

People's Dossier: FERC's Abuses of Power and Law → Stripping People's Rights

FERC Denies the Public their Right to Due Process Before Property Rights are Taken, and Irreparable Environmental and Community Harm is Approved.

FERC routinely uses a legal loophole (a tool called a tolling order) to deny the public the right to challenge approval of a pipeline project before it allows private companies to seize property rights via eminent domain and before FERC approves pipeline construction to begin in ways that inflict irreparable environmental and community harm.

How FERC Forces Communities Into Legal Limbo

Under federal law, a private party is not allowed to legally challenge FERC approval of a pipeline project until they have first submitted a rehearing request to FERC, and FERC has affirmatively granted or denied that request. Rather than do one or the other, FERC's practice is to issue a "tolling order" in response to such requests, which temporarily grants the request but only "for further consideration". As a result, the public's ability to challenge the FERC decision is put into legal limbo until such time as FERC renders and issues its final decision regarding the rehearing request. It is common for FERC to place people in this legal limbo for up to a year or more, while allowing the pipeline company to advance its project, take property, cut through forests, and begin construction.

There does not appear to be a single instance when FERC has granted a rehearing request submitted by the public -- as such, the denial is a foregone conclusion and the use of tolling orders is an obvious ploy to allow pipeline projects to advance unfettered by any legal challenge. The harms inflicted by the delay in responding to the rehearing requests cannot be undone or fully remedied later – forests cut cannot be instantly regrown; property rights, once taken, are not returned.

The New York Attorney General condemned FERC's use of tolling orders "to extend the pendency of rehearing petitions in order to avoid judicial review of FERC orders. FERC's use of tolling orders undermines congressional intent, infringes upon property rights of landowners, and renders judicial review meaningless."¹ FERC Commissioner Glick has joined the impacted public (i.e the focus of this Dossier) in urging Congress to enact reforms to end this harmful practice:

This situation highlights the need for Congress to enact legislation amending the judicial review provisions of the Natural Gas Act and the Federal Power Act to account for the ability of an aggrieved party to seek redress in the courts of appeal. It is fundamentally unfair to deprive parties of an opportunity to pursue their claims in court, especially while pipeline construction is ongoing.²

¹ Stripping People's Rights Attachment 1, Comments of the New York Attorney General, Docket No. PL18-1, July 2018.

² Stripping People's Rights Attachment 2, Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC, Docket Nos. CP15-554-002; CP15-555-001; and CP15-556-001, August 10, 2018.



Tennessee Gas Pipeline Company's Northeast Upgrade Project (TGP NEUP)

In the case of Delaware Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014), FERC's use of a tolling order prevented any sort of real remedy even where a court ruled that FERC had violated the National Environmental Policy Act in allowing the use of segmentation and failing to consider cumulative impacts in its review and approval of the pipeline project. Specifically:

- May 29, 2012: FERC issued a Certificate of Public Convenience and Necessity for the TGP NEUP. (FERC Docket No. CP11-161) The NEUP would devastate 810 acres of land and convert 120.6 acres, including forest, into permanent pipeline right of way. The pipeline would cut through PA's Delaware State Forest, NJ's Highpoint State Park, the Appalachian Trail, and cross the Wild & Scenic Delaware River. Seven miles of prime farmland and dozens of creeks and wetlands all fell within the pipeline's proposed boot print.
- June 28, 2012: the Delaware Riverkeeper Network filed its rehearing request.
- July 9, 2012: FERC issued its tolling order.³
- January 11, 2013: nearly 7 months after the original rehearing request was filed, FERC finally denied the rehearing request.
- Delaware Riverkeeper Network filed its legal challenge within 2 weeks.

The seven months of legal limbo meant that by the time the Delaware Riverkeeper Network secured the court ruling that FERC had in fact violated federal law in their review and approval of the TGP NEUP pipeline, the project was fully constructed and in operation.

Transco Southeast Leidy

While issuing a tolling order to leave communities in Pennsylvania in legal limbo for 15 months for the Transco Southeast Leidy pipeline project (FERC Docket No. CP13-551), FERC issued over 20 Notices to Proceed that allowed the project to advance through various stages of construction and operation. Specifically:

- Transco filed an application with FERC on September 30, 2013 to construct and operate the Leidy Southeast Pipeline, and received its Certificate of Public Convenience and Necessity from FERC on December 18, 2014.
- The Delaware Riverkeeper Network submitted a rehearing request to FERC on January 16, 2015.
- Already, on January 30, 2015 – prior to the deadline for the submission of rehearing requests – FERC issued Transco its first Notice to Proceed with the project.
- On February 4, 2015 Transco requested that FERC approve its request for a Notice to Proceed with additional construction activity. FERC again granted Transco's request on February 5, 2015.
- On February 18, 2015 FERC issued its "tolling order" in response to DRN's rehearing request, thereby putting the organization and its membership into a legal limbo that prevented

³ Stripping People's Rights Attachment 11, FERC Order Granting Rehearing for Further Consideration, Tennessee Gas Pipeline, Docket No. CP11-161, July 9, 2012; and FERC Order On Rehearing, Tennessee Gas Pipeline, Docket No. CP11-161, January 11, 2013.



them from taking any further legal action to challenge the pipeline's approval.

- On March 9, 2015, FERC again authorized Transco to begin tree felling and other construction activities, allowing the company to permanently destroy more than 140 forested acres adjacent to valuable streams and wetland resources. All of this occurred before the public had any chance for court review.
- In total, FERC issued twenty Notices to Proceed for the project, including allowing certain portions of the project to begin operation, before it finally denied the Delaware Riverkeeper Network's rehearing request on March 3, 2016 – 15 months later – thereby freeing the organization to file its legal challenge to the project.

Delaware Riverkeeper Network filed a legal challenge to the project on March 9; however, much of the irreparable harm to the environment that the Delaware Riverkeeper Network and its members had sought to avoid had already occurred. By the time the Delaware Riverkeeper Network was allowed to proceed with its challenge, FERC had allowed the pipeline company to cut trees along 21 miles of right of way on 209 acres of land, and inflicted irreparable harm to at least 8 ½ acres of pristine forested wetlands.⁴

Constitution Pipeline

In the case of the Constitution Pipeline (FERC Docket CP 13-499), FERC tolled the rehearing request for nearly a year. In this case:

- On December 2, 2014, FERC issued Certification for the Project.
- On January 2, 2015, concerned communities filed their Rehearing Request.
- January 27, 2015, FERC issued its tolling order leaving communities without a legal remedy as the project proceeded with eminent domain and elements of construction.
- It wasn't until one year later, January 28, 2016, when FERC finally denied the rehearing request, that concerned communities got the opportunity to challenge FERC's approval of the Constitution Pipeline.

During the one year communities were in legal limbo, the project continued to advance towards construction:

- By December of 2014, the Constitution Pipeline Company had filed 125 Complaints in Condemnation in the Northern District of New York alone, seeking to take private property rights away from landowners in its path.⁵
- By the end of 2015 homeowners who had refused access to their property had their property rights overridden through forced condemnation, and the Constitution Pipeline Company secured access to the properties to finish surveying work and to tag trees for clearing.
- On January 29, 2016, FERC approved tree cutting on 25 miles of the Pennsylvania portion of the pipeline, despite lacking multiple state and federal approvals, including New York Clean

⁴ Stripping People's Rights Attachment 3, People's Hearing Testimony of Maya van Rossum, the Delaware Riverkeeper, on behalf of the Delaware Riverkeeper Network, December 2, 2016.

⁵ Stripping People's Rights Attachment 5, Earthjustice Motion for Stay, Docket Nos. CP13-499 and 13-502, January 11, 2016.



Water Act Certification.⁶

On March 1, 2016, the Constitution Pipeline Company began to cut the forest that has belonged to the Holleran family since the 1950s—they live on the property, enjoy its natural beauty, and operated a growing maple syrup business (North Harford Maple).⁷ In total Constitution chopped down over 500 ash and sugar maple trees on the Holleran property alone, devastating their scenic beauty and their maple syrup operation.⁸

Ultimately New York would deny Clean Water Act Certification, stopping the project in its tracks. As a result, property rights were taken, businesses harmed, forests cut, and the environment irreparably harmed for a pipeline that is unlikely to ever be built. Property owners who were forced to spend their hard earned money to try to protect their property and property rights, are now forced to expend resources on legal actions in order to try to secure return of the property rights that were taken by eminent domain as a direct result of the actions and decisions of FERC.

The Holleran family has had pipeline construction stalled on their property for two years, with no compensation for the taking of their maple trees nor for the harm forced upon them of hosting a construction site on their land.⁹ Where is the justice?

The Sabal Trail Project

The Sabal Trail Project (FERC Docket CP15-17-001) is part of a broader pipeline network known as the Southeast Market Pipelines Project, crossing through Alabama and Georgia to Florida. Sabal Trail was challenged in *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017), in which the court ultimately ruled that FERC had violated the National Environmental Policy Act in its failure to analyze greenhouse gas (GHG) emissions resulting from the Project. However, FERC's use of a tolling order prevented any sort of timely remedy, with much of the pipeline in service before the decision was made. Specifically:

- On February 2, 2016, FERC granted a Certificate of Public Convenience and Necessity to

⁶ Stripping People's Rights Attachment 6, Earthjustice Response to Supplemental Information, Docket No. CP13-499, January 15, 2016; Stripping People's Rights Attachment 7, Catskill Mountainkeeper et al., Press Release, February 18, 2016; and Stripping People's Rights Attachment 8, Stop the Pipeline, Statement in Opposition to Request for Partial Notice to Proceed, Docket No. 13-499, January 12, 2016. See also Stripping People's Rights Attachment 9, Petitioner Stop the Pipeline Brief in Docket Nos. 16-345 and 16-361, (2nd Cir.) July 12, 2016.

⁷ See <https://www.northharfordmaple.com/>.

⁸ See Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458 and Stripping People's Rights Attachment 16, Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, State Impact, July 12, 2018.

⁹ See Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458 and Stripping People's Rights Attachment 16, Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, State Impact, July 12, 2018.



construct and operate the Sabal Trail Project.

- On March 3, 2016, Sierra Club and other environmental petitioners filed a timely request for rehearing, rescission of the certificates, and a stay. Petitioners argued, among other things, that FERC had failed to estimate the downstream GHG emissions from the gas that would be transported by the project and had failed to consider the effects that those emissions will have on climate change, as required by NEPA.
- On March 29, 2016, FERC issued its tolling order and on March 30, FERC denied the request for a stay.¹⁰
- While the tolling order was in place and FERC was still considering Sierra Club's rehearing request, FERC authorized the construction of the projects in August and early September 2016.
- On September 7, 2016, FERC denied the rehearing request, finding that the FEIS sufficiently assessed GHG emissions.
- In September 2016, Sierra Club, among other parties, appealed FERC's Decision to the U.S. Court of Appeals for the District of Columbia Circuit.
- In June and July 2017, while the court case was pending, Commission staff authorized the pipelines to commence service on completed facilities.
- On August 22, 2017, the D.C. Circuit Court sided with the Sierra Club and other environmental groups, concluding that FERC had inadequately analyzed the impacts of GHG emissions that may result from the pipeline in violation of NEPA. See *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329).

The six months of legal limbo meant that by the time the Sierra Club and other environmental petitioners secured the court ruling that FERC had in fact violated federal law in their review and approval of the project by failing to adequately consider climate impacts, the pipeline project at issue was fully constructed and in operation. The court decision vacated FERC's previous approval of the Project and mandated that FERC either quantify and consider the Project's downstream carbon emissions, or explain in more detail why it failed to do so. Had FERC followed the direction of the court, a full and fair analysis of the climate change impacts of the project could have very well changed the outcome of the Project.¹¹

New Market Project

Recently, FERC tolled the New Market project (FERC Docket No. CP14-497) for 24 months. In this case:

- On April 28, 2016, FERC issued Dominion Transmission, Inc. (Dominion) a certificate of public convenience and necessity for the New Market Project.
- On May 31 2016 Otsego 2000, Inc. filed a timely request for rehearing.

¹⁰ Stripping People's Rights Attachment 17, FERC Order Denying Rehearing, Sabal Trail, Docket No. CP15-17-001, March 29, 2016.

¹¹ See Statement of FERC Commissioner Richard Glick, Order on Remand Reinstating Certificate and Abandonment Authorization, Docket Nos. CP14-554-002, CP15-16-003, and CP15-17-002, March 14, 2018.



- On June 27, 2016, FERC issued a tolling order.¹²
- In March of 2017, while petitioners were held in legal limbo, FERC gave Dominion permission to begin construction in upstate New York; the Project was placed in-service November 21, 2017.
- On May 18, 2018, FERC issued an order denying rehearing.

On July 16, 2018, after two years in legal limbo, Otsego 2000 challenged FERC’s May 18 order—which rejected their complaints and set new policy for the Commission’s consideration of greenhouse gas emissions from proposed projects—in the U.S. Court of Appeals for the District of Columbia Circuit. Attorneys General of New York, Maryland, New Jersey, Oregon, Washington, Massachusetts, and the District of Columbia filed amicus briefs in the case, arguing that FERC should have considered upstream and downstream greenhouse gas emissions. While the project has been constructed in-service for over a year, the case is still pending in federal court. FERC’s tolling order clearly prevented timely legal challenge – and so even if the challengers are victorious in court, it will have **no affect** on construction or operation of this pipeline.

Mountain Valley Pipeline

While petitioners were held in legal limbo for 6 months, FERC authorized Mountain Valley Pipeline (MVP) Project (FERC Docket No. CP16-10) to proceed with construction and tree felling. Shortly after rehearing requests were finally denied and much of the construction was complete, a series of court decisions called into question the legitimacy of several of the Project’s state and federal approvals. FERC temporarily halted construction activity—before determining that the tree clearing already completed necessitated continued construction to “mitigate further environmental impacts”¹³—a decision that could have been avoided had FERC not allowed the company to proceed with construction prematurely. Major questions about the project’s viability remain. In this case:

- On October 13, 2017, the Commission issued an order authorizing Mountain Valley Pipeline, LLC (Mountain Valley) to construct and operate its proposed MVP in West Virginia and Virginia. Commissioner LaFleur dissented from the certificate order, questioning whether the Project is in the public’s interest given the lack of demonstrated need for the Project and the considerable environmental impact it would have.¹⁴
- Several legal challenges against other Project permits, including the CWA Section 401 and 404 permits, were already ongoing at the time,¹⁵ and the issuance of the FERC certificate prompted additional legal action. Two weeks after the Certificate Order issued, MVP initiated condemnation actions in three federal district courts against nearly 300 property

¹² Stripping People’s Rights Attachment 18, FERC Order Granting Rehearing for Further Consideration, Dominion Transmission, Docket No. CP14-497-001, June 27, 2016.

¹³ See Partial Authorization to Resume Construction, Docket No. CP16-10, August 29, 2018.

¹⁴ See Statement of FERC Commissioner Cheryl LaFleur, Dissent on Order Issuing Certificates and Granting Abandonment Authority, Docket Nos. CP15-554 and CP16-10, October 13, 2017.

¹⁵ See Ken Ward, *Mountain Valley Pipeline approval faces new federal court challenge*, Charleston Gazette-Mail, December 8, 2017.



owners.¹⁶

- On November 13, 2017 petitioners, including Appalachian Voices and the Sierra Club, filed a timely request for rehearing of the order.
- On December 13 2017, FERC issued a tolling order.¹⁷
- Meanwhile, FERC authorized the pipeline company to proceed with construction—issuing notices to proceed with construction of facilities associated with the Project on January 22 and 29, and February 8, 9, 12, 13, 14, 15, and 16, 2018.
- On June 15, 2018, FERC rejected, dismissed, or denied all pending requests for rehearing.¹⁸
- On July 27, 2018, the United States Court of Appeals for the Fourth Circuit issued an order vacating decisions by the Department of Interior’s Bureau of Land Management and the Department of Agriculture’s Forest Service authorizing the construction of the MVP Project across federal lands.
- In response, on August 3, FERC issued a Stop Work Order halting construction activity along all portions of the MVP Project, acknowledging that it “has not obtained the rights-of-way and temporary use permits from the federal government needed for the Project to cross federally owned lands.”¹⁹
- August 29, 2018, FERC lifted the Stop Work Order in all Project areas except for federal lands, stating that “protection of the environment along the Project’s right-of-way across non-federal land is best served by completing construction and restoration activities as quickly as possible.” Because MVP had already cleared, graded, and installed temporary erosion control devices within “sixty-five percent of the right-of-way between Mileposts 77 and 303”, FERC argued that “maintaining the status quo” would likely pose threats to plant and wildlife habitat and adjacent waterbodies as long-term employment of temporary erosion control measures would subject significant portions of the route to erosion and soil movement” and that requiring “restoration of the entire right-of-way to pre-construction conditions would require significant additional construction activity” resulting in “further environmental impacts.”²⁰
- In December 2018, the Virginia DEQ and Attorney General filed a lawsuit against MVP, documenting more than 300 violations between June 2018 and November 2018. The case is still pending.²¹

¹⁶ See *Mountain Valley Pipeline v. An Easement to Construct, Operate and Maintain An Easement*, Case No. 7:17-cv-00492 (W.D. Va. 2017); *Mountain Valley Pipeline, LLC, v. Simmons*, 307 F.Supp.3d 506 (N.D.W. Va. 2018); and *MVP v. Mc Million et al.*, Case No. 2:17-04214 (S.D. W. Va. 2017).

¹⁷ See FERC Order Granting Rehearings for Further Consideration, Mountain Valley Pipeline, Docket No. CP16-10 and CP16-13, December 13, 2017.

¹⁸ See FERC Order on Rehearing, Mountain Valley Pipeline, Docket No. CP16-10 and CP16-13, June 15, 2018.

¹⁹ See Notification of Stop Work Order, Mountain Valley Pipeline, Docket No. CP16-10, August 3, 2018.

²⁰ See Partial Authorization to Resume Construction, Mountain Valley Pipeline, Docket No. CP16-10, August 29, 2018.

²¹ See Press Release, *Attorney General Herring and DEQ File Lawsuit over Repeated Environmental Violations During Construction of Mountain Valley Pipeline*, Commonwealth of Virginia Office of the Attorney General, December 7, 2018.



- On October 2, 2018 federal court vacated the Army Corps of Engineer’s Nationwide 12 permit, finding that the Corps did not have the authority to approve stream crossing methods that were in violation of West Virginia Law.²²

MVP continues to face serious legal challenges to its state and federal approvals and the future of the Project is very much in question. Had FERC not strategically used tolling to allow eminent domain and construction to prematurely advance, the environmental harms and violations of law already demonstrated could have been avoided.

Atlantic Coast Pipeline

In the case of the Atlantic Coast Pipeline (ACP) Project (FERC Docket No. CP15-554), a new pipeline system consisting of approximately 600 miles of pipeline and other facilities running from West Virginia through eastern portions of Virginia and North Carolina, petitioners were held in legal limbo for 8 months while the pipeline company exercised eminent domain and FERC authorized notices to proceed with tree felling and construction.

- On October 13, 2017 FERC issued a certificate of public convenience and necessity for the ACP. Several parties filed timely requests for rehearing and motions to stay the Certificate Order.
- On December 11, 2017, FERC issued a tolling order of the requests for rehearing.²³
- On January 19, February 12 and 16, 2018, while petitioners were held in legal limbo, FERC granted the company the first of many notices to proceed with construction of facilities associated with the Project.
- February 28, 2018, a Virginia court granted Atlantic Coast “immediate access” for tree-felling on 16 properties in Buckingham, Bath, Augusta and Highland counties.
- March 16 2018, the Virginia Department of Environmental Quality (VA DEQ) issued a violation notice for tree felling that occurred within wetland buffer zones and stream crossings that were supposed to be protected. The violation notice covered 15 separate incidents.²⁴
- On August 10, 2018, FERC issued an order denying rehearing requests.

By the time FERC denied petitioners’ rehearing requests, the pipeline company had already taken private property through eminent domain and begun extensive work tree clearing, ground moving, trenching, and laying pipe in North Carolina and West Virginia. In West Virginia alone, ACP construction activity during the tolling order consisted of 30 miles of right-of-way clearing and excavation, extensive trenching, and deployment of over 30,000 feet of pipe in the construction corridor.²⁵

²² See Juan Carlos Rodriguez, *4th Circ. Nixes Army Corps Permit for \$3.5B Pipeline*, Law360, October 2, 2018.

²³ See Order for Rehearing, Atlantic Coast Pipeline, Docket No. CP15-554-003, December 11, 2017.

²⁴ See Commonwealth of Virginia Department of Environmental Quality Notice of Violation, Atlantic Coast Pipeline, Docket No. CP15-554-003, March 16, 2018.

²⁵ See *Atlantic Coast Pipeline: Timeline of Defiance*, Dominion Pipeline Monitoring Coalition, August 31, 2018.



Due to a series of legal decisions vacating critical permits for the project—including U.S. Fish and Wildlife Service (FWS) Incidental Take Statement, which authorized the ACP project to take certain species protected by the Endangered Species Act; an Army Corp’s Nationwide Permit 12; a National Park Service (NPS) right-of-way permit; and a Special Use Permit for national forest land from the US Forest Service (USFS) required to allow ACP to cross the Appalachian Trail and national forests—it is possible that the pipeline will never be built and that the harms inflicted on the public through eminent domain and construction have been completely unnecessary. Additionally, challenges to FERC’s certificate brought after the tolling order was lifted are still pending, and also may prevent the project from being built.²⁶

Algonquin Pipeline Expansion - Algonquin Incremental Market (AIM)

In response to a rehearing request submitted by Stop the Algonquin Pipeline Expansion (SAPE) on April 2, 2015, FERC issued a tolling order on May 1, 2015. As a result, SAPE was left without access to a legal remedy until FERC issued its Order Denying Rehearing on January 28, 2016. The Spectra AIM pipeline (FERC Docket No. CP14-96), which cuts through New York, Connecticut, Rhode Island, and Massachusetts, was largely constructed in the 10 months since SAPE issued its rehearing request and was then placed in legal limbo by FERC’s tolling order.

While FERC was “considering” the rehearing request, it allowed the pipeline company to seize private property and destroy homes, roads, and parklands.²⁷

Atlantic Sunrise

FERC tolled rehearing requests in the case of the Transco’s Atlantic Sunrise Pipeline (Docket No. CP15-138) for 9 months, allowing eminent domain and other significant construction activity to take place during tolling.²⁸ Legal challenges to the project are still pending before the courts.

Orion Pipeline Project

The Tennessee Gas Pipeline Company, L.L.C (TGP), a subsidiary of Kinder Morgan Inc, filed an application with FERC for its proposed Orion Project on October 9, 2015 (FERC Docket No. CP16-4). In February 2017, DRN submitted a rehearing request, on the grounds that FERC was required to consider the cumulative effects of Orion and two other Tennessee projects because they are connected and clearly part of the same expansion project. On March 13, 2017, FERC issued a tolling order in response. On February 27, 2018, one year after the request was submitted, FERC denied DRN’s Rehearing Request.

NEXUS Project

In an August 25, 2017 order, FERC granted NEXUS Gas Transmission, LLC (NEXUS) a certificate to construct and operate the NEXUS Project (FERC Docket No. CP16-22) in Ohio and Michigan. Multiple timely requests for rehearing were filed, challenging most aspects of the FERC’s review of the NEXUS Project, including the need for the project and the use of eminent domain. On July 25,

²⁶ See *Atlantic Coast Pipeline- Risk Upon Risk*, Oil Change International, March 2019.

²⁷ Stripping People’s Rights Attachment 4, Akiko Matsuda, *FERC Denies Rehearing Request on Algonquin Pipeline Expansion*, the Journal News, January 29, 2016.

²⁸ Stripping People’s Rights Attachment 15, FERC Order Granting Rehearing for Further Consideration, Atlantic Sunrise Pipeline, Docket No. CP15-138, March 13, 2017.



2018, FERC issued an order denying all rehearing requests, excluding a request from the pipeline company.²⁹ During the 10 months that communities were held in legal limbo, NEXUS had exercised eminent domain and nearly completed construction of the pipeline.

Connecticut Expansion Project

On March 11, 2016, FERC issued a certificate of public convenience and necessity authorizing Tennessee Gas Pipeline Company, L.L.C.'s request for construction and operation of the Connecticut Expansion Project. Petitioners filed timely requests for rehearing of the Order, which FERC tolled until August 25, 2017.³⁰ FERC's tolling order delayed a rehearing decision regarding the Project for over sixteen months, during which time it authorized tree clearing and construction for the project, including through a two-mile stretch of conservation land protected under the Massachusetts Constitution in Otis State Forest.

PennEast Pipeline Project

FERC continues its use of tolling of tolling orders unabated. The PennEast Pipeline (FERC Docket No. CP15-558) was tolled for 6 months, and prompted the filing of rehearing requests on the tolling orders issued which then themselves became the subject of tolling orders that had to be challenged with rehearing requests, demonstrating the never-end cycle of rehearing and tolling that this tolling order strategy inspires.

- On January 19, 2018, the Commission issued an order under section 7(c) of the Natural Gas Act authorizing PennEast Pipeline Company, LLC (PennEast).
- The Delaware Riverkeeper Network filed a rehearing request on January 24, 2018 with others, including the state of New Jersey following suit.
- On February 22, 2018, FERC issued a tolling order.³¹
- On March 16, 2018, the Delaware Riverkeeper Network sought rehearing of the February 22 tolling order.
- On April 13, 2018, FERC issued a second order tolling the rehearing request for the February tolling order
- On May 8, 2018, Delaware Riverkeeper Network sought rehearing of the April Tolling Order.
- On May 30, FERC denied the Delaware Riverkeeper Networks request for rehearing of the April tolling order, but the original February 22 tolling order requesting rehearing on the FERC Certificate remained in place.
- August 13, 2018 FERC denied the Certificate rehearing requests submitted by the Delaware Riverkeeper Network, the state of New Jersey and others.
- The case was immediately challenged in court with challenges by multiple parties pending.

As FERC Commissioner Glick points out, the tolling of this project is especially concerning given the unusual level of uncertainty and fundamental concerns regarding the project. Two of the five

²⁹ See Order on Rehearing, Docket Nos. CP16-22-001; CP16-23-001; CP1624-001; and CP16-102-001, July 25, 2018.

³⁰ See Order on Rehearing, Tennessee Gas Pipeline, Docket No. CP14-529-001, August 25, 2017.

³¹ Stripping People's Rights Attachment 19, Statement of FERC Commissioner Richard Glick on PennEast Pipeline, Docket No. CP15-558-002, May 30, 2018.



Commissioners issued concurrences to the Certificate Order in order to highlight serious concerns they had. In addition, one Commissioner dissented. Immediately following FERC's certificate approval, PennEast filed nearly 200 eminent domain cases in PA and NJ and has been granted access to survey and construct in both states.

As Commissioner Glick explains:

“...It is nonetheless critical that the Commission respond to rehearing requests as quickly as possible, especially where—as here—parties have raised serious questions regarding the Commission's conclusion that a new natural gas pipeline facilities needed and in the public interest.

Until the Commission issues its ultimate order on rehearing, the NGA precludes parties from challenging the Commission's decision in federal court. However, the pipeline developer has the right to pursue eminent domain and, in many cases, to begin construction on the new pipeline facility while the Commission addresses the rehearing requests. As a result, **landowners, communities, and the environment may suffer needless and avoidable harm while the parties await their opportunity to challenge the Commission's certificate decision in court.**

This proceeding, in particular, illustrates the need for prompt action on rehearing requests. As I explained in my dissent from the underlying order, I disagree with the Commission's finding that the PennEast Project is needed and in the public interest. I believe that the Commission's reliance on affiliate precedent agreements is, without more, insufficient to demonstrate that a new natural gas pipeline is needed. I also have serious concerns regarding the Commission's practice of issuing conditional certificates—which, notwithstanding their name, vest the pipeline developer with full eminent domain authority—in cases where the record does not contain adequate evidence to conclude definitively that the pipeline is in the public interest.

In short, when the Commission issues a tolling order, it is critical that the Commission issue a subsequent order addressing the merits of the rehearing request as expeditiously as reasonably possible in order to both protect the public from unnecessary harm and permit the parties to timely seek their day in court. (emphasis added and citations removed).³²

Legal Limbo is a Strategy

Delaware Riverkeeper Network is unaware of any non-industry aggrieved party who has actually been granted a request for rehearing in the history of FERC's existence. As a result, the denial of the rehearing request is a foregone conclusion. The only rationale for FERC to delay issuing its denial response is to allow the pipeline project to advance through eminent domain and construction without being impeded by successful legal challenges. The only other possible justification for tolling may be to grant FERC more time to attempt to justify its Certificate decisions after-the-fact, thereby increasing its chances of defeating a later legal action by the public. Other than these two options of benefit to the pipeline companies and FERC, there is no good reason for tolling orders.

³² Stripping People's Rights Attachment 19, Statement of FERC Commissioner Richard Glick on PennEast Pipeline, Docket No. CP15-558-002, May 30, 2018.



FERC Indiscriminately and Inconsistently Interprets Legislative Language to Support Pipeline Approval

The New York Attorney General's office has noted that while FERC is generous with itself in interpreting the timeline mandates on rehearing requests, it gives no such leniency to the States – this obvious difference in how FERC applies the law to itself and others is noteworthy. Here is how the NY Attorney General describes it:³³

“Congress gave FERC 30 days to “act” on a rehearing request, or the request would be “deemed to have been denied.” 15 U.S.C. § 717r(a). This Congressional language clearly requires that FERC either grant or deny a rehearing request with 30 days, so that judicial review of the underlying order can proceed in a timely way. Yet FERC regularly uses tolling orders to unilaterally delay judicial review by months, without applicant or party consultation, allowing natural gas infrastructure to be substantially completed before a Court can even review the FERC order authorizing such construction.”

“In the context of the Clean Water Act, FERC has concluded that similar language imposes a hard limit on a state's consideration of an application. Specifically, Clean Water Act § 401(a) requires a State to “act” on an application for a certification with “a reasonable period of time (which shall not exceed one year)” or the certification requirements are deemed waived. 33 U.S.C. § 1341(a)(1). FERC has described this waiver language of section 401(a)(1) as “unambiguous.” Order Denying Rehearings and Motions to Stay, 161 FERC ¶ 61,186, at ¶38, Docket No. CP16-17-003, Millennium Pipeline Co., LLC (Nov. 15, 2017). Moreover, FERC has stated that “the length of the section 401 waiver period is one year” and “that the deadlines prescribed by federal law . . . are binding,” Order on Petition for Declaratory Order, 162 FERC ¶61,014, at ¶ 20, Docket No. CP18-5-000, Constitution Pipeline Co., LLC (Jan. 11, 2018). And yet when interpreting the Natural Gas Act's similar mandate to “act” on a rehearing request within 30 days, FERC condones its own indefinite delay of judicial review, and harm from that delay, through the use of tolling orders.”

