate wetlands, failed to properly identify and classify wetland types, and failed to accurately account for the expected ground disturbance impacts that will result from the construction activity of the project. As a result, the Commission is unable to accurately establish a foundational baseline from which it can begin to provide an accurate assessment of the harms associated with construction activity to waterways and wetlands. Therefore, any issuance of a finding of no significant impact based on the Environmental Assessment would be arbitrary, capricious, and an abuse of discretion.

A baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action. *See* 54 Fed.Reg. 23756 (1989). It has been recognized that “[w]ithout establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir.1988); *see also* Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act*(visited May 11, 1999) (“The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process”). NEPA requires that the lead agency provide the data on which it bases its environmental analysis. *See Lands Council*, 537 F.3d at 994 (holding that an agency must support its conclusions with studies that the agency deems reliable). Such analyses must occur before the proposed action is approved, not afterward. *See LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9th Cir.1988) (“[T]he very purpose of NEPA's requirement that an [environmental review] be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action”) (internal citation and quotation marks omitted).

a. The Commission Failed To Gather And Review The Necessary Data To Properly Classify Wetlands Impacted By The Project

The Commission’s Environmental Assessment, and supporting documents, reveals that the Commission has failed to identify and evaluate the relevant environmental impacts to wetlands associated with Transco’s proposed Project, and therefore, the Commission’s review is fatally flawed. Indeed, the Commission can point to no data in its supporting documents which demonstrate that wetlands in the project area were properly evaluated and classified. This is

particularly true for the portions of the project in Pennsylvania where the Commission failed whole-sale to evaluate any of the five state designated criteria to determine the proper classification of that wetland. As such, the Commission has unlawfully mischaracterized the impacts resulting from project construction and operation.

Chapter 105 of the Pennsylvania code establishes a clear regulatory regime with respect to the protections afforded to wetlands within the state. *See generally*, 25 Pa. Code 105.17-105.18a, et seq. Wetlands in Pennsylvania are classified as either “exceptional value wetlands” or “other wetlands.” 25 Pa. Code § 105.17(1)-(2). “Exceptional value wetlands” are wetlands that exhibit one or more of the following characteristics:

- (i) Wetlands which serve as habitat for fauna or flora listed as “threatened” or “endangered” under the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. §§ 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543), the Wild Resource Conservation Act (32 P. S. §§ 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code).
- (ii) Wetlands that are hydrologically connected to or located within 1/2-mile of wetlands identified under subparagraph (i) and that maintain the habitat of the threatened or endangered species within the wetland identified under subparagraph (i).
- (iii) Wetlands that are located in or along the floodplain of the reach of a wild trout stream or waters listed as exceptional value under Chapter 93 (relating to water quality standards) and the floodplain of streams tributary thereto, or wetlands within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. §§ 1271—1287) or designated as wild or scenic under the Pennsylvania Scenic Rivers Act (32 P. S. §§ 820.21—820.29).
- (iv) Wetlands located along an existing public or private drinking water supply, including both surface water and groundwater sources, that maintain the quality or quantity of the drinking water supply.
- (v) Wetlands located in areas designated by the Department as “natural” or “wild” areas within State forest or park lands, wetlands located in areas designated as Federal wilderness areas under the Wilderness Act (16 U.S.C.A. §§ 1131—1136) or the Federal Eastern Wilderness Act of 1975 (16 U.S.C.A. § 1132)

or wetlands located in areas designated as National natural landmarks by the Secretary of the Interior under the Historic Sites Act of 1935 (16 U.S.C.A. §§ 461—467).

25 Pa. Code § 105.17(1)(i)-(v). Any wetlands that do not meet at least one or more of the abovementioned characteristics are defined as “other wetlands.” 25 Pa. Code § 105.17(2). It is important that the correct classifications of wetlands are identified because the Pennsylvania wetland classification determines the level of environmental protection for the wetland, and is reflective of the functions and values of that wetland. For example, proposed projects are not permitted to have an “adverse impact” on an Exceptional Value wetland. 25 Pa. Code § 105.18(a). An adverse impact has been found to include the permanent conversion of wetlands from forested wetlands to emergent wetlands. *See Exhibit H; Environmental Assessment*, at 65.

