UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.	)	Docket No. CP-11-161-000

REQUEST FOR REHEARING

SUBMITTED BY
DELAWARE RIVERKEEPER NETWORK, NEW JERSEY HIGHLANDS COALITION, and THE NEW JERSEY CHAPTER OF THE SIERRA CLUB

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, New Jersey Highlands Coalition, and the New Jersey Chapter of the Sierra Club (collectively "Intervenors") hereby request rehearing and rescission of the Commission's May 29, 2012 Order ("Order") granting a Certificate of Public Necessity and Convenience ("Certificate") to Tennessee Gas Pipeline Company, L.L.C. ("Tennessee") to construct the Northeast Upgrade Project ("NEUP" or "Project"). Intervenors seek 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 NEUP outweigh its adverse impacts, thus violating the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717f (2006) and its implementing regulations, 18 C.F.R. Part 157 (2011).

I. Statement of Relevant Facts

Tennessee filed an application on March 31, 2011, for a Certificate authorizing the company to construct, install, modify, operate, and maintain the components of the NEUP in

Pennsylvania and New Jersey. Tennessee also requested approval of new incremental recourse rates for service on the NEUP facilities and on the certificated 300 Line Project facilities, as well as approval to abandon certain metering facilities to be replaced.[1] On October 8, 2010, the Commission issued a "Notice of Intent to Prepare an Environmental Assessment for the Planned Northeast Upgrade Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings." In response, counsel for Intervenors submitted comments on behalf of the Intervenor Organizations. *See* Response to Notice of Intent to Prepare an Environmental Assessment and Request for Comment on Environmental Issues, Docket No. PF10-23-000 (submittal 20101112-5172) (Nov. 12, 2010) ("Scoping Comments"). In these scoping comments, the organizations raised a number of specific concerns and emphasized that the Commission must consider the full extent of multiple impacts of the NEUP, including cumulative impacts, and that given the significance of these impacts, the Commission should prepare a full Environmental Impact Statement ("EIS"). In particular, the organizations pointed out that the Commission should not allow Tennessee to circumvent heightened environmental scrutiny by segmenting its analysis of the 300 Line Project and the NEUP, given that these Projects involve interlocking and alternating loop upgrades on the same pipeline.

On November 29, 2011, the Commission issued the Environmental Assessment ("EA") for the Project, in which Commission staff recommended that the "Order contain a finding of no significant impact" ("FONSI") for the NEUP. EA at 4-1. During the public comment period for the EA, a number of interested parties, including individuals, federal and state agencies, and organizations. *See* NJDEP Comments on the Environmental Assessment, Docket No. CP11-161-

[1] On May 14, 2010, the Commission issued Tennessee a Certificate to construct and operate pipeline facilities and to replace certain compression facilities on the 300 Line System in Pennsylvania and New Jersey. The 300 Line Project involved the construction of eight pipeline loop segments totaling 127.4 miles of new 30-inch diameter pipe, two new compressor stations, and the upgrade of three compressor stations. Tennessee placed the 300 Line Project into service on November 1, 2011.

000 (submittal 20111221-5003) (Dec. 20, 2011); EPA Comment on Tennessee Gas Pipeline Company's Northeast Upgrade Environmental Assessment, Docket No. CP11-161-000 (submittal 20111221-5225) (Dec. 21, 2011); Pike County Conservation District Comment on Tennessee Gas Pipeline Company's Environmental Assessment, Docket No. CP11-161-000 (submittal 20111222-5000) (Dec. 20, 2011). On December 21, 2011, counsel for Intervenors submitted Intervenors' comments, reiterating that the scope and significance of the environmental impacts of the NEUP necessitated a full EIS. *See* Comments on Environmental Assessment of the Northeast Upgrade Project, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011) ("EA Comments").

On May 29, 2012, the Commission ordered that a Certificate be issued to Tennessee for construction of the Project. The Order agreed with the staff recommendation, memorialized in the EA, "that the Northeast Upgrade Project would not constitute a major federal action significantly affecting the quality of the human environment. Therefore, an EIS is not required." Order at ¶ 43 (footnotes omitted). The Order also granted Intervenors' timely motion to intervene in the proceedings. Order at ¶ 10 and Appendix A. For the reasons set forth below, Intervenors 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 NEUP without properly applying the NEPA regulations in evaluating the significance of the Project's impacts, without ensuring an adequate review of the Project's cumulative impacts, and without ensuring that necessary mitigation measures would be fully implemented and complied with to minimize and avoid significant negative environmental impacts. Moreover, the Commission

violated NEPA by unlawfully segmenting consideration of the NEUP's impacts from other interdependent and inter-related projects on the Eastern Leg of the 300 Line. Finally, the Commission was required by its own regulations and past precedent to undertake a full EIS on the NEUP, which should have been considered a major new pipeline project. For these reasons, the Commission's decision to rely on an EA and FONSI and its failure to prepare an EIS was arbitrary and capricious, in violation of applicable statutory and regulatory requirements, and not supported by substantial evidence.

NEPA is a planning statute that requires the Commission, prior to undertaking a major federal action such as issuing the Certificate on the NEUP, 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.

Intervenors and other commenters[2] 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 EA through its Order and FONSI and its inadequate response to comments raising substantial questions on the significance of the NEUP's impacts proves that the Commission failed to take the "hard look" at the NEUP'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, Intervenors assert that the Project is not required for the public convenience and necessity. Based on its flawed and incomplete EA and unjustified FONSI, the Commission violated the NGA and its implementing regulations by improperly determining that the public benefits of the NEUP 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 NEUP's environmental impacts from those of inter-dependent Projects on the Eastern Leg of the 300 Line*. Tennessee separately submitted four applications to the Commission – the 300 Line

[2] *See e.g.*, Pike County Conservation District Comment on Tennessee Gas Pipeline Company's Environmental Assessment, Docket No. CP11-161-000 (submittal 20111222-5000) (Dec. 20, 2011); Notice of Tennessee Gas Pipeline Company's 3/31/11 Filing, Docket No. CP11-161-000 (submittal 20110825-5082) (Aug. 25, 2011).

Project, the NEUP, the MPP, and the NSD (collectively "Eastern Leg Projects") – to loop the entire Eastern Leg of its 300 Line system. By considering the environmental impacts of these four inter-related and functionally inter-dependent projects in separate EAs, rather than completing a full EIS on the Eastern Leg Projects as a whole, the Commission unlawfully segmented its analysis in violation of its obligations under NEPA.

2. *The Commission erred in not treating the NEUP as a major new pipeline project necessitating an EIS*. The Commission failed to consider that, given the doubling of the width of the right-of-way, the miles of new 30-inch pipeline to be installed, and the undisturbed areas to be affected by new right-of-way for the NEUP, the NEUP standing alone should have been treated as a major new pipeline project and subject to an EIS. When considered in light of the Commission's unlawful segmentation of the Tennessee Eastern Leg Projects as identified in Issue #1, it becomes even more evident that these Projects should have been treated as one major new pipeline project subject to an EIS.

3. *The Commission erred in concluding that the NEUP would not have a significant impact on the quality of the human environment and that an EIS is not warranted*. The Commission failed to obtain and consider information that was reasonably available and necessary to the accurate assessment of the significance of the NEUP's impacts. The Commission failed properly to evaluate the significance of the impacts of the NEUP based on the context and intensity factors set forth in the NEPA regulations.

4. *The Commission erred in concluding that its cumulative impact analysis for the NEUP is sufficient*. The Commission failed adequately to address the cumulative impacts of past, present, and reasonably foreseeable projects where it ignored not only the impacts of the other Eastern Leg Projects but also the impacts of shale gas development on resources affected by the

NEUP. The Commission failed to provide the requisite level of detail and quantification in its cumulative impacts assessment. The Commission further impermissibly relied on Tennessee's presumed compliance with permitting requirements and standards established by federal and state agencies as a basis for its finding that cumulative impacts would not be significant, especially where such permits had or have not yet issued.

5. *The Commission erred in concluding that the mitigation measures prescribed in the EA, and incorporated into the Order, will be fully complied with and will be sufficient to avoid significant adverse impacts*. Tennessee has developed an extensive and troubled record of making promises regarding environmental compliance, flagrantly breaking those promises, and cavalierly making those same promises in subsequent projects. As such, the record clearly demonstrates that the Commission improperly relied upon fundamentally untrustworthy and unverifiable information in granting their Certificate of Public Convenience and Necessity to Tennessee for the Northeast Upgrade Project, and therefore must revoke the Certification.

6. *The Commission's EA erred in failing to adequately analyze and consider reasonable and viable project alternatives.* The EA violates NEPA and its implementing regulations by relying on inflated and or unrealistic assessments of market demand for natural gas, leading to an overestimation of projects economic benefits relative to its clear environmental impacts; and also fails to analyze other project alternatives that may sufficiently meet the energy demands that may exist.

7. *The Commission erred in concluding that certification of the NEUP is required by the public convenience and necessity*. Based on its faulty environmental analysis of the adverse impacts of the NEUP, the Commission committed error in determining that the Project's public benefits outweigh its adverse impacts.

B. Statement of Issues

The subsections below correspond to the numbered paragraphs in Part II.A *supra*, and set forth Intervenors' position with respect to the identified issues. Intervenors 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 the Scoping Comments, the EA Comments, and the exhibits thereto as grounds for this request for rehearing.

1. The Commission Improperly Approved Tennessee's Unlawfully Segmented Pipeline Expansion Projects, Including the NEUP, 300 Line Upgrade, MPP, and NSD

The Commission has unlawfully violated its NEPA responsibilities by granting the Certificate and Order for the NEUP. Tennessee has split the overall expansion of their 300 Line natural gas pipeline 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 Intervenors' scoping comments.[3] Even though we are not intervenors in the other three projects (300 Line Upgrade, MPP, and NSD) before the Commission, the below referenced documents regarding those projects are public, and together help demonstrate that the Commission unlawfully segmented all four projects, including the one we are challenging here, the NEUP.

Tennessee operates a number of pipeline systems across the United States which are differentiated by a numbering system.[4] The pipeline being upgraded by the NEUP is the 300 Line. Currently, the 300 Line, from compressor station 219 in Mercer County, Pennsylvania to

[3] *Response to Notice of Intent to Prepare an Environmental Assessment and Request for Comments on Environmental Issues*, (submittal 20101112-5172) (November 12, 2010) pg 13. ("It is clear that the 300 Line Project and the Project at issue here are all part of a larger development plan, as they involve interlocking loop upgrades of the same pipeline.69 Tennessee must not be allowed to circumvent heightened environmental scrutiny by segmenting their upgrades in such a way. The cumulative consequences of all these projects, many of them previously subject to the Commission approval, must be assessed in the NEPA document.").

[4] *Accufacts' Evaluation of Tennessee Gas and Pipeline's 300 Line Expansion Projects in PA & NJ*, pg 1.

compressor station 313 in Potter County, consists of a 24-inch-diameter pipeline with a completed 30-inch-diameter loop along its entire length.[5] This uninterrupted "Western Leg" of the 300 Line spans roughly 132 miles until it reaches compressor station 313 in Potter County.[6] Within the last 24 months Tennessee has applied to the Commission for approval of four projects that together will comprise the Eastern Leg of the 300 Line, starting at compressor station 313 and stretching east to a delivery point in Mahwah, New Jersey.[7] The four projects that together will complete this contiguous East Leg include: the NEUP, 300 Line Upgrade Project, MPP, and NSD.[8]

The Commission may not approve a segmented project such as the Eastern Leg; this unlawful practice is known variously as fragmenting, piecemealing, and, more commonly, segmentation. *See Taxpayers Watchdog v. Stanley,* 819 F.2d 294, 298 (D.C. Cir. 1987) ("'Piecemealing' or 'Segmentation' allows an agency to avoid 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."); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 1980) ("Segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action has been held to be unlawful." (citing *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976)); *see also* 40 C.F.R. § 1508.27(b)(7). In addition to the comments we have submitted to the Commission regarding segmentation,[9] at least two other commenters have provided notice to the Commission that linear

[5] *Id*. at 2-3.
[6] *Id*.
[7] *See* Exhibit A.
[8] *Id*.
[9] *See* Response to Notice of Intent to Prepare an Environmental Assessment and Request for Comment on Environmental Issues, Docket No. PF10-23-000 (submittal 20101112-5172) (Nov. 12, 2010), pg 13; *see also* Comments on Environmental Assessment of the Northeast Upgrade Project, Docket No. CP-11-161-000 (submittal

pipeline project segmentation was a significant and legitimate concern,[10] to which the Commission has not sufficiently responded. [11]

a. NEPA Segmentation: General Provisions

NEPA requires a "detailed statement" of "the environmental impact" of proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). The Council on Environmental Quality ("CEQ"), which has promulgated regulations implementing NEPA, defines "federal action" to include: "Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 C.F.R. § 1508.18(b)(4).