Attachments:

Stripping People's Rights Attachment 1, Comments of the New York Attorney General, Docket No. PL18-1, July 2018.

Stripping People's Rights Attachment 2, Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC, Docket Nos. CP15-554-002; CP15-555-001; and CP15-556-001, August 10,

³³ Stripping People's Rights Attachment 1, Comments of the New York Attorney General, Docket No. PL18-1, July 2018.

2018.

Stripping People's Rights Attachment 3, People's Hearing Testimony of Maya van Rossum, the Delaware Riverkeeper, on behalf of the Delaware Riverkeeper Network, December 2, 2016.

Stripping People's Rights Attachment 4, Akiko Matsuda, *FERC Denies Rehearing Request on Algonquin Pipeline Expansion*, the Journal News, January 29, 2016.

Stripping People's Rights Attachment 5, Earthjustice Motion for Stay, Constitution Pipeline, Docket Nos. CP13-499 and 13-502, January 11, 2016.

Stripping People's Rights Attachment 6, Earthjustice Response to Supplemental Information, Constitution Pipeline, Docket No. CP13-499, January 15, 2016.

Stripping People's Rights Attachment 7, Catskill Mountainkeeper *et al.*, Press Release, February 18, 2016.

Stripping People's Rights Attachment 8, Stop the Pipeline, Statement in Opposition to Request for Partial Notice to Proceed, Docket No. 13-499, January 12, 2016.

Stripping People's Rights Attachment 9, Brief of Petitioner Stop the Pipeline, Docket Nos. 16-345 and 16-361, (2nd Cir.) July 12, 2016.

Stripping People's Rights Attachment 10, FERC Order Granting Rehearing for Further Consideration, Transcontinental Gas Pipeline, Docket No. CP13-551, February 18, 2015; and FERC Order Denying Rehearing, Transcontinental Gas Pipeline, Docket No. CP13-551, March 3, 2016.

Stripping People's Rights Attachment 11, FERC Order Granting Rehearing for Further Consideration, Tennessee Gas Pipeline, Docket No. CP11-161, July 9, 2012; and FERC Order On Rehearing, Tennessee Gas Pipeline, Docket No. CP11-161, January 11, 2013.

Stripping People's Rights Attachment 12, FERC Order Denying Rehearing, Algonquin Gas Transmission, Docket No. CP14-96, January 28, 2016.

Stripping People's Rights Attachment 13, Candy Woodall, *Constitution Pipeline delayed, but hundreds of trees already cut down*, Pennlive, March 10, 2016.

Stripping People's Rights Attachment 14, Jon Hurdle, *Maple syrup trees cut to make way for Constitution Pipeline*, State Impact March 2, 2016.



Stripping People's Rights Attachment 15, FERC Order Granting Rehearing for Further Consideration, Atlantic Sunrise Pipeline, Docket No. CP15-138, March 13, 2017.

Stripping People's Rights Attachment 16, Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, State Impact, July 12, 2018.

Stripping People's Rights Attachment 17, FERC Order Denying Rehearing, Sabal Trail, Docket No. CP15-17-001, March 29, 2016.

Stripping People's Rights Attachment 18, FERC Order Granting Rehearing for Further Consideration, Dominion Transmission, Docket No. CP14-497-001, June 27, 2016.

Stripping People's Rights Attachment 19, Statement of FERC Commissioner Richard Glick on PennEast Pipeline, Docket No. CP15-558-002, May 30, 2018.

Complete People's Dossier: FERC's Abuses of Power and Law

available at <http://bit.ly/DossierofFERCAbuse>

People's Dossier: FERC's Abuses of Power and Law
→ Stripping People's Rights

Stripping People's Rights Attachment 1, Comments of
the New York Attorney General, Docket No. PL18-1,
July 2018.

I. FERC SHOULD NOT ISSUE A CERTIFICATE UNTIL THE APPLICANT RECEIVES ALL STATE PERMITS AND CERTIFICATIONS REQUIRED TO COMMENCE CONSTRUCTION.

FERC seeks comment on how its certification process might better protect landowner interests and how FERC can work “more efficiently and effectively” with state agencies. 83 Fed. Reg. 18,031-32. FERC’s current practice of issuing “conditional” certificates of public convenience and need fails to protect landowners’ interest in avoiding eminent domain, nor does it further the State’s role in reviewing the environmental impacts of natural gas pipelines. Conditional certificates are issued before a natural gas company has received all required permits and authorizations necessary to commence construction, which allows the company to use eminent domain pursuant to Natural Gas Act § 7(h) to obtain the necessary pipeline right-of-way from resistant landowners. 15 U.S.C. § 717f(h). However, there is no guarantee – nor can there be – that the natural gas pipeline company will receive all of the permits and authorizations required to commence construction. By allowing the natural gas pipeline company to condemn land before receiving all required permits and authorizations, FERC is assuming that the State will issue all the required authorizations without regard to its independent review role. In cases where the State ultimately declines to issue required permits or certifications, landowners will have suffered unnecessary condemnation of their land and, in some cases, irreversible environmental damage will already have occurred.

This problem is illustrated by the proposed Constitution pipeline project (FERC Docket No. CP13-499-000). In that proceeding, FERC issued a conditional certificate of public convenience and necessity authorizing the applicant to condemn land for the right-of-way before the State had issued certain authorizations, including a Clean Water Act § 401, 33 U.S.C. § 1341, certification. *See* Order Issuing Certificates and Approving Abandonment, *Constitution Pipeline Co., LLC*, Docket No. CP13-499, 149 FERC ¶61,199 (Dec. 2, 2014). Constitution proceeded to

exercise eminent domain to obtain the necessary right-of-way from New York landowners. *See, e.g.,* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. A Permanent Easement for 2.40 Acres, etc.*, Docket No. 3:14-cv-2046 (N.D.N.Y. Feb. 24, 2015), *available at* 2015 WL 1638211. FERC also authorized tree-clearing over the portions of right-of-way that passed through Pennsylvania, resulting in permanent environmental damage in that State. *See* Letter from Terry Turpin, Director of FERC Division of Gas – Environment and Engineering, *Constitution Pipeline Co., LLC*, Docket No. 13-499 (Jan. 29, 2016). However, the New York State Department of Environmental Conservation (DEC) ultimately denied Constitution’s application for a Clean Water Act section 401 certification for that portion of the pipeline to be sited in New York. Accordingly, at this time the Constitution Pipeline cannot be constructed.¹ Nonetheless, many New York State landowners have already had their land taken, with no clear process available for unwinding the eminent domain process. And permanent environmental damage – in the form of tree-clearing – has occurred.

The Constitution pipeline is not an isolated occurrence. In two other recent proceedings, FERC issued conditional certificates of public convenience and necessity for pipeline projects for which the State ultimately declined to issue the required Clean Water Act section 401 certifications. *See* Order Granting Abandonment and Issuing Certificates, *National Fuel Gas Supply Corp.*, Docket No. CP15-115, 158 FERC ¶61,145 (Feb. 3, 2017); Order Denying Motion to Dismiss Issuing Certificate, *Millennium Pipeline Company, L.L.C.*, Docket No. CP16-17-000,

¹ The Second Circuit upheld DEC’s denial of the section 401 certification for Constitution. *See Constitution Pipeline Co., LLC v. Seggos*, 868 F.3d 87 (2d Cir. 2017), *cert. denied* 138 S.Ct. 1697 (2018). Constitution petitioned FERC for a declaratory order finding that DEC waived its section 401 authority, but FERC denied the petition, Order on Petition for Declaratory Order, 162 FERC ¶61,014, Docket No. CP18-5-000, *Constitution Pipeline Co., LLC* (Jan. 11, 2018) and Constitution’s motion for rehearing, Order Denying Rehearing, 161 FERC ¶61,029, *id.* (July 19, 2018).

157 FERC ¶61, 096 (Nov. 9, 2016). In both of these cases, under current FERC practice, the eminent domain process to obtain rights-of-way from New York State landowners is available to project sponsors for pipelines that might never be constructed.²

FERC's certification process should ensure that eminent domain is a project sponsor's option of last resort, and the best way to ensure that goal is to not issue certificates of public convenience and necessity until a pipeline has received all necessary state permits and authorizations and is therefore ready to be built. This approach will ensure that when applicants use eminent domain, it will be for a project that will be constructed.

Waiting to issue a certificate until a pipeline is ready to be constructed also creates a greater incentive for pipeline applicants to work with landowners to obtain permission to access a proposed pipeline route, rather than rushing to Court to start the condemnation process upon receiving a conditional certification. Although FERC has suggested applicants should negotiate in "good faith" with landowners, it has left it to the courts to determine whether such good faith was used. *See, e.g.,* Order on Rehearing, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at ¶69 (June 15, 2018). Courts, however, are split on whether good faith is required. *See Millennium Pipeline Co. LLC v. Certain Permanent and Temporary Easements*, 552 Fed. Appx. 37, 39 (2d Cir. 2014) (noting split in circuits on whether good faith is required, and declining to resolve split in Second Circuit). It is apparent from eminent domain litigation that natural gas

² NFG petitioned the Second Circuit to review the section 401 denial. Oral argument on NFG's petition for review occurred on November 16, 2017, and the parties are still awaiting a decision. *See National Fuel Gas Supply Corp. v. NYSDEC*, 2d Cir. No. 17-1164. FERC ultimately held that DEC had taken too long to review of Millennium's application for a section 401 certification, *see* Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act, *Millennium Pipeline Co., L.L.C.*, Docket No. CP-16-17-000, 160 FERC ¶61,065 (Sept. 15, 2017), and the Second Circuit upheld FERC's conclusion, *see NYSDEC v. FERC*, 884 F.3d 450 (2d Cir. 2018).

companies make little effort to obtain right-of-ways without resorting to eminent domain. *E.g.* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. Permanent Easement for 0.25 Acres, et al.*, Docket No. 3:14-cv-2069 (N.D.N.Y. Feb. 24, 2015), *available at* 2015 WL 12564217 (record indicated that company made one offer and told landowner if he did not accept the offer, it would obtain easement through eminent domain); Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. Permanent Easement for 0.67 Acres, etc.*, Docket No. 1:14-cv-2023 (NDNY Feb. 21, 2015), *available at* 2015 WL 1638477 (record reflected that applicant made just one offer to landowner before resorting to eminent domain). By declining to issue a certificate until all state permits and authorizations are received, FERC will protect landowner rights and encourage the “good faith” negotiations that FERC favors. *See, e.g.*, Concurring Statement of Neil Chatterjee, *PennEast Pipeline Co., LLC*, Docket No. CP15-558, 162 FERC ¶ 61,053 (Jan. 19, 2018) (expressing concerns regarding certificate’s impact on landowners, and encouraging “pipeline companies and landowners to work with the Commission to maximize engagement and minimize the impacts on landowners going forward.”).

To facilitate the cooperative federalism in project review intended by FERC, FERC should complete its Environmental Assessment or Draft Environmental Impact Statement under the National Environmental Policy Act (NEPA) before state review of an application for a Clean Water Act section 401 certification commences. Environmental agencies such as DEC need the benefit of FERC’s general environmental review before they can conduct their more searching review of state water quality impacts. Accordingly, FERC should ensure that state environmental agencies have a full year from FERC’s completion of an Environmental Assessment or Draft Environmental Impact State to review a Clean Water Act section 401 application. Since states no longer have the option to flag an application as “incomplete” pending completion of FERC’s

environmental review, *see NYSDEC v. FERC*, 884 F.3d 450 (2d Cir. 2018), more applications will be simply denied without prejudice until FERC’s environmental review is completed.

Finally, FERC should require the applicant to obtain state and local permits necessary to minimize adverse environmental impacts. In certain past certification proceedings, FERC’s environmental review has relied on applicants obtaining various state and local permits to minimize adverse environmental impacts, and its Orders have incorporated that mitigation as a condition of the Certificate. *See Order Granting Abandonment and Issuing Certificates, National Fuel Gas Supply Corp.*, Docket No. CP15-115, 158 FERC ¶61,145, at 68 (Feb. 3, 2017) (noting that cumulative impacts of project would be mitigated by “measures required under other federal and state permits”); Environmental Assessment, at 19-21, *National Fuel Gas Supply Corp.*, CP15-115 (listing state and local permits applicable to project, and requiring applicant to “obtain all necessary permits and approvals”); *id.* at 52 (noting that applicant would need to develop compensatory mitigation plan to address permanent wetland impacts “as part of the NYSDEC . . . permitting process”); Final Environmental Impact Statement: Constitution and Wright Interconnect Project, at 1-13 to 1-17, *Constitution Pipeline Co., LLC*, CP13-499-000 (Oct. 2014) (listing various state and local permits applicable to project, and stating that Constitution would be “responsible for obtaining all permits and approvals”); *id.* at ES-13 (a “principal reason[]” for FERC’s conclusion that environmental impacts from the Constitution project would be acceptable was that Constitution “would be required to obtain applicable permits and provide mitigation for unavoidable impacts on waterbodies and wetlands through coordination with . . . NYSDEC”); *id.* at 2-20 (noting that “[w]aterbody crossings would be construction in accordance with federal, state, and local permits”); *id.* at 4-245 (Constitution would minimize adverse impacts from project construction by “complying with applicable federal and state permit

requirements.”). However, when applicants have been unable to obtain such state and local permits, they have gone to Court or back to FERC to argue that state and local permits are preempted by the Natural Gas Act and are not required. *See e.g.* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. NYSDEC*, Docket No. 1:16-cv-568 (March 16, 2017) (dismissing action seeking to hold state environmental permits preempted by Natural Gas Act); Request for Reconsideration and Clarification, etc., *National Fuel Gas Supply Corp.*, Docket No. CP15-115 (March 3, 2017) (seeking “clarification” from FERC that all state and local environmental permits were preempted by the Natural Gas Act). Because state and local environmental permits are necessary to minimize environmental impacts, FERC should continue to require that the applicant actually obtain such permits as a condition of its Certificate.

II. FERC SHOULD GRANT OR DENY REHEARING REQUESTS WITHIN 30 DAYS, AS REQUIRED BY THE NATURAL GAS ACT.

FERC should not use tolling orders to extend the pendency of rehearing petitions in order to avoid judicial review of FERC orders. FERC’s use of tolling orders undermines congressional intent, infringes upon property rights of landowners, and renders judicial review meaningless. Under the Natural Gas Act, parties cannot obtain judicial review of a FERC order unless they first move for rehearing of that order and FERC acts on the rehearing request. *See* 15 U.S.C. § 717r(b). While FERC considers a rehearing request, pipeline construction and permanent environmental damage may begin. *See id.* § 717r(c) (request for rehearing does not stay FERC order). Congress gave FERC 30 days to “act” on a rehearing request, or the request would be “deemed to have been denied.” 15 U.S.C. § 717r(a). This Congressional language clearly requires that FERC either grant or deny a rehearing request with 30 days, so that judicial review of the underlying order can proceed in a timely way. Yet FERC regularly uses tolling orders to unilaterally delay judicial review by months, without applicant or party consultation, allowing

natural gas infrastructure to be substantially completed before a Court can even review the FERC order authorizing such construction. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1364-65 (D.C. Cir. 2017) (project construction had started by the time FERC denied petitioner’s request for rehearing); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312 (D.C. Cir. 2014) (FERC took six months to deny rehearing request).

In the context of the Clean Water Act, FERC has concluded that similar language imposes a hard limit on a state’s consideration of an application. Specifically, Clean Water Act § 401(a) requires a State to “act” on an application for a certification with “a reasonable period of time (which shall not exceed one year)” or the certification requirements are deemed waived. 33 U.S.C. § 1341(a)(1). FERC has described this waiver language of section 401(a)(1) as “unambiguous.” Order Denying Rehearings and Motions to Stay, 161 FERC ¶ 61,186, at ¶38, Docket No. CP16-17-003, *Millennium Pipeline Co., LLC* (Nov. 15, 2017). Moreover, FERC has stated that “the length of the section 401 waiver period is one year” and “that the deadlines prescribed by federal law . . . are binding,” Order on Petition for Declaratory Order, 162 FERC ¶61,014, at ¶ 20, Docket No. CP18-5-000, *Constitution Pipeline Co., LLC* (Jan. 11, 2018). And yet when interpreting the Natural Gas Act’s similar mandate to “act” on a rehearing request within 30 days, FERC condones its own indefinite delay of judicial review, and harm from that delay, through the use of tolling orders.

FERC should be required to comply with the plain language of the Natural Gas Act by either granting or denying a request for rehearing within 30 days. This will ensure that parties have the opportunity to seek judicial review of FERC orders before project construction commences or is substantially completed.

CONCLUSION

For the reasons described above, FERC should revise its certification policy to ensure that the rights of states, landowners, and other interested parties are not overridden.

Respectfully submitted,

FOR THE STATE OF NEW YORK

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People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 2, Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC, Docket Nos. CP15-554-002; CP15-555-001; and CP15-556-001, August 10, 2018.



STATEMENT

Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC

Date: August 10, 2018

Docket Nos.: [CP15-554-002](#);
[CP15-555-001](#); and [CP15-556-001](#)

I chose not to participate in today's order denying rehearing of the Commission's October 13, 2017 order issuing a Certificate of Public Convenience and Necessity to the Atlantic Coast Pipeline (ACP) Project (CP15-554-002; CP15-555-001; and CP15-556-001) solely to enable those parties challenging the Certificate to have their day in court. If I had voted, the rehearing order would have failed on a 2-2 vote (Chairman McIntyre also is not participating in this proceeding), and pursuant to the requirements of section 19 of the Natural Gas, the appellate courts would not have had jurisdiction to review the Commission's decision to grant the Certificate.

I share many of the concerns articulated in Commissioner LaFleur's dissenting opinion and I do not believe that the ACP Project has been shown to be in the public interest. Accordingly, if I had voted today, I would have voted to grant rehearing. Further, I do not believe there would have been the opportunity to vote on this rehearing order after Commissioner Powelson departs leaving only three commissioners to participate in this proceeding for the foreseeable future.

This situation highlights the need for Congress to enact legislation amending the judicial review provisions of the Natural Gas Act and the Federal Power Act to account for the ability of an aggrieved party to seek redress in the courts of appeal. It is fundamentally unfair to deprive parties of an opportunity to pursue their claims in court, especially while pipeline construction is ongoing. Alternatively, the Commission could revise its practices so that a rehearing tolling order is withdrawn when the participating Commissioners are evenly divided on a rehearing order and there is no immediate prospect of a resolution. I have heard some suggest that action is unnecessary because the Commission rarely evenly splits on a matter. But, as today's order demonstrates, a tie vote is certainly possible even when all five commissioner seats are filled.



STATEMENT

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 3, People's Hearing Testimony of Maya van Rossum, the Delaware Riverkeeper, on behalf of the Delaware Riverkeeper Network, December 2, 2016.



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Good morning, I am Maya van Rossum, I am the Delaware Riverkeeper. My organization is the Delaware Riverkeeper Network. Today I will speak to just 3 of the myriad of problems we have experienced with FERC.

#1

In assessing pipeline proposals FERC adopts, as its own, the claims and information provided by the pipeline applicant, even when faced with evidence that the information is false and/or deficient in critical ways.

FERC's DraftEIS for the PennEast Pipeline was so embarrassingly poor that it was questioned by 9 federal and state agencies and thousands of public comments.

The PennEast DraftEIS failings included:

- Embracing claims of economic benefit while ignoring economic damages, including up to \$178 million in lost property value that will result;
- Ignoring the loss of \$53 million over 20 years of ecosystem services because of pipeline construction, including harms to drinking water, food supplies, recreation and nature dependent jobs;
- Relying upon blatantly false information, for example:
 - Accepting PennEast's assertion that along one 0.5 mile stretch of pipeline there were only 2 vernal pools and groundwater seeps when DRN monitoring found at least 12;
 - Asserting there were no private water supply wells or springs located within 150 feet of proposed pipeline construction, while just a cursory analysis found 10 confirmed or likely wells;
- FERC routinely ignored missing information, including:
 - the 8 threatened, endangered, or special concern mussel species that could occur in the pipeline path but were never even mentioned;

- the impacts from the estimated 3000 gas wells the pipeline will cause to be drilled and fracked.

How is it that the public and other agencies can find such significant deficiencies but FERC can not?

#2

FERC routinely embraces pipeline company claims of need which advance corporate goals rather than the public good or need.

FERC's PennEast DEIS asserts the project is needed:

- to “provide low cost natural gas”;
- to displace Gulf Coast gas with Marcellus shale gas;
- to “provide enhanced competition among natural gas suppliers and pipeline transportation providers”;
- to supply “flexibility”, “diversity”, and better pricing.

These are clearly corporate goals and gains, not public goods or needs.

It is neither morally nor legally legitimate for FERC to approve construction of a pipeline project, granting exemptions from state and local laws, giving the power of eminent domain, approving un-mitigatable and irreparable environmental and community harms, so a company can achieve corporate goals of greater profits and a competitive edge.

#3

After approving pipeline projects, FERC strips people of their right and ability to challenge the approval before the pipeline company gets the power of eminent domain and is given authority to begin construction.

FERC intentionally put the Delaware Riverkeeper Network in legal limbo for 15 months, while it issued over 20 Notices to Proceed for the Southeast Leidy pipeline. By the time we were released from that legal limbo, the pipeline company had cut trees along 21 miles of ROW on 209 acres of land, and inflicted irreparable harm to at least 8½ acres of pristine forested wetlands.

FERC's strategy meant that the NorthEast Upgrade Pipeline was fully constructed and in operation by the time the Delaware Riverkeeper Network won our legal challenge against FERC's review and approval, too late for any meaningful remedy.

FERC's routine disregard of facts, law and rights invalidates the integrity and defensibility of all its pipeline decisions.

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 4, Akiko Matsuda, *FERC Denies Rehearing Request on Algonquin Pipeline Expansion*, the Journal News, January 29, 2016.

lohud.com

FERC denies rehearing request on Algonquin pipeline expansion

Akiko Matsuda , amatsuda@lohud.com

Several hundred residents packed the Sept. 15, 2014 public hearing on the Algonquin pipeline expansion project at the Muriel Morabito Community Center in Cortlandt Manor. (Photo: Matthew Brown / The Journal News) Buy Photo

The Federal Energy Regulatory Commission (FERC) has rejected opponents' request to revisit its approval of the controversial Algonquin natural pipeline expansion project.

The decision was a blow to [northern Westchester community](#) members who have been trying to reverse the federal approval, citing, among other concerns, their belief that the pipeline is too close to the Indian Point nuclear power plant in Buchanan.

"I'm very disappointed on behalf of my community," said Cortlandt town Supervisor Linda Puglisi, who, along with Town Board members, had asked the federal agency to reexamine its approval, granted in March. "They basically disregarded all of our concerns and all of our issues, and once again, rubber stamped the approval of this large expansion of a natural gas pipeline that goes through our town, through northern Westchester, going up Northeast, and it really doesn't benefit anybody in our community. It just devastates a lot of our land."

The rerouted 42-inch pipeline would pass only 500 feet away from Buchanan-Verplanck Elementary School, which serves part of Cortlandt, she noted.

Spectra Energy's Algonquin Incremental Market (AIM) project is set to expand existing pipeline systems in New York and three other states to carry more natural gas north from Pennsylvania's Marcellus Shale. The project, under construction now, will replace parts of the pipeline as well as run a new section through Stony Point, under the Hudson River and into Verplanck and Buchanan.

[Opponents](#) — including Stop the Algonquin Pipeline Expansion and Riverkeeper — argued in their rehearing request that the commission improperly relied on a U.S. Nuclear Regulatory Commission's report that concluded that a potential rupture of the proposed pipeline poses no threat to the safe operation or safe shutdown of the Indian Point nuclear plant. An independent analysis should have been conducted based on the challenges posed by the project, they said.

In its decision issued Thursday, the commission disagreed with the opponents, saying that the NRC is the "expert authority and enforcing agency for evaluating and ensuring the safe operation of nuclear facilities, including risk associated with external factors."

Marylee Hanley, the pipeline's spokeswoman, said in a statement that she was pleased with the federal agency's reaffirmation of its approval.

"Algonquin will continue with its construction, in accordance with the FERC certificate, to meet the project's critical construction timeframes and safely transport additional supplies of clean, reliable, domestic natural gas to heat the region's homes and businesses," she said.

The fact that it took more than nine months for FERC to issue its rejection allowed the pipeline project to proceed without legal challenges, complained Courtney Williams of Peekskill, vice president of Safe Energy Rights Group.

"While local municipalities and residents were waiting for FERC's decision, Spectra was allowed to seize private property by eminent domain and proceed with destruction of homes, roads, and parklands," she said.

[Twitter: @LohudAkiko](#)

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People's Dossier: FERC's Abuses of Power and Law
→ Stripping People's Rights

Stripping People's Rights Attachment 5, Earthjustice
Motion for Stay, Constitution Pipeline, Docket Nos.
CP13-499 and 13-502, January 11, 2016.

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

Constitution Pipeline Company, LLC)	Docket No. CP13-499
)	
Iroquois Gas Transmission System, L.P.)	Docket No. CP13-502

**MOTION FOR STAY PENDING REHEARING
OF CATSKILL MOUNTAINKEEPER; CLEAN AIR COUNCIL; DELAWARE-OTSEGO
AUDUBON SOCIETY; RIVERKEEPER, INC.; AND SIERRA CLUB**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. § 385.212, Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Riverkeeper, Inc.; and Sierra Club (collectively, “Intervenors”) hereby move for a stay of: (1) the Commission’s December 2, 2014 Order Issuing Certificates and Approving Abandonment (“Order”) granting Constitution Pipeline, LLC (“Constitution”) authorization under section 7(c) of the Natural Gas Act (“NGA”) to construct and operate an approximately 124-mile-long, 30-inch-diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania (“Pipeline Project”), to a proposed interconnection with Iroquois Gas Transmission System (“Iroquois”) in Schoharie County, New York (“Interconnection Project”) (collectively, the “Projects”), and (2) construction and any other land disturbance conducted under the Order while the Commission reviews Intervenors’ request for rehearing.

On December 30, 2014, Intervenors filed a request for rehearing and rescission of the Order (“Rehearing Request”) with the Commission. Petitioners asked FERC to reconsider its decision because the environmental review underlying the conclusions in the Order failed to meet the requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, 40 C.F.R. pts. 1500–08, and because the Commission’s decision to approve the Projects was not required by the public convenience and necessity as

provided by the NGA, 15 U.S.C. § 717f(e). The Commission granted the Rehearing Request on January 27, 2015, but only to give itself more time to consider the matters raised by Intervenors. Almost a year later, FERC still has not provided a final decision on the Rehearing Request.

Constitution now has sought authorization to proceed with construction by felling trees in the workspaces. If the Commission were to allow Constitution to proceed, construction of the Projects would go forward without the benefit of the meaningful environmental analysis NEPA requires. Construction will adversely affect ecologically important resources in which Intervenors and their members have a significant interest. The felling Constitution seeks to begin in mere days will result in the clearing of huge swaths of forest, permanently fragmenting important tracts of interior forest, jeopardizing threatened species, and increasing the potential for waterway contamination from runoff. Noise, dust, and traffic from future construction activities also will disturb and harm the communities living adjacent to the Pipeline Project's construction areas. Thus, absent a stay, Intervenors, through their members who live and recreate near the construction areas, will be harmed irreparably.

In contrast, Constitution and Iroquois will suffer comparatively little harm and inconvenience by not being permitted to proceed with construction and pre-construction activity until the impacts of their actions are understood properly. Compliance with the law is a cost of doing business that does not trump the harms to the environment and the welfare of Intervenors' members that will occur absent a stay. Constitution and Iroquois have waited more than a year since the Order was issued, and if the Commission acts promptly on Intervenors' Rehearing Request, any additional delay caused by a stay should be minimal. It also is in the public interest that any construction and site preparation activities by Constitution or Iroquois be stayed while FERC reconsiders whether it failed to properly assess the environmental impacts of the Projects

and therefore did not comply with NEPA in issuing the Order. Accordingly, the balance of the equities weighs in favor of granting the stay pending rehearing.

I. Factual Background

On December 2, 2014, the Commission issued an Order conditionally approving the construction and operation of two projects proposed by Constitution and Iroquois. FERC authorized Constitution to construct and operate a 124.4-mile, 30-inch-diameter interstate natural gas transmission pipeline designed to provide up to 650,000 dekatherms per day of transportation service, along with various associated facilities. Order ¶ 1. The Order also conditionally approved Iroquois' request to construct and operate pipeline connection and compression facilities and to lease the incremental pipeline capacity associated with such facilities, located at the eastern terminus of the proposed pipeline in Wright, New York, to Constitution. *Id.* ¶ 2.

Constitution now seeks authorization to commence construction activities by felling an unspecified but likely large number of trees. Construction wants to cut down swaths of forests and remove large amounts of other vegetation. *See, e.g.*, FERC, Final Environmental Impact Statement (“FEIS”), Constitution Pipeline and Wright Interconnect Projects, Dockets CP13-499, CP13-502, PF12-9, at ES-5 (Oct. 2014). Future construction activities will entail excavating miles of open trench, which may be done by blasting. *Id.* at ES-6. Constitution will employ huge equipment and trucks to undertake these activities, creating dust, increasing noise, and inducing heavy truck traffic for months. *See, e.g., id.* at ES-9; 2-25–2-26. Many of the affected areas rely on single-lane, poorly-maintained roads that will be rendered increasingly dangerous by large trucks ferrying construction equipment and workers traveling to and from sites. Declaration of Michelle Fiore (“Fiore Decl.”) ¶ 8, attached hereto as Exhibit 1; Declaration of Carolyn Melszer (“Melszer Decl.”) ¶ 12, attached hereto as Exhibit 2; Declaration of Meryl Solar (“Solar Decl.”)