The Environmental Assessment includes Appendix I, which includes a column for “State Wetland Classification.” Environmental Assessment, at I-1. This column is designed to identify the proper state designation for each of the wetlands impacted by the Project as defined in “Pennsylvania Administrative Code 25, Chapter 105.17.” *Id.* at I-3. For the Pennsylvania portions of the project, this column identifies seven wetlands in Pennsylvania as “Exceptional.” *Id.* at I-2, I-3.

However, the record is completely devoid of any assessment of the five criteria for determining the State Wetland Classification in Pennsylvania. The only data on the record for Transco’s Project that involves *individualized review* of wetlands are the “Stream and Wetland Data Sheets,” which were used to delineate the wetland features in the project area. These sheets were included as A-7 to the Appendix 2F-1 in Resource Report 2 for the Project. However, the “Stream and Wetland Data Sheets” provide *no analysis of the five factors* that must be examined pursuant to the wetlands designations of Chapter 105.17. 25 Pa. Code § 105.17(1)(i)-(v).

Specifically, the forms do not include any information on whether the habitat is suitable for fauna or flora listed as threatened or endangered, or whether the wetland is hydrologically connected to or located within a half-mile of wetlands that serve as habitat for threatened or endangered species. 25 Pa. Code § 105.17(1)(i)-(ii). The forms also fail to identify whether the wetland is located in or along the floodplain of the reach of a wild trout stream or waters listed as exceptional value under Chapter 93 and the floodplain of streams tributary thereto. 25 Pa. Code § 105.17(1) (iii). There is also no mention of whether the wetland was located along an existing public or private driving water supply. 25 Pa. Code § 105.17(1) (iv). Lastly, these forms also do not identify whether the wetlands are located in areas designated by the Department as “natural” or “wild” areas within State forest or park lands. 25 Pa. Code § 105.17(1)(v). Indeed, the Commission cannot show anywhere else in the record that information specific to these five criteria were collected or analyzed.

Without gathering and cataloging the required data on the five criteria for Pennsylvania State Wetland designations, it is impossible for the Commission to have made an informed decision regarding a baseline from which to measure the wetlands impacts of the proposed Project. As such, a finding of no significant impact based on the Environmental Assessment, and its supporting documents, would be arbitrary, capricious, and an abuse of discretion. Until such time the Commission gathers data to properly identify the wetlands to be impacted the Environmental Assessment is deficient and unlawful.

The Commission explicitly included these wetland designation categories in the EA, therefore, it must be assumed that such categorization of wetlands played a role in the Commission’s determination of possible environmental harm caused by the Project. As a result, the data collected and analyzed by the Commission must be accurate to provide a useful baseline

from which the Commission can proceed with its environmental review. However, as shown above, the Commission failed to gather the necessary data to properly determine the designations. Therefore, the Environmental Assessment is missing critical information and is factually and legally flawed. The administrative record, including the Commission's Order, remains devoid of any specific response to these comments.

b. The Commission Misidentified Numerous Wetlands To Be Impacted By The Proposed Project

Considering that the Commission utterly failed to collect and review the necessary data to determine the proper designations for wetlands in the Project area, predictably, the Commission also misidentified no less than nine wetlands as "Other" wetlands when the wetlands clearly meet at least one of the criteria in Section 105.17(1).⁷ The Commission identified only five of the wetlands along the Franklin Loop of the Project as Exceptional Value, including wetlands: WW-001-014, WW-001-020, WW-001-028, WW-001-036, and WW-009-001. Environmental Assessment, at I-2, I-3. It appears as though the Commission *solely relied on whether the wetland was potentially suitable bog turtle habitat* to determine the Pennsylvania state designation. While a site specific review of the five criteria for proper wetland designation in Pennsylvania is missing from the record, a review of the limited data that appears in the record shows that at least nine *additional* wetlands qualify as "Exceptional Value" that were misidentified by the Commission as "Other."⁸ It is possible that more wetlands qualify as

⁷ These Exceptional Value wetlands include: WW-007-002, WW-001-038, WW-001-039, WW-001-040, WW-001-041, WW-009-002, WW-001-019, WW-001-021, and WW-001-016.