When scoping the range of actions to include in an Environmental Impact Statement ("EIS"), federal agencies must consider whether proposed actions are connected, cumulative, or similar. 40 C.F.R. § 1508.25(a)(1)-(3). If an agency finds proposed actions to be connected, cumulative, or similar, then the agency has the discretion to consider actions in a single or separate impact analyses. *See id.* (explaining that connected, cumulative, or similar actions

---

20111221-5231) (Dec. 21, 2011), Exhibit A, pgs 3-4 (Tennessee asserts need based on these contracts but is permit applicants' assertion of (independent) need enough to establish that this is a truly independent project for segmentation analysis? See 40 CFR 1508.9(b) on EA "shall include brief discussions of the need for the proposal, alternatives, impacts of proposed action and alternatives, and listing of agencies/persons consulted.")

[10] *See e.g., NJDEP Comments on the Environmental Assessment*, Docket No. CP11-161-000 (submittal20111221-5003) (Dec. 20, 2011); *EPA Comment on Tennessee Gas Pipeline Company's Northeast Upgrade Environmental Assessment*, Docket No. CP11-161-000 (submittal 20111221-5225) (Dec. 21, 2011); *Pike County Conservation District Comment on Tennessee Gas Pipeline Company's Environmental Assessment*, Docket No. CP11-161-000 (submittal 20111222-5000) (Dec. 20, 2011)

[11] the Commission's singular and only response to segmentation failed to address the MPP or NSD projects, and only provides a cursory and conclusory explanation of the 300 Line Upgrade based on unsubstantiated facts: "We authorized the 300 Line Project almost two years ago in May 2010, which singular response was a stand-alone project and designed to provide a contracted for volume of gas to a certain customer within a certain timeframe. The proposed project is designed to provide another contracted-for volume of gas within a different timeframe to different customers . . . The 300 Line Project is currently in operation and is not dependent on the Northeast Upgrade Project facilities. The impacts associated with the 300 Line Project are included in the cumulative impacts discussion in the EA." *NEUP Certificate for Public Convenience and Necessity*, (submittal 20120529-3049) (May 29, 2012) pgs 33-34. (It should be noted that *no* specifics regarding the impacts of any other project – 300 Line Uprade, NSD, or MPP – are even mentioned with any degree of specificity in the NEUP Environmental Assessment).

"*should* be discussed in the same impact statement" (emphasis added)). Courts have interpreted both NEPA, as well as these rules, to require that connected, cumulative, or similar actions should be treated together unless the agency provides a non-arbitrary reason for analyzing the actions separately. *See, e.g. Klamath–Siskiyou Wildlands Ctr. v. Bureau of land Mangement*, 387 F.3d 989, 998 (citing 40 C.F.R. § 1502.4(a)).

"Cumulative actions" are those that, when viewed with other proposed actions, have "cumulatively significant impacts." 40 CFR § 1508.25(a)(2). The regulations define "cumulative impact" (though not "cumulatively significant impact") as: "the impact on the environment which results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable future actions*." 40 C.F.R. § 1508.7 (emphasis added). "Connected actions" are closely related actions that: 1) "Automatically trigger other actions which may require environmental impact statements," 2) "Cannot or will not proceed unless other actions are taken previously or simultaneously," or 3) "Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(i)-(iii). Under NEPA regulations, "similar actions" may be analyzed together, when the:

> [s]imilar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement. 40 C.F.R. § 1508.25(a)(3).

Project proponents and federal agencies may not evade their responsibilities under NEPA by "artificially dividing a major federal action into smaller components, each without a 'significant' impact." *Coalition on Sensible Transportation 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), *see also Stewart Park and Reserve Coalition, Inc. (SPARC) v. Slater*, 352 F.3d 545, 559 (2d Cir. 2003). Without this rule, developers and agencies could "unreasonably restrict the scope of environmental review." *Fund for Animals v. Clark*, 27 F. Supp. 2d (D.D.C. 1998). In other words, agencies could divide a project into proposals that are: (1) small enough to warrant a Finding of No Significant Impact (FONSI), thus allowing the proponent to entirely avoid preparation of a full EIS; or (2) significant enough to require an EIS, but lacking the necessary information for a complete, comprehensive review of environmental impacts.[12] *See Foundation of Economic Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985); *Coalition on Sensible Transportation v. Do*le, 826 F.2d 60, 68 (D.C. Cir. 1987).

Whereas federal courts have not yet addressed the precise question of whether and when the Commission may lawfully segment its consideration of pipeline construction projects, courts have developed general pattern for analyzing segmentation cases. Courts look to determine whether the proposed project has "independent utility" in concert with other case specific factors, including, but not limited to: whether the project was conceived as an integrated whole, the economic interdependence of the projects, the foreseeability of subsequent projects, the common timing of the projects, and the geographic proximity of the projects.[13] Challenged segmented actions have included dams and reservoirs,[14] dredge and fill permitting,[15] importation of spent

[12] *Fund for Animals* (1998) also – "Importantly, an agency may not segment actions to unreasonably restrict the scope of the environmental review process. *See Foundation of Economic Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985)." *See also Coalition on Sensible Transportation v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987)

[13] *See infra*, notes 35-39.

[14] *See, e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974).

[15] *See, e.g.*, Town of Huntington v. Marsh, 859 F.2d 1134 (2d Cir. 1988).

fuel rods,[16] land exchanges for private development,[17] military housing,[18] pipelines,[19] railroad lines,[20] salmon preservation,[21] and water rights.[22]

b. The Commission's Unlawful Segmentation of the NEUP and other Eastern Leg Expansion Projects is Demonstrated by the Projects' Failure to Meet the "Independent Utility" Test

The factor most often dispositive in a segmentation analysis is "independent utility," which some courts apply independently of other factors. *See Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1227 (10th Cir. 2008) ("Reviewing courts apply an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration in a single EIS.") (quoting *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006)); *see also Utahns for Better Transportation v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1183 (10 Cir. 2002) ("An inquiry into independent utility reveals whether the project is indeed a separate project, justifying the consideration of the environmental effects of that project alone.").

The crux of the test is whether "each of two projects would have taken place with or without the other and thus had 'independent utility.'" *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) (internal quotations and citation omitted). In other words, the question is whether one project is functionally dependent on the completion of the other project *See O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 238 n. 11 (5th Cir. 2007) (citing the "degree of independent function" as a primary factor in NEPA segmentation analysis).

[16] *See, e.g., South Carolina ex rel. Campbell v. O'Leary*, 64 F.3d 892 (4th Cir. 1995).
[17] *See, e.g., Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012 (10th Cir. 2002).
[18] *See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760 (2d Cir. 1988).
[19] *See, e.g., Wilderness Workshop v. U.S. Bureau of Land Mgmt*., 531 F.3d 1220 (10th Cir. 2008).
[20] *See, e.g., Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987).
[21] *See, e.g., Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv*., 56 F.3d 1060 (9th Cir. 1995).
[22] *See, e.g., Churchill Cnty. v. Norton*, 276 F.3d 1060 (9th Cir. 2001).

In *Thomas v. Peterson*, the NEPA issue presented was whether the construction of an access road and the sale of timber were "sufficiently related so as to require combined treatment in a single EIS that covers the cumulative effects of the road and the sales." 753 F. Supp. 2d 754, 757 (9th Cir. 1985). The court determined that the road and sale of timber could not proceed separately but were interdependent parts of a larger action, and as such, were required to be evaluated under a single EIS. *Id*. at 758-759. When a project might reasonably have been completed without the existence of the other, the project has independent utility and is not "connected" for NEPA's purposes. *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 894 (9th Cir. 2002); *see also Piedmont Heights Civic Club, Inc. v. Moreland,* 637 F.2d 430, 439 (5th Cir.1981). ("If proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together.").

The Commission does not define "independent utility." However, the Army Corps, a cooperating agency for the Commission's review of the NEUP, has defined "independent utility" as follows: "A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility." 42 U.S.C.A. § 4321 et seq.

While the Commission addressed *Thomas v. Peterson*, and segmentation in the context of whether the NEUP project had been segmented in the context of foreseeable impacts from induced gas drilling development, the Commission has not yet addressed, in any capacity, the

way in which the Eastern Leg pipeline projects have been segmented from each other.[23] Tennessee does make a number generalized blanket statements that the Eastern Leg's projects are unrelated and independent of each other[24] – a position blindly accepted by the Commission – however, this posture is not supported by the evidentiary record.

An independent review of the Eastern Leg projects by Accufacts Inc., concluded that "the four Tennessee projects [NEUP, 300 Line Upgrade, NSD, and MPP] are essentially one master interdependent project to complete the looping of 300 Line."[25] Notwithstanding Tennessee's admittance that the functional capacity and "availability" of the NSD project is wholly dependent on the completion and operation of the 300 Line Project, NEUP, and MPP,[26] the expert report makes five specific technical observations and conclusions that demonstrate how, from an engineering perspective, the Eastern Leg projects are functionally dependent on each other. First, the report states that:

> the fact that almost 1,500,000 dekatherms/d of capacity increase (see Table 1) is asserted for these four projects over that provided by the existing 24-inch Eastern Leg raises serious concerns about the claimed independence of these projects. Based on Accufacts' extensive experience, this dekatherm/d capacity increase is well above what a 24-inch pipeline can reasonably accommodate by significant factors (on the order of 2 to 3 times the capacity of a single 24-inch pipeline).[27]

In other words, as evinced by total operational capacity, all four projects, including the NEUP, are clearly designed and intended to operate as a looped Eastern Leg of the 300 Line system. Second, Accufacts determined that:

---

[23] *NEUP Certification for Public Convenience and Necessity*, pg 68-69.
[24] *See e.g., NSD Application for Certification for Public Convenience and Necessity, Resource Report* (Nov. 12, 2012), pg 1-2 (Tennessee's projects "each address separate customer delivery needs and are separate projects based on the in-service target dates needed to supply contracted capacity to customers.")
[25] *Accufacts' Evaluation of Tennessee Gas and Pipeline's 300 Line Expansion Projects in PA & NJ,* pg 1.
[26] *MPP Project Application for Certificate of Public Convenience and Necessity* (Dec. 9, 2011), pg 4. (the "availability of this Project capacity" is based on the assumption that the NEUP, 300 Line Upgrade Project, and NSD will all be operational by November 2013).
[27] *Accufacts' Evaluation of Tennessee Gas and Pipeline's 300 Line Expansion Projects in PA & NJ*, 6.

> An analysis of Table 2 horsepower by compressor station suggests a distribution of horsepower across the Western and Eastern Legs commensurate with the expected capacity of *a completely looped 24-inch and 30-inch pipeline system* . . . Because of pipe MAOP constraints, a single 24-inch pipeline cannot handle the significantly increased capacity claimed by Tennessee without exceeding erosional velocity restrictions. HP additions clearly follow the needs of a fully 24 and 30-inched looped 300 Line pipeline system across Pennsylvania.[28]

It is Accufacts professional expert opinion that the way in which Tennessee distributed the additional horsepower from the projects demonstrates functional interdependence and a clear overarching goal of transporting natural gas across the state of Pennsylvania and into New Jersey utilizing a 30 inch looped section of pipeline. Third, the report provides that:

> Accufacts believes the stated much greater capacity increase for the NEUP project over the 300 Line Project effort clearly signals that the NEUP is "piggybacking" off the 300 Line Project's: 1) major pipeline Eastern Leg pipeline looping additions, 2) the 2 new compressor stations adding a total of 32,000 HP on the Western Leg, and 3) the additional HP installed on the Eastern Leg. The NEUP project is clearly dependent on the 300 Line Project and cannot stand on its own.[29]

The 300 Line Project involved over 120 miles of added 30 inch pipeline, and over 55,000 horsepower, which created an additional capacity of roughly 350,000 dekatherms/d. The NEUP added only 40 miles of 30 inch pipeline, and just 22,000 horsepower; yet it is adding over 636,000 dekatherms/d of capacity. Accufacts rightly identifies that the NEUP added only a third of the pipe, less than half the horsepower, yet added nearly twice as much capacity as the 300 Line Upgrade Project. While Tennessee asserts that the NEUP is independent from the 300 Line Project and provides service to a "certain customer within a certain timeframe,"[30] this is clearly not the case, as these projects are clearly interdependent projects that interact to fulfill the capacity requirements of the contracts. Fourth, Accufacts states that:

> Proposed short line loopings on the 300 Line without HP addition do not make engineering sense. Tennessee claims that the proposed MPP and NSD projects

[28] *Id.*
[29] *Id*. at 6-7.
[30] *NEUP Certificate for Public Convenience and Necessity*, pgs 33-34.