¶ 7, attached hereto as Exhibit 3. Local waterways will be impacted by increased runoff and may be contaminated by herbicides and fuel or oil used by heavy construction vehicles. *See* FEIS at 4-29; Fiore Decl. ¶ 8; Declaration of John McKeeby (“McKeeby Decl.”) ¶ 11, attached hereto as Exhibit 4.

Intervenors participated in the FERC process from the beginning and throughout the Commission’s proceedings, identifying major deficiencies in FERC’s analysis of the Project’s environmental impacts. *See, e.g.*, Catskill Mountainkeeper et al., Comments on Application of Constitution Pipeline Company, LLC for Certificate of Public Convenience and Necessity, Docket CP13-499 (July 17, 2013); Catskill Mountainkeeper et al., Comments on Draft Environmental Impact Statement for Constitution Pipeline Company, LLC for Certificate of Public Convenience and Necessity, Docket CP13-499 (Apr. 7, 2014) (“DEIS Comments”). The Commission’s errors include: basing its assessment on incomplete information; refusing to take a hard look at the indirect and cumulative impacts of the Project; and failing to properly consider purpose and need, reasonable alternatives, and the impacts of the Northern Energy Direct Pipeline that will follow the same route as the Pipeline Project for more than 100 miles. *See* DEIS Comments; *see also* Application of Tennessee Gas Pipeline Co., LLC for a Certificate of Public Convenience and Necessity to Construct, Install, Modify, Operate, and Maintain Certain Pipeline and Compression Facilities and to Abandon Facilities, at 10–11 (Nov. 20, 2015). For the same reasons, Intervenors filed a timely Rehearing Request with the Commission on December 30, 2014 seeking rehearing and rescission of the Commission’s Order. Catskill Mountainkeeper et al., Request for Rehearing, Dockets CP13-499, CP13-502 (Dec. 30, 2014). Intervenors also filed their opposition on January 11, 2016 to Constitution’s request to fell countless trees without fully complying with the Order and prior to the Commission issuing a

final determination on the Rehearing Request. Catskill Mountainkeeper et al., Answer to Constitution Pipeline Company, LLC's Request for Partial Notice to Proceed, Docket CP13-499 (Jan. 11, 2016).

Almost a year has passed since FERC issued its tolling order on January 27, 2015, granting Intervenors' Rehearing Request but only insofar as the Commission needed more time to develop its response. The January 27 Order did not indicate how much additional time the Commission will need beyond the 30-day response period provided under the NGA. In other matters, FERC has taken widely varying amounts of time to issue final decisions on pending requests for rehearing, but few have been as extensive as the delay in this case.¹ While communities await a decision, the Commission has given project applicants wide rein to undertake extensive construction activities causing the precise environmental harms alleged to have been insufficiently analyzed by FERC. With little sense of when the Commission might issue a final decision that can be challenged in court, affected intervenors understandably become frustrated at their lack of a remedy to address their injuries.

II. Justice Requires That the Commission Stay Its Order.

Under the Administrative Procedure Act, the Commission has the authority to stay its actions when "justice so requires." 5 U.S.C. § 705. The Commission should grant a stay when: (1) the party requesting the stay will suffer irreparable injury without a stay, (2) issuing the stay may not substantially harm other parties, and (3) the stay is in the public interest. *See Ruby*

¹ The delays the Commission has imposed in other projects have varied in duration. For example, the delay in the Corpus Christi liquefied natural gas export terminal application was two months whereas the ongoing delay in the Algonquin Incremental Market Project has lasted more than eight months.

Pipeline, L.L.C., 134 FERC ¶ 61,020, at ¶ 15 (2011). Construction will permanently destroy environmental resources—starting with significant swaths of interior forest—that are important to Intervenor and their members. Fiore Decl. ¶ 14; McKeeby Decl. ¶ 11; Melszer Decl. ¶ 8. Future construction activities will cause noise, dust, and traffic impacts that will transform quiet rural portions of Pennsylvania and New York into industrial zones. Solar Decl. ¶ 6; Fiore Decl. ¶ 15. By contrast, staying the Order and delaying any construction activity during the brief time it should take the Commission to decide the Rehearing Request will cause limited harm to companies that have waited more than 13 months since the Order was issued to seek permission to begin construction. Granting this stay request is in the public interest because it will ensure that Intervenor and their members have a remedy at law to address their injuries. Justice therefore requires that FERC grant Intervenor’s request to stay the Order and all construction activities.

A. A Stay Is Necessary to Avoid Irreparable Injury.

Absent a stay pending the Commission’s review of the Rehearing Request, the organizational Intervenor, through their members, will suffer irreparable injury. Constitution has asked for permission to fell trees—including the permanent removal of interior forest—that will forever alter the landscape where Intervenor’s members live and recreate. Fiore Decl. ¶ 8; McKeeby Decl. ¶ 11; Solar Decl. ¶ 4. There is no doubt that Intervenor’s members will suffer injuries that are “both certain and great” and “actual and not theoretical.” *Wis. Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Ruby Pipeline*, 134 FERC at ¶ 17 (applying the definition of “irreparable injury” from *Wisconsin Gas Co.* to a request that FERC stay construction).

Harm to one's interest in the environment almost always is irreparable, because damage to the environment "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Ak.*, 480 U.S. 531, 545 (1987). Without a stay, Constitution will cut down trees; dig and blast trenches through private property, forests, wetlands, and streams; and operate huge trucks and heavy machinery in close proximity to homes. There is no dispute that these actions will result in extensive environmental damage that will permanently change the natural features of the areas around the planned pipeline route. *See, e.g.*, FEIS at 2-7 (acknowledging permanent land impacts).

Construction of the Pipeline Project will forever fragment interior forest and impair waterways and wetlands. The trees Constitution seeks to cut down form some of the last remaining habitat in the area for certain species of birds, such as the killdeer. Melszer Decl. ¶ 8. Many of Intervenor's members live near and recreate in these forests and will be irreparably injured by the loss of the trees, reduction of threatened species' populations, and introduction of invasive species. *See, e.g.*, Fiore Decl. ¶ 14; McKeeby Decl. ¶ 11; Melszer Decl. ¶ 8. Constitution's removal of trees and other vegetation also will cause increasing runoff in already flood-prone areas. *See, e.g.*, McKeeby Decl. ¶ 11.

Future construction activities also threaten waterways and wetlands with potential discharges from construction activity and equipment. *See* FEIS at 4-29; McKeeby Decl. ¶ 11. Digging and blasting trenches close to and in some cases through streams and wetlands will cause sediment to run into and degrade the quality of these waterbodies. Construction vehicles also can leak and spill contaminants such as diesel into sensitive areas. FEIS at 4-89. Moreover, Constitution plans to use herbicides to remove some vegetation, and these chemicals can run off

and affect both surface and ground water, some of which supplies Intervenors' drinking water. Fiore Decl. ¶ 13; Melszer Decl. ¶ 9. Constitution's construction thus will cause damage that cannot be remedied easily, if at all. *See, e.g., League of Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (finding that the logging of thousands of mature trees "cannot be remedied easily if at all" because "[n]either the planting of new seedlings nor the paying of money damages can normally remedy such damage"); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding that injury to one's "ability to view, experience, and utilize [recreational areas] in their undisturbed state" was irreparable and weighed in favor of a stay) (internal quotation marks omitted).

Construction of the Pipeline Project also will require months of heavy industrial activity in normally quiet communities. Large trucks and other vehicles transporting equipment and materials to the Pipeline Project sites will increase traffic on poorly-maintained country roads and pose a real danger to local drivers who travel these routes daily. Solar Decl. ¶ 7; Melszer Decl. ¶ 12; Fiore Decl. ¶ 12. Traffic and construction activity—particularly cutting trees and blasting—also will create considerable noise that will disturb residents' quiet enjoyment of their homes and scare away species that Intervenors' members enjoy viewing. Fiore Decl. ¶ 11; Solar Decl. ¶ 6. Dust from increased traffic and soil disturbance will coat nearby homes and other property, causing damage and degrading air quality. Solar Decl. ¶ 5; Fiore Decl. ¶ 10. Aesthetic injuries also will result from the visual blight of felled trees, missing tracts of forest, trenches, and massive industrial equipment. Melszer Decl. ¶ 8. Even if the impacts will last for only the construction period, the injuries Intervenors' members will suffer from construction are irreparable because they cannot be remedied with monetary damages. *See San Luis Valley Ecosystems Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1241 (D. Colo. 2009).

While the Order concludes that the Projects' significant environmental impacts can be mitigated, Order ¶ 3, the proposed mitigation measures do not diminish Intervenor's claims of irreparable injuries. The mitigation measures do not stop the destruction of forest; eliminate the dangers posed by truck traffic; or alter the fact that construction at the scale required by the Pipeline Project will transform quiet, rural areas into dusty, noisy construction zones. The purpose of a stay is to preserve the *status quo* pending the Commission's review of its decision. See, e.g., *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir.), *vacated in part on other grounds sub nom. W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) ("By maintaining the Status quo [sic], while additional environmental studies are performed, or additional alternatives are considered, an injunction ensures that there will be at least a possibility that the agency will change its plans in ways of benefit to the environment. It is this possibility that courts should seek to preserve." (internal quotations and citations omitted)). Without a stay pending review of the Rehearing Request, Constitution and possibly Iroquois will be permitted to complete extensive construction work in advance of FERC's decision on whether the Projects' environmental impacts have been analyzed adequately under NEPA. When a showing of potential environmental injury is combined with a procedural violation of NEPA, "courts have not hesitated to find a likelihood of irreparable injury." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009) (internal citation omitted).

B. Granting a Stay Will Not Cause Any Significant Harm.

Constitution and Iroquois will not be harmed significantly by a stay of the Order. The applicants have waited more than 13 months since the Order was issued to ask for permission to begin construction. Any delay caused by the grant of a stay likely would be short-lived, as FERC already has had almost a year to prepare its response to the Rehearing Request. The

minor harm from what should be a brief delay pales by comparison with the permanent environmental damage and other irreparable injuries to community welfare that would occur absent a stay. *See Citizen's Alert Regarding the Env't v. U.S. Dep't. of Justice*, Civ. A. No. 95-1702 (GK), 1995 WL 748246, *11 (D.D.C. Dec. 8, 1995) (finding that potential loss of revenue, jobs, and monetary investment that would be caused by project delay did not outweigh “permanent destruction of environmental values that, once lost, may never again be replicated”). That short-term delay to ensure that the Projects comply with the law is a normal part of doing business, which Constitution and Iroquois easily can bear while the Commission answers serious questions about whether the environmental review mandated by NEPA was sufficient.

C. A Stay Is in the Public Interest.

The public interest weighs heavily in favor of a stay. Granting the stay will prevent irreparable harm to the environment and the community. The stakes are high for the people living and recreating near the Projects: construction will permanently destroy precious natural areas and is a direct threat to their rural quality of life. To subject communities to such impacts while FERC considers the Rehearing Request would deprive Intervenors and their members of the chance to obtain a full remedy under the law.

The public interest also is served by ensuring that FERC complies with NEPA prior to authorizing permanent impacts to the environment. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (the public interest in completing a highway project “must yield to the obligation to construct the [p]roject in compliance with the relevant environmental laws”). In enacting NEPA and demanding compliance “to the fullest extent possible,” Congress has underscored the public interest in preserving our environment. *See* 42 U.S.C. § 4332; *see also Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) (finding that “the

preservation of our environment, as required by NEPA . . . is clearly in the public interest”),
abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).
NEPA also is meant “to serve the public and the agency *before* major federal actions occur.”
Found. on Econ. Trends v. Heckler, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original);
see also Brady Campaign to Prevent Gun Violence, 612 F. Supp. 2d at 24 (citing to *id.*). A stay
will promote the public interest and the goals of NEPA by preserving existing conditions
pending review of whether the Commission’s NEPA assessment was adequate. *See Wild
Rockies*, 632 F.3d at 1138 (recognizing “the public interest in careful consideration of
environmental impacts before major federal projects go forward”); *Found. on Econ. Trends*, 756
F.2d at 157 (finding that NEPA underscores the public interest in vetting environmental
consequences before resources are committed).

III. Conclusion

For all the reasons set forth above, Intervenors request that the Commission grant a stay
of all construction, land-disturbing activity, and tree felling until the Commission makes a
decision on the Rehearing Request.

Respectfully submitted on this 14th day of January, 2016,

/s/ Moneen Nasmith

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Counsel for:

Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society;
Riverkeeper, Inc.; and Sierra Club.

Exhibit 1

DECLARATION OF MICHELLE FIORE

1. I, Michelle Fiore, set forth that I am over the age of 18 years and am competent to attest to the facts contained in this Declaration.

2. I am a member in good standing of Catskill Mountainkeeper, a non-profit advocacy organization dedicated to protecting and preserving the unique and irreplaceable Catskill Region of New York State. The organization represents the citizens of seven counties in New York State—Albany, Delaware, Greene, Otsego, Schoharie, Sullivan and Ulster—as well as both the Upper Delaware and Susquehanna River basins which reach from Cooperstown well into Pennsylvania and include the vast forest preserve of the Catskill Park. Catskill Mountainkeeper is committed to vigorously fighting threats to the region and pursuing opportunities for sustainable growth. It focuses on maintaining the Catskill Region's capacity to provide pure unfiltered water to over 17 million people; continuing as an important food shed that provides local, healthy food to the entire NY metro area; and protecting the area's authentic wilderness so that it can be enjoyed by all.

3. I live at 693 Baldwin Road, Summit, New York in Schoharie County with my husband, three daughters, and two dogs. I have lived here for 18 years. We own 30 acres of property that is zoned for agricultural use.

4. We bought this property and moved here from Long Island because we wanted to raise our kids in a safe and healthy environment. We wanted to live where we can get outdoors and enjoy nature's beauty. We love our home and property and plan to retire here. We've already built a second driveway on our property that we plan to use to access a future smaller retirement home. We want to build that smaller house once our kids are grown, split the property, and sell our current larger house so that we can retire.

5. Our entire family spends a lot of time outdoors and places a great value on preserving our local forests and protecting the species in our area. My husband spends as much time outside as he can. His quality of life depends heavily on being able to enjoy our property and the surrounding area in their current rural state. Our two dogs also run free on our property.

6. The Constitution pipeline will pass directly through our property and at least 70–80 feet of pipeline will be located on our land. In places, the pipeline will be within 800 feet of our current house. Having this pipeline on our property so close to our home will lessen the value of our property, both because of safety concerns and because constructing the pipeline will alter our property.

7. To build the pipeline, Constitution will have to dig a massive trench through our land. This is going to require blasting because there is a lot of shale under our property. The pipeline route also goes right under the second driveway we built for our future retirement house. Constitution said it will try to go underneath the driveway but can't guarantee that the driveway won't be dug up. Building the pipeline is going to also require removing part of a stone wall on our land and displacing a number of large metal sculptures that my husband and his father made and that are on display in our yard. I am concerned that the construction will seriously damage our driveway, stone wall, and my husband's sculptures.

8. Constitution will be cutting down a number of trees on our property. The company also will remove any other vegetation along the route, potentially by using herbicides. One of the reasons we bought this property was the trees on, bordering, and near our land. Some of these trees are extremely old and would take decades to regrown.

9. The construction of the pipeline will drastically undermine our quality of life. Our property will be crawling with strange workers and littered with huge pieces of equipment. I

am concerned for the safety of my daughters and me with so many strangers permitted on our land. I won't be able to tell the difference between who works for the pipeline company and who is a potentially dangerous trespasser. We normally would use our dogs for security, but I can't let the dogs out of the house while construction is ongoing. I would be too worried that they would be harmed by the huge construction equipment, dangerous activities like blasting, or even by the construction workers themselves.

10. Throughout construction, we will experience dirt and dust from the equipment, the digging, and the blasting. We will have to keep our windows closed, even during the summer months, to limit the dust that enters our home. The dust also will coat everything around the construction site, and cause damage to our house, cars, and any other possessions we have outside. The dust also will harm and possibly kill nearby plants and animals and make it harder for me and my family to breathe.

11. Construction activities also will be extremely noisy. We will have to live through blasting, tree clearing, and the use of heavy machinery right near our home. I am concerned that nothing in FERC's Order allowing construction to proceed keeps Constitution from constructing at night. The noise from Having a major industrial construction zone in our front yard will drastically undermine our quality of life.

12. Building the pipeline will drastically increase the number of large trucks and other traffic on our rural roads. Workers will need to get to and from the sites and heavy equipment will need to be hauled in. More traffic likely will make it dangerous to drive and be near the streets in our neighborhood. Our road is a 2½-mile horseshoe, so increased traffic is a particular problem on the tight turns. If there are any road closures, my family and I will need take a 2½-mile detour to get to the nearest main road.

13. I also am extremely concerned about Constitution using herbicides to remove vegetation from the pipeline path. We live right over an aquifer and draw water from a well. We've had problems in the past with our water being contaminated by e. coli when our neighbor pumped waste into a stream that was 800 feet away from our property. It took months to resolve and showed that what goes into the stream ends up in our drinking water. I am very worried that herbicides used by Constitution will runoff into the water bodies on or near our property and make our well water hazardous to my family's health.

14. Our family values the rural quality and natural beauty of our area. The pipeline is going to have a very negative effect on the local forests and animal populations. Constitution is going to cut down a huge number of trees and drive away or even cause the death of local animals. Use of herbicides in the area could contaminate local waterways and harm plants and animals.

15. The construction of this pipeline is going to fundamentally undermine our ability to use and enjoy our property, neighborhood, and to maintain the quiet, rural lifestyle we moved here to experience. Construction can't be allowed to proceed while FERC is considering Catskill Mountainkeeper and others' requests that it reconsider its decision to allow this pipeline to be built.

Executed on January 12, 2016


Michelle Fiore

Exhibit 2

DECLARATION OF CAROLYN MELSZER

1. I, Carolyn Melszer, set forth that I am over the age of 18 years and am competent to attest to the facts contained in this Declaration.

2. I have been a member in good standing of the Sierra Club, a 501(c)(3) not-for-profit, volunteer-led environmental organization for the last five years. The Sierra Club is actively engaged in working to protect the health and wellbeing of the communities in New York. Sierra Club's mission is to explore, enjoy and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club's mission includes protecting and restoring the quality of wild places, such as national parks, forests and wilderness areas, enjoyed by our members for their scenic views and vistas.

3. I live at 581 Baldwin Road, Summit, New York in Schoharie County with my husband. We own 5.6 acres of property. I have lived here for 32 years; this is where we raised our children. Our son lives next door on 22 acres.

4. We love the country and the rural area we live in. We are very fortunate to be surrounded by natural beauty and love to see wildlife passing through our property. We also enjoy listening to and seeing all the species of birds that nest in or travel through our county. We greatly value living in a quiet and forested area. We have a stream with pristine water running through our property.

5. The Constitution pipeline will pass about half a mile from our property. Our neighbor whose pond feeds into the stream on our property has agreed to allow the pipeline onto his land. I am worried that runoff from the construction on our neighbor's property will end up

in his pond and flow into our now-pristine stream. Our son also lives closer to the pipeline route and I am worried that his health will be impacted by the construction of the pipeline.

6. To build the pipeline, Constitution will have to dig a massive trench through our area and from one end of our town to the other. The construction of the pipeline is really going to undermine our quality of life. The noise, dust, and traffic from construction will drive off tourists and destroy our community's quiet atmosphere.

7. Construction activities will be extremely noisy. I have no doubt that we will be able to hear the tree clearing and blasting activities from our home and that this will disturb us and prevent us from opening windows and enjoying the outdoors during the warmer months.

8. I am very worried about how construction is going to affect the forests, waterways, and animals in our area. Constitution will be cutting down a large number of trees in our neighborhood and town. This is going to scar our community and create a very negative visual impact. The killdeer birds nest right in the middle of a field that is going to be used for the pipeline and the construction will destroy this nesting area. The noise and dust of construction could drive away or badly harm other local wildlife that my husband and I enjoy being able to see from our property.

9. The company also will remove some other vegetation along the route with herbicides. I am very concerned that the herbicides could runoff into local waterways and contaminate them. Our town relies on well water, which starts as surface and ground water. I worry that the herbicides could make our well water harmful to my family's health.

10. The dust from construction will coat everything around the sites where they are digging trenches and doing other work, and cause damage to passing cars and nearby plants. We will need to drive by the trenches several times a day because that's the most direct way for us to

access the main road. I am worried that dust and debris from the construction sites or from passing construction vehicles could damage our car and potentially affect our breathing.

11. Building the pipeline will cause a massive increase in the number of large trucks and other traffic on our two-lane roads. Those roads already are in bad shape and there is no money to fix them. These trucks are going to make the problem worse.

12. The main road in and out of town, State Route 10, is in very poor condition and there is no money to repair this New York State road. This construction will make the road worse and will make travelling hazardous. Our own road, Baldwin Road, is an oil and stone road, not made for heavy traffic and construction trucks will destroy it. My husband and I are going to be a lot less safe having to share narrow and poorly-maintained roads with these huge vehicles. With only one-lane for each direction of traffic, trying to pass a big truck is a huge danger. My husband also is a first responder and the congestion caused by the increased traffic could delay his ability to respond to medical emergencies and make it more dangerous for him to do so.

13. Our town has suffered considerable economic hardships and is a mess. We need something to draw people back, but this pipeline is going to do the opposite. My friend tried to sell her son's property in Summit. The sale was turned down twice specifically because the pipeline was going through the property. The pipeline is going to damage our natural resources and decrease our property values. This pipeline is the last thing people in this area need.

Executed on January 9, 2016

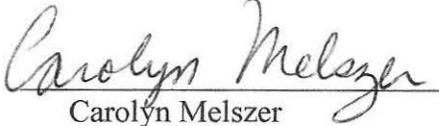

Carolyn Melszer

Exhibit 3

DECLARATION OF MERYL SOLAR

1. I, Meryl Solar, set forth that I am over the age of 18 years and am competent to attest to the facts contained in this Declaration.

2. I am a member in good standing of the Clean Air Council, a non-profit organization dedicated to protecting and defending everyone's right to breathe clean air. The Clean Air Council works through a broad array of related sustainability and public health initiatives and uses public education, community action, government oversight, and enforcement of environmental laws to improve environmental health in the mid-Atlantic region. The Clean Air Council also is committed to fostering clean energy sources using non-polluting technologies.

3. I live on 5 acres of property at 39 Hall Road in New Milford, Pennsylvania. My home is directly at the intersection of PA-492 and Hall Road, two normally quiet thoroughfares. Thirteen years ago, I took my savings and bought this property and its beautiful country house as a present to myself for retirement. I moved here for the rural quality of life, including the fresh air and the tranquility.

4. The Constitution pipeline will go directly adjacent to the back of my property. It will require cutting down trees and altering the rural landscape that led me to move here. My home is less than 2,000 feet from the Constitution pipeline right-of-way.

5. To get to the area where the pipeline will be constructed via the closest access road, trucks and other major equipment will need to turn off of PA-492 onto Hall Road, passing directly by my house. My front door is less than 50 feet from the road. Having trucks and other construction equipment pass so close to my home will cause a huge disruption to my quality of life. The exhaust from these vehicles will contaminate the air I breathe. The dust and exhaust will coat my home's exterior and cause damage. The dust, fumes, and poor air quality also will

keep me from opening my windows during the warmer months and enjoying the fresh air I moved here to experience.

6. Constitution's building activities also will transform my neighborhood from a peaceful rural area into a noisy industrialized construction zone. The increased truck and other traffic will create a lot of round-the-clock noise that will keep me from enjoying the outdoors or opening my windows. The pipeline trench digging, blasting, and tree cutting also will cause a lot of noise and make it impossible for me to enjoy my property.

7. Hall Road is a narrow dirt road and the large trucks and construction equipment passing on it will cause wear and tear to the road itself and damage to the adjacent property. My property borders both sides of the road. Passing wide trucks that end up on the shoulder of the road will tear up the grass and soil on my property. Even if they stay on the road itself, these vehicles kick up rocks and other debris that lands on my property, kills the grass and other vegetation, and keeps anything from growing. In short, Constitution's construction activities will cause significant harm to both me and my property.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on January 12, 2016



Meryl Solar

Exhibit 4

DECLARATION OF JOHN MCKEEBY

1. I, John McKeeby, set forth that I am over the age of 18 years and am competent to attest to the facts contained in this Declaration.

2. I am a member in good standing of Riverkeeper, Inc., a nonprofit organization committed to protecting the environmental, recreational, and commercial integrity of the Hudson River and its tributaries, and safeguarding the drinking water of nine million New York City and Hudson Valley residents.

3. I live at 2031 Burtonsville, in the Village of Burtonsville, in Montgomery County. I have lived at that address since 1989. My home is located directly on Schoharie Creek. Schoharie Creek flows into the Mohawk River, the largest tributary of the Hudson River. My home is located downriver from the location where the Constitution pipeline would cross Schoharie Creek.

4. I am deeply committed to protecting the water quality of the Hudson River watershed. I am the Executive Director of the Schoharie River Center ("SRC") and am very involved with all aspects of the Center's activities, including spending a large amount of time on and around Schoharie Creek. The SRC is a not-for-profit organization dedicated to educational and cultural programming about Schoharie Creek and the communities which make up the Schoharie Creek Valley. The Center also sponsors an Environmental Study Team ("EST") program, which engages middle school and high school age youth to work with ecologists and aquatic biologists to study, monitor, and improve the water quality of local streams, rivers, and lakes. While learning about their environment, EST members go hiking, swimming, biking, cross-country skiing, snowshoeing, canoeing, and kayaking, on and around Schoharie Creek. As the Executive Director of the SRC, I also am the program director for the Center's award winning EST Environmental Education and Youth Development program. In this capacity I

provide direct outdoor-based experiential education programming to youth ages 12–18 years, and oversee the day-to-day operations of the SRC and its environmental education, cultural, and arts programming.

5. As Executive Director of the Center, I also have worked hard to address the large problem of sedimentation in Schoharie Creek. Particularly after the flooding damage caused by Hurricane Irene, there are large deposits of clay along the banks of the Creek that have been exposed. Once exposed, these clay deposits liquefy when it rains and runoff into Schoharie Creek, compromising the water quality of the Creek. The sediment also flows into the Mohawk River, which has had to undergo dredging to maintain navigability. Individuals at the SRC and I have been trying to reduce this problem by replanting vegetation along clear areas of the Creek's bank. This work has been done along an 18-acre natural forest and wooded riparian area nature preserve owned by the SRC in Burtonsville, where we have planted close to 3000 native trees and other plants in an effort to reduce stream bank erosion and sedimentation on the Schoharie. In addition, volunteers from the SRC and our EST programs have assisted in riparian area replanting and restoration projects on the Schoharie Creek near the villages of Blenheim and Breakabeen.

6. I spend a lot of my time in and around Schoharie Creek. From the late Spring throughout the Summer and into the Fall, I spend time fishing, kayaking, and swimming in the Creek. I routinely am by or in the Creek during these months at least 6 times per week. Enjoying the beauty and tranquility of the Creek, including observing local wildlife like our population of bald eagles, is something I do on almost a daily basis.

7. I often frequent the area of the Schoharie Creek where Constitution plans to construct its pipeline crossing. This area of the Creek is wide and deep and is particularly good

for fishing. It also is an area where I can easily gain access to the Creek for activities such as canoeing, kayaking, nature study, and water quality monitoring.

8. Constructing a pipeline crossing across Schoharie Creek and the right-of-way leading to and from the Creek will greatly impair my use and enjoyment of the Creek.

9. The use of heavy construction equipment, including equipment to allow for trenchless crossing of the Creek, will create noise and impair my ability to fish and kayak in Schoharie Creek. The noise and dust of construction also will drive away important wildlife such as bald eagles.

10. Constitution's construction of the pipeline crossing and the right-of-way will further interfere with my boating and other recreational activities on the Creek by restricting water access to the existing public access point adjacent to its planned pipeline route.

11. Moreover, I believe that Constitution's construction activities and removal of vegetation near Schoharie Creek will adversely impact the Creek's water quality and undermine SRC and my efforts to improve the water quality of the Schoharie. The removal of additional trees and other vegetation around Schoharie Creek will increase the amount of sediment that reaches the Creek from run-off. By clearing trees and using heavy construction equipment so close to the Creek, Constitution also will create channels in the surface that make it easier for contaminants like agricultural run-off to reach Schoharie Creek. The presence of heavy construction equipment so near the Creek also dramatically increases the risk that pollutants from these machines, such as diesel, will end up in Schoharie Creek. I live and recreate downstream from the site where Constitution's pipeline will cross the Creek and will be negatively impacted by any spill into or negative water quality impact on Schoharie Creek from Constitution's construction of the portion of its pipeline near and across the Creek.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on January 11, 2016


John McKeeby

**People's Dossier: FERC's Abuses of Power and Law
→ Stripping People's Rights**

**Stripping People's Rights Attachment 6, Earthjustice
Response to Supplemental Information, Constitution
Pipeline, Docket No. CP13-499, January 15, 2016.**



January 15, 2016

Via Electronic Filing

Kimberly D. Bose, Secretary
 Federal Energy Regulatory Commission
 888 First Street, NE, Room 1A
 Washington, DC 20426

Re: Response to Constitution Pipeline Company, LLC's Supplemental Information in Support of Request for Partial Notice to Proceed, Docket CP13-499.

Dear Secretary Bose:

On behalf of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club (collectively "Intervenors"), we write to reiterate Intervenors' objections to Constitution's Request for Partial Notice to Proceed and respond to the Supplemental Information Constitution Pipeline Company, LLC ("Constitution") filed with the Federal Energy Regulatory Commission ("FERC" or the "Commission") on January 14, 2016 in support of its Request. Constitution's Supplemental Information does little to respond to the objections raised by Intervenors in their Answer filed on January 11, 2016 and entirely fails to respond to the objections raised in the New York Attorney General Office's opposition filed on January 14, 2016. In particular, Constitution fails to explain how the grant of its Request to Proceed with tree felling would not:

- (1) violate the plain terms of FERC's Order authorizing Constitution's project;
- (2) affect the water quality of nearby waterways by increasing pathways for runoff;
- (3) subvert the New York Department of Environmental Quality's ongoing review of the potential water quality impacts of Constitution's pipeline under the 401 Water Quality Certification provision of the Clean Water Act;
- (4) undermine the rehearing request process provided for by the Natural Gas Act by allowing construction to proceed while the requests for rehearing by Intervenors and others are pending before the Commission; and
- (5) violate the National Environmental Policy Act ("NEPA") by allowing an activity—felling trees but not removing them—that was not considered by the Commission in its NEPA review.