⁸ A tenth wetland, 001-050, is also potentially an Exceptional Value wetland however it was unclear from the visual survey and the documents submitted by Transco whether or not this wetland qualified as an Exceptional Value wetland pursuant to the water supply protection criteria. 25 Pa. Code § 105.17(1)(iv).

Exceptional Value wetlands beyond the nine identified below, as the report focused solely on the Franklin Loop and not the Dorrance Loop in Pennsylvania.

A certified wetlands specialist reviewed the Project documents, performed a site specific review of the wetlands in the project area, and drafted an Expert Report detailing the misidentified wetlands in the Environmental Assessment. There is no evidence in the record that any certified wetlands specialist employed by the Commission performed any similar analysis. Of the nine wetlands improperly identified as “Other” wetlands, at least six of them qualify as “Exceptional Value” because they lie within a floodplain of an Exceptional Value water, these wetlands include: WW-007-002, WW-001-038, WW-001-039, WW-001-040, WW-001-041, and WW-009-002. Specifically, the Project applicant states that wetland WW-007-002 directly abuts an unnamed tributary to the Leigh River, which is an exceptional value water, thus making WW-007-002 an Exceptional Value wetland. 25 Pa. Code § 105.17(1)(iii). This wetland may also qualify as a result of being suitable bog turtle habitat pursuant to 25 Pa. Code § 105.17(1)(i)-(ii). The Project applicant states that wetland WW-001-038 directly abuts the Lehigh River, which is an exceptional value water, thus qualifying it an Exceptional Value wetland. 25 Pa. Code § 105.17(1)(iii). The Project applicant states that wetland WW-001-039 lies within the 100-year floodplain of the Lehigh River, which is an exceptional value water, thereby qualifying it as Exceptional Value. 25 Pa. Code § 105.17(1)(iii). The Project applicant states that wetland WW-001-040 directly abuts an unnamed tributary to the Leigh River, which is an exceptional value water, qualifying this wetland as Exceptional Value. 25 Pa. Code § 105.17(1)(iii). The Project applicant states that wetland WW-001-041 directly abuts an unnamed tributary to Kendall Creek which is an exceptional value water, qualifying the wetland as Exceptional Value. 25 Pa. Code § 105.17(1)(iii). The Project applicant states that wetland WW-009-002 directly abuts Kendall

Creek which is an exceptional value water, qualifying it as an Exceptional Value wetland. 25 Pa. Code § 105.17(1)(iii). This wetland also likely qualifies as exceptional value as a result of being within a preserve or sanctuary as pursuant to in 25 Pa. Code § 105.17(1)(v).

Furthermore, the record shows that three additional wetlands qualify as “Exceptional Value” wetlands as a result of being suitable bog turtle habitat, these include wetlands: WW-001-016,⁹ WW-001-019, and WW-001-021. An on-site visit by a certified wetlands specialist – confirmed by photographic evidence – demonstrates that each of the three aforementioned wetlands are suitable for bog turtle habitat. In addition, wetland WW-001-016 also qualifies as an “Exceptional Value” wetland as a result of being within a preserve or sanctuary as pursuant to in 25 Pa. Code § 105.17(1)(v).

The Commission cannot make an informed decision regarding a baseline from which to measure the impacts of the proposed Project unless the Commission is provided correct classifications of wetlands. If the Commission contends that the classification or designation of the wetlands are irrelevant and strictly left to the purview of other agencies, than why would the Commission include this data in its Environmental Assessment at all? In other words, this type of data was important enough to include in the Environmental Assessment, yet when it is shown to be inaccurate or incomplete, the Commission suddenly contends that this type of data is only relevant in the context of other agencies’ review and permit approvals.