> add almost 500,000 dekatherms/d of capacity, a substantial throughput increase without adding horsepower, implying that benefits from a relatively small amount of line looping on the East Leg have been overstated. The MPP and NSD are looping less than 10% of the total 24-inch pipe being looped by all four projects on the Eastern Leg (see Table 1). The NEUP and/or the 300 Line Projects are clearly being used to power-up the MPP and NSD projects, as no HP is supplied from the MPP or NSD project proposals.[31]

Despite adding merely 8% of the total pipeline, and no horsepower, the MPP and NSD projects together account for roughly *a third* of the overall additional capacity created by the Eastern Leg projects. The only way those numbers can be explained is that the Eastern Leg projects are functionally dependent parts of one overall project, wherein, horsepower from one project is being utilized to activate other static segments of pipeline. Tennessee admits to such in its Application for Certificate of Public Convenience and Necessity for the NEUP, where it states "this Project [NEUP], through the addition of horsepower and modifications to existing compressor stations on the 300 Line, will "power-up" the existing 300 Line facilities, as expanded by the 300 Line Project."[32] Lastly, the report indicates that:

> The use of the MPP project to provide Marcellus shale gas to utilities in Tennessee and Ohio by reversing gas flow on the Western Leg also indicates the individual projects are part of a grand single project master scheme or plan and are interrelated.[33] Excess capacity from previously installed compressor station horsepower in the west to east direction must be available, as reverse flow (east to west) can consume capacity that might be made more available to west to east flow demands.[34]

Reversing gas transmission Pipelines introduce capacity utilization concerns for the 300 Line system, which further suggests that the systems are highly interdependent, as there must be excess west to east capacity to permit such a reversal scheme.

---

[31] *Id*. at 7.
[32] *NEUP Application for Certificate of Public Convenience and Necessity*, pgs 12, 13.
[33] MMP Project to the Commission – Docket No CP12-28-000, "Environmental Assessment," May 2012, pg 2.
[34] *Accufacts' Evaluation of Tennessee Gas and Pipeline's 300 Line Expansion Projects in PA & NJ*, pg 7.

It is clear that any one of the five technical conclusions would be sufficient to determine that these projects are functionally dependent, whether that is: the Eastern Leg's overall functional capacity, its interdependent distribution of horsepower, the inability for the projects (the NEUP or the NSD and MPP) to stand on their own, or the bidirectional flow capacity of the NSD project. The fact that all five weigh so heavily on the side of dependency simply cannot be ignored. These observations lead to the inevitable conclusion that the Eastern Leg projects are functional dependent portions of a single unified pipeline system, and were envisioned and designed to operate as an integrated whole. As such, the Eastern Leg projects clearly cannot be shown to have independent utility, and thus, it is also clear that the Commission improperly granted approval to the projects, including the NEUP.

c. The Commission's Unlawful Segmentation of the NEUP and other Eastern Leg Expansion Projects is Further Demonstrated by Case Specific Factors Showing that the Projects Were Sufficiently Connected, or Cumulative, or Related Pursuant to NEPA

In addition to independent utility, a number of judicial opinions have identified other factors that courts will evaluate in determining whether an agency unlawfully segmented projects to avoid the requirement of completing an EIS. These factors include: whether the project was conceived as an integrated whole,[35] the economic interdependence of the projects,[36] the foreseeability of subsequent projects,[37] the common timing of the projects,[38] and the geographic

[35] *Florida Wildlife Fed'n v. United States Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1315 (D. Fla. 2005); *Conservation Society of Southern Vermont, Inc. v. Sec'y. of Transportation*, 508 F.2d 927 (2d Cir. 1974); *Western North Carolina Alliance v. North Carolina Department of Transportation*, 312 F.Supp.2d 765 (E.D. N.C. 2003); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1975); *Cady v. Morton* 527 F.2d 786, 795 (9th Cir. 1975); *see also* NEPA Law and Lit Treatise § 619.

[36] *Cady v. Morton* 527 F.2d 786 (9th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974); *Citizen's Alert Regarding Environment v. U.S. Dep't. of Justice*, 1995 WL 748246, *8 (D. D.C. Dec. 8, 1995).

[37] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998); *see also Peterson*, 753 F.Supp. 2d at 757.

[38] *Fund for Animals, et al., Plaintiffs, v. Clark*, 27 F.Supp.2d 9, 13 (D.D.C. 1998); *see also* 40 C.F.R. § 1508.25(a)(3).

proximity of the projects.[39] These factors, considered either individually or together, can determine whether proposed projects are determined to be sufficiently connected, cumulative, or similar actions that must be considered together in a single EIS. *Wetlands Action Network v. United States Army Corps of Eng'rs,* 222 F.3d 1105 (9th Cir. 2000) (citing 40 C.F.R. § 1508.25).

Even assuming that the Commission were justified in accepting Tennessee's claims that the projects at issue here have independent utility, which they do not, applying these factors to the facts demonstrate that the Commission unlawfully segmented its NEPA analysis of the NEUP and the other three projects (300 Line Upgrade, MPP, NSD) that compose the Eastern Leg of the 300 Line.

d. The Eastern Leg Projects Together are an Integrated Development Scheme

In *Florida Wildlife Federation v. United States Army Corps of Engineers,* a Florida district court invalidated a determination by the Army Corps of Engineers that the first phase of a project had "independent utility." *Florida Wildlife*, 401 F. Supp. 1298, (D. Fla. 2005). The court determined that the factual record demonstrated that the "permitted road and the planned extension are part and parcel of development intended by the County and conceived of as an *integrated whole*. Far from a 'minuscule component' of the larger project, the initial phase is intended as the anchor and catalyst for the remaining development." *Id*. at 1315 (emphasis added); *see also Western North Carolina Alliance v. North Carolina Department of Transportation,* 312 F. Supp. 2d 765 (E.D. N.C. 2003) (Court found an EIS necessary for the proposed development of contiguous sections of highway where the planning proceeded in stages, was funded by separate counties, and where each project was individually named before the agency because there was evidence that the overall plan was to develop an entire highway corridor.); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1975) (an EIS must cover

[39] *Clark*, 27 F.Supp.2d 9, 12-13; *see also* 40 C.F.R. § 1508.25(a)(3).

subsequent stages when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken."). Furthermore, in *Cady v. Morton*, the court found that even phased actions with *substantial independence* should be assessed together in a comprehensive EIS, if they are clearly part of a greater plan and will have cumulative impacts. *Cady*, 527 F.2d 786, 795 (9th Cir. 1975).

The common overarching design behind Tennessee's four upgrade projects on the Eastern Leg demonstrate that the Commission should have considered all four projects as an integrated whole for the purposes of NEPA segmentation analysis.[40] The Commission, as the lead agency for review of Tennessee's NEUP is responsible for determining whether Tennessee unlawfully segmented their four projects. The "Western Leg" of the 300 Line in Pennsylvania – from compressor station 219 in western Pennsylvania to compressor station 313 in Potter County – currently consists of approximately 132 miles of 24-inch-diameter pipeline with a completed 30-inch-diameter loop along its entire length.[41] The 300 Line Upgrade, NSD, NEUP, and MPP projects together effectively close all the loops along the 300 Line east of compressor station 313, thus completing the "Eastern Leg" of the 300 Line. The proposed Eastern Leg and the already-upgraded Western Leg together provide linear 30-inch-diameter looping pipeline across all of Pennsylvania and into New Jersey. Tennessee clearly intended to complete this Eastern Leg through undertaking these four projects.

Tennessee's documents submitted to the Commission demonstrate the way in which these four projects are designed and envisioned to operate as whole. For example, Tennessee's Application for a Certificate of Public Necessity for its MPP Project admits that:

> [*T*]*he availability of this Project capacity is based on the following assumptions regarding construction projects on Tennessee's system*: (i) the 300 Line Project

[40] *See Accufacts' Evaluation of Tennessee Gas and Pipeline's 300 Line Expansion Projects in PA & NJ,* pg 1.
[41] *300 Line Upgrade Project Environmental Assessment*, pg 3-2; *see also* Exhibit A.

> (certificated by FERC in Docket No. CP09-444-000 on May 14, 2010) placed in-service as of November 1, 2011; (ii) the Northeast Supply Diversification (NSD) Project (certificated by FERC in Docket No. CP11-30-000 on September 15, 2011) being placed in-service as of November 1, 2012; and (iii) the Northeast Upgrade Project (certificate application pending in Docket No. CP11-161-000) being certificated and placed in-service as of November 1, 2013 (contemporaneously with this Project).[42]

In other words, without the other three projects being placed in-service before the MPP becomes operational, it would not be possible to achieve the requisite capacity that the MPP was designed to achieve. In addition, in Tennessee's application for its Certificate for the NEUP it admits that, through the addition of horsepower and modifications to existing compressor stations from the NEUP, it will "power-up" the existing 300 Line facilities, as expanded by the 300 Line Project."[43] Tennessee thus admits that the NEUP will activate additional capacity through the NEUP that otherwise would not have been available without the 300 Line Upgrade Project, thus further cementing the projects' interdependency.

e. The Eastern Leg Projects are Economically Interdependent

Another factor informing a NEPA segmentation analysis involves the economic interdependence of the concerned projects. In *Cady*, the court noted the project proponent's "massive capital investment and extended contractual commitments present a situation in which 'it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.'" *Cady*, 527 F.2d at 795 (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974)); *see also Citizen's Alert Regarding Environment v. U.S. Dep't. of Justice*, 1995 WL 748246, *8 (D.D.C. Dec. 8, 1995) (the "economic interdependence" of a proposed prison project and a proposed business park led to the conclusion that they should be evaluated under a single EIS.).

[42] *MPP Project Application for Certificate of Public Convenience and Necessity*, pg 4 (emphasis added)
[43] *NEUP Application for Certificate of Public Convenience and Necessity*, pgs 12, 13.

In support of its grant of the Certification, the Commission notes that the NEUP was designed to provide a contracted for volume of gas on a "different timeframe to different customers [shippers]."[44] However, Tennessee's calculations of the rates it would charge its shippers ultimately belie this position, as the calculations were founded on the assumption that the completion of one project would lower the cost, and subsequent recourse rate, of the next project. Specifically, Tennessee calculated the incremental recourse rate for the NEUP project based on the incremental cost-of-service and design capacity of NEUP facilities *combined* with cost of service and billing determinants related to the facilities constructed by Tennessee for its 300 Line Upgrade Project.[45] Tennessee admits that:

> The 300 Line Project Market Component facilities will enable Tennessee to increase capacity for this Project *at a much lower cost than would have been possible absent the 300 Line Project Market Component facilities*. As such, Tennessee believes it is appropriate to calculate the recourse rate for this Project based on a cost-of-service that *combines the costs and design capacities* of both the 300 Line Project Market Component facilities and this Project. Otherwise, the shippers that would pay an incremental rate for capacity created by the 300 Line Project Market Component would be at a disadvantage as compared to those shippers paying an incremental rate for this Project because of the higher costs of incremental capacity for the 300 Line Project Market Component facilities.[46]

Tennessee also admits that it negotiated a rate adjustment for the 300 Line Upgrade Project based on the recognition that a subsequent project – the NEUP – would provide Tennessee with the ability to increase capacity at a lower cost that would not have been possible without the 300

---

[44] *See NEUP Certificate of Public Convenience and Necessity*, pg 34.
[45] *NEUP Project Application for Certificate of Public Convenience and Necessity*, pgs 12-13; *see also* Tennessee's Exhibit N to the *NEUP Project Application for Certificate of Public Convenience and Necessity*.
[46] *Id*. at 2 ("Tennessee also requests approval of new incremental recourse rates for service of the Project facilities, as combined for rate purposes with the Market Component facilities of Tennessee's 300 Line Project"); *Id*. at 14 ("Tennessee's proposal to roll in the Project costs to the 300 Line Project Market Component is consistent with the premise that such rolled-in rate treatment is appropriate in cases of inexpensive expansibility made possible because of earlier costly construction. Such is the case for the Project facilities as it relates to the earlier, more expensive capacity created by the 300 Line Project Market Component facilities."); *Id*. (""In the event the Commission issues an order authorizing this Project, including approval of the proposed calculation of the incremental rate, the recourse rates for the 300 Line Project would be revised based on the combined cost-of-service for the 300 Line Project and the Northeast Upgrade Project as of the in-service date of this Project.") (emphasis added).