Intervenors therefore again urge the Commission to deny Constitution's Request for Partial Notice to Proceed with tree felling.

/s/ Moneen Nasmith

Moneen Nasmith
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Counsel for:

Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club.

Document Content(s)

Supplemental Oppposition to Tree Felling final 1.15.2016.PDF.....1-2

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 7, Catskill
Mountainkeeper et al., Press Release, February 18, 2016.

Contact: Anne-Marie Garti (718) 601-9618
Wes Gillingham, Catskill Mountain Keeper (845) 901-1029
Roger Downs, Sierra Club (518) 944-0992

FOR IMMEDIATE RELEASE

February 18, 2016

**Advocates Ask Governor Cuomo to Reject Constitution Pipeline Now
Denounce Unwarranted Tree Cutting While DEC Considers Denying Required
Water Quality Certificate**

Albany, NY—Advocates gathered at the State Capitol today to denounce the Federal Energy Regulatory Commission's (FERC) disregard for New York State authority by prematurely approving mass tree cutting along the 25 mile Pennsylvania route of the proposed Constitution Pipeline. On January 29, 2016, the day after it denied a rehearing request from multiple advocacy groups, FERC gave the pipeline company permission to cut down trees along the Pennsylvania section of the pipeline route, even though the company does not have all the federal permits it needs to start construction. The project would cut a 100-foot wide swath through five counties in New York and Pennsylvania; disturb more than 1,859 acres of land; cross multiple public drinking water supply sources, three watersheds, and more than 250 water bodies; and affect more than 90 acres of wetlands. In particular, New York State has not granted this project a required water quality certificate under the Clean Water Act. If this certificate is denied, the pipeline could not be built and the gratuitous destruction of trees in Pennsylvania would be for naught.

Legal filings by, Catskill Mountainkeeper, Clean Air Council, Delaware Otsego Audubon Society, Riverkeeper Inc., Sierra Club, Stop the Pipeline and NY Attorney General Eric Schniederman appear to have temporarily prevented tree clearing in New York while the DEC continues to review water quality permits. "FERC stated in its recent Order that the Company "cannot cut vegetation" prior to receiving ALL federal authorizations," said Anne Marie Garti, an attorney associated with Stop the Pipeline and volunteering with the Pace Environmental Litigation Clinic. "Allowing the pipeline company to cut trees along 25 miles of the route before New York State makes a decision is a tragic example of FERC operating outside of the law."

Contract loggers working for the Williams Pipeline Company have already cut 100-foot swaths of trees in over nine miles of forest along the Pennsylvania pipeline Route. Of particular concern is the Holleran family's North Harford Maple Syrup Farm, in New Milford, PA. The tree felling will obliterate the core of their business-- 1,670 linear feet through their sugar bush that is currently outfitted with spiles and collection lines for syrup production. Many supporters of the Holleran family are gathering daily at the site where the cutting is to take place. On February 10, logging crews and representatives of Constitution tried to access the property, calling the Pennsylvania State Police for assistance. After talking with Megan Holleran the police refused to intervene to allow tree felling. But, it is uncertain how long this reprieve can last.

"Our family has owned this property for generations that includes maple trees that we tap for a family maple syrup business, North Harford Maple," said Maryann Zeffer, resident of the property and co-owner." But when the gas companies came in they lied to us about their intentions. Now they are trying to bully us into building their pipeline across our property. All we want is for them not to cut our trees and harm our business. At the very least they should have to wait for full approval for the entire pipeline before they get to cut our trees. They do not have that approval now."

On February 5th, the Sierra Club and Clean Air Council filed a motion for a stay of tree cutting until pending lawsuits against FERC's larger permitting review are settled. It is uncertain if such a stay will be granted.

"Governor Cuomo and DEC Commissioner Basil Seggos can put an end to this broken FERC process by denying the 401 water quality certificate right now," said Roger Downs, Conservation Director, Sierra Club Atlantic Chapter, "The Second Circuit Court of Appeals has held that a State is authorized to deny this certificate even after FERC has approved a project, particularly when there is overwhelming evidence that there will be chronic violations to the Clean Water Act as a result of the project."

The groups ask Governor Cuomo to be a true climate leader by stopping the pipeline project now.

"The New York DEC warned FERC from the start that the construction of the Constitution Pipeline would be problematic to water resources and forested ecosystems – but that concern fell on deaf ears," said Wes Gillingham, Program Director for Catskill Mountainkeeper." Governor Cuomo should push back on the rubberstamped permits and premature tree cutting approvals by denying the 401 water quality certifications now. He can protect our water from this flawed pipeline proposal. It's the right thing to do."

###

**People's Dossier: FERC's Abuses of Power and Law
→ Stripping People's Rights**

Stripping People's Rights Attachment 8, Stop the Pipeline, Statement in Opposition to Request for Partial Notice to Proceed, Docket No. 13-499, January 12, 2016.

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

IN THE MATTER OF)
)
Constitution Pipeline Company, LLC) **Docket No. CP13-499-000**

**STATEMENT IN OPPOSITION TO CONSTITUTION PIPELINE
COMPANY’S REQUEST FOR A PARTIAL NOTICE TO PROCEED
AND MOTION FOR A STAY PENDING REHEARING
BY STOP THE PIPELINE**

Pursuant to Rules 101 and 212 of the Federal Energy Regulatory Commission (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.101(a)(1), 385.212, the Pace Environmental Litigation Clinic, Inc. hereby files this statement on behalf of Stop the Pipeline (“STP”) to object to the January 8, 2016 request for a partial notice to proceed (“NTP”) made by the Constitution Pipeline Company, LLC (“Company”). STP further hereby requests a stay of the Commission’s December 2, 2014 Order (“Order”) granting a Certificate of Public Convenience and Necessity (“Certificate”) to the Company as well as a stay of all construction activities, including the felling of trees, conducted under such Certificate or under any “partial” NTP, should the Commission grant the Company’s request, pending review of the Order on rehearing and review of any order granting the partial NTP. FERC staff cannot approve the request for a partial NTP as it alters the terms of the Order.

I. BACKGROUND

On April 5, 2012 the Company requested pre-filing review of a proposed 30-inch diameter, 121-mile long natural gas transmission line that would run from Susquehanna County, Pennsylvania, through Broome, Chenango, Delaware and Schoharie Counties, New York. FERC

approved the request on April 16, 2012, and assigned docket number PF12-9 to the pre-filing. On September 14, 2012, FERC published a Notice of Intent to prepare an Environmental Impact Statement in the Federal Register and supplemented that notice on October 9, 2012. During the comment period on the scope of work, STP and its members submitted hundreds of comments requesting studies and analyses on many topics, including cumulative impacts and the need for the project. *See* STP's comments (submittals 20121010-5028 and 20121109-5196).

The Company submitted a 7(c) application for a certificate of public convenience and necessity for a 124-mile long pipeline on June 13, 2013, under docket number CP13-499. *See* Company's application (submittal 20130613-5078). STP filed a timely motion to intervene and analyzed the Company's lack of response to issues raised by the New York State Department of Environmental Conservation ("DEC") and United States Army Corps of Engineers ("ACE"). *See* STP's Motion to Intervene and Analysis (submittals 20130717-5045 and 20131217-5017). FERC released its Draft Environmental Impact Statement ("DEIS") on February 21, 2014. *See* FERC's DEIS (submittal 20140212-4002). Six federal and state agencies characterized the DEIS as insufficient, and requested a revised or supplemental DEIS on which to comment. *See* United States Environmental Protection Agency ("EPA") comment (submittal 20140409-5120); the United States Department of Interior/ Fish and Wildlife Services ("FWS") comment (submittal 20140408-5035); ACE comment (submittal 20140408-5149); DEC comment (submittal 20140407-5409); New York State Office of Attorney General (OAG) comment (submittal 20140416-5100); and New York State Public Service Commission (PSC) comment (submittal 20140407-5001). STP, along with its individual members, again requested a thorough environmental analysis of all issues, including cumulative impacts and the need for the project, and pointed out countless legal requirements under a variety of laws, including the Clean Water Act ("CWA") and National Environmental Policy Act ("NEPA"). *See* STP's comments on DEIS (submittal 20140408-5088); Anne Marie Garti's Report on Need for Project (submittals 20140407-5237, 20140407-5252). The Final Environmental Impact Statement ("FEIS"), issued on October 24, 2014, did not include documentation on a variety of issues raised by STP, including cumulative impacts and the need for the project. Over the past year and a half, STP has persistently called for a Supplemental Draft Environmental Impact Statement ("SDEIS") to cure the lack of required documentation and analyses. *See* STP's comments (submittals 20140707-

5086, 20140923-5016, 20141017-5152, 20150529-5195, 20150921-5040, 20151109-5091, 20151203-5030). All of these requests were ignored by FERC.

The Commission issued an Order granting the Company a Certificate on December 2, 2014. *See* FERC's Order (submittal 20141202-4011). STP filed a timely request for rehearing on January 2, 2015, making a variety of claims, including the Commission's violation of the CWA and Citizens' Due Process rights by failing to wait for DEC's determination of whether the project would violate New York State's water quality standards. *See* STP's request for rehearing (submittals 20150102-5158, 20150102-5014). The Commission granted STP's request for rehearing on January 27, 2015 for the sole purpose of granting itself more time to issue a final order ("Tolling Order"). *See* FERC's Tolling Order (submittal 20150127-3038). On March 10, 2015, STP demanded a final order from FERC, and notified the Commission it would be petitioning the Second Circuit Court of Appeals for a Writ of Mandamus, in an attempt to resolve the underlying legal issues prior to the commencement of project construction. *See* STP's notice to FERC (submittal 20150310-5125). The petition was denied.

In December 2014, the Company filed 125 complaints in condemnation in the Northern District of New York ("NDNY"). *See* Ex. 1. The NDNY granted the Company a partial motion for summary judgment and a motion for an injunction for immediate access. The latter included Court ordered easements across each of these parcels of land according to the terms of the December 2, 2014 Order. *See* Ex. 2, at 1. ("A permanent right of way and easement . . . as approved by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act and the Order of the Federal Energy Regulatory Commission dated December 2, 2014"). FERC's Order states, "**Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities**, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof)." *See* Order at 51. The Company has not received two federal authorizations: (1) a 401 water quality certificate from DEC and (2) a 404 permit from the ACE, both of which are required under the Clean Water Act. *See* Company's January 5, 2016 status report, Att. A at 4, 6 (submittal 20160105-5343). However, in direct contradiction to FERC's Order, the Company has now filed a request for a partial notice to proceed to cut almost all of the trees along the pipeline route, claiming that felling trees is "not construction." *See* Company's request for NTP at 1-2 (submittal 20160108-5125).

II. ARGUMENT

A. The Company's Request for a Partial Notice to Proceed Must Be Denied

1. Introduction

On January 8, 2016, in spite of not having obtained two required federal authorizations, Lynda Schubring, Environmental Project Manager for the Company, submitted a four-page letter, with six attachments, requesting a partial notice to proceed from FERC. *See* Company's request for NTP (submittal 20160108-5125). One federal authorization that the Company has not obtained is a 401 water quality certificate that can be granted, conditioned, denied, or waived by DEC. The other missing authorization is a 404 permit that can be granted, conditioned, or denied by ACE. Both are required under the Clean Water Act, and both are mandatory conditions in the Commission's Order. 33 U.S.C. §§ 1341, 1344 (2012); Order at 45, 51. The Company has admitted in the thirty-two weekly status reports it has filed with FERC that it has not obtained these two federal authorizations, and that they are both required to obtain a NTP. *See, e.g.*, Company's January 5, 2016 status report at 1, Att. A at 4, 6 (submittal 20160105-5343) ("A FERC Notice to Proceed (NTP) is required prior to the commencement of any other Project construction activities and is currently pending necessary federal authorizations."). In spite of these acknowledgments, the Company is now claiming that felling approximately 700,000 trees on 1000 acres of land is not part of the construction of this project.¹ NTP at 1–2. The notion that site preparation is not an integral part of construction would be laughable for its absurdity if the consequences here were not so dire.²

¹ FERC, FEIS 4-118 (2014) (submittal 20141024-4001). (The table states that 1,034 acres of upland forest would be affected by construction and operation of the pipeline). EPA, Comment on Marc 1, at 7 (July 11, 2011), FERC Docket No. CP10-480-000, submittal 20110711-5181. (EPA states "one acre of land sustains approximately 700 mature hardwood trees, according to Guidelines issued by the U.S. Department of Energy (DOE) pursuant to Section 1605(b) of the Energy Policy Act of 1992. . . .")

² *See, e.g., Construction*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/construction.html> ("1. General: *Clearing*, dredging, excavating, and grading of land and other activity associated with buildings, structures, or other types of real property such as bridges, dams, roads." (emphasis added)); *Glossary of Statistical Terms: New Construction*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), <https://stats.oecd.org/glossary/detail.asp?ID=1774> ("New construction refers to *site preparation* for, and construction of, entirely new structures and/or significant extensions to existing structures whether or not the site was previously occupied." (emphasis added)). "Clearing" or "site preparation" are typically the first phase of construction and cannot be separated from the activities that follow.

In typical fashion, the Company is claiming one thing in this docket, while stating something entirely different, under oath, in another. In December 2014, the Company filed 125 complaints in condemnation in the NDNY. Ex. 1. It also filed an injunction for immediate access to the land, to which it attached an affidavit by Matthew Swift, dated January 9, 2015. *See* Ex. 3, Swift Aff. The affidavit begins by referencing another. *Id.* ¶ 2. In his December 11, 2014 affidavit attached to the motion for partial summary judgment, Mr. Swift states his title as “Project Manager for Williams Gas Pipeline Company, LLC, the operator of Constitution, and [] Project Manager for the Project.” Ex. 4, Swift Aff. ¶ 4. In his affidavit for an injunction, Mr. Swift swears, under penalty of perjury, that construction begins with tree clearing. Ex. 3, Swift Aff. ¶ 8 (“Pipeline construction begins with tree and vegetation clearing, and installation of environmental controls, followed by grading and trenching.”). Now, in a desperate attempt to move the project forward, the Company is directly contradicting its own Project Manager by trying to claim that cutting 700,000 trees is not part of construction. In other words, the Company is attempting to defraud the public, irreparably destroy private property, and subvert State and National laws.

The Company implicates other agencies in this ploy. Ms. Schubring frames the request for a NTP as a requirement of the FWS, which issued a Biological Opinion (“BO”) for the Northern long-eared bat on December 31, 2015. NTP at 1; FWS, BO (submittal 20160105-4002). However, nowhere in the BO does FWS say that trees must be cut *this* winter. In fact, consistent with every other document on file other than the request for a NTP, the BO states that all federal authorizations must be obtained before construction is commenced. BO at 2 (“Construction of the project cannot commence until the FERC issues a notice to proceed. This is anticipated in late 2015 or early 2016 upon completion of ESA consultation and *issuance of pending state and federal permits.*” (emphasis added)). Thus, according to the FWS, the cutting of trees is contingent upon DEC granting a 401 water quality certificate and the ACE granting a 404 permit.

There is no evidence in the documents submitted by the Company that DEC, ACE, or any other agency has formally agreed to or approved proceeding in the fashion proposed by the Company. The Company has not included any letters, notarized transcripts, or affidavits that are specific to this pipeline. Instead it included two old letters from the ACE in reference to two completely different projects in Pennsylvania where a 401 water quality certificate may already

have been granted. *See* NTP, Att. A. However, even if the Company had submitted credible evidence of agency complicity in this outrageous proposal, federal laws still must be followed. Neither lower level staff in state and federal agencies, nor the Commission itself, can override the requirements of federal law. *City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) (“Though FERC makes the final decision as to *whether* to issue a license, FERC *shares* its authority to impose license conditions with other federal agencies.”). Accordingly, the Commission must deny this request for a “partial” NTP.

2. The Commission would be exceeding its authority if it grants the request

The Commission has two main roles as it considers an application for an interstate gas pipeline. The first is to determine whether the project qualifies for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (2012).³ The application for a certificate of public convenience and necessity also triggers an environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), with FERC designated as lead agency, 15 U.S.C. § 717n(b)(1). In these roles, the Commission must ensure compliance with all federal laws, including the partnership between the state and federal government under the Clean Water Act. *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008). As such, *the 401 water quality certificate “is a prerequisite to the FERC granting final approval to commence construction of the proposed pipeline.”* *Id.* at 144 (emphasis added). Since the clearing of almost 700,000 trees in preparation for laying pipeline in the ground is the first phase of construction, the Commission must deny the Company’s request to cut trees until DEC grants a 401 water quality certificate. This also ensures that there will be no irreparable injury if DEC denies the water quality certificate, or conditions it in a way that affects the current proposal. *Pub. Util. Dist. No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711 (1994) [hereinafter *PUD 1*] (“Section 401(d) thus allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act and with ‘any other appropriate requirement of State law.’”). Thus DEC has the right to deny a 401 water quality certificate under subsection (a), and the right

³ *License*, BLACKS LAW DICTIONARY (9th ed. 2009) (“1. A permission, usu. revocable, to commit some act that would otherwise be unlawful; 2. The certificate or document evidencing such permission.”).

to condition it in accordance with “any other appropriate requirement of State law” under subsection (d). 33 U.S.C. § 1341(a), (d). In either event, the result could be that the pipeline project is never commenced, and, if the NTP is granted, the irreparable injury to the environment, STP and its members would be for naught.

While the Commission has the authority to impose conditions in its certificates, that power does not extend to overriding the explicit Congressional mandates in the Clean Water Act. The Natural Gas Act grants the Commission a much more modest right, an ability to attach “reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). The words “reasonable terms and conditions” are not a carte blanche, and certainly do not empower the Commission to interpret or rewrite federal law to preempt the express rights of states under the Clean Water Act. *City of Tacoma*, 460 F.3d at 65. Upon judicial review, no deference will be given to FERC on water quality issues as it is DEC, not FERC, that is authorized to decide whether New York State water quality standards might be violated. *Ala. Rivers All. v. FERC*, 325 F.3d 290, 396–97 (D.C. Cir. 2003). For this reason, the Company’s unsworn and unspecific claims of “approval” from unknown employees of various state and federal agencies, or the Commission’s “interpretation” of those “approvals,” are meaningless. No determination has been made by DEC that the tree and vegetation clearing does not implicate section 401, nor has the project been approved.

a. DEC has the power to deny the 401 Water Quality Certificate

In 1972 Congress passed the Clean Water Act so “that the discharge of pollutants into the navigable waters be eliminated by 1985.” 33 U.S.C. § 1251(a)(1). To achieve this lofty goal, it was mandated that “the discharge of any pollutant by any person shall be unlawful.” *Id.* § 1311(a). Congress integrated an existing state role into the federal regime, granting states the right to develop and enforce water quality standards. *Id.* § 1313. State water quality standards were considered so critical to the success of cleaning up our nation’s waters that Congress provided states with the authority to stop federal projects that might violate water quality.

Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). The Clean Water Act specifies that a 401 Certificate must be issued *before* a federal license or permit is issued. “No license or permit shall be granted *until* the certification required by this section has been obtained or has been waived” 33 U.S.C. § 1341(a)(1) (emphasis added). This statement is explicit and unambiguous, and gives states the right to block federal projects that the State determines will violate state water quality standards. *Islander E.*, 525 F.3d at 164. That right becomes meaningless if hundreds of thousands of trees along a 124-mile corridor can be cut prior to DEC’s decision.

b. DEC has broad authority to condition the 401 WQC

In its request for a NTP prior to the issuance of 401 water quality certificate, the Company says it will “avoid watercourses and waterbodies.” NTP at 2. It also claims that “because this activity does not involve a discharge of dredged and/or filled material, no state certification is required for this activity, in that Section 401 of the CWA only applies to activities ‘which may result in any discharge into the navigable waters.’” *Id.* This is either a complete misunderstanding of DEC’s authority under the Clean Water Act, or a blatant attempt to diminish it.

Once a 401 water quality certificate is required, DEC assumes great power over the project. In *PUD I*, the Supreme Court held that a State’s authority under the Clean Water Act is extremely broad and includes the right to impose conditions far from the actual disturbance. *PUD I*, 511 U.S. at 708–09, 723. To reach this decision, the Court reviewed all of section 401.

Section 401 . . . also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth any effluent limitations and other limitations . . . necessary to assure that *any applicant* will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. 1341(d) (emphasis added).

Id. at 711. The Supreme Court thus upheld State-imposed conditions in a 401 certification that required minimum stream flows in an undisturbed part of the water body, even though minimum stream flows did not implicate the “discharge” that triggered the 401 certification requirement. DEC apparently shares the view of the Supreme Court, and recently used this argument in its denial of a 401 water quality certificate for a nuclear power plant.⁴ New York State’s position is

⁴ In denying Entergy’s application for a section 401 water quality certificate, DEC stated that applicants are required to demonstrate compliance with all “[s]tate statutes, regulations and criteria otherwise

that “the applicant *must* demonstrate compliance with sections 301-303, 306 and 307 of the [CWA], as implemented by state WQS, effluent limitations, discharge prohibitions, new source performance standards, and state statutes, regulations and criteria otherwise applicable to [the project] activities.” N.Y. COMP. CODES R. & REGS. tit. 6, § 608.9 (2016). In this instance, the appropriate state statutes include, but are not limited to, fish and wildlife laws, and protections of endangered or threatened species, and species of concern. N.Y. ENVTL. CONSERV. LAW §§ 11-0105, 11-0535 (McKinney 2016). These species, and their habitats, may include the very trees and undergrowth the Company is asking permission to destroy. In addition, under the Company’s proposal, trees, limbs, and other undergrowth would be left lying on the ground for many months, if not years. If another extreme storm event were to happen this winter or spring, this debris could be carried by the torrents that suddenly appear, scour the banks and beds of streams, dam existing streams, and cause even more catastrophic flooding in the valleys that lie downhill from the still proposed route.⁵ Such an occurrence would cause substantial turbidity and other problems, and thus violate New York State water quality standards. N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2.

Throughout this entire process, DEC has been critical of the Company’s application and the adequacy of the environmental review performed by FERC. For example, DEC has specifically stated that the alternative and cumulative impact analyses in the DEIS are deficient. *See* DEC’s comments on DEIS (submittal 20140407-5409). Instead of endorsing FERC’s decision to approve the Company’s preferred route, it requested an analysis of another route that it characterizes as having less of an impact on water quality. *See* DEC’s comments on its hybrid alternative (submittal 20150529-5195). In other words, it is possible DEC will condition the 401 water quality certificate in a way the Company is not considering. *See PUD 1*, 511 U.S. at 713. (“[L]imitations to assure compliance with state water quality standards are also permitted by 401(d)’s reference to ‘any other appropriate requirement of State law.’”). It is also possible that this maneuver by the Company is meant to foreclose such a possibility.

applicable to such activities.” This language expresses DEC’s own position that relevant state statutes and regulations must be complied with by applicants before DEC will grant a section 401 certificate. *See* DEC, NOTICE OF DENIAL FOR JOINT APPLICATION FOR CWA 401 WATER QUALITY CERTIFICATION NRC LICENSE RENEWAL - ENTERGY NUCLEAR INDIAN POINT UNITS 2 AND 3, at 21–23 (2010), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ipdenial4210.pdf.

⁵ In the past decade, there have been three extreme storm events in the vary region where this pipeline is proposed. They devastated towns and caused billions of dollars in damages.

The point is that FERC must wait for the DEC's decision. The Commission simply does not have the authority to decide whether the felling of 700,000 trees might violate New York State water quality standards. DEC has the right to impose any number of conditions on this project, and those conditions could include the protection of the very trees and undergrowth that would be prematurely cut. The unsworn and unspecific claim that the Company spoke to someone at DEC and that unnamed person did not object to the request—even if true—does not somehow grant the Company or the Commission the right to conclude that DEC has formally taken such a position or consented to the Company's request. Since the Supreme Court has sanctioned the appropriate use of State law in these situations, FERC cannot grant the Company's request to cut trees prior to the issuance, or denial, of a 401 water quality certificate.

3. A partial notice to proceed is contrary to FERC's December 2, 2014 Order

The Commission's December 2, 2014 Order forbids granting this request for a partial NTP. FERC's Certificate is conditioned on "compliance with the environmental conditions listed in the appendix to this order." *See* Order at 45. Condition 7 says that the Company shall file weekly status reports that shall include "an update on the Applicants efforts to obtain the necessary federal authorizations[.]" Condition 8 states, "**Prior to receiving written authorization from the Director of OEP to commence construction of their respective project facilities**, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof)." *See* Order at 51. Here the Company admitted in its January 5, 2016 status report that it has not obtained two required federal authorizations: (1) a 401 water quality certificate from DEC, and (2) a 404 permit from the ACE. *See* Company's status report at 6 (submittal 20160105-5343). The Company's Project Manager has stated under oath that tree cutting is part of construction. Ex. 3, Swift Aff. ¶ 8. Thus FERC cannot issue a partial notice to proceed for the felling of trees as that would be the start of construction, which must await the decisions by DEC and the ACE.

This past fall, the Company requested permission to coat pipes at construction yard 5b. In a September 18, 2015 letter granting permission for this limited activity at a confined site, FERC stated that construction of the rest of the project must await all federal authorizations. *See* FERC, letter approving pipe-coating activity (submittal 20150918-3046) ("***This letter does not***

authorize commencement of construction of Constitution's project. I remind you that Constitution must comply with all remaining terms and conditions of the Commission's Order."). Since the Company's request is outside of the Commission's Order, FERC staff cannot approve it. If the request is to be granted, the Commission must issue a new order. In turn, the Company must obtain new orders from the NDNY for easements on land acquired through eminent domain because the current easements require strict compliance with FERC's December 2, 2014 Order.

4. The Company has not submitted sufficient evidence to support their request

As discussed in the introduction, the Company's entire request for a NTP is based on the erroneous premise that cutting hundreds of thousands of trees is somehow separate from the construction process. This absurd fallacy has been contradicted, under oath, by the Company's own project manager. Ex. 3, Swift Aff. ¶ 8 ("Pipeline construction begins with tree and vegetation clearing, and installation of environmental controls, followed by grading and trenching."). That admission, when combined with FERC's Order, which requires all federal authorizations prior to the start of construction, mandates a denial of this request. *See* Order, Condition 8, at 51.

The request for the NTP also includes hearsay that unspecified agency employees have agreed that it's okay with them if 700,000 trees are cut now. As discussed above, even if these unnamed employees did say this, neither lower level staff in state and federal agencies, nor the Commission itself, can override the requirements of federal law. *City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) ("Though FERC makes the final decision as to *whether* to issue a license, FERC *shares* its authority to impose license conditions with other federal agencies."). Only the DEC Commissioner can decide whether or not to grant a 401 water quality certificate, and on what terms, so the opinions of these unnamed employees are irrelevant. *See* N.Y. ENVTL. CONSERV. LAW § 17-0303(4)(d) (2016).

The Company includes two letters from the ACE that authorized the cutting of trees in wetlands in other projects in Pennsylvania. The first letter, dated January 28, 2011, does not include a docket number, but it appears to be for the Tennessee Gas Pipeline's Northeast Upgrade Project, docket number CP11-161. This project was for an upgrade of the 300 line, not a 124-mile long greenfield pipeline. It is worth noting that the D.C. Circuit held that this pipeline

project was illegally segmented from three others to which it was connected. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014). The second letter, dated February 25, 2015, also does not include a docket number, but also appears to be for an upgrade, the Leidy Southeast Expansion Project, docket number CP13-551. It is currently in litigation.

The distinctions between the Constitution pipeline and these other projects make these two letters from the ACE inapplicable to the current situation. Both of the projects associated with these letters were much smaller upgrades, rather than greenfield projects, and only had environmental assessments, rather than full environmental impact statements. Significantly, at the time these letters were written, it is likely that both projects had already acquired their 401 water quality certificates. Finally, it cannot be ignored that, unlike in those cases, the Company here has *no such written* “approval” or opinion from *any* agency. If anything, the unrelated letters highlight the lack of support for the Company’s request.

5. Easements granted under eminent domain by the Northern District of New York require strict compliance with the December 2, 2014 Order

In Attachment F, the Company erroneously states that it has all the required easement agreements to perform this work. *See* NTP, Att. F (“Constitution has possession of all of the right of way areas where tree felling will occur, and the affected landowners have either received agreed compensation for the rights of way, or payment of compensation has been secured by bonds filed with and approved by the United States District Court for the Northern District of New York.”). It is true that the NDNY granted the Company easements across each of the condemned parcels of land. However, the Court Order for each parcel states that the easement is conditioned upon, and must abide by, the terms of the December 2, 2014 Order of the Commission. *See* Ex. 2, at 1. (“A permanent right of way and easement . . . as approved by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act and the Order of the Federal Energy Regulatory Commission dated December 2, 2014”). As discussed above, FERC’s Order is further conditioned upon the need for “compliance with the environmental conditions listed in the appendix to this order.” *See* Order at 45. Condition 7 says that the Company shall file weekly status reports that shall include “an update on the Applicants efforts to obtain the necessary federal authorizations[.]” Condition 8 states, “**Prior to receiving written**

authorization from the Director of OEP to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof).” *See* Order at 51. Here the Company admitted in its January 5, 2016 status report that it has not obtained two required federal authorizations: (1) a 401 water quality certificate from DEC, and (2) a 404 permit from the ACE. *See* Company’s status report at 6 (submittal 20160105-5343). The Company’s Project Manager has stated under oath that tree cutting is part of construction. Ex. 3, Swift Aff. ¶ 8. Since the conditions specified in the NDNY’s Order have not been met, then trees cannot be cut on properties obtained through eminent domain proceedings in New York State. If the Company moves forward under these circumstances, trespassing charges may be filed seeking compensatory and punitive damages.

6. The Company can request an extension from FERC if needed.

The Company undertook this endeavor at its own risk, and was never assured that the money that it was expending would result in the required authorizations within the timeframes it specified. Since DEC has the power to deny the 401 water quality certificate, then 700,000 trees should be left standing now. It is true that FERC’s Certificate states the pipeline should be operational by the end of December 2016. However, it is likely that FERC would extend the time frame for construction if DEC grants a 401 water quality certificate at a date later than expected. That should be the request now, rather than the unnecessary destruction of 700,000 trees. Allowing the Company to start construction prior to DEC’s issuance of a 401 water quality certificate would be a gross violation of law.