As described above, the Commission failed to perform a site specific review of the wetlands in the Project area, this alone is sufficient to dismiss the Environmental Assessment as deficient. A site specific review performed by a certified wetland specialist irrefutably shows that at least nine wetlands were misidentified in the Environmental Assessment. As such, a finding of

⁹ This wetland may also likely qualifies as exceptional value as a result of being within a preserve or sanctuary as pursuant to in 25 Pa. Code § 105.17(1)(v).

no significant impact and certificate approval based on the Environmental Assessment, and its supporting documents, would be arbitrary, capricious, and an abuse of discretion. The wetlands at issue here received a special designation by the state because of the high value of the resource. The Commission's cavalier treatment of those resources renders the Environmental Assessment legally and factually deficient. The administrative record, including the Commission's Order, remains devoid of any specific response to these comments.

c. The Commission Failed To Identify The Proper Wetland Type And Serially Under-Counted Project Impacts To Wetland Cover

The Commission has failed to accurately account for the expected ground disturbance impacts that will result from the Project's construction and operational activity. In addition to the problems articulated above, the Commission also misidentified the cover type for many of the wetlands to be impacted by the Project; the improper classifications included a significant number of Exceptional Value wetlands in Pennsylvania. In addition, the Commission has also undercounted the acreage of permanent impact to a number of Exceptional Value forested wetlands in Pennsylvania. These mistakes provide further evidence of a failure of the Commission to determine a proper baseline for an environmental review of the Project, thus rendering any decision based on the Environmental Assessment unlawful.

As discussed above, included in the Environmental Assessment is Appendix I. In addition to the "State Wetland Classification" column, there also appears a "Wetland Type" column, which is designed to identify the National Wetlands Inventory classification for each wetland, which includes: PEM = Palustrine Emergent Wetland; PSS = Palustrine Scrub-Shrub Wetland; and PFO = Palustrine Forested Wetland. Environmental Assessment, at I-3.

Of the forty-nine wetlands in Pennsylvania identified in Appendix I, fourteen were incorrectly classified by the Commission.¹⁰ Of the fourteen wetlands that were improperly classified, half qualify as Exceptional Value wetlands.¹¹ Below, DRN focuses on seven Exceptional Value wetlands to show how their “Wetland Type” classification was misrepresented by the Commission in Appendix I.¹² As a result of the these mischaracterizations the Commission has undercounted and misrepresented the amount of temporary and permanent impact resulting to the cover type present in those wetlands.

One of the many egregious examples of a mischaracterization of “Wetland Type” is the Commission’s classification of wetland WW-007-002, which is an Exceptional Value Wetland. Wetland WW-007-002 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (page 15 of 43) clearly shows that wetland WW-007-002 is almost entirely forested in cover type, and therefore should be classified as a PFO. In addition to the Resource Report document, the forested cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission misclassified wetland WW-001-038, which is an Exceptional Value Wetland. Wetland WW-001-038 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (pages 13-14 of 43) clearly shows that wetland WW-001-038 has a combination of forested, shrub scrub, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should be classified as a

¹⁰ WW-007-002; WW-001-019; WW-001-021; WW-001-022; WW-001-031; WW-001-035; WW-001-038; WW-001-039; WW-001-041; WW-001-043; WW-001-047; WW-007-002; WW-007-009; WW-006-004; WW-009-001.

¹¹ WW-001-019; WW-001-021; WW-001-038; WW-001-039; WW-001-041; WW-009-001.

¹² The misclassification of the Exceptional Value wetlands detailed below is also representative of the misclassifications of “Wetland Type” for Other wetlands across the project area in Pennsylvania.