Line Project.[47] While the Commission rejected this pricing scheme in its issuance of the Certificate, it did so without prejudice providing the option to Tennessee of later proposing a Section 4 proceeding to "consolidate the rates of the Northeast Upgrade Project and the 300 Line Project Market Component rates into a single incremental rate."[48]

Furthermore, Tennessee failed to demonstrate, in any capacity, that without the cost savings resulting from the related upgrade projects, that it would have been able to successfully negotiate the contracts with their shippers solely on the basis of the costs associated with that single project.[49] The fact that cost-ratio calculations were made and relied upon to complete contracts with shippers, which were wholly dependent on the completion and service dates of other connected expansion projects, is controlling here. In the context of NEPA analysis, the argument that the four projects are in varying stages of development for different customers is irrelevant. the Commission's separate applications for its projects simply do not excuse it from its NEPA obligations. Ultimately, the Commission failed to properly identify and evaluate the economic interdependence of these projects, and as such, improperly granted its Certificate to Tennessee.

In addition, the Commission's contracts with its shippers for each of the Eastern Leg projects, when compared to the estimated life span of the projects, demonstrate that those contracts cannot be relied upon to establish economic independence of the projects. The two contracts with the shippers for the NEUP are each limited to a 20 year primary term, with the

[47] *Id*. at 14 ("Furthermore, Tennessee notes that in the precedent agreement that provided the market support for the 300 Line Project, Tennessee and EQT Energy, LLC agreed to a rate adjustment to the negotiated rate to the extent a subsequent project meeting certain criteria would be constructed and eventually placed in-service within a specified time period. The parties agreed to this negotiated rate adjustment in recognition that a subsequent project (such as the Northeast Upgrade Project) would likely provide Tennessee with the ability to increase capacity at a lower cost that would not have been possible without the 300 Line Project.").
[48] *NEUP Application for Certificate of Public Convenience and Necessity*, pg 10.
[49] *See* Exhibit N of *NEUP Application for Certificate of Public Convenience and Necessity* (combining the cost of service and billing determinants of the NEUP with the 300 Line Upgrade to calculate recourse rate).

option to extend service in 5 year increments.[50] This is also the case with the other Eastern Leg projects.[51] As such, Tennessee only has a guarantee of the use for each of the Eastern Leg projects for half of their estimated 40 year lifetime.[52] Therefore, it is disingenuous for Tennessee to claim, and improper for the Commission to agree, that these projects are economically independently justified on basis of contracts that only ascribe the use of capacity for half the lifetime of the project.

f. The Eastern Leg Projects are Reasonably Foreseeable

In *Blue Mountains Biodiversity Project v. Blackwood*, the court required that the Forest Service prepare a single EIS for multiple timber sales when they formed part of a single timber salvage project were, among other things, *"reasonably foreseeable.*" 161 F.3d 1208, 1214-15 (9th Cir. 1998) (emphasis added); *see also Peterson*, 753 F. Supp. 2d at 757; 40 C.F.R. § 1508.7 ("the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."); *see also Northern Plains Resource Council v. Surface Transportation Board 668 F.3d 1067*, 1079 (9th Cir. 2011).

Here, there is no doubt that the four projects composing the Eastern Leg – the 300 Line, the NEUP, the MPP, and the NSD -- were reasonably foreseeable projects. An examination of the relevant maps and documents submitted by Tennessee clearly demonstrates that Tennessee intended to extend its already completed Western Leg of 30 inch looped pipeline across the rest of Pennsylvania and into New Jersey. In 2010, at the moment Tennessee committed to constructing the 300 Line (the first project) in spaced out segments across Pennsylvania, they simultaneously committed to completing the entire 30 inch looped Eastern Leg from compressor

[50] *NEUP Certification of Public Convenience and Necessity*, 12, 13.
[51] *See 300 Line Upgrade Certificate of Public Convenience and Necessity*, pg 13 (15 year primary term); *MPP Application for Certificate of Convenience and Public Necessity*, pg 15 (15 year primary term, may negotiate to 10 year); *NSD Certificate of Public Convenience and Necessity*, pg 4(15 year primary term).
[52] *NEUP Certification of Public Convenience and Necessity*, 9.

station 313 to the Mahwah Metering Station, because without a fully looped system certain and inherent engineering inefficiencies would take place.[53] Furthermore, Tennessee has made representations in documents it has submitted before the Commission that in the agreement that provided the market support for the 300 Line Project, Tennessee and the shipper agreed to a rate adjustment to the negotiated rate "*to the extent a subsequent project meeting certain criteria would be constructed and eventually placed in-service within a specified time period*."[54] In other words, at the time Tennessee was negotiating rates for its 300 Line, it was doing so based on the assumption that an additional upgrade project would take place. It is difficult to fathom how the NEUP could have been any *more* foreseeable.

g. Common Timing of The Eastern Leg Projects

Pursuant to 40 C.F.R. § 1508.25(a)(3), the "common timing" of projects is a factor that provides a basis for determining whether or not to evaluate the environmental consequences of two projects together. 40 C.F.R. § 1508.25(a)(3). *See also Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 13 (D.D.C. 1998) (finding that "if agency actions are similar in that they share common timing. . . such actions should also be addressed in the same environmental document so as to assess adequately their combined impacts."). Here, all four projects composing the Eastern Leg had proposed "in-service" dates within 24 months of each other.[55] In fact, two of the projects have in-service dates on the *same exact day,* as the MPP and the NEUP are both projected to be operational on November 1, 2013. The 24 month time period in which all four Eastern Leg projects are proposed to be in operation further demonstrates that the Commission should have evaluated the projects as a whole and thus violated NEPA in issuing the Certificate

[53] *Accufacts' Evaluation of Tennessee Gas and Pipeline's 300 Line Expansion Projects in PA & NJ, pg 7-9.*
[54] *NEUP Application for Certificate of Convenience and Public Necessity,* pg 14.
[55] MPP In-Service

for the NEUP based on an EA and FONSI without undertaking an EIS on the Eastern Leg as a whole.

h. The Eastern Leg Projects Share Geographic Proximity

40 C.F.R. § 1508.25(a)(3) also describes the geographic proximity of proposed projects as a factor when evaluating whether an EIS should be required. *See also Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 9 (D.D.C. 1998) (citing 40 C.F.R. § 1508.2(a)(3) in holding that an EIS should be prepared where the projects "all [took] place in the same geographic area.").

Tennessee contends, and the Commission accepts, that the construction activity along different sections of the Eastern Leg for these projects are not linked, and thus have little, if any, environmental impact. However, when looked at in concert, construction activity for the Eastern Leg projects is happening no differently than how construction would normally take place on one large-scale linear pipeline. Tennessee's four Eastern Leg projects occur in a contiguous, uninterrupted line across Pennsylvania and into New Jersey. This type of linear construction activity potentially results in severe impacts to watersheds and local ecosystems as numerous streams and water bodies must be crossed in order to complete the project.

Despite the fact that the 300 Line Upgrade Project became operational in November of 2011, at this time remediation and re-vegetation have still yet to be completed, construction for the NSD project is currently ongoing, and construction for the NEUP and MPP is currently projected to begin before the NSD is finished. Therefore, it is clear that Tennessee is orchestrating one commonly timed construction pipeline project.

The Commission has previously found that segmented pipeline projects, less extensive than the ones currently under consideration, require an EIS. For example, the Commission required an EIS for a proposed project that consisted of four segments of 24 and 30-inch pipeline

totaling approximately 164 miles in length, where a significant proportion of the proposed pipeline route was along an existing utility right of way. *Colorado Interstate Gas Company*, 122 FERC ¶ 61,256 (2008). It should be noted that the combined Tennessee projects involve over 20 miles of additional pipeline and result in 153 more water crossings than the Colorado Interstate Gas Company's pipeline project.

Accordingly, because the Commission improperly segmented its consideration of the NEUP from the other interdependent projects of Tennessee's Eastern Leg of the 300 Line, the Commission should grant this request for rehearing and rescind its Order and Certification pending a full and legally adequate EIS on these projects.

2. The Commission's Finding that the NEUP is Not a Major Pipeline Project is not Supported by the Record, or by Previous FERC Decisions on Similarly Situated Pipeline Projects

Commission regulations recognize that an EIS would normally be prepared for a "major pipeline projects . . . using rights of way in which there are no existing natural gas pipelines." *See* 18 C.F.R. § 380.6(a)(3). However, the regulations do not consider to what extent a pipeline must be "using rights-of-way" of an existing pipeline in order to be considered a non-major pipeline and thus excused from triggering the regulatory requirement to prepare an EIS in the first instance.

There is no bright-line test for determining which projects are subject to the EIS requirement and which are not. As such the Commission' decision is often largely determined on a case-specific basis. *Dominion Transmission, Inc.*, 113 FERC ¶ 61,065, 61,242 (2005). Although total mileage/acreage is not the only consideration in determining the necessity for an EIS, it is significant. The Commission may also consider whether the project is constructed on sensitive areas or affects endangered species' critical habitat. *Central New York Oil and Gas*

Company, LLC, 137 FERC ¶ 61,121 (2011). A number of cases of pipeline construction projects similar in scope to the NEUP and to the Eastern Leg projects as a whole have been determined by the Commission to require an EIS as a result of being categorized a major federal action.

For example, a project that proposed to construct and operate a natural gas storage facility along with connecting pipelines and a metering and regulating station required an EIS. *Floridian Natural Gas Storage Company, LLC*, 124 FERC P 61214 (2008). In that matter, the construction for the project only required 55.58 acres for the LNG storage facility and 71.45 acres for the construction right-of-way, construction staging area, the M&R station, and pipeline interconnections. *Id*.

Here, the NEUP project alone exceeds these figures, as it will disturb over 640 acres of land (roughly 75% being acreage classified as having poor re-vegetation potential), require over 120 acres of permanent new right-of-way, cross over 100 water bodies, as well as have significant portions of the right-of-way cut through virgin forest and sensitive habitats. As identified by the Pike County Conservation District in their comments to the EA, the fact that the NEUP goes through 6.4 miles of new pipeline right-of-way through intact forest land, traversing steep slopes and previously undisturbed special protection waters is largely ignored or discounted by the EA and FONSI.[56] The Commission discounts the impact of the project by claiming "fragmentation will be minimal because the project will mostly expand the width of the existing right-of-way which already has edge habitat." However, the Commission fails to take into account the multiplier-effect of doubling the right-of-way for the project, the further biological invasion of non-native invasive organisms, the disruption of native plant cover, decreased contaminant filtration, and more generally the large scale increased penetration of

[56] *PCCD Comments on the NEUP Environmental Assessment* (Dec. 20, 2011), pg 1.

edge effects.[57]

Similarly, the Commission required an EIS for a proposed project that consisted of four segments of 24 and 30-inch pipeline totaling approximately 164 miles in length, where a significant proportion of the proposed pipeline route was along an existing utility right of way. *Colorado Interstate Gas Company*, 122 FERC P 61256 (2008).

Here, Tennessee's combined Eastern Leg is considerably larger than Colorado Interstate Gas Company's project, as Tennessee's projects involve over 185 miles of pipeline, result in 285 water crossings, require over 620 acres of permanent new right-of-way, and will disturb over 3,700 acres of land (over 2,400 of which is acreage considered to be of poor re-vegetation potential). Furthermore, when the projects for the Eastern Leg are properly considered as a whole, the forest edge effects are increased by a factor of three as compared to just the NEUP project. The Commission fails to consider that, while adjacent to an existing right-of-way, essentially an entire new 25 right-of-way for a 30 inch looped system will extend from Potter County Pennsylvania to the Mahwah Meter Station in New Jersey. The Commission improperly failed to consider the projects as a whole when making a determination that the NEUP did not constitute a major new pipeline necessitating an EIS.