B. FERC Must Stay All Activities Until It Issues a Final Order

In the event that the Commission elects to grant the Company’s request for a NTP, STP hereby moves, pursuant to Rule 212 of the Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2015), for a stay of the NTP Order and for a stay of any removal of trees or other plant life pursuant to the NTP Order pending the later of (1) resolution of the pending petition for

rehearing regarding the December 2, 2014 Certificate and (2) resolution of any subsequently filed petition for rehearing of the NTP Order itself, when and if filed by STP.

Pursuant to the Administrative Procedure Act, the Commission has the authority to stay its actions when "justice so requires." 5 U.S.C. § 705 (2012). In assessing a request for a stay, the Commission will consider: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether the stay is in the public interest. *See Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020, at 15 (Jan. 12, 2011). Absent a stay, construction of the project will go forward causing irreparable harm to STP and its members through the removal of thousands of plants, including trees that are decades old and could never be replaced. The irreparable environmental harm facing STP and its members will be permanent and will not be remediable by any amount of monetary compensation. In sharp contrast, any injury to the Company is purely speculative. The pipeline project has yet to gain formal approval, and in the event that the Company fails to obtain the necessary certifications and approval from DEC, ACE or FERC (upon rehearing), the stay will have caused no injury to the Company at all. Thus, the balance of the harms weighs in favor of granting the stay pending rehearing. The public interest also weighs in favor of granting a stay given the permanent and irreparable damage to the environment caused by allowing the Company to proceed on a project of uncertain future.

1. A Stay is Necessary to Avoid Irreparable Injury

The purpose of a stay is to preserve the *status quo* pending the Commission's review of its decisions. *See, e.g., Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) ("By maintaining the *Status quo* [sic], while additional environmental studies are performed, or additional alternatives are considered, an injunction ensures that there will be at least a possibility that the agency will change its plans in ways of benefit to the environment. It is this possibility that courts should seek to preserve." (internal quotations omitted)). Under the standard for injunctive relief—which the Commission has applied to its assessment of requests for administrative stays—the harms alleged "must not be remote nor speculative, but actual and imminent and can not be remedied by an award of monetary damages." *Shapiro v. Cadman Towers*, 51 F.3d 328, 332 (2d Cir. 1995); *see also Wis. Gas Co. v. Fed. Regulatory Comm'n*, 758 F.2d 669, 674 (D.C.

Cir. 1985). The petitioner has met its burden if it can show the irreparable harm is likely to occur. *See Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 22 (2008).

Should the Commission refuse to grant a stay, there is little dispute that STP and its members will suffer irreparable injury. The Supreme Court has stated that environmental harm “by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration i.e., irreparable.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The Company is proposing to cut down trees and plant life for a 124-mile pipeline that would cause approximately 700,000 trees in 1034 acres of forested land to be clear-cut. FERC, FEIS 4-118 (2014) (submittal 20141024-4001). Approximately 36 miles of this path would affect interior forests, which are particularly important because they serve as quality habitat for different species of wildlife and migratory birds, and if destroyed or fragmented would subject these animals to loss of feeding and nesting habitat. *Id.* at 4-71.

The Project would also cross 298 surface water bodies, most of which are cold-water streams that are home to trout and serve as a breeding ground for their spawn. *Id.* at ES-6. Impacts to these trout and their breeding grounds directly affect STP and its members’ enjoyment of their properties. *See* Ex. 5, Declaration of Robert Lidsky, ¶ 9 [hereinafter Lidsky Decl.], submitted herewith. The project route, where the Company seeks to begin felling trees, would impact 95.3 acres of wetlands, including 33.8 acres of forested wetlands, 35.4 acres of herbaceous wetlands, and 26.1 acres of shrub-scrub wetlands. FEIS at 4-62. Additionally, 35.1 miles of the proposed route (28 percent of the entire route) are sited on steep slopes, which are prone to flash floods. *Id.* at 4-18, App. G. Removing vegetation from the area will increase the severity and frequency of these flashfloods, which has caused major destruction right where the pipeline is proposed to be built. *See* Ex. 5, Declaration of Daniel J. and Laura Jean Brignoli, ¶ 13 [hereinafter Brignoli Decl.], submitted herewith; Lidsky Decl., ¶ 8; Declaration of Glenn and Laura Bertrand, ¶ 8 [hereinafter Bertrand Decl.], submitted herewith.

Property owners along the pipeline, including members of STP, will suffer irreparable injury if the Company is allowed to start construction of the project, as it would affect 1,871.5 acres of land. FEIS at 4-118. Members of STP, like many members of the local communities threatened by the pipeline’s route, purchased their land specifically for the land’s pristine forested environment. *See* Ex. 5, Brignoli Decl. ¶¶ 4-5; Lidsky Decl. ¶¶ 4-7; Declaration of Robert and Anne Stack, ¶ 5 [hereinafter Stack Decl.], submitted herewith. Indeed, some of the

trees and shrubs that the company seeks to cut down were planted decades ago by members of STP themselves. *See* Ex. 5, Bertrand Decl., ¶¶ 4–6. Many members purchased this land as an investment and hope to pass down the property to their children. Bertrand Decl., ¶ 4; Stack Decl., ¶ 5. The destruction and deforestation of the virgin land will permanently alter the scenic views, marring the aesthetics of STP’s members’ properties forever. Stack Decl., ¶¶ 4–5; Brignoli Decl., ¶¶ 4–5; Lidsky Decl., ¶¶ 4–7; Bertrand Decl., ¶¶ 4–5. Instead of beautiful views of lush forest, the land will be marked with stumps to where these trees once stood. The pipeline will irrevocably fragment members’ property and habitats, and will cause valuable land to become practically worthless.

None of these facts are truly in dispute. Real property, like the property threatened here by the requested NTP, is, by its very nature unique, and accordingly, injunctive relief is often appropriate to protect interests in real property. “[T]he threat of the destruction of the plaintiff’s property constitutes irreparable harm.” *Randisi v. Mira Gardens, Inc.*, 707 N.Y.S.2d 204, 205 (App. Div. 2d Dep’t 2000); *see also* *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 897 N.Y.S.2d 669 (Sup. Ct. 2009), *aff’d as modified*, 889 N.Y.S.2d 793 (App. Div. 4th Dep’t 2009). There can be little doubt that the removal of hundreds of thousands of decades-old trees and countless other plants over thousands of acres is an “irreparable injury,” and there can be no doubt that this will be the result should a stay be denied here.

2. The Balance of the Equities Favors the Granting of a Stay, Especially Given that Any Injury Alleged By the Company Is Purely Speculative.

The issuance of a stay will not cause substantial injury to the Company, and, indeed, whatever potential injury there may be is speculative given that the pipeline project does not have the permits and certifications necessary to proceed and may never receive them. For example, the Commission’s Certificate requires that the Company obtain a Clean Water Act Section 401 Water Quality Certification (“WQC”) from the New York State Department of Environmental Conservation (“DEC”). DEC has expressed significant concerns about the pipeline project’s impacts to water quality, and the DEC has yet to issue the necessary 401 WQC. Moreover, STP raised significant issues in its petition for rehearing involving the Clean Water Act, NEPA and due process, any one of which could put an end to the project when FERC

completes the rehearing. As such, the Company cannot rely on the speculative assumption that a project delay will cause *any* injury, given the uncertainty surrounding whether the pipeline will ever be built.

Even if the Commission were to consider the speculative potential injury and assume that the Company will eventually be granted permission to proceed, the economic losses that the Company may suffer are insignificant given that the Company “[was] on notice that the project might be enjoined, and any economic investments were made at the companies’ own peril.” *Conservation Cong. v. U.S. Forest Serv.*, 803 F. Supp. 2d 1126 (E.D. Cal. 2011). Whatever relevance such an injury may have, it cannot outweigh the irreparable environmental injuries detailed above. *See Citizen’s Alert Regarding the Env’t v. U.S. Dep’t. of Justice*, No. 95-1702 (GK), 1995 WL 748246, at *11 (D.D.C. Apr. 15, 1995) (holding loss of money and jobs due to project delay did not outweigh “permanent destruction of environmental values that, once lost, may never again be replicated”). Accordingly, the equities strongly favor granting a stay.

3. A Stay Is in the Public Interest

In cases involving public convenience, each decision on whether a stay should be granted should be evaluated based on its own particular facts and circumstances. *Minto v. Salem Water, Light & Power Co.*, 250 P. 722 (Or. 1926) (“There is no hard or fixed rule whether an injunction should be granted or refused.”). The public interest sways towards protecting the rights of the property owners who are already being affected by the eminent domain proceedings and who suffer continuous environmental harm with out a grant of stay. *See Weinberger v. Romeo-Barcelo*, 456 U.S. 305, 312 (1932) (citing *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). Moreover, the public interest in keeping ancient forests pristine and undisturbed is self-evident. In contrast, there can be no public interest in permitting the destruction of a thousand acres of trees to benefit a project that has not been approved and may never even be completed. Whatever minimal public interest there may be in a completed pipeline, that is not what is proposed in the NTP Order. Rather, the NTP Order is for destruction of plant life alone and serves no public interest. Accordingly, staying this Order will be in the public interest.

Each of the factors relevant to determining if a stay should be granted weighs heavily in STP's favor. Consequently, the Commission should stay its NTP Order and any actions authorized thereunder pending resolution of the currently pending Petition for Rehearing, and any subsequently filed petitions related to the NTP Order itself.

Respectfully submitted,

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Dated: January 12, 2016

**People's Dossier: FERC's Abuses of Power and Law
→ Stripping People's Rights**

Stripping People's Rights Attachment 9, Brief of
Petitioner Stop the Pipeline, Docket Nos. 16-345 and 16-
361, (2nd Cir.) July 12, 2016.

16-345, 16-361

Oral Argument Not Yet Scheduled

In the United States Court of Appeals for the Second Circuit

Catskill Mountainkeeper, Inc.; Clean Air Council; Delaware-Otsego
Audubon Society, Inc.; Riverkeeper, Inc.; and Sierra Club,

Petitioners

Stop the Pipeline,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Constitution Pipeline Co., LLC; Iroquois Gas Transmission System, L.P.;
and Natural Gas Supply Association,

Intervenors

**BRIEF OF PETITIONER STOP THE PIPELINE
IN SUPPORT OF ITS PETITION FOR REVIEW OF THE
FEDERAL ENERGY REGULATORY COMMISSION ORDERS
149 FERC ¶ 61,199, 154 FERC ¶ 61,046,
AND JANUARY 27, 2015 TOLLING ORDER**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Stop the Pipeline hereby states that it is an unincorporated association of citizens and landowners, and that it has never issued stock. As such, Stop the Pipeline has no parent corporations or publicly held corporations owning 10% or more of any of its stock.

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GLOSSARY

ACE	United States Army Corps of Engineers
APA	Administrative Procedure Act
Application	Company's June 13, 2013 application to FERC
Cabot	Cabot Oil & Gas Corporation, Cabot Pipeline Holdings LLC
Certificate Order	149 ¶ FERC 61,199 (Dec. 2, 2014)
Commission	Federal Energy Regulatory Commission
Company	Constitution Pipeline Company, LLC
CWA	Clean Water Act
DEC	New York State Department of Environmental Conservation
DEIS	Draft Environmental Impact Statement
Dth/d	Decatherm per day
EIS	Environmental Impact Statement
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
Iroquois	Iroquois Gas Transmission System, L.P.; Iroquois Pipeline
JA	Joint Appendix
LDC	Local Distribution Company
NDNY	Northern District of New York

NEPA	National Environmental Policy Act
NED	Northeast Energy Direct Project, Tennessee Gas Pipeline
NGA	Natural Gas Act
NHPA	National Historic Preservation Act
R	Record
Rehearing Order	Order denying request for rehearing. 154 FERC ¶ 61,046.
SA	Sealed appendix for privileged and CEII documents
SoNo	South to North Project by Iroquois
STP	Stop the Pipeline
Tennessee	Tennessee Gas Pipeline, LLC
TGP	Tennessee Gas Pipeline
Tolling Order	Order Granting Rehearing for Further Reconsideration
WIP	Wright Interconnect Project
WQC	Water Quality Certification
WQS	Water quality standards

JURISDICTION

Pursuant to the Natural Gas Act (“NGA”), this Court has jurisdiction to review an order issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) if an aggrieved party is denied rehearing and petitions for review of the same issues within sixty days of a final order. 15 U.S.C. §§ 717r(a), (b) (2012). Stop the Pipeline (“STP”) requested rehearing on January 2, 2015, within thirty days of FERC’s December 2, 2014 Order granting a certificate of public convenience and necessity (“Certificate Order”) to the Constitution Pipeline Company, LLC (“Company”). R.2076, 2094, 2096, JA____. STP filed a petition for review on February 5, 2016, within sixty days of FERC’s January 28, 2016 final order (“Rehearing Order”). R.2298, 2309, JA____. Since STP timely requested rehearing from FERC, was denied, and timely petitioned for review of the same issues, this Court has jurisdiction.

STATEMENT OF ISSUES

1. Whether FERC violated the Clean Water Act (“CWA”) by issuing the Certificate Order and the Rehearing Order under the NGA before the New York State Department of Environmental Conservation (“DEC”) issued a section 401 water quality certification (“WQC”) under the CWA. (Raised at R.2096 at PP8-11, JA____; ruled on at R.2298 at ¶¶57-72, JA ____).

2. Whether FERC violated the due process clause of the Fifth Amendment of the United States Constitution and Section 717r(a) of the NGA, 15 U.S.C. § 717r(a), by issuing the January 27, 2015 Order Granting Rehearing for Further Reconsideration (“Tolling Order”), instead of a final order, within thirty days of STP’s request for rehearing, thereby denying STP and its members judicial review of the Certificate Order and allowing eminent domain proceedings to be initiated and real property to be taken from STP’s members prior to judicial review, without due process. (Raised at R.2096 at PP11-14, 50-51, JA____, ____; ruled on at R.2298 at ¶¶8-9, 61-62, 71 JA ____, ____).

3. Whether FERC violated the NGA by issuing the Certificate Order without substantial evidence to support: (1) the need for the project and (2) project benefits, including (a) how the project would increase reliability, (b) how the project would reduce prices and price volatility, and (c) how the project would eliminate constraints in the Iroquois and Tennessee Gas Pipelines that inhibit the flow of gas between Wright, NY and the purported target markets in New York City and New England. (Raised at R.2096 at PP14-25, JA____; ruled on at R.2298 at ¶¶15-23, JA____).

4. Whether the Commission violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and its implementing regulations, 40 C.F.R. Parts 1500-1508, in issuing the Certificate Order and Rehearing Order based on an

environmental impact statement that illegally segmented consideration of the impacts of the proposed project from other projects that would be required to move the gas to the purported markets relied on as justification for the proposed project. (Raised at R.2096 at PP25-35, JA____; ruled on at R.2298 at ¶¶88-98, JA____).

STATUTES AND REGULATIONS

Statutory and regulatory provisions are set forth in Addendum A.

STATEMENT OF CASE

STP seeks review of the Commission's Certificate Order and Rehearing Order under the CWA, NGA, and NEPA and review of FERC's Tolling Order under the NGA and Fifth Amendment of the United States Constitution. The Certificate Order was issued by Commission Chairwoman Cheryl LaFleur and Commissioners Philip Moeller, Tony Clark, and Norman Bay; the Tolling Order by Deputy Secretary Nathaniel Davis, Sr.; and the Rehearing Order by Commission Chairman Norman Bay and Commissioners Cheryl LaFleur, Tony Clark, and Colette Honorable.

The Company pre-filed in April 2012, and filed an Application on June 13, 2013, for a 30-inch diameter, 124-mile long interstate gas transmission pipeline that would run from Susquehanna County, Pennsylvania, through Broome, Chenango, Delaware, and Schoharie Counties, New York. R.1-001, JA____. FERC

assigned docket numbers PF12-9 and CP13-499, respectively. STP filed a timely motion to intervene and analyzed the Company's lack of response to issues raised by the DEC and United States Army Corps of Engineers ("ACE"). R.396, 1544, JA____. FERC released its Draft Environmental Impact Statement ("DEIS") on February 21, 2014, noting that 24% of the properties the pipeline would cross had not been surveyed. R.1560, JA____. Six federal and state agencies characterized the DEIS as insufficient, and requested a revised or supplemental DEIS on which to comment. R.1798, 1904, 1918, 1924, 1959, 2149, JA____, JA____, JA____, JA____, JA____, JA____. STP documented missing information and other deficiencies and requested a thorough analysis of all issues and compliance with all laws. R.1914, JA____. STP members, whose comments were incorporated by reference in STP's submission, supplemented this critique. *See, e.g.*, R.1606, 1656, 1746, 1748, 1752, 1914 at PP3, 31, JA____, JA____, JA____, JA____, JA____, JA____. No gas customers in the purported end markets were identified, no market studies were included, and although the Company claimed the project was "fully subscribed," there was no requirement to ship any gas. R.1560 at PP1-1 – 1-3, JA____. The Final EIS ("FEIS"), issued on October 24, 2014, did not cure problems noted by the agencies, STP, or its members. R.2057, JA____. STP repeatedly requested a Supplemental DEIS in which FERC could conduct one environmental review for all required licenses, permits, and consultations, for all connected projects. R.2047,

2053, 2196, JA____, JA____, JA____. The Commission issued the Certificate Order, which included ten pages of environmental conditions, on December 2, 2014.

R.2076, JA____. STP filed a request for rehearing within thirty days. R.2094, 2096, SA4, JA____. FERC issued the Tolling Order on January 27, 2015, which did not address any of the issues raised in STP's request for rehearing but merely purported to forestall FERC's obligation to rule on the petition for rehearing.

R.2103, JA____. One year later, on January 28, 2016, FERC denied STP's request for rehearing and issued the Rehearing Order. R.2298, JA____. STP petitioned for review of FERC's Orders on February 5, 2016. R.2309 , JA____.

The project would require the clearing of 1,872 acres of land, including the destruction of approximately 700,000 trees on 1,034 acres of forest. R.2057 at P.4-118, 2269 at N.4, JA____, JA____. It would cross 289 bodies of water, most of them cold-water trout streams, and impact over 95 acres of wetlands, of which 34 acres are irreplaceable forested wetlands. R.2057 at PP ES-6, 4-62, JA____. Additionally, over 35 miles of the proposed route are located on steep slopes, and 45.5 miles are over shallow bedrock. R.2057, App.G, P4-15, JA____. Twenty-four percent of this land had not been surveyed when the DEIS and FEIS were issued. R.1560 at P1-3, 2057 at P1-5, JA____, JA____.

The proposed route is located in an area that has experienced the devastation of extreme storms, and STP members who live along the route have witnessed

catastrophic floods near their homes. R.1703, 2259, JA____, JA____. As Governor Andrew Cuomo stated, "[t]here is a 100 year flood every two years now." R.1565, JA____. On August 28, 2011, Hurricane Irene caused extensive flooding, and was followed several days later by Tropical Storm Lee, which dropped almost a foot of rain along the proposed route. R.2057 at P4-14, JA____.

The Commission issued its Certificate Order prior to the Company obtaining a 401 WQC from DEC. R.2150, Att. A, JA____. The day after the Certificate Order was issued, the Company sent letters threatening the use of eminent domain to approximately 350 landowners who had refused to sign easement agreements. R.2080, 2298 at ¶22, JA____, JA____. STP objected to these letters, and to FERC's issuance of the Certificate Order prior to the Company obtaining a 401 WQC. R.2096 at PP11-14, Ex.2-3, JA____. By the end of December, 125 complaints in condemnation had been filed in the Northern District of New York ("NDNY"). R.2269, Ex.1, JA____. STP members opposed the use of FERC's Certificate Order to take their land, but the NDNY held the issues had to be reviewed by a circuit court. *Constitution Pipeline Co. v. A Permanent Easement for 1.80 Acres & Temporary Easement for 2.09 Acres Davenport, Del. Cnty., N.Y.*, 3:14-cv-02049-NAM-RFT (N.D.N.Y., Feb. 21, 2015), ECF # 20, at 5. However, STP was blocked from petitioning this Court for a full year because FERC issued the Tolling Order, instead of a final order, which is a condition precedent for seeking judicial review.

R.2121, 2309, JA____, JA____. The NDNY granted the Company access to STP members' land and signed easements that were recorded in the County Clerks' Offices. R.2269, Ex.2, JA____. This allowed the Company to enter private property to conduct surveys and mark easements for tree clearing. R.2269, Ex.5, Brignoli ¶10, Stack ¶¶9-11, JA____. On January 29, 2016, FERC granted the Company's request to cut trees along twenty-fives miles in Pennsylvania, over the objections of property owners. R.2299, 2302, JA____, JA____. On April 22, 2016, DEC denied the Company's application for a 401 WQC, stopping the project from proceeding.

STANDING

To establish Article III standing, the petitioner must have suffered, or soon suffer, a concrete and particular injury that is "fairly traceable" to the defendant, which can be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here FERC issued its Certificate Order – a federal license – before the Company obtained the required 401 WQC. R.2150, Att.A, JA____. The Commission's premature issuance of the Certificate Order, compounded by the Tolling Order, caused economic injury to STP members who lost property and property rights. Addendum B, Bertrand Aff. at ¶¶1-7, Brignoli Aff. at ¶¶1-12, Lidsky aff. at ¶¶1-7, Stack Aff. at ¶¶1-11. The taking of STP members' property and the subsequent entrance onto their land by the Company to perform surveys and mark areas for destruction was unnecessary as DEC

subsequently denied the 401 WQC. *Id.*, Ex.2. FERC's actions also caused environmental, aesthetic, water quality and recreational injuries to STP members, which would escalate if the project proceeds. *Id.*, Bertrand Aff. at ¶¶8-12, Att.1, Brignoli Aff. at ¶¶5, 12-15, Att.1, Lidsky Aff. at ¶¶6-8, Att.1, Pezatti Aff. at ¶¶1-2, 8-11, Stack Aff. at ¶¶4-5, Attachment.1, Ex1. All of these injuries were the direct result of FERC's three orders.

FERC's Tolling Order blocked STP from obtaining judicial review of the Certificate Order while allowing the harm described above to take place, thereby depriving STP and its members of property and property rights without due process. Addendum B, Bertrand Aff. at ¶¶5-6, Brignoli Aff. at ¶¶7-12, Lidsky Aff. at ¶¶7, 10, Pezatti Aff. at ¶¶7, 11, Stack Aff. at ¶¶9-10. STP demanded that FERC issue a final order in March 2015, but the Commission refused to act. R.2121, JA____. STP petitioned this Court for relief, but the Court held that STP did not meet the high standard required for the issuance of a writ of mandamus. *In re Stop the Pipeline*, 15-926, (2d Cir. 2015).

STP has standing as it is an organization dedicated to preserving the rural heritage and pristine environment of the region through which the pipeline would be built. Addendum B, Pezatti Aff. at ¶¶3-6. Thus, "the interests at stake are germane to the organization's purpose. . . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Members of STP would have the

right to sue as individuals as they had their land taken, properties devalued, landscape defaced, trees cut, privacy invaded, water quality degraded, and their ability to recreate diminished as a direct result of FERC's orders. *Id.*; *B&J Oil and Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004); Addendum B (sworn statements of STP members). Their harms can be redressed by the relief requested, as this Court can: (1) vacate FERC's Certificate Order and order that all easement agreements acquired as a result of that order be rescinded and court ordered easements nullified; (2) declare that the Commission's failure to issue a final order within thirty days of STP's request for rehearing was contrary to law and a violation of STP members' due process rights; and, (3) remand this matter for evidentiary hearings on the need for the project under the NGA and for a supplemental EIS under NEPA, if so decided. Each of these remedies can be achieved without the individual participation of STP's members. *Friends of the Earth*, 528 U.S. at 180-81. Thus, STP has Article III standing. *Lujan*, 504 U.S. at 560-61.

STP members' injuries are ongoing as the easements obtained since December 2, 2014 remain in force. Addendum B, Bertrand Aff., Attachments 2,3, Brignoli Aff., Attachments 2,3, Lidsky Aff., Attachments 2,3, Stack Aff., Attachments 2,3. On May 23, 2016, the Company told landowners it expects to complete the pipeline in 2018. *Id.*, Ex.3. To overcome the DEC's denial of the 401

WQC, the Company petitioned this Court for review (Docket 16-1568) and filed a separate complaint in the NDNY (Docket 16-cv-0568).

Even if the Company withdraws its Application to FERC and rescinds the easement agreements, or if this Court upholds DEC's denial of the 401 WQC thereby effectively stopping the project, STP would retain standing as these injuries are capable of repetition, yet evading review. FERC routinely issues certificates without a 401 WQC and tolling orders that block petitioners from seeking judicial review while property is taken and construction activities begin. *See e.g.*, 139 FERC 61,161 at ¶53, App.B at ¶4. Here, landowners who suffered injury could be subject to the same treatment in the near future as the Company could reapply to FERC or Tennessee Gas Pipeline, LLC ("Tennessee") could revive the Northeast Energy Direct ("NED"), a parallel pipeline planned along the same route. Addendum B, Bertrand Aff. at ¶¶13-15, Brignoli Aff. at ¶¶16-18, Lidsky Aff. at ¶¶9-12, Stack Aff. at ¶¶12-14. Thus, these issues are capable of repetition, yet FERC could continue to evade review through the same process it used here. *See Roe v. Wade*, 410 U.S. 113, 125 (1973).

STANDARD OF REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

While the four issues presented for review have nuances in their standard of review that will be discussed below, all share a violation of the Administrative

Procedure Act (“APA”). This Court shall set aside any agency order that is arbitrary, capricious, not in accordance with law, contrary to constitutional right, or not supported by substantial evidence. 5 U.S.C. §§ 706(2)(A), (B), (E) (2012). If an agency “entirely failed to consider an important aspect of the problem,” or failed to comply with legal requirements, the action must be set aside. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). Legal issues, such as Constitutional due process and unambiguous statutory interpretation are reviewed *de novo*. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

SUMMARY OF ARGUMENT

Issue I

FERC violated the CWA by issuing its Certificate Order before the Company obtained a 401 WQC from DEC. The statutory language in the CWA is unambiguous – a 401 WQC is required before the issuance of *any* federal license or permit. In addition, under the NGA, FERC is required to comply with schedules established in other federal laws. Finally, the NGA does not preempt the CWA.

The principal case on which FERC has relied is inapposite. Unlike here, it was decided under the National Historic Preservation Act (“NHPA”), which has an

implementing regulation that specifically allows nondestructive planning activities to proceed before the consultation required under section 106 of the NHPA is complete. There are no exceptions in the CWA regulations allowing “conditional” licenses to be issued *before* a 401 WQC.

Issue II

FERC violated the NGA and the Due Process Clause of the Fifth Amendment by issuing a Tolling Order, instead of a final order, within thirty days of STP’s request for rehearing. This blocked STP from obtaining any judicial review of the validity of FERC’s order or the public need for the project while the Company took property through eminent domain. As a result, STP and its members were deprived of real property and property interests without due process.

The NGA strikes an equitable balance between parties and FERC: (1) a party must request rehearing within thirty days of an order; (2) FERC is given thirty days to reconsider; and (3) a party must petition for review within sixty days of a final order. However, instead of issuing a final order, FERC issued the Tolling Order, which “granted” a rehearing for the sole purpose of giving itself an indefinite period of time in which to “act.” This deprived STP of a property interest – a statutory right to an adjudicatory hearing.

FERC violated the Due Process Clause, as a hearing must occur at a meaningful time. In *Brody*, this Court found that a *judicial* hearing must occur before someone is deprived of real property through eminent domain. *Brody v. Village of Port Chester*, 434 F.3d 121, 128-129 (2d Cir. 2005). FERC's Tolling Order prevented *any* judicial review here, in violation of STP's due process rights. All three factors in the *Mathews*' balancing test weigh in STP's favor. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Issue III

FERC violated the NGA by issuing the Certificate Order without substantial evidence to support its public use determination. The Company listed several purported benefits of the project, but none of them were substantiated. FERC adopted and embellished the Company's marketing points in a two-page summary in the DEIS, again without any evidence in support. In contrast, STP submitted substantial evidence to show that some of the purported "benefits" were entirely fictional and others self-contradictory. For example, while the Company claimed the market for the gas was in New York City and New England, when asked how much would be delivered to those areas, it stated it could not "*forecast the ultimate delivery markets.*" The Company also claimed it would reduce prices, but FERC stated that pipelines need to be expanded "in the proposed delivery areas" to meet future demand and reduce price volatility. There are well-know constraints in the

system downstream of the termination point of this pipeline, and it is undisputed that this pipeline does not increase capacity in those areas.

FERC relies entirely on the contracts between the shippers and transporters of the gas (“precedent agreements”) to justify the public need for the project. However, the contract for most of the gas is between a subsidiary of a gas driller, which is a partner in the Company, and the Company. In other words, these entities are just selling gas to themselves. No end users were identified, except for a few speculative franchises for a mere 0.6% of the gas. FERC cites cases that are inapposite, as there were contracts for local distribution in those instances, while here there are none. Finally, FERC’s policy statement is not a substitute for the statutory requirement for substantial evidence.

Issue IV

FERC violated NEPA by failing to study Iroquois Gas Transmission System, L.P.’s (“Iroquois”) South to North (“SoNo”) project, which is a reasonably foreseeable, connected project that would reverse the flow of gas in the Iroquois pipeline. Without SoNo, this project lacks a significant purpose, substantial independent utility, and a logical terminus. This project would not add capacity to the interconnecting pipelines, which are already constrained, and there is minimal potential use of the gas along the length of this project. However, by reversing the flow of the Iroquois, gas in this project could be sold in Canada, and pipeline

bottlenecks would be eliminated. In contrast, all that could be accomplished without SoNo is the displacement of one shipper's gas with another shipper's gas, which does not fulfill the stated purpose of this pipeline.

This project has a physical, functional, temporal, and financial nexus with SoNo, as the Company has a fifteen-year lease on Iroquois' Wright Interconnect Project ("WIP") and an owner of the Company would pay Iroquois to transport its gas. SoNo is reasonably foreseeable because Iroquois is simply waiting for construction to start on this project to file its application to export the gas.