PFO/PSS/PEM. In addition to the Resource Report documents, the cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission misclassified wetland WW-001-021, which is an Exceptional Value Wetland. Wetland WW-001-021 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (pages 34 of 43) clearly shows that wetland WW-001-021 has a combination of forested, shrub scrub, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should clearly be classified as a PFO/PSS/PEM. In addition to the Resource Report document, the cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission misclassified wetland WW-001-019, which is an Exceptional Value Wetland. Wetland WW-001-019 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (pages 37 of 43) clearly shows that wetland WW-001-019 has a combination of forested, shrub scrub, open water, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should clearly be classified as a PFO/PSS/PEM/POW. In addition to the Resource Report document, the cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission misclassified wetland WW-001-039, which is an Exceptional Value Wetland. Wetland WW-001-039 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (pages 13 of 43) clearly shows that wetland WW-001-039 has a combination of forested and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should clearly be classified as a PFO/PEM. In addition to the Resource Report document, the cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission misclassified wetland WW-001-041, which is an Exceptional Value Wetland. Wetland WW-001-041 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (pages 10 of 43) clearly shows that wetland WW-001-041 has a combination of forested, shrub scrub, and emergent cover type that will be impacted by project construction and operation. Therefore, the wetland should clearly be classified as a PFO/PSS/PEM. In addition to the Resource Report document, the cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission misclassified wetland WW-009-001, which is an Exceptional Value Wetland. Wetland WW-009-001 was identified by the Commission as a PEM wetland; however, a review of Resource Report 2, B-5 (pages 4 of 43) clearly shows that wetland WW-009-001 has a combination of forested cover type and scrub shrub cover type that will be impacted by project construction and operation. Therefore, the wetland should clearly be classified as a PFO/PSS. In addition to the Resource Report document, the cover type was also verified by a certified wetland specialist and appears in the administrative record.

The Commission’s contention in the Order that the “wetland delineations were conducted using the Corps’ Wetlands Delineation Manual,” and that this “methodology is sufficient for the Commission to disclose and evaluate potential impacts on wetlands and to serve as a starting point for the development of protective mitigation.” Order at ¶ 77. However, the Commission’s statement is non-responsive to DRN’s comments. DRN does not contend that the Wetlands Delineation Manual is not an appropriate methodology for identifying potentially impacted resources; rather, DRN contends that the Commission has utterly failed to *properly implement its methodology*, and as a result, severely undercounted and misidentified numerous potentially impacted resources.

The Commission has not specifically responded to any of these comments contained in Section II (B)(2)(a.-c.). If the Commission, or Transco's environmental consultant (who largely prepared the information contained in the Environmental Assessment) had properly collected or reviewed the relevant data it would have found that numerous wetlands were misidentified, mischaracterized, and undercounted.

3. The Commission Erred by Failing to Disclose or Verify Flow Velocity and Other Technical Data that was Necessary to Determine the Full Extent of the Project's Inter-relatedness to Previous, Pending, and Future Projects, and also to Determine the Operational Safety of the Project

As described above, on March 24, 2014, DRN filed a request for specific data on gas flow velocities and supporting information for Transco's proposed Project. Additional requests for this information were filed on April 2, April 10, April 17, June 18, and July 25, 2014. On July 23, 2014 the Commission issued a letter requesting verification that Transco has provided DRN with the requested information. DRN never received any information from Transco that specifically addressed the 10 requests made in DRN's March 2014 Letter. The information requested by DRN also did not appear anywhere in the Environmental Assessment or its supporting documents.

Transco filed a letter on July 25, 2014 stating that Transco believes that the information contained in exhibits G and G-II combined with a quarter page spreadsheet provided to FERC on July 14, 2014 sufficiently provides "DRN with the requested information." However, as noted in DRN's letters of March 24, April 2, April 10, April 17, and June 18, 2014, DRN already had access to, and indeed based its initial conclusions on, Exhibits G and G-II. Transco's limited additional submission of data on flow velocities in only 5 segments is wholly insufficient to answer any of the very basic questions asked in DRN's initial March letter, which include:

1. The pipe diameters and where they change,
2. The pipe grade and where the grade changes,
3. The pipe wall thicknesses,
4. The mileage for each pipe grade along the system,
5. Include the MAOP for each pipe segment and where it changes,

6. Identify for each pipeline segment the location of gas meters (if any) along the Transco system Loops that may be used to allocate gas flow between the various pipeline segments
7. Gas flow rates in MMSCF/D, for all stream inputs and deliveries along the systems,
8. Pressures at the respective inlet and delivery points along the system for the peak flow case, and
9. At each compressor station, include the compressor HP, fuel usage, compressor suction pressure, compressor discharge pressure, the compression ratio, gas volume compressed in MMSCF/D.

The need for this information is further buttressed by the Exhibit D expert report. The report notes that the “Project’s CEII Exhibit Gs are very poor, lacking basic critical information, such as MAOPs of pipeline system, existing pipe parameters (such as grade, wall thickness and diameter), and system operating pressures along the Leidy Loop for the boundary cases. A simple hydraulic profile, critical to determining if each project is justified on its own and thus not segmented, cannot be reliably developed from the limited CEII data provided.” *Id.* at 8.