3. The Commission Erred in Determining that the NEUP's Impacts Are Not Significant and Do Not Warrant an EIS

The NEPA regulations establish that the determination of whether a project will "significantly affect[] the quality of the human environment" depends on considerations of "both context and intensity." 40 C.F.R. § 1508.27. In issuing its Order and FONSI, the Commission erred in determining that neither the context of the NEUP nor the intensity factors when applied to the NEUP warrant preparation of an EIS. *See generally* Order at ¶¶ 124-201. As predicate to

[57] *Comments on Environmental Assessment of the Northeast Upgrade Project*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), exhibit B, pgs 4-6.

this error, the Commission failed to collect the necessary data to make an informed decision about the significance of the NEUP's impacts in the first instance, despite multiple comments highlighting the many subject areas of the EA that lacked the requisite data to inform the Commission's analysis. The Commission's failure to collect, or to require Tennessee to provide, the necessary data prior to completing the EA violates NEPA's two-fold mandate not only to ensure that the Commission's decision is fully informed but also to make this information available for public review and comment in its NEPA document.

a. The Commission's EA and FONSI are Based on Incomplete and Inadequate Information, in Violation of NEPA

As Intervenors noted in their EA Comments and the attached exhibits, and as also highlighted by other commenters, the Commission based its EA on incomplete and inadequate information, thus irretrievably prejudicing its NEPA analysis and subsequent decision not to proceed with an EIS. NEPA is an "environmental full disclosure law," *Monroe Cnty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972). To ensure that the agency not only takes an informed "hard look" at the consequences of its actions, but also fully informs the public of its decision-making process, the agency is obligated to obtain and consider information, and to disseminate its analysis of this information to the public for comment. This requirement "ensures that an agency will not act on incomplete information, at least in part . . . by ensuring that the public will be able to analyze and comment on an action's environmental implications." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 792 (S.D. W.Va. 2009) (internal quotation marks and citations omitted). The information provided to the public "must be of high quality" because "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

Here, the Commission's failure to gather reasonably available information to remedy deficiencies in the EA not only violated these general principles but specifically implicated the fifth NEPA intensity factor, "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." As Intervenors detailed in their EA Comments at 8-11, and as further underscored in Thonet Associates, Inc.'s expert report, the EA is full of significant information gaps, both those candidly admitted by the Commission when it asserts that such information will become available on the completion of further studies, surveys, and permitting requirements by Tennessee as well as those identified by commenters and expert agencies such as the EPA and NJDEP. Although the Order purports to respond, Order at ¶¶ 143-49, these paragraphs do not begin to cover all of the informational deficiencies commenters identified.

Given the laundry list of missing information on a range of issues, the EA was at best incomplete and at worst entirely speculative, thus rendering nugatory its purpose "to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988). Because this insufficient EA increases the uncertainty of the Project's impacts, the Commission's refusal to prepare an EIS was unlawful. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-14 (9th Cir. 1998). "[W]here uncertainty may be resolved by further collection of data . . . or where the collection of such data may prevent speculation on potential . . . effects," an agency must prepare an EIS. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732-33 (9th Cir. 2001) (internal quotation marks and citations omitted), *abrogated on other grounds by Monsanto v. Geerston Seed Farms*, 130 S. Ct. 2743 (2010).

The Commission's various answers – that it had sufficient information to complete the EA, that Tennessee's belated submission of data before the Order issued enabled the Commission to make an informed decision in reaching its FONSI, or that more details on Project impacts would be worked out in other state or federal permitting processes – are unavailing. Substantively, these information deficits rendered the EA insufficient as a matter of law to fulfill the agency's analytical and evidentiary obligations. It is the EA, not the FONSI or some outside permit, that must contain the Commission's environmental impacts review. *See Blue Mountains Biodiversity* Project, 161 F.3d at 1214 ("The EA . . . is where the [agency's] defense of its position must be found.") (citing 40 C.F.R. § 1508.9(a)). This holds true whether or not Tennessee had yet to complete necessary surveys, or whether other agencies are required under their own statutory mandates to consider more fully the impacts to a particular resource (*e.g.*, endangered species, wetlands, or water resources) in separate permitting processes outside the Commission's control.[58] Procedurally, by denying Intervenors and the public the right to review and comment on all of the information upon which the Commission's FONSI was based, the Commission violated NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). This issue alone provides sufficient justification for the Commission to grant this request for rehearing and rescind the Order pending completion of a full and adequate EIS.

b. The EA Ignores the Context of the NEUP in Violation of NEPA

In determining whether an action requires an EIS, "the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region,

[58] Thus, for example, the Commission's assertions that it is not unreasonable for the EA to assume that Tennessee will comply with permit requirements entirely misses the point. *See, e.g.*, Order at ¶¶ 170-71, 176, 199-200. Whether or not different federal and state laws obligate Tennessee to adhere to certain environmental standards, the Commission's obligation fully to disclose and discuss based on complete information the Project's impacts to resource areas addressed in the EA is undiminished as a matter of law. Moreover, as a matter of fact, the Commission had ample evidence before it to support the argument that it is entirely reasonable to assume that, as in the 300 Line Project, Tennessee will repeatedly fail to adhere to its permit terms and conditions.

the affected interests, and the locality." 40 C.F.R. § 1508.27(a). As stated in Intevenors' EA Comments at 2, here, the context of the Project required the EA to analyze the NEUP against the context of the exponential growth of unconventional gas development in the areas of Pennsylvania underlain by the Marcellus Shale. The EA's failure to acknowledge and analyze the effects of this rapid industrialization of formerly rural areas not only violated NEPA's cumulative impacts analysis requirement, as argued below, but it also separately violated NEPA's mandate to consider the NEUP within this context. The context requirement also mandated that EA consider that the Project will be constructed in and through high value resource areas and special protection waters designated by local, state, and federal agencies, but the EA entirely failed to address whether the impacts of the NEUP will significantly affect these areas either locally or regionally. *See Anderson v. Evans*, 371 F.3d 475, 490-92 (9th Cir. 2002) (local effects may be basis for a finding of significant impacts; if there are substantial questions about the significance of effects on the local area not adequately addressed by an EA, an EIS must be prepared). The Commission should reconsider its analysis of the context of the NEUP in order to make a reasoned and legally supportable determination as to whether an EIS must be prepared.

c. The Commission Erred in Determining that the NEPA Intensity Factors Do Not Warrant Preparation of an EIS

As Intervenors detailed in the EA Comments and expert reports submitted therewith, the Commission's EA failed to analyze the significance of the NEUP in light of the intensity factors established by the NEPA regulations. Some of these factors are broken out for more detailed discussion elsewhere in this request for rehearing. *See, e.g.*, *supra* at II. B. 1 (intensity factor 7), II. B. 3. a (intensity factor 5), *infra* at II. B. 4 (intensity factor 7), *infra* at II. B. 5. b (intensity factor 10).

With respect to intensity factors 3 and 8, Intervenors demonstrated that the NEUP will be built through and adversely affect each and every one of the six categories of unique geographic characteristics identified by CEQ regulations as pertinent to the significance determination: historically and culturally significant areas, park lands, prime farmlands, wetlands,[59] ecologically critical areas, and even under the Delaware River, a federally designated Wild and Scenic River. *See* EA Comments at 5-7. The EA largely failed to address this range of impacts in any depth.

Moreover, as noted above and in the EA Comments, what analysis was contained in the EA was based on incomplete information. The Commission's answer, Order at ¶¶ 132-36, that Tennessee will sufficiently mitigate these impacts, is unavailing. As discussed in greater detail below, the record of Tennessee's violations of its mitigation requirements on the 300 Line Upgrade has given the Commission ample notice of the very shaky ground on which this assumption rests.

Yet even were Tennessee fully to comply with all relevant mitigation requirements, the EA does not address the impacts that will occur regardless of mitigation efforts by virtue of the Project's doubling the existing right-of-way and maintaining it for the life of the Project as a clear corridor. Certainly the EA did not address the expert comments in the Heatley Report, detailing the EA's analytical deficiencies in addressing the significance of short- and long-term impacts of forest fragmentation and edge effects, adverse impacts to forest regeneration, structure, and function, biological invasion by invasive species, and the cumulative impacts of maintaining the right-of-way throughout the service life of the project. The Commission's defense of the EA's inadequate analysis on these issues, Order at ¶¶ 139-40, is non-responsive,

[59] With respect to wetlands impacts, Intervenors submit here a recent report by ground water experts Demicco & Associates, documenting the potential that the pipeline installation will affect ground water movement and thus potentially have larger permanent impacts to wetlands and ground water resources than the Commission discussed in the EA. *See* Exhibit C attached hereto.

and merely asserts that the EA did a good job without addressing the substance of Intervenors' and expert comments.

The Commission further erred in concluding that intensity factor 4, the highly controversial effects of the Project, does not weigh in favor of preparing an EIS. Order at ¶¶ 137-41. A federal action is controversial if "a substantial dispute exists as to its size, nature, or effect." *LaFlamme v. Fed. Energy Reg. Comm'n*, 852 F.2d 389, 400-01 (9th Cir. 1998). "A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusions." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 736 (citation omitted). Here, Intervenors and other commenters such as NJDEP and EPA[60] submitted such evidence with their comments. The Commission may not excuse its failure to consider or respond to this evidence by conclusorily asserting that no substantial dispute exists and therefore no EIS is required. Order at ¶ 138. Here, Intervenors and other commenters did not merely "oppose" the Project, as the Commission suggests, but submitted expert evidence documenting the existence of the controversy. *See Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982) (holding that disagreement by other agencies, together with "responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and all disputing the EA's conclusion" is "precisely the type of 'controversial' action for which an EIS must be prepared"). Where, as here, substantial expert comments submitted in response to the EA demonstrate that the Project's effects are highly controversial with regard to myriad affected resources, the

[60] For example, EPA highlights that the EA, while listing in an appendix the sensitive waters that will be affected by the Project, contains "no analysis whatsoever of the impacts to sensitive waters, such as those classified as High Quality (HQ) or Exceptional Value (EV) by the state agencies, or those whose waters are considered impaired. One of the major concerns with any proposed pipeline construction or upgrade is how it will affect area waters, whether due to an individual crossing or through cumulative impacts to the watershed through multiple crossings and other area development. Thus, it is disappointing that so little attention was apparently focused on this important issue of concern." EPA Comments at 2.

Commission's deficient NEPA analysis cannot support its Order and FONSI. *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, -- F.3d --, 2012 WL 2249259 at ** 7-8 (4th Cir. June 18, 2012) (unique characteristics and highly controversial factors warranted ordering the Corps to prepare an EIS on remand). "Even were the situation considerably less clear-cut, we remain mindful that 'when it is a close call whether there will be a significant environmental impact from a proposed action, an EIS should be prepared.'" *Id.* at *8 (quoting *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997). Certainly the Commission may not "ignore[] the conflicting views of other agencies having pertinent expertise," *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (internal quotation and citation omitted), and expect its EA not to be treated skeptically by the courts.

The Commission also erred in determining that intensity factor 6, setting precedent for other agency decisions, did not warrant preparation of an EIS. Order at ¶¶ 150-51. Most notably, the Commission's decision here – as on all the Tennessee Eastern Leg Projects – to segment its NEPA analysis of these indisputably inter-related and inter-dependent pipeline upgrade projects that make up a unitary whole – has established negative precedent. *See supra* at II.B.1. Whether or not such precedent is "binding," Order at ¶ 151, is not the relevant issue. Given the explosive growth in shale gas development targeting the Marcellus and other shales, it is entirely reasonable to assume that pipeline companies will respond to the demand from natural gas producers to build more interstate transmission lines or to upgrade existing facilities. It is also reasonable to assume that the Commission will permit these companies to segment their applications, and the Commission's NEPA review, as happened here. It is also reasonable to assume, given the Commission's lack of clear governing standards and apparently inconsistent application of precedent on when a pipeline constitutes a major new construction project, *see*

supra at II. B.2, that the Commission's decision not to treat the NEUP as a major new project will serve as precedent in future cases.