ARGUMENT

I. FERC VIOLATED THE CLEAN WATER ACT BY FAILING TO WAIT FOR THE REQUIRED SECTION 401 WATER QUALITY CERTIFICATION BEFORE ISSUING ITS CERTIFICATE ORDER

A. Standard of Review

This Court shall set aside any agency order that is arbitrary, capricious or not in accordance with law. 5 U.S.C. § 706(2)(A) (2012). FERC's interpretation of the CWA receives *de novo* review because EPA, not FERC, is charged with administering the statute. 33 U.S.C. § 1251(d) (2012). *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("FERC's interpretation of § 401... receives no judicial deference..., because the Commission is not Congressionally authorized to administer the CWA."). The EPA has vested its authority under section 401 with

DEC, which must make its determination before FERC issues a certificate. *Ala. Rivers Alliance*, 325 F.3d at 300 (vacating FERC’s order as a 401 WQC from the state was required before FERC could issue its license).

B. FERC Issued the Certificate Order in Violation of the Clean Water Act’s Express Prohibition of any Federal License Being Granted Prior to the Applicant Obtaining a 401 WQC.

The plain language of the CWA requires FERC to wait for a 401 WQC before granting a certificate of public convenience and necessity. 33 U.S.C. § 1341(a)(1) (“[n]o license or permit shall be granted until the [401 WQC] . . . has been obtained or has been waived”). Instead of complying with this mandate, FERC issued its Certificate Order over sixteen months before DEC *denied* the Company’s application for a 401 WQC.¹ R.2076, JA____. Thus, FERC’s issuance of its Certificate Order was contrary to law.

Congress passed the CWA to “restore and maintain the chemical, physical, and biological integrity” of waters within the United States, and stated that the unpermitted “discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1251(a); 33 U.S.C. § 1311(a). To attain the goals of the statute, Congress “recognize[d], preserve[d], and protect[ed]” the rights and responsibilities of the states, including the right to establish water quality standards (“WQS”) within their borders. 33 U.S.C. § 1251(b); 33 U.S.C § 1313. The role of states was considered

¹ DEC, 401 WQC denial (April 22, 2016), http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf.

so vital to the success of the CWA that Congress expressly required a state WQC *prior* to the grant of any federal license:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. .

. .

33 U.S.C. § 1341(a)(1); *see also S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 374 (2006). Congress further mandated that: “[n]o license or permit shall be granted until the certification . . . has been obtained or has been waived . . .” 33 U.S.C § 1341(a)(1). Thus, the plain language of the CWA requires that the 401 WQC must be obtained or waived before any federal agency grants a license or permit. *Id.*; *see also Pub. Util. Dist. No.1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 707-08 (1994) (“PUD”). Without this requirement, states would not have the ability to block projects that would violate water quality standards or impose conditions necessary to protect the water quality in the state. *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006); *see also United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983) (states remain “prime bulwark” in effort to abate water pollution). Therefore, the primary role of water protection is given to states, and FERC is “limited to awaiting, and then deferring to, the final decision” by the state. *City of Tacoma*, 460 F.3d at 67. In addition, FERC “may not

act based on any certification that the state *might* submit,” rather it is obligated to determine that the certification has been obtained or waived, and without it “FERC lacks authority to issue a license.” *Id.* at 68; *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir 1991) (stating that applicant for a federal license must first obtain state approval as primary mechanism for state authority is the certification requirement of Section 401).

FERC does not dispute that the pipeline project “may” result in discharge to waters of New York, and that a 401 WQC is required. R.2057 at P1-16, JA____. However, as discussed in the next section, the Commission asserts a right to condition its orders on the future acquisition of a 401 WQC, and assumed that a 401 WQC would be granted. R.2057 at ES-5, JA____. (“Construction and operation-related impacts on wetlands would be further minimized or mitigated by Constitution’s compliance with the conditions imposed by the...NYSDEC.”) Issuing a “conditional” Certificate Order is not valid, though, as it reverses the priority Congress has established in protecting water and allows the project to proceed before a 401 WQC is obtained. R.2299, 2302, JA____, JA____. In *Islander East*, this Court acknowledged that the NGA does not preempt the CWA, and held that a state has the right to deny a 401 WQC. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143-44, 164 (2d Cir. 2008). Nor is preemption implied, as the NGA explicitly acknowledges states’ rights under the CWA and requires FERC to

“comply with applicable schedules established by Federal law.” 15 U.S.C. §§ 717b(d)(3), 717n(c)(1)(B). Yet, FERC ignored its obligations and exceeded its authority by granting the Certificate Order – the “license” at issue here – *before* the Company obtained a 401 WQC from DEC.² Thus FERC violated the plain language of the CWA and the Certificate Order is contrary to law.

C. FERC Is Not Authorized to Condition Its Certificate Order on the Applicant Obtaining a 401 WQC Sometime in the Future.

The NGA grants FERC the right to attach “such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). This limited authority is not a *carte blanche* and does not extend to overriding an explicit Congressional mandate by preempting the express rights of states under the CWA. In fact, the NGA requires FERC to “comply with applicable schedules established by Federal law.” 15 U.S.C. § 717n(c)(1)(B). FERC ignored this mandate by issuing its Certificate Order before the 401 WQC had been obtained.

FERC supports its claim that it can condition its orders on future federal authorizations by drawing parallels with the NHPA, even though that law has little in common with the CWA. R.2298 at ¶¶62-71, JA____. The NHPA is a “procedural

² *License*, *Black’s Law Dictionary* (9th ed. 2009) (“1. A permission, usu. revocable, to commit some act that would otherwise be unlawful; 2. The certificate or document evidencing such permission.”).

statute” that requires consideration of impacts on historic resources and coordination with other reviews, such as an Environmental Impact Statement (“EIS”) under NEPA. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999); 36 C.F.R. §§ 800.3(b), 800.8. In contrast, the CWA is a substantive statute meant to “restore and maintain the chemical, physical, and biological integrity” of waters within the United States, and empowers states to condition or block federal projects. 33 U.S.C §§ 1251(a), 1341. Unlike the CWA, the implementing regulations of the NHPA explicitly allow “*nondestructive project planning activities*” to proceed prior to the authorization of federal funds or the issuance of a license. 36 C.F.R. § 800.1(c) There are no such provisions for “conditional” approvals in the CWA. 33 U.S.C § 1341(a)(1).

FERC states that “[t]he order is an ‘incipient authorization without current force or effect’ because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied.” R.2298 at ¶62, JA____.

However, the Certificate Order allowed both the taking of property and the clear-cutting of a 100-125-foot swath of trees along twenty percent of the pipeline route without a 401 WQC from DEC. R.2299, JA____. This was in direct contravention of FERC’s own Certificate and Rehearing Orders, which state that no vegetation would be cut before all required federal authorizations have been obtained. R.2076 at PP45-46, 51, 2298 at ¶71, JA____, JA____. The day after the Commission issued

this statement in its Rehearing Order, it authorized tree clearing on land acquired through eminent domain. R.2299, 2302, JA____, JA____.

FERC relies on *Grapevine* , but it is inapposite. R.2298 at ¶¶65-67, JA____. In *Grapevine*, the Federal Aviation Administration’s (“FAA”) issuance of a conditional approval of the project did *not* allow what the statute forbade. *City of Grapevine v. U.S. Dep’t of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (“Throughout these events the FAA followed the procedure prescribed by the ACHP’s regulations.”). The FAA’s “conditional” approval did not permit the expenditure of any federal funds prior to “tak[ing] into account the effect of the undertaking on historic properties” as the FAA did not contribute to any pre-authorization activities. 36 C.F.R. § 800.1(a). Also, the NHPA’s implementing procedures specifically allow conditional approvals for nondestructive planning activities. *Id.* at § 800.1(c). Unlike the FAA in *Grapevine*, FERC violated what the CWA forbids by granting its Certificate Order prior to the Company obtaining the 401 WQC. Accordingly, *Grapevine* does not support FERC here.

The Company is likely to argue that FERC can condition its Certificate Order on future acquisition of a 401 WQC because states’ rights under the CWA are limited. However, the Supreme Court has held that a state’s authority under the CWA is extremely broad and includes the right to impose conditions far from the

actual discharge to water. *PUD*, 511 U.S. at 708–09, 723. To reach this decision, the Court reviewed all of section 401.

Section 401 . . . also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth ‘any effluent limitations and other limitations ... necessary to assure that *any applicant*’ will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. 1341(d) (emphasis added).

Id. at 711. The Court thus upheld state-imposed conditions that required minimum stream flows in an undisturbed part of the water body, even though minimum stream flows did not implicate the “discharge” that triggered the 401 certification requirement. For DEC, the “appropriate state law requirements” include, but are not limited to, fish and wildlife laws, and protections of endangered or threatened species, and species of concern. N.Y. Env'tl. Conserv. Law §§ 11-0105, 11-0535 (McKinney 2016). As a result, FERC cannot predetermine what conditions a state may impose as part of a future 401 WQC, and those conditions could negate activities that FERC authorizes in the interim. Thus FERC must comply with the CWA by waiting for states to issue, condition, waive, or deny a 401 WQC.

II. FERC VIOLATED THE NATURAL GAS ACT AND THE FIFTH AMENDMENT DUE PROCESS CLAUSE BY BLOCKING JUDICIAL REVIEW OF ITS CERTIFICATE ORDER

A. Standard of Review

“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. Due process claims require a two-step inquiry: (1) whether there has been a deprivation of a protected interest; and, if so (2) determining what process is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Three factors are considered in determining what process is required prior to a taking: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation; and (3) the Government’s interest. *Mathews*, 424 U.S. at 335. Whether there was a deprivation of property without due process is reviewed *de novo*. 5 U.S.C. § 706(2)(B).

“[D]ue process requires an opportunity for a hearing before a deprivation of property takes effect.” *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972). “[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely, if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.” *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005). Thus,

the courts serve “as an arbiter of a constitutional limitation on the sovereign's power to seize private property.” *Brody*, 434 F.3d at 129.

Timing requirements for review of FERC’s orders are established in the NGA. If FERC does not comply with statutory timeframes, the delay functions as a denial of due process because a party cannot petition for judicial review until FERC issues a final order. 15 U.S.C. § 717r(a), (b). The right to challenge the validity of an order granting eminent domain is a property interest protected by the Due Process Clause. *Logan*, 455 U.S. at 428. Whether FERC’s Tolling Order is an impermissible failure to act under the NGA, and a deprivation of a property interest under the Due Process Clause, are legal questions that are reviewed *de novo*. 5 U.S.C. § 706(2)(A), (B). *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986); *Alexander v. FERC*, 609 F.2d 543, 546 (D.C. Cir. 1979). Application of the unambiguous terms of section 717r(a) of the NGA is also addressed by this Court *de novo*. *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991).

B. FERC’s Certificate Order Authorizes the Deprivation of Property.

The Commission has two roles as it considers an application for an interstate gas pipeline. One is to determine whether the project qualifies for a certificate of public convenience and necessity and the second is to act as lead agency for the environmental review triggered by the project. 15 U.S.C. §§ 717f(c), 717n(b)(1). In

these roles, the Commission must ensure compliance with the schedules established by federal law. 15 U.S.C. § 717n(c)(1)(B). The Certificate Order synthesizes FERC's determinations of public need and statutory compliance and, upon issuance, authorizes a pipeline company to acquire land through the use of eminent domain. 15 U.S.C. § 717f(h). Thus the Commission's public use determination is intertwined with its decisions regarding other statutes, such as the CWA. In this case, FERC's Certificate Order was conditioned upon obtaining a federally required 401 WQC; without it, the project could not proceed.

When FERC issued the Certificate Order on December 2, 2014, approximately half of the landowners had not signed easement agreements. R.2298 at ¶22, JA____. The next day, the Company sent letters to these landowners, threatening to enter their land within ten days and initiate eminent domain proceedings if they did not sign easement agreements. R.2080 at PP4-5, JA____. STP objected, stating the Company did not have the right to take property prior to the issuance of a 401 WQC. *Id.* at PP1-3. Instead of responding to these concerns, the Company initiated a legal blitzkrieg against landowners, most of whom had no legal representation. Addendum B, Brignoli Aff. at ¶8-9. By the end of December 2014, 125 complaints in condemnation were filed in the NDNY, with additional cases in Pennsylvania. R.2269, Ex.1, JA____. The Company obtained title to the land and filed Court ordered easements in the County Clerks' Offices. R.2269,

Ex.2, JA____. This allowed them to enter otherwise private property, conduct surveys, and mark easements for tree cutting. R.2269, Ex.5, Brignoli ¶10, Stack ¶¶9-11, JA____. On January 29, 2016, FERC allowed the Company to cut trees in Pennsylvania. R.2299, JA____. Three months later, DEC denied the 401 WQC, which stopped the project from proceeding. *Islander East*, 525 F.3d at 164. Thus there have been erroneous deprivations of property by the federal government.

C. The Validity of FERC’s Certificate Order Cannot Be Challenged in Condemnation Proceedings.

STP questioned the validity of the Certificate Order, including the public need for the project, in its request for rehearing, and STP members objected to the taking of their land on similar grounds. R.2096, JA____. Addendum B, Brignoli Aff. at ¶11, Lidsky Aff. at ¶10. However, the district court found that it must assume the validity of the Certificate Order, and challenges to it must be made in circuit court.

Defendants contend that the FERC Order herein is invalid or insufficient because a certificate under section 401(a)(1) of the CWA (CWA 401 certificate) has not yet been obtained or waived; indeed, it is undisputed that Constitution’s reapplication for a CWA 401 certificate is still pending. In response to defendants’ argument, plaintiff correctly points out that **once a FERC certificate is issued, judicial review of the FERC certificate itself is only available in the circuit court.**

Constitution Pipeline Co., 3:14-cv-02049-NAM-RFT at 1-2, 5 (emphasis added).

Thus, title passed from property owner to pipeline company without a judicial pre-deprivation hearing on the validity of FERC's Certificate Order.

D. FERC's Tolling Order Caused a Deprivation of a Property Interest.

The right to challenge the validity of an order granting the power of eminent domain is a discrete property interest protected by the Due Process Clause. *Logan*, 455 U.S. at 428. “[The] Due Process Clause has been interpreted as preventing the [government] from denying potential litigants use of established adjudicatory procedures, when such an action would be ‘the equivalent of denying them an opportunity to be heard upon their claimed [rights].’ ” *Id.* at 429-30 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Here, FERC's Tolling Order deprived STP of a property interest – the statutory right to an adjudicatory procedure prior to the taking of property. STP was unable to challenge the validity and public use determination of FERC's Certificate Order for a full year longer than Congress intended because a final order is required to seek judicial review. 15 U.S.C. §717r(b). By blocking judicial review while empowering the Company to take private property, FERC undermined the courts' role “as an arbiter of a constitutional limitation on the sovereign's power to seize private property.” *Brody*, 434 F.3d at 129.

In *Brody*, this Court held that due process requires judicial scrutiny of a public use determination in the context of eminent domain:

The Village argues that . . . public use is essentially a legislative decision not subject to the requirements of due process. We disagree with the Village's characterization of the issue. . . . While we agree that due process rights do not attach to legislative actions, the issue here is whether such rights attach to a judicial proceeding established to allow aggrieved persons to assert a constitutionally prescribed limitation on a legislative action, i.e., the review procedure for challenging a public use determination. . . . “[T]he question [what is a public use] remains a judicial one . . . which [the courts] must decide in performing [their] duty of enforcing the provisions of the Federal Constitution.”

Brody, 434 F.3d at 128-9 (internal citations omitted).

As discussed below, in Issue III, STP is challenging FERC’s public use determination, which provided the basis for the Company’s right to eminent domain. 15 U.S.C. § 717f(h). However, by issuing the Tolling Order, the Commission prevented *any* judicial review of FERC’s Certificate Order by a circuit court as the Tolling Order did not go to the merits, and could not be deemed final and reviewable.³ 15 U.S.C. § 717r(b). In this manner, the Tolling Order deprived STP and its members of their property interests without due process.

³ In March 2015, STP petitioned this Court for relief, but the Court held that STP did not meet the high standard required for the issuance of a writ of mandamus. *In re Stop the Pipeline*, 15-926, (2d Cir. 2015).

E. A Judicial Pre-deprivation Hearing Is Required.

The question before this Court is what process is due, and when it must occur. In *Mathews*, the Court established a three-factor balancing test to guide such determinations. *Mathews*, 424 U.S. at 335. In *Brody*, this Court applied the *Mathews* test, and found that a public use determination should be subject to judicial review prior to the taking of property through eminent domain. *Brody*, 434 F.3d at 129, 134-5. Like in *Brody*, a pre-deprivation judicial hearing is needed here, and, in fact, is already required.

FERC has implied that due process and the taking of real property are irrelevant, as the Company “will not be allowed to construct any facilities on subject property unless and until there is a favorable outcome on all outstanding requests for necessary federal approvals.... Further, Constitution will be required to compensate landowners for any property rights it acquires.” R.2298 at ¶71, JA____. FERC’s position misconstrues due process and ignores property owners’ right to exclude. In *Lingle*, the Court stated that a lack of bona fide public use, or an arbitrary decision, cannot be cured through compensation. *Lingle*, 544 U.S. at 543. FERC also stated there would be minimal impact on landowners and no property damage, “[b]ecause Constitution may go so far as to survey and designate the bounds of an easement but no further, e.g., it cannot cut vegetation or disturb ground, any impacts on landowners will be minimized.” R.2298 at ¶71, JA____.

The day after issuing this order, FERC violated it by authorizing tree clearing on properties taken through eminent domain prior to acquiring all federal authorizations. R.2299, 2302, JA____, JA____.

The Supreme Court has repeatedly stated, “[a] fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal citation omitted). In *Fuentes*, a case involving replevin statutes in two states, the Court held, “[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.” *Fuentes*, 407 U.S. at 81-82. Over thirty years later, this Court reiterated that right. “The general rule is ‘due process requires an opportunity for a hearing before a deprivation of property takes effect.’” *Brody*, 434 F.3d at 135 (quoting *Fuentes*, 407 U.S. at 88). Although *Brody*’s hearing was post-deprivation, it occurred before title was transferred. *Id.* at n.9. In that case, as here, a *judicial* pre-deprivation hearing was required to ensure compliance with the Fifth Amendment. *Id.* at 128-9.

1. Real Property Interests Are Significant.

According to the test in *Mathews*, the first factor to be considered is the significance of the deprivation of the private interest. *Mathews*, 424 U.S. at 335. Here, “the right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This right is fundamental to our social values and jurisprudence. For example, Blackstone defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁴ See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.”).

In *Mathews*, the issue was whether the termination of disability benefits was a deprivation of property that required a prior hearing. *Mathews*, 424 U.S. at 340-343. In making its determination, the Court noted that disability benefits were temporary and not based on financial need. *Id.* This case can be distinguished, as it is real property that has been taken, including the bundle of sticks that define property rights – the right to exclude, the right to quiet use and enjoyment, and the right to determine when to sell and at what price. Here, landowners who had their

⁴ 2 William Blackstone, *Commentaries on the Laws of England* *2 (Univ. of Chicago Press 1979) (1766).

property taken through eminent domain can no longer exclude strangers who work for the Company from coming on their land, use it as the landowners choose, or quietly enjoy it as before. R.2269, Ex.5, Brignoli ¶10, 15, Lidsky ¶4-7, 10, Stack ¶¶5-11, JA____. Some landowners were forced to live like nomads, as they could not build their retirement home where they planned. R.2269, Ex.5, Stack ¶¶5-8, JA____. Others wonder if they can still count on harvesting timber, or sap from maple trees, during their retirement. R.2269, Ex.5, Bertrand ¶¶4-7, JA____. Many feel the loss of their home and property as a safe haven, even outside of the easement area. For example, some are fearful for their safety, or for the safety of their children and grandchildren, and say they would have to abandon their homes, as the pipeline would be highly explosive and could incinerate anyone within 800-900 feet of it, well beyond the easement area. R.2269, Ex.5, Bertrand ¶10, Brignoli ¶¶7, 11-13, Lidsky ¶5, JA____. The majority of landowners opposed the project, and more than half of them refused to sign easement agreements. R.2298 at ¶22, JA____.

The significance of the deprivation weighs in STP's favor. Unlike the temporary disability benefits in *Mathews*, these easements are permanent (unless vacated by this Court). Unlike *Brody*, property rights were transferred before FERC's determination of public need could be challenged. This "render[s] meaningless the court's role as an arbiter of a constitutional limitation on the

sovereign's power to seize private property.” *Brody*, 434 F.3d at 129. While landowners will be compensated, they will never be paid for their loss of rights associated with ownership.⁵ See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (“[T]he creation of a right is distinct from the provision of remedies for violations of that right.”). Since full relief will never be obtained, a pre-deprivation hearing is required. *Mathews*, 424 U.S. at 331 (“A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing.”). “In sum, the private interests at stake in the seizure of real property weigh heavily in the *Mathews* balance.” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54-55 (1993).

2. There Were Erroneous Deprivations of Property.

The second factor in *Mathews* is “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]” *Mathews*, 424 U.S. at 335. In *Fuentes*, the Court elaborated on the purpose of due process, which is “to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of

⁵ In condemnation proceedings, fair market value is set through “comparable” prices based on transactions by *willing sellers*. Here landowners are forced to relinquish their land, and are not compensated for losing their right to decide.

property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes*, 407 U.S. at 80-81. What the Court warned of in *Fuentes* happened here, but involved the loss of real property, which is more significant than deprivation of personal possessions. *James Daniel Good*, 510 U.S. at 54. The Company applied to FERC to build a pipeline of questionable public use, was granted the right, and took property before STP could obtain judicial review of the Certificate Order because FERC issued the Tolling Order, instead of a final order. R.1-001, 2076, 2103, 2269, Ex.2, JA____, JA____, JA____. Sixteen months after FERC issued its conditional Certificate Order, DEC denied the 401 WQC, which stopped the project. Thus, there were erroneous deprivations of real property as a direct result of FERC's procedures, which means additional safeguards are needed. *Mathews*, 424 U.S. at 341.

The second procedural problem was FERC's issuance of the Tolling Order, which deprived STP of judicial review of the Certificate Order. 15 U.S.C. § 717r(a), (b); *Logan*, 455 U.S. at 428. FERC's delay in issuing the Rehearing Order is fundamentally unfair, as it blocked STP from challenging the validity of the Certificate Order before property was taken. As discussed below, in Issue III, FERC failed to provide substantial evidence to support the need for the project. Whether STP prevails in its challenge of the public use determination is irrelevant

to the need for due process. *Fuentes*, 407 U.S. at 87 (“The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.”).

FERC’s administrative process to determine public use is also unreliable, which adds weight to the need for a pre-deprivation hearing. *Mathews*, 424 U.S. at 343. In response to comments questioning the need for the project, FERC stated, “[w]e also received comments on the draft EIS requesting additional information regarding need of the projects and whether it serves the public convenience and necessity. A project’s need is established by the FERC when it determines whether a project is required by the public convenience and necessity, i.e., the Commission’s decision is made.” R.2257 at P1-3, JA____. Thus, FERC admitted that it makes its public use determination outside of NEPA, at the very end of the administrative review. R.2298 at n.24, JA____. At that point, the only process available is to request rehearing of FERC’s Certificate Order, which STP did. However, FERC blocked judicial review by issuing the Tolling Order.

There would be great value in prohibiting the use of tolling orders. By requiring FERC to issue a final order within thirty days of a request for rehearing, judicial review of FERC’s orders could be initiated prior to the taking of property. This safeguard, which is already required by the NGA, might have prevented the erroneous deprivations in this case.

3. The Fiscal and Administrative Burdens on FERC in Providing Due Process Are Low.

The third factor under *Mathews* is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. Here the Government has three distinct interests: (1) facilitating the interstate transmission of gas, under the 1938 NGA; (2) “restor[ing] and maintain[ing]” the Nation’s water, under the 1972 CWA; and (3) ensuring the right to due process prior to the taking of property under the Fifth Amendment. 15 U.S.C. § 717(a); 33 U.S.C. § 1251(a). Congress has indicated that the preservation of water quality is more important than the transportation of gas, as the 401 WQC must be issued prior to FERC’s license. 33 U.S.C. § 1341(a). Congress could have created an exception for pipelines when it enacted the CWA, or in any one of the subsequent amendments, but did not. “It is elementary that a more recent and specific statute is reconciled with a more general, older one by treating the more specific as an exception which controls in the circumstances to which it applies.” *Thompson v. Calderon*, 151 F.3d 918, 929 (9th Cir. 1998) (citing 2B *Sutherland on Statutory Construction* § 51.02 (5th ed. 1992)). The government’s interest in preserving Constitutional rights is even higher than protecting statutory rights.

There should be no additional burdens on FERC to provide due process, as STP is merely asking this Court to enforce existing procedures, not add new ones.

Even if that were not true, the fiscal and administrative burdens on FERC would be low. FERC is reimbursed for its efforts by the industry it regulates, so if staff has to be hired to issue timely orders on requests for rehearing, those costs could be recouped. 42 U.S.C. § 7178. In addition, unlike *Mathews*, where millions of people apply for disability benefits and could technically request judicial review, the number of parties who request rehearing of FERC's orders is low. *Mathews*, 424 U.S. at 347. Here, nearly 500 people and groups intervened, but only five requested rehearing. R.2057 at P1-9, 2298 at ¶10, JA____, JA____. It is unlikely that there would be an increase in these numbers. *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 617 (2d Cir. 1965) (“Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.”). In any event, all that STP seeks is the judicial review *already required* under the NGA. That review should take place before eminent domain proceedings have been completed, not after, as is happening here because of FERC's Tolling Order. Put simply, STP does not seek to impose *any* additional burdens on the government, so this factor also weighs in STP's favor.

In sum, all three of the *Mathews* factors weigh in STP's favor. There can be no question here that judicial review of the Certificate Order, including the public use determination therein, was required before land could be taken by eminent

domain. FERC deprived STP and its members of that right, and thereby violated the due process rights guaranteed by the Fifth Amendment.

E. FERC’s Tolling Order Violates the Natural Gas Act.

In addition to violating the Fifth Amendment, FERC’s Tolling Order is also contrary to the NGA. “In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning.” *Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013). Congress struck an equitable balance in the NGA, giving an aggrieved party thirty days to object to FERC’s decision, the agency thirty days to correct an error, and the aggrieved party sixty days to seek judicial review. 15 U.S.C. § 717r(a), (b). The third sentence of section 717r(a) enumerates the specific actions FERC must take in response to a request for rehearing. “Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing.” 15 U.S.C. § 717r(a). The fourth sentence specifies the timeframe within which these enumerated actions may be taken: “Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.” *Id.* The word “acts” in the fourth sentence refers to the specific *acts* that Congress authorized in the third (“grant or deny rehearing or [] abrogate or modify its order...”). *Id.* Instead of complying with the ordinary meaning of these words, FERC habitually “grants” a request for rehearing for the

sole purpose of giving itself an indefinite amount of time to issue a final order, as it did in this case. R.2103, JA____. Delaying a decision was not an “act” Congress intended. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 370 (2d Cir. 2006) (“[T]he express statutory mention of certain things impliedly excludes others not mentioned . . . [I]t ‘applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded.’” (quoting *United States v. City of New York*, 359 F.3d 83, 98 (2d Cir. 2004)).⁶

Instead of following its Congressional mandate, FERC unfairly – and illegally – shifts power to itself, first by issuing conditional orders, and then by preventing meaningful challenges to its orders by delaying action on requests for rehearing. Here FERC’s Certificate Order prematurely enabled the Company to take property, while its Tolling Order denied STP the “use of established adjudicatory procedures” to challenge the validity of the Certificate Order. *Logan*,

⁶ STP acknowledges that the First, Fifth, and D.C. Circuits have accepted FERC’s use of tolling orders, but the cases can be distinguished. In both *California Co. v. Fed. Power Comm’n*, 411 F.2d 720 (D.C. Cir. 1969) and *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm’n*, 409 F.2d 597 (5th Cir. 1969), the subject matter of the FERC orders involved rate proceedings, and in *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988), the relevant complaint involved “unreasonable fees” charged by a utility for access to a particular water body. In the context of economic regulation, agency delays may be acceptable, but such holdings do not extend to situations where the delay results in deprivation of constitutionally protected property rights without due process. *See Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951) (“Agency inaction can be as harmful as wrong action.”).

455 U.S. at 429-30. As a result, two deprivations of property took place: (1) land was seized and (2) STP was denied a statutory right to be heard.

III. FERC VIOLATED THE NATURAL GAS ACT BY FAILING TO PROVIDE SUBSTANTIAL EVIDENCE OF THE NEED FOR THE PROJECT.

A. Standard of Review

Under the NGA, “[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.” 15 U.S.C. § 717r(b). In a dispute regarding a similarly worded standard under the National Labor Relations Act, 29 U.S.C. §§ 151-169, the Court held that the entire record must be considered in such a determination. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-88 (1951). The meaning of substantial evidence is the same as that used in the APA, 5 U.S.C. § 706(2)(E); *Id.* at 481-82, 487; *Mobil Oil Corp. v. Fed. Power Comm’n*, 483 F.2d 1238, 1258 (D.C. Cir. 1973) (“The phrase ‘substantial evidence’ is a term of art well recognized in administrative law. This requirement imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.”). Applying this standard, the Court has upheld decisions to overturn certificates issued by FERC. *See Atlantic Refining Co. v. Public Service Comm’n of State of N.Y.*, 360 U.S. 378, 392-94 (1959). “[T]he rule that the ‘whole record’ be considered - both evidence for and against - means that the procedures must provide some mechanism for interested parties to introduce adverse evidence

and criticize evidence introduced by others.” Mobil Oil Corp, 483 F.2d at 1258 (emphasis in original). Regardless of any internal decision-making process, the statutory requirements for substantial evidence must be satisfied. Id. at 1257; 15 U.S.C. § 717r(b).

B. STP Repeatedly Questioned the Evidence.

STP and its members questioned the need for this project in 2012, submitted reports and comments after the Company filed its Application, and objected when the Commission granted a conditional certificate. R. 1606; 1746; 1752; 1914 at 3, 4, 31, 42-45, 47-48, 51-62; 2026; 2047; 2094 at 14-27; 2096 at 14-25; JA____, JA____, JA____, JA____, SA4, JA____. The determination of need allowed private property to be taken through eminent domain, eliminated the right to exclude Company staff and subcontractors from otherwise private property, and led to environmental destruction, even before conditions required by other federal laws, and by the Certificate Order, were satisfied. R.2096 at 11-14, Ex.2, 2299, 2302, JA____, JA____, JA____.