The Commission states that it “reviewed all the information provided by Transco on the Leidy Project’s gas flow velocities and analyzed Transco’s flow diagrams and transient hydraulic models, for both existing and proposed operating conditions of the Leidy Project. Based upon our review, we find that Transco has properly designed its pipeline system to accommodate the proposed new service while maintaining its existing service obligations.” Order at ¶ 29. The Order does not clarify whether the Commission had access to, or used, the proprietary “DVN GL’s Synergi pipeline simulation software” necessary to review Transco’s transient hydraulic modeling. To the extent the Commission does not have the software, the Commission must require Transco to disclose any and all information related to the 10 questions articulated in DRN’s March 2014 Comment Letter. To the extent that the Commission does have access to the software, the Commission must also provide answers to the 10 questions articulated in DRN’s March 2014 Comment letter so that the public can have access to the same information that was used by the Commission in coming to its conclusions regarding flow velocities.

A failure to provide this critical information on flow velocities renders it impossible for the public to accurately confirm or contest the safety ramifications of the project, or how quickly

Transco will need to complete upgrading the Leidy line system in order to alleviate system inefficiencies.¹³ It is well established law that “[t]he purpose of NEPA is to require disclosure of relevant environmental considerations that were given a ‘hard look’ by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm.” *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir.2005); *see* 42 U.S.C. § 4332(E) (requiring agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”). Furthermore, Transco’s belated response to DRN’s requests for information prejudiced DRN’s ability provide comments on the Project. Therefore, not only is the Environmental Assessment and the administrative record are missing critical pieces of information necessary to review crucial aspects of the proposed Project, the pieces of information that were provided were belated relayed to the public and prejudiced the public’s ability to appropriately comment on the issues raised. As such, the Environmental Assessment and Order are factually and legally deficient.

4. The Commission Improperly Relied on Representations of Mitigation Measures Without Adequate Evidentiary Support

An agency must evaluate the efficacy of mitigation measures proposed in an Environmental Assessment to support a finding of no significant impact. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998). At a minimum, the agency must “explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.” *Northern Plains Research Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1075 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2011) (overturned on other grounds)) (emphasis added). As such, an agency may not rely only on “[a] perfunctory description or mere listing of mitigation measures, without supporting analytical data . . . to

¹³ DRN does not have access to the Synergi software.

support a finding of no significant impact.” *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733 (internal quotation marks and citations omitted).

Additionally, the assumptions underlying a mitigated FONSI must be supported by record evidence. *See e.g., Hill v. Boy*, 144 F.3d 14 (ruling Corps’ refusal to prepare EIS arbitrary and capricious where no evidence supported key mitigation assumption and no analysis conducted gauging effect of opposite assumption); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir.1997) (concluding that Forest Service arbitrarily and capriciously bypassed EIS where record failed to establish likely efficacy of mitigation proposal). The Commission’s mitigation measures, as applied, are inadequate to meet NEPA’s requirements. As noted in the expert report:

The planned disturbance to 33 Special Protection streams will destroy 4,138 linear feet of streambed (1.20 acres per mitigation plan narrative; 1.1 acres per Applicant’s Table A-1 of its Appendix A1) plus virtually all the existing vegetation along 8,276 linear feet of Special Protection (EV and HQ) stream banks. This would represent 9.5 acres of 50-foot wide FERC buffer along the banks of Special Protection streams. The streambeds are to be returned to some semblance of their original physical condition per FERC drawing details. No compensatory mitigation is proposed for these construction activities in waters of the United States. No preconstruction stream inventory was made, and there is no proposed monitoring to demonstrate the successful restoration of the streambeds post construction.