With respect to intensity factor 9, the degree to which the Project may adversely affect species listed under the Endangered Species Act as well as their habitat, the Commission's EA again falls short of what NEPA requires. As extensively detailed in the EA Comments at 23-28, the EA failed to incorporate complete survey data for listed species potentially to be affected by the Project, or even to describe the survey methodologies used to gather what limited data was discussed in the EA. This concern holds especially true given the documented difficulties in determining whether or not Indiana bats and their habitat are present in a given area based on mist net surveys. *See* EA Comments at 25 (citing Comments of Dr. DeeAnn Reeder, submitted as an exhibit to the comments). The Commission entirely fails to respond to this expert comment on the inadequacy of mist net surveys for an already-endangered species whose numbers have dropped precipitously due to White Nose Syndrome.[61]

As argued above, these data deficiencies cannot as a matter of law be remedied by the purported subsequent submission of the missing data to the Commission, Order at ¶¶ 152-59, not only because the Commission's analysis must be contained within the EA itself, not a subsequent document, but also because Intervenors have been entirely deprived of any meaningful opportunity to review and respond to the Commission's analysis and the data upon which it is allegedly based. To add insult to injury, the Commission denied Intervenors' requests to examine endangered species surveys completed by Tennessee.

Nor, as a matter of law, may the Commission's Endangered Species Act Section 7 consultation process remedy the facial deficiencies of the EA itself. *See* Order at ¶ 160,

[61] Exhibit D to this request for rehearing consists of a recently-completed report by Bat Conservation International titled "Impacts of Shale Gas Development on Bat Populations in the Northeastern United States." This report further documents the significant impacts to endangered and imperiled species of bats from shale gas development.

Environmental Condition 13. The Commission's legal obligations under NEPA and the ESA are entirely separate, however, and compliance with the ESA Section 7's prohibition against jeopardizing a species' continued existence, 16 U.S.C. § 1536(a)(2), does not satisfy NEPA's requirements to analyze significant impacts short of the threat of extinction. *See Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1275-76 (10th Cir. 2004) (recognizing FWS conclusion that action not likely to cause jeopardy does not necessarily mean impacts are insignificant); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) ("A FONSI . . . must be based on a review of the potential for significant impact, including impact short of extinction. Clearly, there can be a significant impact on a species even if its existence is not jeopardized."); *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1302 (E.D. Cal. 2000) (requiring EIS under NEPA even though mitigation plan satisfied ESA); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992)(rejecting agency's request for the court to "accept that its consultation with [FWS under the ESA] constitutes a substitute for compliance with NEPA.").

Finally, as has been amply discussed in this request for rehearing, the Commission may not substitute conclusory assertions that Tennessee will adequately mitigate for impacts to any endangered species for an actual discussion of the impacts that the NEUP will cause to these species.

In sum, the Commission's perfunctory and inadequately supported discussion of the NEPA context and intensity factors fail to support its conclusion that the NEUP will have no significant environmental impacts. The Commission should therefore grant this rehearing request and rescind the Order until such time as it has prepared the requisite EIS under NEPA.

4. The Commission's Inadequate and Incomplete Cumulative Impacts Analysis Violated NEPA

The cumulative impact analysis in the EA that undergirds the Commission's Order and FONSI fails to meet the requirements pursuant to NEPA. In Intervenors' EA Comments, we detailed numerous insufficiencies of the EA's cumulative impacts analysis.[62] Yet the Commission's treatment of cumulative impacts in the EA and the subsequent Order and FONSI falls far short of what is required by NEPA. Among other reasons, the cumulative environmental impacts described below, as they relate to intensity factor seven, signal a finding of severe significant impacts necessitating an EIS. The Commission should grant this request for rehearing and rescind the Certificate until such time as it has completed, through a full and adequate EIS, the appropriate cumulative impacts analysis.

Under NEPA, agencies are required to consider a full range of environmental impacts, including "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, [and] cultural" impacts, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. Cumulative impacts are:

> impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.* § 1508.7.

Consideration of cumulative effects pursuant to NEPA requires "some quantified or detailed information," because "[w]ithout such information, neither the courts nor the public, in reviewing the [agency's] decisions, can be assured that the [agency] provided the hard look that it is required to provide." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372,

[62] *Comments on Environmental Assessment of the Northeast Upgrade Project*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), exhibit B, pgs 14-23.

1379 (9th Cir. 1998); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993–94 (9th Cir. 2004) ("A proper consideration of the cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." (internal quotation marks and citations omitted); *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2004) (agency must provide "a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between these projects, are thought to have impacted the environment.").

"NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with "*past, present and reasonably foreseeable future actions*." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002) (citing 40 C.F.R. §§ 1508.7, 1508.25, 1508.27(b)(7) (2001); *Hall v. Norton*, 266 F.3d 969, 978 (9th Cir.2001); *Kern v. United States Bureau of Land Management* ,284 F.3d 1062, 1075-76 (9th Cir.2002)) (emphasis added). Furthermore, it has been established that projects need not be finalized before they are reasonably foreseeable. *Northern Plains Resource Council v. Surface Transp. Bd., 668 F.3d 1067*, 1079 (9th Cir. 2011). Although "foreseeing the unforeseeable" is not required, an agency must use its best efforts to find out all that it reasonably can." *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). The Commission here, plainly did not.

Contrary to the overwhelming weight of case law, the Commission improperly states that "Marcellus Shale impacts sought by commentors is outside the scope of the project analysis because the exact location, scale, and timing of future facilities are unknown."[63] However, knowledge of the *exact* location, scale, and timing of future facilities is not required under

[63] *NEUP Certificate of Public Convenience and Necessity*, pg 64.

NEPA. Instead, "NEPA requires that an EIS engage in reasonable forecasting. Because speculation is ... implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) (internal quotation marks and citation omitted).

Courts have regularly held that induced development related to large-scale development projects has properly been considered cumulative actions under NEPA. For example, a court held that NEPA required the Corps to analyze both the significant upland development adjacent to several shoreline casinos, and the secondary development that may result from the casinos. *Friends of the Earth v. United States Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000); *see also City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (requiring agency to prepare an EIS on effects of proposed freeway interchange on a major interstate highway in an agricultural area and to include a full analysis of both the environmental effects of the exchange itself and of the development potential that it would create.); *Mullin v. Skinner*, 756 F. Supp. 904, 925 (E.D.N.C. 1990) (agency enjoined from proceeding with bridge project which induced growth in island community until it prepared an adequate EIS identifying and discussing in detail the direct, indirect, and cumulative impacts of and alternatives to the proposed Project); *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 347 (D.C. Cir. 2002) (the cumulative impact analysis for the proposed construction of an airport was required to evaluate the cumulative impact of noise pollution on a nearby park as a result of the proposed action, "in light of air traffic near and over the Park, from whatever airport, and air tours near or in the Park.").

Further, contrary to the Commission's assertion, the scope of a cumulative impact analysis is not even categorically delimited by a requirement of causality. The language of the

NEPA regulations indicates that cumulative impacts include impacts of "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The impacts of these "other actions" considered in the cumulative impact analysis need not be directly initiated by the project, as the Commission erroneously suggests. *See also Nat. Res. Def. Council. v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988) (determining that the cumulative impact assessment of an Outer Continental Shelf ("OCS") oil and gas leasing activity must consider the cumulative impacts of "simultaneous OCS development in different areas" without requiring that such other OCS development be *caused* by the proposed leasing activity).

Here, the fact that some natural gas development may or may not occur with or without the Project's construction is ultimately irrelevant. What controls here is that there will be significant development – which the Commission admits – around the Project. *U.S. v. 27.09 Acres of Land*, 760 F. Supp. 345, 351–52 (S.D.N.Y 1991) (finding a FONSI unsupportable where the cumulative impact analysis for construction of a Postal Service facility failed to consider the impacts of future nearby development without requiring that such other development be *caused* by construction of the proposed facility).

Furthermore, even if the Commission was correct and that there existed some "independent utility" for the project, its failure to conduct an appropriate cumulative impacts analysis in the EA on its approval of the NEUP to include consideration of the reasonably foreseeable natural gas development that the Project will induce or promote as well as related and other projects within the Project area is still unlawful and inappropriate. The "independent utility" test is relevant only to the issue of whether multiple projects must be considered as one

"project." It is not a limitation of the mandate to analyze reasonably foreseeable cumulative impacts. *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 896 n. 2 (9th Cir. 2002).

Throughout the cumulative impacts analysis, FERC staff abdicates its NEPA responsibilities by categorically deferring to standards administered by other agencies, without independently assessing anticipated impacts. *See, e.g., Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (holding that lead agency's deferral to standards of other agencies neglected NEPA's "mandated balancing analysis"). There are no cases "indicating that exclusion of consideration of an issue under the AEA requires exclusion of the same issue from consideration under NEPA." *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 (3d Cir. 1989). To the extent that the EA addresses impacts related to gas development, it does not independently assess the impacts from such activities and only points to compliance with other agencies' permitting requirements as a basis for concluding that no significant cumulative impacts exist.[64] Such blind acceptance of presumed compliance with standards implemented by another agency as a basis for a FONSI does not suffice as a hard look under NEPA. *See Calvert Cliffs'*, 449 F.2d at 1122. Permitting requirements "essentially establish a *minimum condition*" for approval of a project, *id.* at 1125 (emphasis in original), and do not necessarily indicate whether a project's impacts will be significant as understood in the NEPA context.

The cumulative effects analysis is also demonstrably insufficient because the Commission failed to consider the scope of both the impacts of the NEUP project individually and as an integrated whole with Tennessee's interdependent Eastern Leg expansion projects. The EA identifies ten existing or proposed pipelines within fifty miles of the Project area, totaling at least 240 miles of new pipeline construction or upgrade.[65] However, the EA provides absolutely no detailed information or analysis relating to the additive environmental impacts of these past,

[64] *See NEUP Environmental Assessment*, pg 2-129.
[65] *Id. at* 2-123, 2-124.

present, and proposed actions, including those projects on the Eastern Leg of the 300 Line of which the NEUP is an integral and inseparable part. Although the Commission claims in the Certificate that it considered the environmental impacts from these other pipelines in its cumulative analysis section of the EA,[66] five glaring omissions undermine this blanket assertion.

First, the MPP project is completely excised from the cumulative impact analysis in the EA for the NEUP: it is not even referenced, let alone examined.

Second, the NSD project is referenced, but none of its environmental impacts are specifically discussed, including, but not limited to: acreage affected (both permanently and temporarily), stream and wetland crossings, and sensitive habitat disturbance.

Third, the cumulative impact analysis section fails to mention, let alone analyze, the 2,628 acres already affected by the construction of the 300 Line Upgrade Project, the 155 stream crossings, or the 439.2 acres of permanent new right of way as a result of the 300 Line Upgrade. In fact, the Commission entirely omits any specific, detailed, or analytic consideration of the relationship between the 300 Line and Northeast Upgrade Projects.[67]

Fourth, the Commission failed to consider or address the voluminous notices of violations and noncompliance reports from the environmental inspection reports from the 300 Line Upgrade Project, authored by both the Pike County Conservation District and FERC's own inspectors.

Fifth, and significantly, the Commission entirely failed to evaluate the Eastern Leg projects as an integrated whole with regards to their simultaneous and cumulative environmental impacts. The NEUP closes out the remaining gaps left in the Eastern Leg projects, thus completing a new and expanded ROW. In determining whether the project should be evaluated

[66] *See NEUP Certificate for Public Convenience and Necessity*, ¶¶ 33-34.
[67] *Id.*

by an EIS, the aggregate and synergistic impacts of these combined projects must be considered together. But the EA entirely excludes any specific, detailed, or analytic consideration of the relationship between the Eastern Leg projects and NEUP.

The Commission's cumulative impact analysis is also insufficient because of the Commission's categorical deferral to standards administered by other agencies as evidence of no significant cumulative impacts. Such blind acceptance of presumed compliance with standards implemented by other agencies as a basis for a FONSI does not suffice as a hard look under NEPA. *See Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971). As discussed in more detail below, the Commission inappropriately assumed – contrary to the factual record before it – that it need not discuss within the cumulative impacts section those issues it assumed would be regulated and mitigated by other agencies. Not only does this violate NEPA's requirement to ensure that the cumulative effects discussion is complete, to inform both the agency's decision-making as well as the public, the Commission's assumption is belied by Tennessee's repeated violations of the environmental permits administered by other agencies in constructing the 300 Line.