C. The Company’s Application and FERC’s DEIS Provide Marketing Points, Not Evidence.

1. Introduction

The purported benefits of the project mentioned in the Application resemble a sales pitch, and lack substantiating evidence and analysis. The Company states there is a need for the gas even though no sales contracts are in the record. R.1-002

at PP4, 16-17, JA___. It says it would serve certain markets, but when questioned, changes its story and says it doesn't know where the gas would go. R.1-036 at P4, 1514-027 at PP63-64, JA ___, JA___. The Company states the pipeline would increase reliability, yet admits it would not expand existing capacity. R.1-002 at PP7-8, 1514-027 at PP64, JA ___, JA___. It claims it would increase competition and lower costs, but provides no analysis as to how. R.1-002 at PP16-17, JA _____. FERC repeats the purported benefits of the pipeline put forth by the Company, and ignores contrary facts. R.1560 at PP1-1-1-3, JA _____. Thus the record does not include the evidence required to support FERC's findings. *Atlantic Refining Co.*, 360 U.S. at 392-94.

2. The Company Failed to Substantiate Its Claims.

The Company claims its project would provide several benefits, but doesn't substantiate these claims with evidence. The pipeline would begin in Susquehanna County, Pennsylvania, and end in Wright, New York, where new compressors would push up to 650,000 decatherms per day ("Dth/d") of gas into the existing Iroquois Pipeline ("Iroquois") and Tennessee Gas Pipeline ("TGP"). R.1-002 at PP4-5, JA___. The Company states it would be able to transport this gas "to major, high-demand markets, including New York and New England." R.1-002 at P16, JA___. This claim was repeated in materials prepared for government officials.

R.1-036 at 4, JA____. However, when FERC asked how much gas would be delivered to those markets, the Company refused to give an answer.

FERC: “Estimate the individual volumes of natural gas that would be delivered to New York City from Constitution via the Iroquois system and to the New England area via the [TGP] 200 system.”

Company: “Constitution’s proposed delivery points will deliver natural gas into *existing pipeline capacity* via proposed interconnections with Iroquois and/or Tennessee Gas Pipeline.

Constitution cannot forecast the ultimate delivery markets of the natural gas transported by Constitution’s shippers.”

R.1514-027 at PP63-64, JA ____ (emphasis added). Thus, after claiming one thing, the Company then admitted that it would not be increasing the amount of gas delivered via Iroquois and TGP, and might never serve markets in New York City and New England.

The Company states the project *might* provide economic benefits to the region, and *might* increase reliability and diversity of the natural gas supply. R.1-002 at P8, JA____. The Company also says that this project “may ultimately lead to lower costs to consumers.” R.1-002 at PP16-17, JA____. By using conditional auxiliary verbs (might and may) to describe these three benefits (reliability, diversity, and lower cost), the Company admits that the possibility of actually achieving them is small. Even so, *no evidence* is presented to support these speculative goals. According to historic documents, existing pipelines should be providing reliability and diversity at a competitive price. For example, the Iroquois pipeline was approved after years of regulatory proceedings held at all levels of

government. *La. Ass'n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1107-10 (D.C. Cir. 1992). The shippers were local distribution companies (“LDCs”), who substantiated the need for the gas with market projections and long-term *sales* and transportation contracts. *Id.* at 1115-16. The Department of Energy found the gas “would market competitively and that the import agreements were sufficiently flexible so that the gas would remain competitive.” *Id.* at 1120. There is no evidence in the record to suggest that Iroquois is no longer providing these benefits.

[REDACTED]

[REDACTED] In Section D, below, STP summarizes

evidence it submitted that show that all of the pipes leading out of Wright are already full of gas and much of it is already coming from Pennsylvania. There is no evidence showing the gas the Company would transport would be any cheaper. In any event, it would be hard to prove, as Tennessee already transports competitively priced gas from Pennsylvania. R.1752, Att.1 at 19, JA____. As noted in the next section, FERC admitted that additional capacity is needed in the end market (New York City and New England) to end price volatility. R.1560 at 3-2, JA _____. Since this project ends at Wright, it does not increase capacity in those areas.

3. FERC Merely Repeats the Company's Claims.

In spite of these contradictions and lack of substantiating evidence, FERC reiterates the Company's claims about market benefits in five points. R.1560 at PP1-1-1-3, JA _____. FERC expands point two, regarding "new natural gas service for areas currently without access to natural gas;" but fails to provide details on the amount of gas that could be delivered to these small rural towns, the cost of installing such service, or the economic risks involved. R.1560 at 1-2, JA _____. Leatherstocking, the start-up LDC that would be delivering this gas, revealed the insignificance of potential local use when it admitted that if all of its non-binding franchise agreements came to fruition, it would amount to a mere 0.6% of the gas in the pipeline. R.1817 at N8, JA _____. In point three, FERC repeats the Company's

claim that the project would increase “reliability in the New York and New England market areas[,]” but fails to show how. R.1560 at 1-2, JA _____. FERC also neglects to mention that the Company admitted that the gas might never be delivered to New York City or New England. R.1514-027 at PP63-64, JA _____. In point four, FERC echoes the unsubstantiated statement that the project would “reduce[] price volatility, and lower prices[.]” R.1560 at 1-2, JA _____. However, this claim was contradicted elsewhere when FERC admitted that pipeline constraints in the proposed delivery areas are the cause of price volatility. R.1560 at 3-2 – 3-3, JA _____. This project does not add capacity to those pipelines, so it would merely replace gas that is currently under contract to be transported. R.1-004, Ex.G at P1, GII, SA1, SA2. FERC failed to mention that fact until it issued its orders. R.2076 at ¶115, JA _____. As discussed below, in Section D and Issue IV, pipeline constraints downstream of Wright, NY are the crux of the problem, and the project cannot decrease price volatility until downstream capacity is increased. R.1746 at 6-9, 1752, Att.1, 33-34, JA____, JA____. Finally, FERC converted the Company’s statements of mere possibility (what *might* happen), into conclusive statements. R.1560 at 1-2, JA _____. As the D.C. Circuit has found before, FERC can be overly generous toward the companies it is responsible for regulating: “Why the Commission would be so tender-hearted to the pipeline is unclear.” *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 892 (D.C. Cir. 1998).

The only materials prepared by FERC on which the public could comment are a few pages in the DEIS. R.1560 at PP1-1-1-3, 3-2, JA _____. Statements made by FERC in its orders should not contribute to the weight of the evidence because members of STP were not allowed an opportunity to critique the material. *Mobil Oil Corp.*, 483 F.2d at 1258.

D. FERC Ignored STP's Evidence, Which Outweighs the Sales Points Made by the Company and FERC.

STP, and its members, submitted substantial amounts of factual information, analysis, and industry reports that show a lack of benefit and need for the project. *See* R. 1606; 1746; 1752; 1914 at PP3, 4, 31, 42-45, 47-48, 51-62; 2026; 2047; R.2094 at PP14-27; 2096 at PP14-25; JA____, JA____, JA____, JA____, JA____, SA4, JA____. These include: (1) industry reports documenting constraints in the system that would inhibit the delivery of additional gas to markets south and east of Wright, NY; (2) lists of other pipelines bringing gas from Pennsylvania to New York City and New England; (3) absence of sales contracts either along the route or elsewhere; (4) insignificant potential use and exorbitant costs associated with delivering gas to sparsely populated rural areas; (5) trends to move gas stranded in Pennsylvania out of the country; and (6) recent reports indicating lack of market need. *Id.* These points, which are elaborated upon below, diminish the weight of the already insubstantial evidence in the record. *Universal Camera Corp.*, 340 U.S.

at 488 (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

According to an industry report, “New York State’s natural gas infrastructure is large, dynamic and more than adequate to serve the requirements of entitlement holders.” R.1752, Att.1 at 20, JA____. It explains that the main reason for higher gas prices in New York City and New England is pipeline congestion, which causes price spikes during a few hot and cold weeks of the year. R.1746 at PP6-9, 1752, Att.1 at PP32-34, JA____, JA____.⁷ The project would not solve this problem as it is not increasing capacity and adds gas upstream of the bottlenecks. R.1514-027 at PP63-64; 1746 at PP6-9, 1752, Att.1 at PP58-66, 72-77, JA____, JA____, JA____. Because of these physical limitations, the project could not significantly lower costs or increase reliability, goals that FERC stated establish the need for the project. R.1560 at 3-2, JA____.

As for bringing Pennsylvania gas to New York City and the Northeast, those areas already consume gas from Pennsylvania. R.1746 at PP21-23, 1752, Att.1 at PP18-19, 72-73, 134, JA____, JA____. Since 2010, about twenty projects have been built to increase delivery of Pennsylvania gas to New York and New England. *Id.* Densely populated areas are already well served by the pipeline network, and six

⁷ STP incorporated this report into its comments. R.1914 at PP3, 31, JA____.

major pipelines, with many points of intersection, already run through, or near, the gas fields of Pennsylvania. R.1560 at P3-14, JA____.

In terms of supplying gas to areas along the route, gas service exists where the population density justifies the cost of installing it. R.1606 at P1, JA____.

Sparsely populated areas cannot afford gas infrastructure, and new transmission lines will not change that. R.1746 at PP25-26, JA____. The truth of this is bolstered by the lack of sales contracts in the record.

FERC states the market for the gas is in New York City and New England, but recent reports conclude there is no need for additional gas in those locations. R.1746 at PP6, 20-23, 1752, Att.1 at P20; 2026, Att.14; 2236 at P2, n.1; 2238 at PP1, 4; JA____, JA____, JA____, JA____, JA____. Instead of market demand, this project is being driven by an excess supply of gas, with the goal of exporting it. R.1746 at PP19-20, JA____. Cabot Oil & Gas Corporation (“Cabot”) promoted its export plans to investors in 2013, but the Company told FERC a few months later that it didn’t know where the gas was going. R.1752, Att.2 at PP1, 18; 1514-027 at PP63-64, JA____, JA____.⁸ Cabot’s presentation included a graphic showing the

⁸ SA Transcripts, Cabot Oil & Gas (COG) Dan O. Dinges on Q2 2015 Results - Earnings Call Transcript (July 24, 2015), <http://seekingalpha.com/article/3355855-cabot-oil-and-gas-cog-dan-o-dinges-on-q2-2015-results-earnings-call-transcript?part=single>. Two years later, Cabot CEO, Dan Dinges, discussed the need to move gas to higher priced markets, and stated, “Constitution, as an

flow of the gas in the Iroquois pipeline being reversed at Wright, with text that the gas would be transferred to TransCanada Pipeline. R.1752, Att.2 at P18, JA____.

Iroquois will facilitate Cabot's goal of reaching higher priced markets when it reverses the flow of its pipeline from south to north, exporting gas to Canada (the "SoNo" project). R.1746 at PP9-18, 1752, Att. 3, JA____, JA____. The project manager for Iroquois' SoNo project stated Iroquois is waiting for Constitution to put pipes in the ground before it proceeds.⁹ Once in Canada, the gas could be moved to the Maritimes and shipped overseas. R.1746 at PP10-18, 2026, Att.9-13, JA____, JA____. The goal of shipping the gas to Canada contradicts the record, which states the end markets are in New York City and New England. Even if there is a need for gas in Canada, exporting it raises Constitutional questions about whether citizens' property can be taken for "public use" in other countries.

However, those serious concerns were not addressed here. As discussed below, in Issue IV, FERC refused to include SoNo in its EIS.

example, we're going to be able to move gas, not only south from Wright Station, but we're also going to be able to move gas north into Canada from that position."

⁹ Brian Nearing, *Pro-gas pipeline supporters push Cuomo to greenlight project*, TIMES UNION (April 18, 2016), <http://www.timesunion.com/tuplus-business/article/Pro-gas-pipeline-supporters-push-Cuomo-to-7256065.php>. (This article is not in the record as it was published after the record was closed.)

E. Contracts Between Parties Are Not Substantial Evidence.

A certificate of public convenience and necessity is required for new pipelines, and the decision to grant one must be based upon substantial evidence. 15 U.S.C. §§ 717f(c), 717r(b). In 1999, the Commission developed policy guidelines to help determine whether a project should be granted such a license. R.2076 at ¶22, n.22, JA____. Deference should not be given to FERC based upon these policy statements. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Interpretations . . . contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.”). The role of this Court is to ensure that the weight of the evidence substantially supports the determination made. *Scenic Hudson*, 354 F.2d at 612. If it doesn’t, then FERC’s decision must be reversed. *Atlantic Refining*, 360 U.S. at 392-93 (“Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity. . . .”).

In recent challenges of need for pipelines, there was evidence of market demand. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (“[T]he Project would ensure ‘the ability of two local distribution companies . . . to meet the needs of their overall 1.5 million customers during periods of peak demand (i.e., the winter heating season). . . .’”) (internal

citations omitted). While FERC cited *Myersville*, it is inapplicable here, as the Company has no sales contracts. R.2298 at ¶21, n.30-31, JA____. Instead, the shippers are drillers, selling gas to themselves. R.1-002 at P5, JA____. Cabot, which would be supplying over 75% of the gas in the pipeline, owns 25% of the Company, and signed a precedent agreement in which it agreed to pay a set fee for the shipment of its own gas. R.1-002 at P5, 1-003, Ex.A, 1-004, Ex.I, 1746 at P19, JA____, JA____, SA3, JA____. This enables Cabot to buy gas at a lower rate, divert gas from other pipelines to this one, and earn transportation fees for the gas it ships. These self-serving contracts are not arms-length transactions, and do not establish *market* need. Yet FERC relied on them to approve the project, which empowered the Company take people's property and cut trees. R. 1-004, Ex.I; 2096 at PP11-14, Ex.2; 2269, Ex.1, 2; 2298 at ¶21; 2299; 2302; SA3, JA____, JA____, JA____. In sum, the record on which FERC bases its determination of public use fails to provide substantial evidence of the purported benefits, including local use, market demand, increased reliability, or decreased costs. *Mo. Public Serv. Comm'n v. FERC*, 215 F.3d 1, 7 (D.C. Cir. 2000) ("It could hardly satisfy the Natural Gas Act's requirement of substantial evidence for facts found by the Commission.") (internal citations omitted).

IV. FERC VIOLATED NEPA BY ILLEGALLY SEGMENTING A REASONABLY FORESEEABLE PROJECT.

A. Standard of Review

Under NEPA, and its implementing regulations, agencies must analyze connected, cumulative, and similar actions in an EIS. 40 C.F.R. §§ 1500.1, 1502.9, 1508.7, 1508.25(a). *See Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 87-90 (2d Cir. 1975); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309-1310, 1313-1314 (D.C. Cir. 2014). NEPA requires a “hard look” and strict compliance with procedures to ensure the goals of the statute are achieved. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Projects that lack a logical terminus and substantial independent utility may be illegally segmented. *Del. Riverkeeper Network*, 753 F.3d at 1313-18. An EIS must include “other connected, closely related, and interdependent projects.” *Id.* at 1309.

FERC’s interpretation of NEPA and its implementing regulations is not entitled to *Chevron* deference as NEPA applies to all federal agencies and is not administered by FERC. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 270 (D.C. Cir. 2002) (“[W]hen we are faced with an agency's interpretation of a statute *not* committed to its administration, we give no deference.”). If an agency fails to provide an adequate rationale, its decisions can be overturned as arbitrary and capricious. 5 U.S.C. § 706(2)(A); *State Farm*, 463 U.S. at 43. Interpretation of contracts is a

legal question, to be reviewed *de novo*. 5 U.S.C. § 706(2)(A). *Pennzoil*, 789 F.2d at 1136.

B. FERC Refused to Study Impacts of Other Projects.

STP repeatedly requested studies of connected projects and cumulative impacts. R.1914, PP56-57, 2027, 2047, 2053, 2096 at PP25-35, 2196 at 1, 2227, JA____, JA____, JA____, JA____, JA____, JA____, JA____. FERC refused to revise or supplement its EIS in spite of many requests and delays in the start of this project. Instead, in a post hoc rationalization, the Commission attempted to change the purpose of the project, from increasing capacity to displacing other shippers' gas. R.2057 at 3-3, 2076 at ¶¶114-117, 2298 at ¶¶95-97, JA____, JA____, JA____.

C. The Project Lacks a Significant Purpose, Substantial Independent Utility, and a Logical Terminus.

Illegal segmentation of highway and pipeline projects is determined through similar factors because both systems are interconnected and built in sections. *See Village of Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 65-71 (1989); R.2298 at ¶89, JA____. The pipeline at issue here ends at Wright, NY, where it would interconnect with two already congested pipelines. R.1746 at PP6-9, 1752, Att.1 at PP58-66, 72-77, JA____, JA____. This is comparable to building a new highway that ends at an intersection of two highways that have no room for more vehicles. Until the existing highways are expanded or the flow of traffic diverted, cars that are

traveling down the existing highways would be blocked by the flow of traffic from the new interchange, or vice versa.

To avoid illegal segmentation, a project should serve a significant purpose even if related projects are not built. *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (“The proper question is whether one project will serve a significant purpose even if a second related project is not built.”). Projects that facilitate movement by decreasing congestion have been found to have significant purpose. *Id.* (“[T]he... projects...are expected to result in less congestion at interchanges, facilitate local traffic, and provide access to mass transit.”). Although FERC cited this case, for this principle, all that would be accomplished here is the replacement of one shipper’s gas with another’s. R.2076 at ¶115, 2298 at ¶95, JA____, JA____. To achieve a *significant* purpose when there are constraints in the system, capacity has to be increased. That would not occur here.

This project also lacks substantial independent utility, as there are no firm contracts for the gas along the route. Even if all of Leatherstocking’s speculative franchise agreements came to fruition, a mere 0.6% of the pipeline’s capacity would be utilized. R.1817 at n.8, JA _____. Instead, almost all of the gas would be transferred to the Iroquois and Tennessee pipelines, which are already full of gas. R.1746 at PP6-9, 1752, Att.1 at PP58-66, 72-77, JA____, JA____. FERC stated that

new pipelines are needed in the New York City and New England areas to meet an increase in market demand. R.2057 at 3-3, JA____. However, this project cannot increase supply in those areas, as it does not add capacity to the already constrained pipelines with which it interconnects. R.1514-027 at PP63-64, JA ____.

In addition, Wright, NY is not a logical terminus, as it is located far to the north and west of the intended markets, and upstream of the congestion in the Iroquois and Tennessee Pipelines. R.2096 at PP32-35, JA____. As such, the project would perpetuate pipeline constraints and the volatile prices they cause. The stated objectives of this project can only be achieved by moving the point of interconnection closer to the intended markets or adding capacity between Wright, NY and the end markets.

For all of these reasons, without SoNo, which would provide an avenue for gas in the Company's pipeline, this project has no purpose and serves no need.

D. The Project Is Physically, Functionally, Temporally, and Financially Connected to SoNo.

Physical, functional, temporal, and financial connections between projects may also establish illegal segmentation. *Del. Riverkeeper Network*, 753 F.3d at 1308. Here the new compressors at the WIP would increase the pressure of the gas in the Constitution pipeline so it could flow into the Iroquois and Tennessee pipelines. R.2076 at ¶12, JA____. The interconnection between the Constitution and

Iroquois pipelines, enabled by WIP, establishes the required physical and functional nexus.

This project would be “completed within the same general time frame” as SoNo, and therefore meets the required temporal nexus. *Del. Riverkeeper Network*, 753 F.3d at 1309-1310 (“Between 2010 and 2013, Tennessee Gas commenced four upgrade projects along the Eastern Leg.”). Here the Company filed in June 2013, and Iroquois held its Open Season for SoNo six months later. R.1752, Att.3, JA____. WIP is the major facility needed to push gas transported by the Company into Iroquois, and WIP is part of this project. That means no major construction would be required to reverse the flow of gas in Iroquois, so Iroquois does not have to file an application with FERC for SoNo until construction begins on this project.

Robert Perless, project development manager for the Iroquois South-North project, said that project remains on hold until the Constitution project moves forward. “We need to see some construction by Constitution. They need to put some pipe into the ground,” he said. Without Constitution, there is no need to reverse the Iroquois pipeline, Perless added. If Constitution is built, the Iroquois pipeline could be reversed by 2018 or 2019, he said.¹⁰

Thus, Iroquois can postpone its application to FERC and move Cabot’s gas north into Canada once this project is completed. However, this Court should not allow

¹⁰ Brian Nearing, *Pro-gas pipeline supporters push Cuomo to greenlight project*, TIMES UNION (April 18, 2016), <http://www.timesunion.com/tuplus-business/article/Pro-gas-pipeline-supporters-push-Cuomo-to-7256065.php>. (This article is not in the record as it was published after the record was closed.)

the avoidance of environmental reviews through tactical delay of proposals. *Del. Riverkeeper Network*, 753 F.3d at 1310.

The required financial nexus is established through the interrelated contracts between: (1) the Company and Iroquois, (2) the Company and Cabot, and (3) Cabot and Iroquois. The Company has a fifteen-year, \$1,083,333 fixed monthly lease with Iroquois for use of WIP, and WIP would enable the gas transported by the Company to flow into the Iroquois. R.2076 at ¶¶12-15, JA____. Cabot Pipeline Holdings LLC, which owns 25% of the Company, is a wholly owned subsidiary of Cabot Oil & Gas Corporation. R.1-002 at PP2-3, 1-003, Ex.A, JA____, JA____. Cabot would ship up to 500,000 Dth/d of its gas, which would flow into either the Iroquois or Tennessee pipelines. R.1-002 at P5, 1-004, Ex.G, GII, I, JA____, SA1, SA2, SA3. As a shipper, Cabot would pay these two pipeline companies fees based upon the amount of gas they transport. Thus, there are financial connections between the Company and Iroquois, both directly and through Cabot.

E. FERC Violated NEPA.

Reasonably foreseeable and connected actions should be studied in one EIS. 40 C.F.R. §§ 1508.7, 1508.25(a). FERC will claim that SoNo is neither reasonably foreseeable nor connected because it is not yet proposed. R.2298 at ¶96, JA____. However, this Court has held that perspective to be “too constricted.” *Callaway*, 524 F.2d at 88, 94. As discussed above, SoNo is a connected action because it

would allow gas owned by Cabot, which is currently stranded in Pennsylvania, to reach higher priced markets in Canada, or overseas. It is reasonably foreseeable because Iroquois has stated that it is simply waiting for this project to proceed before it files an application for SoNo. While the extent of the potential impacts are unknown, it is clear that taking property for gas that might be exported triggers serious constitutional questions that were never considered. R.2096 at PP31-32, JA____. Thus, FERC's failure to study this connected project is a violation of NEPA. *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988).

CONCLUSION AND PRAYER FOR RELIEF

Fifty-one years ago, this Court found that “the Commission... failed to compile a record which is sufficient to support its decision.” *Scenic Hudson*, 354 F.2d at 612, 620. A careful review of the record in this case will uncover a similar failure. Therefore, for all of the reasons stated above, STP respectfully asks this Court to: (1) vacate FERC's Certificate Order and order that all easement agreements acquired as a result of that order be rescinded and all court ordered easements nullified; (2) declare that the Commission's failure to issue a final order within thirty days of STP's request for rehearing was contrary to law and a violation of STP members' due process rights; and, (3) remand this matter for evidentiary hearings on the need for the project under the NGA and for a

supplemental EIS under NEPA, one that includes SoNo, a reasonably foreseeable connected project.

Respectfully submitted,

s / KARL S. COPLAN

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Dated: July 12, 2016
White Plains, New York

CERTIFICATE OF COMPLIANCE

I, Karl S. Coplan, the Attorney of Record for the Petitioners herein, hereby certify that this Petition complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), as it contains 13,918 words, excluding the portions of the Petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s / KARL S. COPLAN

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 10, FERC Order Granting Rehearing for Further Consideration, Transcontinental Gas Pipeline, Docket No. CP13-551, February 18, 2015; and FERC Order Denying Rehearing, Transcontinental Gas Pipeline, Docket No. CP13-551, March 3, 2016.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP13-551-001

ORDER GRANTING REHEARING FOR
FURTHER CONSIDERATION

(February 18, 2015)

Rehearing has been timely requested of the Commission's order issued on December 18, 2014, in this proceeding. *Transcontinental Gas Pipe Line Company, LLC* 149 FERC ¶ 61,258 (2014). In the absence of Commission action within 30 days from the date the rehearing request was filed, the request for rehearing (and any timely requests for rehearing filed subsequently)¹ would be deemed denied. 18 C.F.R. § 385.713 (2014).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Document Content(s)

CP13-551-001.DOC.....1-1

154 FERC ¶ 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP13-551-001

ORDER DENYING REHEARING

(Issued March 3, 2016)

1. On December 18, 2014, the Commission issued Transcontinental Gas Pipe Line Company, LLC (Transco) a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act (NGA) to construct and operate facilities in Pennsylvania and New Jersey.¹ On January 16, 2015, Delaware Riverkeeper Network (Delaware Riverkeeper) filed a timely request for rehearing of the December 18 Order. On January 20, 2015, Kathleen P. Cherry and the Princeton Ridge Coalition, separately, filed timely requests for rehearing. This order denies the requests for rehearing.

I. Background

2. The December 18 Order authorized Transco to construct and operate approximately 29.97 miles of new pipeline loop and to add a total of 71,900 horsepower of compression at four compressor stations in Pennsylvania and New Jersey (the Leidy Southeast Project). The Leidy Southeast Project will enable Transco to increase its pipeline system's capacity in order to provide an additional 525,000 dekatherms per day (Dth/day) of firm transportation service from the existing Grugan Interconnect on Transco's existing Leidy Line in Clinton County, Pennsylvania, and the existing MARC I Interconnect in Lycoming County, Pennsylvania, to various delivery points on Transco's

¹ *Transcontinental Gas Pipe Line Company, LLC*, 149 FERC ¶ 61,258 (2014) (December 18 Order).

Mainline as far south as Transco's existing Station 85 Zone 4 and 4A Pooling Points in Choctaw County, Alabama. The new pipeline loop will be constructed in four segments – the Dorrance, Franklin, Pleasant Run, and Skillman Loops. The project's expansion capacity is fully subscribed by seven shippers² that have contracted for an in-service date of December 1, 2015.

3. The Commission found that the benefits the Leidy Southeast Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities.³ After review of the Environmental Assessment (EA) prepared by Commission staff for the Leidy Southeast Project to satisfy the requirements of the National Environmental Policy Act (NEPA),⁴ the Commission concluded that approval of Transco's proposal, with the imposition of 24 environmental conditions, would not constitute a major federal action significantly affecting the quality of the human environment.⁵ The issues raised by Delaware Riverkeeper, Kathleen P. Cherry, and the Princeton Ridge Coalition on rehearing primarily relate to the Commission's environmental analysis in the EA and the December 18 Order.

A. Transco's Upgrade Projects

4. Transco's multi-looped mainline system, consisting of over 10,000 miles of pipeline, extends from Texas, Louisiana, and offshore of the Gulf of Mexico, through Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey, to its terminus in the New York City metropolitan area. Transco's mainline facilities includes the Leidy Line, an approximately 200-mile-long, multi-looped pipeline originating at an interconnection with Transco's mainline system at Compressor Station 505 in Hunterdon County, New Jersey, and terminating near Wharton, Pennsylvania, in Potter County.

² Capitol Energy Ventures Corp., Anadarko Energy Services Company, MMGS Inc., Piedmont Natural Gas Company, Public Service Company of North Carolina, Inc., South Carolina Electric & Gas Company, and Washington Gas Light Company.

³ December 18 Order, 149 FERC ¶ 61,258 at PP 12-17.

⁴ 42 U.S.C. §§ 4321-4370h (2012). Commission staff placed the EA into the public record on August 11, 2014, established a 30-day comment period, and mailed it to all stakeholders on the environmental mailing list.

⁵ December 18 Order, 149 FERC ¶ 61,258 at PP 126-27.

5. Historically, Transco has transported natural gas supplies from the Gulf Coast, Mid-continent and Appalachia to meet its shippers' market demands in the Northeast. However, in recent years, Transco shippers have reduced their reliance on Gulf Coast supplies in favor of northeast-market-area supplies. Transco has proposed infrastructure projects, including projects on its Leidy Line, in order to receive and transport these gas supplies. In its request for rehearing of the December 18 Order, Delaware Riverkeeper asserts that the Commission improperly segmented its environmental review of the Leidy Southeast Project from that of Transco's Northeast Supply Project, Atlantic Sunrise Project, and Diamond East Project. In order to provide context in addressing this argument, the Northeast Supply and Atlantic Sunrise Projects are described below.⁶

1. Northeast Supply Link Project (Docket No. CP12-30-000)

6. On December 14, 2011, Transco filed an application for a certificate of public convenience and necessity for its Northeast Supply Link Project (Northeast Supply Project) to provide 250,000 Dth/day of new incremental firm transportation service from supply interconnections on its Leidy Line in western Pennsylvania to its 210 Market Pool in New Jersey and the existing Manhattan, Central Manhattan, and Narrows delivery points in New York City. The Commission approved Transco's Northeast Supply Project on November 2, 2012.⁷

7. Transco completed the Northeast Supply Project and placed its facilities into service on November 1, 2013. The project facilities included a total of approximately 12 miles of new 42-inch-diameter pipeline looping, 16,000 horsepower of additional compression at an existing compressor station and construction of a new 25,000 horsepower compressor station, along with other smaller modifications to

⁶ While, according to its website (<http://investor.williams.com/press-release/williams/williams-announces-open-season-transco-pipelines-diamond-east-project>), Williams Partners LP (Williams) held an open season for a Diamond East Project from August 26 to September 23, 2014, Williams has not released the results of the open season or, to our knowledge, announced any further details about the project. While noting that "the final capacity, scope and cost of the project will be determined by the results of the open season," the press release only indicated that the project was anticipated "to include approximately 50 miles of pipeline looping and horsepower additions at existing Transco compressor facilities." There is no Diamond East Project currently before the Commission in any stage.

⁷ *Transcontinental Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091 (2012).