Exhibit D, at 36. Alone the failure to compensate for streambed and buffer destruction renders the proposed mitigation plan inadequate. Furthermore, the mitigation plan has been prepared independently of any analysis of the damages to wetland function along the Franklin Loop. For example the Commission does not identify any specific wetland functions that will be enhanced at the mitigation site or compare them with functions lost along the Franklin Loop. Additionally, the report shows that:

No mention of any biological resources appeared in the Pennsylvania Natural Diversity Inventory database query results for 24 acres of the Bleiler Farm that were checked by the Applicant’s consultant. No claim of existing bog turtle habitat or potential habitat for bog turtles to be created is made for the Bleiler Farm easement. The proposed plant species for installation here are not those unique to the Pocono plateau. It will take close to a century for planted trees to offer habitat for Indiana bats whose forested habitat is being lost along the pipeline.

Exhibit D, at 45. For these reasons, and others more fully detailed in Exhibit D, the Commission’s proposed mitigation plan is unlawful. As such, the Commission’s application of the *Waterbody Construction and Mitigation Procedures* is inadequate and unlawful.

5. The Commission Violated the Clean Water Act by Issuing the Certificate Prior to the Finalization of Pennsylvania’s Section 401 Water Quality Certification

At the time the Order was issued Transco had not yet obtained the Pennsylvania Section 401 Water Quality Certificate pursuant to the Clean Water Act (“CWA”). Indeed, on September 4, 2014 the Pennsylvania Department of Environmental Protection (“Department”) issued a Technical Deficiency letter identifying a litany of problems in Transco’s application for the 401 Water Quality Certification. Transco was unable to meet the Department’s statutory deadline for a response to the Technical Deficiency letter, and *on December 17, 2014 Transco officially withdrew its application material from the agency*. If Transco eventually resubmits its application, the application will need to be noticed in the Pennsylvania Bulletin and provided a 30 day public comment period.

Section 401 of the CWA plainly requires “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.” 33 U.S.C. § 1341(a)(1); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (“without [Section 401] certification, FERC lacks authority to issue a license.”). The Supreme Court has stated that, consistent with the State’s primary enforcement responsibility under the CWA, Section 401 “requires States to provide a water quality certification *before* a federal license or permit can be issued....” *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 707 (1994) (emphasis added). Likewise, the D.C. Circuit clearly held that “without [Section 401] certification, FERC lacks authority to issue a license.” *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

Nevertheless, the Order issues a certificate of public convenience and necessity, a blanket construction certificate, and a blanket transportation certificate to the Applicants while acknowledging that the required Section 401 certification has not been obtained from Pennsylvania.¹⁴ The Commission routinely authorizes construction activity to begin once the Certificate has been issued, even where all the necessary federal permits – such as a 401 Water Quality Certification – have not been obtained. *See e.g.*, Commission Docket Nos. CP11-161-000, CP14-17-000. As such, the authorization by the Commission, which provides the project applicant an opportunity to begin construction activities, is premature under the unambiguous terms of Section 401 as this approval remains outstanding.

The fact that the Order conditions upon the Applicants' ability to commence construction on the future receipt of the Section 401 certification does not cure the Commission's violation of the CWA. *See Order at Condition 9.* The clear language of the CWA prohibits the granting of *any* license or permit. 33 USC § 1341(a)(1). The statute does not make exceptions for licenses or permits that are conditioned on the subsequent grant of the 401 Certification. Moreover, it is wholly unreasonable to allow some of the activities authorized by the Order to proceed, including eminent domain proceeding, or certain earthmoving or tree clearing activities, when the Project could be prohibited from moving forward if Pennsylvania refuses to give the Applicants a Section 401 certification.

In addition, the Commission's issuance of even a conditional license is incompatible with the design and intent of the CWA, which assigns the States the role of primary regulator under the statute. Section 401 allows states to condition Water Quality Certifications on measures

¹⁴ These certificates constitute a “license or permit” within the definition provided by EPA regulations, because they are granted to permit an “activity which may result in any discharge into the navigable waters of the United States,” namely, the Constitution pipeline project. 40 CFR 121.1(a).

designed to ensure compliance with effluent limitations and other state regulations. *Id.* at § 1341(d). The state's conditions, in turn, are required to "become a condition on any Federal license or permit subject to the provisions of this section." *Id.* In order for Pennsylvania to play this primary role, the Section 401 Certification therefore must come before the Order.