In sum, the Commission fails to assess the additive effect of the NEUP and other Eastern Leg projects together with the effects of existing or reasonably foreseeable gas development activities in the Project area as required by law. As demonstrated by the case law cited above, such construction activity, whether or not induced by the NEUP, must be adequately evaluated by the Commission in order to fulfill its legal requirements pursuant to NEPA.

These foreseeable related activities include the impacts of gas exploration and production and the construction and operation of well pads, access roads, gathering lines, compressor

stations, and other infrastructure.[68] Instead, the Commission staff merely acknowledges "general development of the Marcellus Shale" upstream activities, specifically but utterly fails to addresses existing wells and gathering systems, and ultimately dismisses upstream activities as "outside the scope of [the cumulative impacts] analysis because the exact location, scale, and timing of future facilities are unknown." This bald assertion demonstrates a fundamental misunderstanding of the law. *See* 40 C.F.R. § 1508.7; *Hodel*, 865 F.2d at 298; *Acres of Land*, 760 F. Supp. at 351–52.

Ultimately, the development of upstream activities in the Marcellus region may only proceed if the Commission continues to expand access to markets through the interstate pipeline system. All potential interstate transmission lines must first be approved by the Commission before construction may begin. Thus, the Commission is, in effect, a gatekeeper, able to promote, prevent, or otherwise affect such activities. "[W]hen an agency serves effectively as a 'gatekeeper' for private action, that agency can no longer be said to have "no ability to prevent a certain effect [under the *Public Citizen* rule]." *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 25 (D.D.C. 2007).[69]

Here, there can be no doubt whatsoever that the construction of an interstate natural gas transmission line in order to enable natural gas drillers to get their product to market is causally related to the development of shale gas resources in the Project area because of the Commission's role as gatekeeper. Indeed, a better example of a federal agency's serving as gatekeeper could hardly be imagined. Unlike a hypothetical producer of widgets, which has

[68] *Comments on Environmental Assessment of the Northeast Upgrade Project*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), pgs 13-14.

[69] The Commission unsuccessfully attempts to distinguish this case by pointing to the fact that, in *Humane Society*, no EA or EIS was prepared, whereas an EA was developed in the instant matter. However, this assertion does not, and cannot, alter the fundamental holding of the case that supports a finding that the Commission ultimately acts as a gatekeeper for the purposes of upstream natural gas development.

many options to transport its goods to markets across state lines via road, train, and/or air freight, natural gas producers are entirely constrained by the nature of the product they produce and sell and are wholly reliant on FERC-approved interstate natural gas transmission lines to sell their goods in interstate commerce. But for the construction of an interstate pipeline – whose approval is entirely controlled by the Commission – natural gas producers would simply be unable to access markets across state lines without access to interstate transmission lines. The Commission's denial of a causal link between its approval of an interstate transmission line and the inducement of shale gas development upstream – and all of the associated impacts of infrastructure construction – simply flies in the face of reality.

Thus, Marcellus Shale development activities in Pennsylvania, particularly those in and around the pipeline's service area, are reasonably foreseeable consequences of the Project, and their effects must therefore be considered in the Commission's cumulative impacts analysis.[70] The cumulative impact analysis, in the EA's own words, must encompass consideration of actions that cause an effect within "all, or part, of the time span" of the proposed Project's effects.[71] The EA states that the Project will have effects for "several years," – or permanently, in the case of new right-of-way – and that Marcellus Shale development in the area of the Project will be ongoing for twenty to forty years.[72] Thus, by the Commission's own admission, the effects of Marcellus development will have effects within "all, or part, of the time span" of the Project's effects, and Marcellus development should therefore be included in the cumulative impacts analysis.

Nor can the Commission reasonably argue that it is impossible to determine where within the Project's service area shale gas development will occur. To the contrary, the Commission

[70] *Id*. at 14.
[71] *NEUP Environmental Assessment*, pg 121.
[72] *Id*. at 2-131.

ignored available sources of information provided in the comment period as well as other reasonably available sources of information. As Intervenors' EA Comment noted, publicly available maps of permitted gas wells in Pennsylvania show the locations of wells already drilled in the Pennsylvania counties to be crossed by the Project as well as the locations of newly-permitted well sites.[73] By simply stating, in general terms, how many wells will be drilled in the entire state of Pennsylvania, and failing to provide more detail or analysis, particularly where such details are readily available from public sources, the Commission falls far short of its obligations under NEPA.[74] The Commission quite simply cannot argue that the location, scale, and timing of wells impacting the Project area are "unknown" when numerous wells are already permitted and relevant data on them is widely available on-line. Nowhere does the Commission acknowledge this wide wealth of information, let alone analyze it in any meaningful way.

What is more, the Commission directly contradicts its own statement that Marcellus Shale developments are not "foreseeable," when it admits in the EA that:

> As an open access pipeline, TGP's FERC Gas Tariff, consistent with Commission policy, provides a process by which shippers may request an interconnection with TGP's pipeline system. TGP has *had numerous requests from producers in the Project area for interconnections on TGP's system. Several of these interconnections have already been completed, while other requests are being processed. This effort is ongoing and TGP expects additional interconnection requests from producers.*[75]

It is completely disingenuous for the Commission to claim ignorance of ongoing and future related development, when at the same time such development has either already occurred or is in the process of being evaluated and processed by Tennessee.

---

[73] *Comments on Environmental Assessment of the Northeast Upgrade Project*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), pg 15.
[74] *Id*.
[75] *NEUP Environmental Assessment*, pg 1-25.

Additionally, the cumulative impacts analysis is devoid of detailed, reasoned conclusions and quantified information. The Commission in its EA and FONSI fails to meet its responsibility to provide a degree of quantified or detailed support to demonstrate that it took a hard look to justify its conclusions. Instead, the Commission simply provides a litany of perfunctory and generalized statements, discounting or disregarding potential cumulative impacts.[76]

For example, the Commission simply catalogs existing and reasonably foreseeable gathering systems, but without analyzing their cumulative impacts.[77] The EA states that such projects will have "similar" impacts as the Project, but perfunctorily concludes that "land requirements for construction would typically be less for gathering systems due to the installation of smaller diameter pipeline."[78] Presumably, the Commission staff reasons that because impacts would be less significant for gathering systems, more comprehensive analysis is unnecessary. But cumulative impact analysis is precisely intended to analyze "individually minor but collectively significant actions," such as the development of gathering systems in the Project area. 40 C.F.R. § 1508.7. Additionally, the Commission fails to adequately assess information that quantifies the "increased long-term emissions of criteria pollutants, HAPs, and GHGs within the region," and consider how such emissions might contribute to climate change or impact the public health under 40 C.F.R. § 1508.27(b)(2). Instead the Commission simply disregarded such significant impacts as "outside the scope of our analysis."[79] The Commission's GHG and Climate Change analysis is similarly deficient, as it only considers direct emissions, rather than including the more substantial indirect emissions cumulatively resulting from the Project such as fugitive emissions from pipeline

[76] *Comments on Environmental Assessment of the Northeast Upgrade Project*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), pg 16.
[77] *NEUP Environmental Assessment*, 2-122.
[78] *Id*. at 2-126.
[79] *NEUP Environmental Assessment*, pg 2-133.

leaks, well pad flaring, and compressor station emissions.[80] These are but two examples of the plethora of development impacts that will be undeniably causally related to the NEUP individually, and to the Eastern Leg Projects as a whole. The absence of reasoned conclusions and quantified data, combined with the Commission's failure to include the full scope of cumulative impacts in its EA, is grounds for the Commission to grant this request for rehearing and rescind the Certificate pending full compliance with NEPA.

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

The Order relies heavily on the mitigation measures as prescribed in Appendix B, Environmental Conditions, and referenced throughout the EA, Order, and FONSI to support the Commission's conclusion that the NEUP will not have significant environmental impacts and therefore that no EIS is required. Yet the record before the Commission amply demonstrates that the Commission improperly relied upon fundamentally untrustworthy and unverifiable information in granting the Certificate, and indeed ignored concrete evidence of Tennessee's extensive record of violations of the mitigation conditions established in the Order for the 300 Line Project. Tennessee has developed a reputation and record of making promises regarding environmental compliance, repeatedly breaking those promises, and then making those very same promises for its next project. The failed mitigation analysis by the Commission, as described below, relate to intensity factor seven and signal a finding of severe significant impacts necessitating an EIS. The Commission should therefore grant this motion for rehearing in order to reconsider whether Tennessee will, in fact, fully and adequately implement all mitigation measures.

[80] *See NJDEP Environmental Assessment Comment*, 14.

An agency must evaluate the efficacy of mitigation measures proposed in an EA to support a FONSI. *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 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). With regards to enforcement, courts have also found that measures designed to minimize a particular action's impact upon the environment are "more readily deemed efficacious (and thus more comfortably within an agency's broad prerogative to propose or assume) "when they are likely to be policed.'" *Friends of Back Bay v. U.S. Army Corps of Engineers*, --F.3d --, 2012 WL 2249259, *7 (4th Cir. June 18, 2012) (quoting *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997)).

Ultimately, the Commission's unjustified leap of logic and unwarranted assumptions regarding the efficacy of Tennessee's proposed mitigation measures and the likelihood that

Tennessee will actually fulfill them, fail to adequately fulfill the legal requirements for a mitigated FONSI. Therefore, the Commission should grant this request for rehearing and reconsider its Order and FONSI.

a. The Commission Failed to Consider Tennessee's Record of False Promises Regarding Environmentally Damaging Construction Techniques

As Intervenors noted at EA Comments at 29, Tennessee is making the same exact promises and representations in its EA for the NEUP that it made, and subsequently failed to implement, in the EA for the 300 Line Project. In the 300 Line EA, for example, Tennessee indicated that it intended to exclusively use dry cut, rather than open-cut, construction methods for waterbody crossings where there was perceptible flow. One of many such claims interspersed throughout the EA was that:

> [t]he greatest potential impacts of construction on surface waters would result from an increase in sediment loading and turbidity. The highest levels of sediment would be generated by use of the wet open-cut method. However, as noted above, Tennessee would not utilize the wet open-cut method to cross any waterbodies with perceptible flow at the time of the crossing.[81]

In the EA for the NEUP, Tennessee makes an *identical* promise:

> [t]he greatest potential impacts of construction on surface waters would result from an increase in sediment loading and turbidity. The highest levels of sediment would be generated by use of the wet open-cut method. However, as noted above, Tennessee would not use the wet open-cut method to cross any waterbodies with perceptible flow at the time of the crossing, unless a dry crossing is impractical due to site-specific conditions.[82]

Despite the repeated claim that use of the open-cut method would be minimized in the 300 Line Project, Tennessee did not follow through with that promise. Specifically, at the West Branch of the Lackawaxen in Pike County, Tennessee utilized a wet open-cut crossing method, thus adversely impacting the ecosystem in ways that were not anticipated and thus not addressed

[81] *300 Line Upgrade Project Environmental Assessment*, pg 2-19.
[82] *NEUP Environmental Assessment*, pg 2-17.

in the 300 Line EA. NJDEP warns that "FERC should be aware that Tennessee's planned crossing methods are know [sic] to change during the review process increasing the likelihood of additional environmental impacts to threatened and endangered species habitat and increased turbidity for aquatic biota, oval water quality, and water supply."[83] This is also relevant to the evaluation of the threat to endangered species, such as the dwarf wedgemussel, which depends on the successful implementation of a specific crossing method, HDD.[84]

The fact that Tennessee has made identical guarantees in past projects, and has failed to adhere to those very promises, weighs heavily against Tennessee's credibility. Further demonstrating the inadequacy of the Commission's review, the Commission failed to specifically and substantively respond to this criticism in the Order issued for the NEUP.

b. The Commission Failed to Anticipate that the Project Will Threaten a Violation of Federal State, and Local Law Requirements Imposed to Protect the Environment

The Commission, in a number of instances, assumes that Tennessee will fully, adequately, and timely implement a series of mitigation measures to reduce a wide range of potential environmental degradation, from wetland habitat impacts,[85] and restoration activities,[86] to addressing landslide risks.[87] However, Tennessee has developed a troubling record of noncompliance with regards to environmental mitigation measures that prove these assumptions false. This record should have led the Commission to determine that intensity factor 10 of the NEPA regulations was implicated, *see* 40 C.F.R. § 1508.27(10), warranting much stricter scrutiny in the form of an EIS to determine whether Tennessee's demonstrable failure to comply

[83] *NJDEP Comments on the Environmental Assessment*, pg 16, para. 5.
[84] *NEUP Environmental Assessment*, 2-50 (concluding that no additional surveys for the species are needed "as long as the crossing of the Delaware River can be completed using the HDD crossing method").
[85] *NEUP Certificate for Public Convenience and Necessity*, 47.
[86] *Id*. at 49.
[87] *Id*. at 50.

with laws and requirements imposed for the protection of the environment increased the likelihood of environmentally significant impacts, as discussed above. The Commission's failure to consider Tennessee's proven non-compliance undermines not only the agency's significance analysis but also its mitigation analysis.