The terms of the Order also attempt to further erode the state's power under the CWA by providing that "[a]ny state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate." Order ¶ 127. This provision impermissibly curtails Pennsylvania's ability to exercise its authority under Section 401 of the CWA, including by refusing to grant the Certification if it determines that the Project pose an unacceptable risk to Pennsylvania's water quality.

The Order thus not only was issued prematurely, but also contains terms that conflict with the CWA. *See City of Tacoma v. Federal Energy Regulatory Commission*, 460 F.3d 53 at 68 (D.C. Cir. 2006) ("The Clean Water Act gives a primary role to states to block... local water projects ... FERC's role [under CWA Section 401] is limited to awaiting, and then deferring to, the final decision of the state.") (internal quotations omitted). The Commission therefore lacked the authority to issue the Order without Pennsylvania's water quality certification. The Commission must correct its error by rescinding the Order until such time as the Applicants are able to obtain a Section 401 Certification from Pennsylvania.

6. The Commission Violated NEPA and the NGA by Narrowly Defining the Project's Purpose in Order to Reject All Other Alternatives

The Commission determined that to be considered feasible, all alternatives to the Projects must "meet Transco's stated Project alternatives, which are to provide an additional 525,000 Dth/d of firm natural gas transportation capacity to delivery points that would be accessible by customers in the mid-Atlantic and Southeast states; help to meet the current and future demand

for natural gas; provide its customers with access to new sources of domestic natural gas; and support the overall reliability of energy transmission infrastructure.” Environmental Assessment at 196. With this narrow purpose in mind, the Commission rejected all available alternatives to the Project, including the no action alternative, because no proposal except the Project would suffice.

The Commission cannot interpret the Project’s purpose and need so narrowly that every conceivable alternative is ruled out by definition. *See Simmons v. U.S. Army Corps of Eng’s*, 120 F.3d 664 (7th Cir. 1997) (cautioning agencies not to put forward a purpose and need statement that is so narrow as to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence”); *Nat'l Parks & Cons. Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009) (finding a purpose and need statement that included the agency’s goal to address long-term landfill demand, and the applicant’s three private goals was too narrowly drawn and constrained the possible range of alternatives in violation of NEPA). Only Transco’s proposed Project offers the means of meeting the Commission’s stated requirements, thus all alternatives are preordained to fail in comparison. Such a narrow statement of purpose and need, and failure to examine other system alternatives, undermines the NEPA process and will not be upheld. *Env’tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App’x 440, 443 (9th Cir. 2007) (agencies cannot “define[] the objectives of the project so narrowly that the project [is] the only alternative that would serve those objectives”).

Additionally, no system alternatives were considered outside of Transco’s token offering of “replacing existing pipeline segments with larger diameter pipeline and increasing the MAOP of additional pipeline segments to avoid construction of the proposed looping segments.” *Id.* at 197. The Commission never examined upgrading a competing gas transportation network’s

system. By failing to examine other competing pipeline system alternatives the Commission violates the Natural Gas Act's overriding purpose "to protect consumers against exploitation at the hands of natural gas companies." *United Distrib. Co. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996) (citation omitted). Neither NEPA nor the Natural Gas Act allows the Commission to reject all alternatives except the Project in order to promote the pecuniary interests of its already identified project shippers. As such, the Environmental Assessment and Order are factually and legally deficient.

III. COMMUNICATIONS

Communications and correspondence regarding this proceeding should be served upon the following individuals:

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IV. CONCLUSION

For the aforementioned reasons, the Commission has failed to meet the requirements of the National Environmental Policy Act and its implementing regulations. The Environmental Assessment cannot serve as the basis for an adequate hard look at the Project's environmental impacts, support a finding of no significant impact, or provide the basis for a certificate Order. The Commission cannot determine that the public benefits of the proposed Project outweigh its adverse impacts by relying on the flawed environmental review, thus violating the Natural Gas Act and its implementing regulations.

For the foregoing reasons, DRN respectfully request that the Commission grant this request for rehearing and rescission of the Order. Additionally, DRN requests that the Commission

require Transco to submit the information requested in DRN's March 2014 Comment Letter, in a formal evidentiary hearing before the Commission.

Respectfully submitted this 16th day of January, 2015.

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