Tennessee's past compliance record suggests that the risk that the NEUP will violate the Clean Water Act, the Federal Safe Drinking Water Act, and the Pennsylvania Clean Streams Act, is highly likely.[88] As stated in Intervenors' comments, the risk that a law may be broken in the future weighs in favor of an EIS for the NEUP.[89] Paragraph 171 of the Order attempts to refute this claim, where the Commission claims that "Sierra Club offers no evidence why it is inappropriate to assume Tennessee will adhere to its permit requirements."[90] However, as directly stated in Intervenors' comments, and also demonstrated through numerous filings in the Commission's docket itself for the 300 Line Upgrade Project, Tennessee has earned a reputation for noncompliance and has accumulated numerous violations as a result of failed environmental inspections.

Specifically, Intervenors pointed to more than "45 violations of the Clean Streams Law," have been documented in "ten Pike County inspection reports in September 2011."[91] All of the 45 separate violations "occurred only from the short time period between June 22 and September 19 and reflect '17 instances in which dirt and sediment were discharged into Pennsylvania waters and pollution was documented . . . seven cases [of] . . . work site conditions that had a potential for water pollution, and 21 examples of failure to implement or maintain effective erosion and

[88] *Comments on Environmental Assessment of the NEUP*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), pg 28-29.
[89] *Id*. at 28.
[90] *NEUP Certificate for Public Convenience and Necessity*, pg 60.
[91] *Comments on Environmental Assessment of the NEUP*, Docket No. CP11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), pg 36.

sediment best management practices.'"[92] In Wayne County, out of 16 inspections conducted by the County Conservation District during the 300 Line Extension Project, 15 violations were found. This startling 93% failure rate provides further evidence of systemic compliance failures.[93] In addition to the concerns cited in Intervenors' comments, the Pike County Conservation District also provided numerous comments to the Commission calling into question the mitigation techniques proposed by Tennessee, particularly where they aligned with techniques used in the 300 Line Upgrade Project.[94] The Commission states that violations of the clean streams law have "no bearing in this proceeding,"[95] however, the Commission then curiously relies upon the very mitigation measures that have been violated in order to support their finding of no significant impact. Such a self-contradicting position again demonstrates the way in which the Commission has erred in in its approval of the Certificate.

Furthermore, an examination of the docket for the 300 Line Upgrade Project (Docket No. CP09-444) demonstrates that in 28 out of 38 "Environmental Compliance Monitoring Program Weekly Summary Report[s]" that were submitted to the Commission, and posted on its website, there was at least one recorded incident where construction activity did not come into "compliance with Project specifications, mitigation measures, and applicable Commission-approved Project plans." Additionally, there were also at least 10 separate instances where an inspector's "Environmental Compliance Monitoring Program Weekly Summary Report" indicated that a noncompliance report would be filed at a later date, but where the inspector failed to file a noncompliance report with the Commission (and no reason was provided for the failure to issue that report in the following week's report). These 10 separate instances indicate

[92] *Id.*
[93] Violations resulting from construction activity of the 300 Line Upgrade Project appear in Docket No. CP09-444.
[94] *PCCD Comments on the NEUP Environmental Assessment*, Docket No. CP11-161-000 (Dec. 20, 2011).
[95] *NEUP Environmental Assessment*, pg 62.

that either the Commission maintained incomplete records for the project, or that there were multiple failures to follow-up on potentially enforceable noncompliance matters by the Commission-sanctioned environmental inspectors.[96] Here, the Commission is incapable of relying even on their specious argument that violations as a result of state inspections have no bearing on their evaluation.

All of this information was all directly before the Commission; however, it was never sufficiently addressed in the EA or the Order and FONSI. The track record of Tennessee does more than threaten that violations will occur. The repeated culture of violation, and non-enforcement, implies a near *certainty* that the current project will be noncompliant and that Tennessee should not, and in fact cannot, be taken at its word. These noncompliance situations are explicit and clear evidence – on the record – that demonstrate why it is inappropriate for the Commission to assume that Tennessee will comply with any number of different regulatory controls.

c. The Commission Improperly Abrogated its NEPA Responsibilities to Ensure Proper Mitigation Techniques are Identified, Established, and Enforced

The Commission was put on notice that the mitigation measures identified in the EA are not, in fact, mitigation measures at all; rather, they are simply conditions of approval.[97] In fact, the Commission lists a significant portion of its required mitigation measures in its Appendix B, "Environmental Conditions."[98] A number of the 19 conditions listed in Appendix B would be the

[96] All Commission inspection reports for the 300 Line Upgrade Project are available under Docket No. CP09-444.
[97] *Comments on Environmental Assessment of the NEUP*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), exhibit A, pgs 14-17.
[98] *NEUP Certificate for Public Convenience and Necessity*, pg 77-83.

very environmental and cultural resource studies that are normally accomplished as part of an EIS, and therefore subject to public review.[99]

This is a tacit recognition by the Commission that it understands that the NEUP's design is not yet finalized, and that numerous environmental studies and permits still need to be completed before construction can even proceed. As such, the Commission should not have prematurely granted approval before it could properly demonstrate, with any degree of certainty, that Tennessee had secured the proper permits from state and local agencies, and that proper environmental mitigation measures had been fully agreed upon. The record, and in fact the Certificate and Order itself, demonstrate that the Commission has abrogated its NEPA responsibilities with regard to the existence and adequacy of the mitigation requirements.

Lastly, it has been established that the enforcement of violations for construction activity will take place after the project is complete. This is problematic as Tennessee is able to accumulate violations during construction and remediation activities with absolutely no accountability. As articulated in the above case law, the projected efficacy of environmental compliance measures and enforcement play a significant role in determining whether further evaluation is warranted, such as an EIS. Tennessee's history of noncompliance provides ample evidence to the Commission that enforcement procedures have not been properly implemented both at the state and federal levels, thus warranting an EIS.

6. The Commission's EA Fails Adequately to Analyze and Consider Reasonable and Viable Alternatives

The alternatives analysis in the EA fails to meet the requirements set forth under NEPA and its implementing regulations. Therefore, the Commission's decision to issue a FONSI based on this deficient EA violates NEPA by relying on inflated and or unrealistic assessments of

[99] *Comments on Environmental Assessment of the NEUP*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), exhibit A, pg 17.

market demand for natural gas, leading to an overestimation of projects economic benefits relative to its clear adverse environmental impacts. *See NRDC v USFS*, 421 F.3d 797, 811 (9th Cir. 2005); *Hughes River Watershed Conservation v Glickman*, 81 F.3d 437, 446-48 (4th Cir. 1996).

The discussion of alternatives is considered the heart of the NEPA review process. *See* 40 C.F.R. § 1502.14. Under NEPA, "all agencies of the Federal Government shall study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

The Commission claims that the primary focus of the project is "to expand the natural gas delivery capacity to the northeast U.S." and "meet market demand for new transportation services." However, as articulated in Intervenors' comment to the EA and by others, the "need" for this project is dubious at best.[100] Currently, there is a significant oversupply of natural gas, such that prices per thousand cubic square foot of natural gas are at historic lows. This lack of demand has resulted in large numbers of project sponsors proposing construction of liquefied natural gas ("LNG") export facilities around the U.S.[101] The Commission's website indicates that there are at present at least 11 LNG export sites that are either pending before the Commission or have been identified by project sponsors as likely future projects.[102] As such, the Commission has improperly relied on inflated and or unrealistic assessments of market demand in their approval of the NEUP project.

[100] *Comments on Environmental Assessment of the Northeast Upgrade Project*, Docket No. CP-11-161-000 (submittal 20111221-5231) (Dec. 21, 2011), Exhibit a, pgs 1-5.
[101] *See* North American Import/Export Terminals, http://ferc.gov/industries/gas/indus-act/lng/LNG-proposed-potential.pdf. (Accessed 6/28/12).
[102] *Id*.

Furthermore, the Commission failed to analyze whether renewable energy sources or conservation measures would have adequately met what energy demands actually do exist. The Commission's EA and FONSI violate NEPA by so narrowly defining the purpose and need such that only the proposed project fits the definition, thus precluding adequate analysis and consideration of other reasonable alternatives. *See* 40 CFR §§1500.1(b), 1500.2(e), 1502.13,14; *Env'tl Law & Policy Center v US Nuclear Reg. Comm.*, 470 F.3d 676, 683 (7th Cir. 2006); *Simmons v US Army Corps*, 120 F.3d 664 (7th Cir. 1997); *Davis v Mineta*, 302 F.3d 1104, 1119-20 (10th Cir. 2002).

7. The Commission's Determination that the Project Is Required by the Public Convenience and Necessity Is In Error

In determining whether the Project meets the standards established by the NGA and its implementing regulations for being required by the public convenience and necessity, the Commission purports to have followed the Certificate Policy Statement's guidance on evaluating proposals to certificate new construction. Order at ¶ 12.[103] The Certificate Policy Statement's guidance provides that "avoidance of unnecessary disruption of the environment" is one factor to be considered in the balancing test of public benefits versus adverse impacts in reaching a determination of public necessity and convenience. *See, e.g.*, 88 FERC ¶ 61,227 at ¶¶ 61,737, 61,743, 61,745-46. 61,749.

Here, as detailed above, the Commission erred in concluding that, based on incomplete information and an analytically inadequate EA, the NEUP will not have significant environmental impacts. The Commission also erred in failing to conduct an adequate analysis of the public need for and alternatives to the Project. Therefore, the Commission made its determination of public necessity and convenience without a comprehensive consideration of the

[103] Citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) ("Certificate Policy Statement").

full range of factors it is mandated to consider. Its determination is necessarily and fundamentally flawed as a result. On this record, the Commission cannot show that the significant and substantial negative environmental impacts of the Project are outweighed by Tennessee's purported demonstrated need and the claimed benefits of the Project. Accordingly, the Commission should grant this request for rehearing and rescission of the Order to determine, based on the requisite full consideration of the Project's significant environmental impacts through an EIS, as well as a full range of alternatives, whether in fact the NEUP can meet the standards for a determination the Project's public benefits will outweigh its adverse impacts.

III. Communications

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

Jane P. Davenport
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215) 369-1188 x 106 (tel)
(215) 369-1181 (fax)
jane@delawareriverkeeper.org

Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215) 369-1188 x 106 (tel)
(215) 369-1181 (fax)
aaron@delawareriverkeeper.org

Susan J. Kraham
Columbia Environmental Law Clinic
Columbia University School of Law
425 West 116th Street
New York, NY 10027
(212) 854-4376 (tel)
(212) 854-3554 (fax)
skraha@law.columbia.edu

Edward Lloyd
Columbia Environmental Law Clinic
Columbia University School of Law
425 West 116th Street
New York, NY 10027
(212) 854-4376 (tel)
(212) 854-3554 (fax)
elloyd@law.columbia.edu

IV. Conclusion

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

Respectfully submitted this 28th day of June, 2012.

/s/ Jane P. Davenport

Jane P. Davenport
Aaron Stemplewicz
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215) 369-1188 x 106 (tel)
(215) 369-1181 (fax)
jane@delawareriverkeeper.org

/s/ Susan J. Kraham
Susan J. Kraham
Edward Lloyd
Columbia Environmental Law Clinic
Columbia University School of Law
425 West 116th Street
New York, NY 10027
(212) 854-4376 (tel)
(212) 854-3554 (fax)
skraha@law.columbia.edu

Counsel for Delaware Riverkeeper Network, New Jersey Highlands Coalition, and the New Jersey Chapter of the Sierra Club

CERTIFICATE OF SERVICE

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

Dated at Bristol, Pennsylvania this 28th day of June, 2012.

/s/ Jane P. Davenport
Jane P. Davenport
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
(215) 369-1188 x 106 (tel)
(215) 369-1181 (fax)
jane@delawareriverkeeper.org