Transco's existing Leidy Line. The capacity created by the Northeast Supply Project is fully subscribed by four shippers.⁸

2. Atlantic Sunrise Project (CP15-138-000)

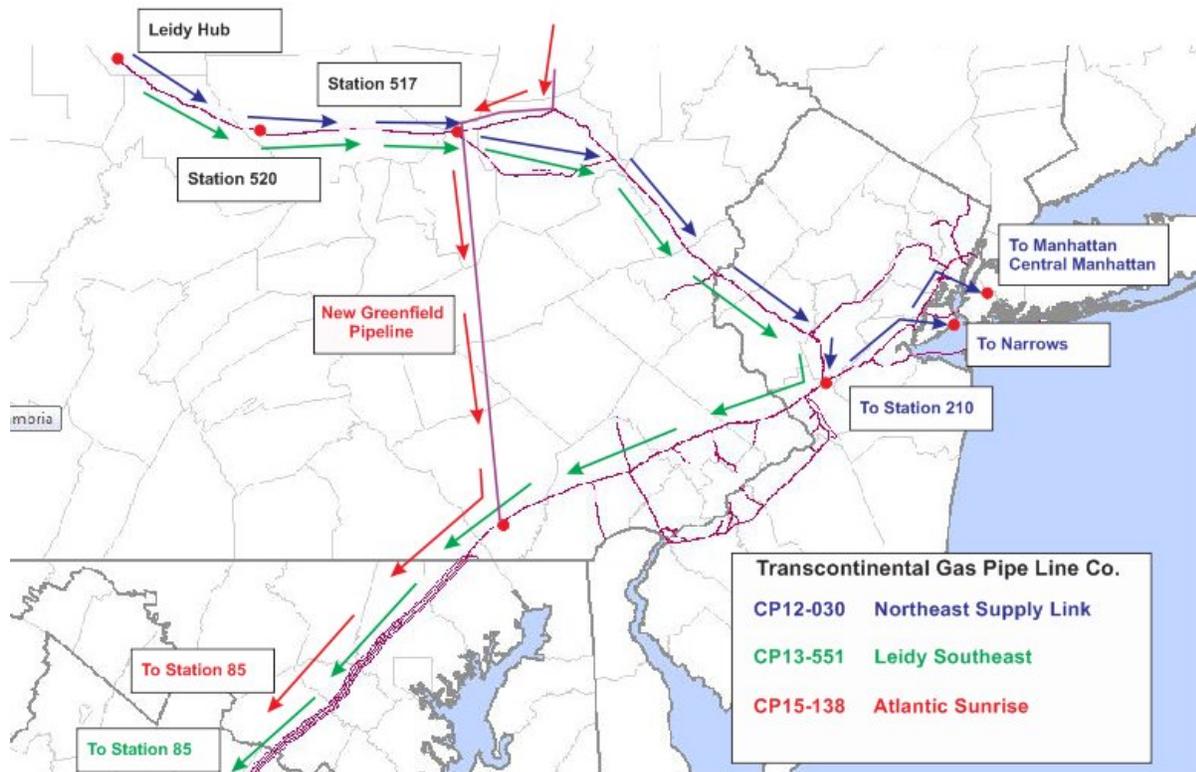
8. On March 31, 2015, Transco filed its pending application for a certificate of public convenience and necessity to construct and operate the Atlantic Sunrise Project to provide 1,700,002 Dth/day of incremental firm transportation service from northern Pennsylvania in Transco's Zone 6 southbound to Transco's Station 85 in Alabama. The Atlantic Sunrise Project would include deliveries to markets along Transco's pipeline system in Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, and interconnects with existing pipelines serving the Florida market. The proposed project would include the construction of a new, 57.3-mile, 30-inch-diameter greenfield pipeline (the "Central Penn Line North") and a new 125.2-mile, 42-inch-diameter greenfield pipeline (the "Central Penn Line South"), incremental facilities on Transco's existing natural gas transmission system, and modifications to Transco's existing natural gas transmission system to enable north-to-south flow. The Atlantic Sunrise Project is fully subscribed by nine shippers⁹ and has a proposed in-service date of July 1, 2017.

3. Summary of Proposed Upgrade Projects

9. In sum, Transco's proposed Leidy Southeast, Northeast Supply, and Atlantic Sunrise expansion projects will each function to increase incremental capacity on portions of Transco's Leidy Line and mainline system by adding pipeline looping and additional compression facilities. Each project was designed to provide firm transportation from the primary receipt points to the primary delivery points specified in Transco's contracts with the expansion shippers. The following map depicts the Leidy Southeast, Northeast Supply, and Atlantic Sunrise Projects' transportation paths for the receipt and delivery of gas supplies:

⁸ Hess Corporation; MMIGS Inc.; Anadarko Energy Services Company; and Williams Gas Marketing Inc.

⁹ Anadarko Energy Services Company, Cabot Oil & Gas Corporation, Chief Oil & Gas LLC, Inflection Energy LLC, MMGS, Inc., Seneca Resources Corporation, Southern Company Services, Inc., Southwest Energy Services Company, and WGL Midstream, Inc.



II. Requests for Rehearing

A. Delaware Riverkeeper's Argument Regarding Segmentation of Transco's Leidy Project From Other Transco Expansion Projects

10. The Council on Environmental Quality (CEQ) regulations requires the Commission to include "connected actions," "cumulative actions," and "similar actions" in its NEPA analyses.¹⁰ "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."¹¹ "Connected actions" include actions that: (a) automatically trigger

¹⁰ 40 C.F.R. § 1508.25(a)(1)-(3) (2015).

¹¹ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Unlike connected and cumulative actions, analyzing similar actions is not always mandatory. See *San Juan Citizens' Alliance v. Salazar*, CIV.A.00CV00379REBCBS, 2009 WL 824410, at *13 (D. Colo. Mar. 30, 2009) (citing 40 C.F.R. § 1508.25(a)(3) for

(continued...)

other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; (c) are interdependent parts of a larger action and depend on the larger action for their justification.¹²

11. In evaluating whether connected actions are improperly segmented, courts apply a “substantial independent utility” test. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”¹³ For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. Similar to a highway network, “it is inherent in the very concept of” the interstate pipeline grid “that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”¹⁴

12. In *Del. Riverkeeper Network v. FERC*, the D.C. Circuit ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and where those projects were financially interdependent.¹⁵ The court put a particular emphasis on the four projects’ timing, noting that, when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.¹⁶ Courts have subsequently indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet

the proposition that “nothing in the relevant regulations compels the preparation of a single EIS for ‘similar actions’”).

¹² 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2015).

¹³ *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987); *see also O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project “can stand alone without requiring construction of the other [projects] either in terms of the facilities required or of profitability”).

¹⁴ *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

¹⁵ *Del. Riverkeeper Network*, 753 F.3d at 1308.

¹⁶ *Id.* at 1314.

filed an application, or where construction of a project is not underway.¹⁷ Further, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.¹⁸

13. As noted above, Delaware Riverkeeper asserts that Transco's Northeast Supply Project, Atlantic Sunrise Project, Diamond East Project, and Leidy Southeast Project should have been analyzed in a single environmental impact statement (EIS) consistent with the holding in *Del. Riverkeeper Network v. FERC*.¹⁹ It asserts that the proposed project here presents the same factual circumstances, where a single pipeline is being upgraded piecemeal to avoid the proper environmental review.

14. We disagree. As noted above, the courts have found that the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application.²⁰ Section 102(c) of NEPA requires agencies to prepare an environmental document for "proposals" for major federal actions affecting the human environment.²¹ The CEQ regulations state that "proposals" exist only when the action is at the stage when "an agency subject to [NEPA] has a goal and is actively preparing to make a decision ... and the effects [of that action] can be meaningfully evaluated."²²

15. The projects cited by Delaware Riverkeepers were not pending as proposals before the Commission at the same time. Therefore, the Commission was not required by CEQ

¹⁷ *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 113, n.11 (D.C. Cir. 2014). See also *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 ("... an EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*") (emphasis in original); *Del. Riverkeeper*, 753 F.3d at 1318 ("NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed.").

¹⁸ See *Myersville Citizens for a Rural Community Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015).

¹⁹ 753 F.3d 1304.

²⁰ See *supra* n.17.

²¹ 42 U.S.C. § 4332(2)(C) (2012).

²² 40 C.F.R. § 1508.23 (2015).

regulations or the court's decision in *Del. Riverkeeper Network* to prepare a single environmental document to analyze the impacts of the Northeast Supply, Leidy Southeast, Atlantic Sunrise, and Diamond East Projects.

16. As discussed above, the Northeast Supply Project certificate was issued on November 2, 2012;²³ Transco did not file its application for the Leidy Southeast Project until September 18, 2013. Further, when the Commission approved the Leidy Southeast Project on December 18, 2014, the Atlantic Sunrise Project was still in the development phase; Transco had not yet filed a certificate application for the project. Further, the Diamond East Project, if such a project is still under consideration by the company, is still in a conceptual stage. Thus, when the December 18 Order approving Transco's Leidy Southeast Project was issued, it was Transco's only proposal before the Commission to modify, increase capacity on, or create access to the Leidy Line. Because the Atlantic Sunrise Project and Diamond East Project were not fully defined "proposals" at any time during the period that the Leidy Southeast Project was receiving consideration, these projects were not improperly segmented from the Commission's environmental review of the Leidy Southeast Project under NEPA. The Commission nonetheless further addresses Delaware Riverkeepers' segmentation concerns below, and considers the environmental impacts of those projects identified by Delaware Riverkeepers as part of our environmental analysis of the Leidy Southeast Project, to the extent there was available information to consider such impacts.

17. We disagree that the Northeast Supply Project and the Leidy Southeast Project are "connected" actions, such that the Commission is required to consider them in a single environmental document. The Northeast Supply Project has a "substantial independent utility" from the Leidy Southeast Project. As stated above, the Northeast Supply Project was placed into service on November 1, 2013, to transport gas produced in Western Pennsylvania to New Jersey and New York City. The Leidy Southeast Project, approved over one year after the in-service date of the Northeast Supply Project, will transport gas from Western Pennsylvania southbound to different east coast markets and southward to Alabama. As evidenced, the Northeast Supply Project was built independently of the Leidy Southeast Project, and it has independent utility from the Leidy Southeast Project that "serve[s] a significant purpose."²⁴ Likewise, the Leidy Southeast Project does not

²³ *Transcontinental Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091 (2012).

²⁴ *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). See also *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project "can stand alone without requiring

(continued...)

rely on the Northeast Supply Project for its operation and would have been built even if the Northeast Supply Project had not been constructed.

18. Delaware Riverkeeper asserts that the Northeast Supply and Leidy Southeast project facilities are designed to work in unison and therefore they are interdependent and connected actions. Every natural gas pipeline project before the Commission can be found to be interconnected with another by virtue of the fact that the entire interstate pipeline grid is a highly integrated transportation network. Every part of the system must be designed to receive and deliver natural gas from the pipeline network, which includes over 306,000 miles of pipeline that links production areas to markets across the country and nearly every major metropolitan area in the nation.

19. Delaware Riverkeeper contends that the December 18 Order's segmentation analysis was flawed because it only considered whether Transco's projects were "connected" and did not consider whether Transco's Northeast Supply, Atlantic Sunrise, and Diamond East Projects were "cumulative" and "similar" to the Leidy Southeast Project. We disagree.

20. "Cumulative" actions include actions that "when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."²⁵ As stated in the December 2014 Order, the EA for the Leidy Southeast Project analyzed the Northeast Supply Project as a recently completed project in the Leidy Southeast Project area, and found no significant cumulative impact associated with the two projects.²⁶ The Northeast Supply Project was considered as part of the environmental baseline for the Leidy Southeast Project because it had already been constructed at the time of the later project's environmental review.²⁷ The EA described the facilities associated with the Northeast Supply Project, discussed the impacts of that project, and assessed the potential for cumulative impacts of the Leidy Southeast Project and the Northeast Supply Project by resource type.²⁸ During the Leidy Southeast

construction of the other [projects] either in terms of the facilities required or of profitability").

²⁵ 40 C.F.R. § 1508.25(a)(2) (2015).

²⁶ December 18 Order, 149 FERC ¶ 61,258 at P 65.

²⁷ December 18 Order, 149 FERC ¶ 61,258 at P 51 and EA at 180.

²⁸ December 18 Order, 149 FERC ¶ 61,258 at P 51. *See also* EA at 183 (describing project), 187-90 (discussing cumulative impacts on soils), 188 (discussing

(continued...)

Project's environmental analysis, the Atlantic Sunrise Project was still in the pre-filing stage. Nevertheless, the Commission's environmental consideration of the Leidy Southeast Project used the limited available information on the Atlantic Sunrise Project, which consisted primarily of the draft resource reports (project description and alternatives analysis).²⁹ As the Commission continues its review of the filed application for the Atlantic Sunrise Project, we will evaluate whether the project would have any significant cumulative impacts associated with the Northeast Supply and Leidy Southeast Projects and the need for any environmental conditions on the Atlantic Sunrise Project to avoid or mitigate such impacts. Delaware Riverkeeper fails to substantiate its claim that significant cumulative impacts would result from the construction of the Northeast Supply Project, the Leidy Southeast Project, and the Atlantic Sunrise Project so as to necessitate a single environmental analysis.³⁰

21. "Similar" actions include actions that, "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."³¹ The CEQ regulations state that "[a]n agency *may* wish to analyze [similar] actions in the same impact statement. It *should* do so when the *best way* to assess

cumulative impacts on water resources), 190 (discussing cumulative impacts on vegetation and wildlife).

²⁹ December 18 Order, 149 FERC ¶ 61,258 at P 53. *See also* EA at 184 (observing that, while detailed information regarding the environmental impacts associated with the Atlantic Sunrise Project is not available, none of that project's construction activities would occur within 20 miles of any of the Leidy Southeast Project's facilities and that construction schedules for the two projects would be separated by a minimum of 6 months); *see also* EA at 187-193 (considering the cumulative impacts of the Atlantic Sunrise Project on soils, water resources, vegetation and wildlife, land use, recreation, special interest areas, and visual resources, air quality, and noise).

³⁰ As stated above, Transco has not yet requested to begin the pre-filing process for a Diamond East Project, which, if it exists, is still in the planning stages. If Transco files a certificate application in the future for a Diamond East Project so that it is a "proposal" in front of the Commission, the Commission will evaluate whether the project has any significant cumulative impacts associated with Transco's other projects.

³¹ 40 C.F.R. § 1508.25(a)(3) (2015).

adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.”³²

22. We do not find that the Northeast Supply, Atlantic Sunrise, Diamond East and Leidy Southeast Projects are “similar” actions. Contrary to Delaware Riverkeeper’s assertions, the Leidy Southeast Project does not share common timing with the Northeast Supply Project, the Atlantic Sunrise Project, or a Diamond East Project. The Northeast Supply Project was placed into service two months before the Leidy Southeast Project was proposed to the Commission. The Atlantic Sunrise Project was still in the pre-filing process when the December 18 Order was issued,³³ and the Diamond East Project is still, at best, in its conceptual stage; it is not yet in the Commission’s pre-filing process. Moreover, while portions of the Northeast Supply and Atlantic Sunrise Projects may overlap with the Leidy Southeast Project, each project is designed to serve different markets independent of the Leidy Southeast Project. Under these circumstances, the Commission finds that a single environmental analysis is neither required nor the best way to assess these proposals. The Commission has appropriately conducted a comprehensive environmental review of the Leidy Southeast Project, including an analysis of the potential cumulative impacts of the Northeast Supply Project. Of course, before either the Atlantic Sunrise or Diamond East Projects could be authorized and constructed, each would be subject to full Commission scrutiny, including NEPA analysis.

23. Delaware Riverkeeper also argues that the Commission fails to satisfy factors articulated in *Taxpayers Watchdog, Inc. v. Stanley*,³⁴ namely whether the project has substantial independent utility, has logical termini, and does not foreclose the opportunity to consider alternatives. As discussed above, the Leidy Southeast Project meets the *Taxpayers Watchdog* factor of having substantial independent utility and the project would have been built even if the Northeast Supply Project had not been, and Atlantic

³² *Id.* (emphasis added); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004) (similarly emphasizing that agencies are only required to assess similar actions programmatically when such review is necessarily the *best way* to do so).

³³ Transco entered into the Commission’s pre-filing process for the Atlantic Sunrise Project on April 4, 2014. While preliminary project details were available (Resource Reports 1- Project Description and 10 - Alternatives), there was not sufficient information to make an informed analysis of environmental impacts.

³⁴ 819 F.2d 294, 298 (D.C. Cir. 1987) (*Taxpayers Watchdog*).

Sunrise Project is not in the future, constructed. Additionally, the Commission's separate consideration of the three projects did not foreclose our opportunity to consider alternatives – the Commission evaluated alternatives to the Leidy Southeast in its EA.³⁵ With respect to the logical termini factor, the placement and termini of pipeline looping is logical, as it is based on the dictates of the engineering and hydraulics necessary to add capacity to an existing system sufficient to transport the contracted for volumes of natural gas between designated receipt and delivery points. However, unlike a metro rail system, which was the infrastructure under consideration in *Taxpayer Watchdog*, the logical termini of pipeline expansion loops are not necessarily coterminous with the contracted receipt and delivery points (or what would be the stations in the case of a rail system). Further, the logical placement of compressor stations, which cannot be said to have “termini” in the usual sense of the word, are also dictated by engineering and hydraulics.

24. The court in *Del. Riverkeeper Network v. FERC*, noting that the Commission had relied on the four factors of *Taxpayers Watchdog* in defending its determination in proceeding on appeal emphasized that, instead, “the agency’s determination of the proper scope of its environmental review must train on the governing regulations, which here means 40 C.F.R. § 1508.25(a).”³⁶ Our environmental review here indeed followed CEQ’s regulations against segmentation. Consistent with the court’s ruling in *Del. Riverkeeper Network v. FERC*, we evaluated the Leidy Southeast Project under our governing regulations and find that we did not improperly segment our NEPA review of the Leidy Southeast Project from the Northeast Supply or Atlantic Sunrise Projects.

B. Princeton Ridge Coalition’s Argument Regarding Cumulative Impacts of Transco’s Leidy Southeast and Diamond East Projects and PennEast Pipeline Company, LLC’s PennEast Project

25. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions”³⁷ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

³⁵ EA at 196-210. See December 18 Order, 149 FERC ¶ 61,258 at PP 118-25.

³⁶ *Del. Riverkeeper Network*, 753 F.3d at 1315.

³⁷ 40 C.F.R. § 1508.7 (2015).

26. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”³⁸ CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”³⁹ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”⁴⁰ An agency’s analysis should be proportional to the magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.⁴¹

27. Separate from any segmentation claims, Princeton Ridge Coalition alleges that the EA failed to analyze the cumulative impacts of Transco’s Diamond East Project and PennEast Pipeline Company, LLC’s (PennEast) PennEast Project as they relate to the Leidy Southeast Project. We disagree. PennEast did not receive permission to enter into the Commission’s prefilng process for the PennEast Project until October 2014 and did not file its certificate application for the project until September 2015, after the EA for the Leidy Southeast Project was issued. As discussed above, there is no evidence the Diamond East Project has moved beyond the conceptual stage – there is nothing regarding it pending before the Commission. Thus, prior to issuance of the Leidy Southeast Project EA, the information available regarding the PennEast and Diamond East Projects was insufficient to provide any meaningful cumulative impacts analysis. While Princeton Ridge Coalition contends that a route was developed for the PennEast Project before the EA for the Leidy Southeast Project was issued, there was no specific information with regard to impacts on specific environmental resources. Further, as discussed above, projects that enter the Commission’s prefilng process may undergo numerous changes, both large and small in scale, prior to a formal proposal.

³⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976).

³⁹ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (January 1997).

⁴⁰ *Id.*

⁴¹ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005).

C. Disclosure of Gas Flow Velocity Data

28. On rehearing, Delaware Riverkeeper alleges that the Commission failed to provide critical information on the flow velocities of the Leidy Southeast Project. Delaware Riverkeeper states that failure to provide this information prevents the public from determining the safety of the project.

29. We disagree. Delaware Riverkeeper had ample opportunity to review the flow velocity data prior to the December 18 Order.

30. Delaware Riverkeeper first raised its concerns with the Leidy Southeast Project's flow diagrams in a March 24, 2014 letter filed with the Commission. Specifically, Delaware Riverkeeper alleged that Transco's flow diagrams showed that the operation of the proposed Leidy Southeast Project would result in "unsafe gas velocities" at several locations along Transco's system and that these flow velocities would "pose direct threats to the safety of the system."⁴² Delaware Riverkeeper further argued that, as a result of these alleged unsafe gas velocities, Transco would need to add additional future looping in order to reduce those gas velocities to safe levels.⁴³ Delaware Riverkeeper also requested specific data on gas flow velocities and supporting information for Transco's proposed project.⁴⁴

31. On July 23, 2014, the Commission issued a letter requesting Transco to verify that it provided Delaware Riverkeeper with the information requested in its March 24, 2014 letter. On July 25, 2014, Transco stated its understanding that Commission staff had sent Delaware Riverkeeper copies of Transco's Exhibits G and G-II of the Leidy Southeast Project's certificate application.⁴⁵ Transco further stated that the Exhibit G documents, along with Transco's responses to Commission staff's July 2 and July 11, 2014 data requests, would provide Delaware Riverkeeper with the requested gas flow velocity information. Transco also offered to share its Synergi Gas hydraulic flow models (in electronic file format) used in designing the Leidy Southeast Project. The Synergi Gas

⁴² Delaware Riverkeeper's March 24, 2014 Comments at 1.

⁴³ *Id.*

⁴⁴ Delaware Riverkeeper made additional requests for flow velocity information on April 2, April 10, April 17, June 18, and July 25, 2014. Specifically, Delaware Riverkeeper requests answers to a list of 10 questions.

⁴⁵ Exhibits G and G-II contain flow diagrams and flow diagram data.

hydraulic flow model software requires a commercial license to operate; therefore, Transco invited Delaware Riverkeeper to view the models at Transco's office or via video-conference.

32. On July 25, 2014, Delaware Riverkeeper filed a response acknowledging it had access to Exhibits G and G-II and confirmed it received Transco's invitation to view the commercially licensed hydraulic flow models.

33. Now, on rehearing, Delaware Riverkeeper contends the Commission erred by failing to disclose or verify flow velocity and other technical data that was necessary to determine the full extent of the project's inter-relatedness to previous, pending, and future projects, and also to determine the operational safety of the project. Specifically, Delaware Riverkeeper also argues that the Commission must answer the 10 questions it filed in its March 2014 letter.

34. The Commission rejects Delaware Riverkeeper's allegation that technical data pertaining to the current project had not been properly disclosed. As detailed above, Delaware Riverkeeper was given proper access and ample opportunity to review the supporting technical data filed in this proceeding. Transco, of its own accord, provided Delaware Riverkeeper with the opportunity to review the hydraulic flow modeling used in the design of the project; however, Delaware Riverkeeper did not respond to Transco's invitation. The Exhibit G information and the hydraulic flow modeling provides all the information Delaware Riverkeeper requested in the March 2014 letter, including the answers Delaware Riverkeeper seeks to the 10 questions. Therefore, we find Delaware Riverkeeper's assertions that it could not meaningfully comment on the safety of the project due to a lack of gas flow velocity information without merit.

35. Furthermore, as explained in the December 18 Order, the Commission reviewed all the information provided by Transco on the Leidy Southeast Project's gas flow velocities and analyzed Transco's flow diagrams and its Synergi Gas hydraulic flow models, for both existing and proposed operating conditions of the Leidy Southeast Project. Based upon our review, we found that Transco has properly designed its pipeline system to accommodate the proposed new service while maintaining its existing service obligations. Delaware Riverkeeper provided no evidence that that the proposed pipeline operations will be unsafe. Additionally, we found that Delaware Riverkeeper's assertions about future looping and expansion are entirely speculative and found no evidence that the current project, as proposed, required future looping in order to reduce gas velocities. On rehearing, Delaware Riverkeeper provided no additional information to support additional looping projects, other than mere speculation.

D. Identification of Wetland Delineations

36. Delaware Riverkeeper alleges that the Commission failed to perform a site specific review of the wetlands in the project area and properly implement the methodology of the U.S. Army Corps of Engineers Corps' (Corps) Wetlands Delineation Manual. Delaware Riverkeeper also argues that the Commission failed to properly classify wetland types and assess the criteria for wetlands under Pennsylvania's State Wetland Classification and, therefore, misidentified and undercounted several wetlands that would meet state requirements as Exceptional Value. From these concerns, Delaware Riverkeeper extrapolates to question the accuracy of the baseline data used to assess impacts on waterbodies and wetlands and the expected ground disturbance impacts that will result from the construction activity of the project.

37. As indicated in the EA and the December 18 Order, Transco's wetland delineations were conducted using the Corps' Wetlands Delineation Manual.⁴⁶ Transco's methodology to determine baseline wetlands data is acceptable. Further, the methodology enabled staff to disclose and evaluate potential impacts on wetlands and to serve as a starting point for the development of protective mitigation. As we stated in the December 18 Order, the EA includes a consideration of the water resource classifications for the potentially affected surface and groundwater resources identified during the application process.⁴⁷ Stream designations and state water quality standards are verified through final consultation with the appropriate state regulatory agencies, prior to their issuance of state permits.⁴⁸

38. The Corps and Pennsylvania Department of Environmental Protection have the discretion to determine whether Transco's waterbody classifications and crossing techniques comply with their permit application process prior to issuing a water quality permit. As such, we uphold our determination that the baseline data used in the EA to assess impacts on waterbodies and wetlands were appropriate.

⁴⁶ December 18 Order, 149 FERC ¶ 61,258 at P 77 and EA at 61.

⁴⁷ December 18 Order, 149 FERC ¶ 61,258 at P 74.

⁴⁸ The Commission will not authorize Transco to construct the project without documentation of all applicable authorizations under federal law. December 18 Order, 149 FERC ¶ 61,258 at Appendix B, Environmental Condition 9.

E. Evidentiary Support for Mitigation Measures

39. Delaware Riverkeeper contends that the Commission's wetland mitigation measures are inadequate and lack adequate evidentiary support. Delaware Riverkeeper also alleges that the Commission failed to properly implement and require the mitigation procedures outlined in the Commission's *Wetland and Waterbody Construction and Mitigation Procedures*.

40. We disagree. As we previously explained in the December 18 Order,⁴⁹ the Commission's *Wetland and Waterbody Construction and Mitigation Procedures* are based on Commission staff's experience inspecting pipeline construction and include industry best management practices designed to minimize the extent and duration of disturbance on wetlands and waterbodies during the construction of Commission-jurisdictional natural gas projects. The *Wetland and Waterbody Construction and Mitigation Procedures* were recently revised and fully vetted with input from the natural gas industry; federal, state, and local agencies; environmental consultants; inspectors and construction contractors; and nongovernmental organizations and other interested parties with special expertise with respect to natural gas facility construction projects. The Commission is confirming Transco's implementation of the mitigation measures under the *Wetland and Waterbody Construction and Mitigation Procedures* during project inspections.⁵⁰ Therefore, we find that the construction and mitigation measures in the *Wetland and Waterbody Construction and Mitigation Procedures* are sufficient to protect wetlands and waterbodies.

F. Issuance of Public Convenience and Necessity Prior to Receipt of Water Quality Certifications Under Section 401 of the Clean Water Act

41. Environmental Condition 9⁵¹ requires that Transco receive the necessary state approvals under all applicable federal statutes prior to the construction of the Leidy

⁴⁹ December 18 Order, 149 FERC ¶ 61,258 at P 79.

⁵⁰ Throughout construction, Commission staff has conducted monthly inspections to determine Transco's compliance with our mitigations measures. On January 5, 2016, Transco placed the Leidy Southeast Project into service, following a Commission determination that restoration and rehabilitation of the right-of-way and other areas affected by the project proceeded satisfactorily.

⁵¹ December 18 Order, 149 FERC ¶ 61,258 at Appendix B, Environmental Condition 9.

Southeast Project. Nevertheless, Delaware Riverkeeper and Princeton Ridge Coalition state that the Commission violated the Clean Water Act by issuing the December 18 Order prior to the issuance of a Section 401 Water Quality Certification from the Pennsylvania Department of Environmental Protection and the New Jersey Department of Environmental Protection. Delaware Riverkeeper requests that the Commission rescind the December 18 Order until Transco receives its required water quality certifications.

42. As an initial matter, we find Delaware Riverkeeper's and Princeton Ridge Coalition's arguments moot, in part. Transco obtained its Section 401 Water Quality Certifications from the Pennsylvania Department of Environmental Protection on April 17, 2015, and from the New Jersey Department of Environmental Protection on April 8, 2015. Accordingly, we find no need to address Delaware Riverkeeper's request to rescind the December 18 Order for lack of a water quality certification.

43. In any event, we find that the issuance of our December 18 Order was consistent with the Clean Water Act. The December 18 Order ensured that until the Pennsylvania Department of Environmental Protection and the New Jersey Department of Environmental Protection issued the WQCs, Transco could not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies. Consequently, there could be no adverse impact on Pennsylvania or New Jersey jurisdictional waters until the Commission received confirmation that the Pennsylvania Department of Environmental Protection and the New Jersey Department of Environmental Protection have completed their review of the project under the Clean Water Act and issued the requisite permits.

44. Delaware Riverkeeper and Princeton Ridge Coalition cite *City of Tacoma v. FERC*,⁵² in which a tribe complained that the state's water quality certification, which had issued before the Commission's hydroelectric license issued, was deficient under section 401(a) of the Clean Water Act. We have previously observed the court in *City of Tacoma* did not hold that the Commission's issuance of a conditional license or certificate violates the terms of the Clean Water Act. Rather, *City of Tacoma* addressed the extent to which the Commission must verify that a state's water quality certification is valid.⁵³ Thus, as we describe further below, we do not believe that *City of Tacoma* limits our authority to conditionally approve applications prior to state action under the Clean Water Act.

⁵² 460 F.3d 53, 68 (D.C. Cir. 2006) (*City of Tacoma*).

⁵³ *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 27 n.38 (2006).

45. Previously, in explaining our rationale for granting conditional authorizations, we have cited *City of Grapevine v. U.S. Department of Transportation*,⁵⁴ a case in which the D.C. Circuit upheld the Federal Aviation Administration's (FAA) approval of a runway project conditioned upon the applicant's subsequent compliance with the National Historic Preservation Act (NHPA).⁵⁵ In past proceedings, we likened the NHPA to the Clean Water Act in that the NHPA states that the head of a federal agency "shall," prior to the approval of the expenditure of any federal funds on an undertaking, take into account the effect of the undertaking on historic properties. We explained that "this language expressly prohibits a federal agency from acting prior to compliance with its terms, a fact that did not deter the *City of Grapevine* court from upholding the FAA's conditional approval of a runway."⁵⁶

46. Unlike in *City of Tacoma*, the *City of Grapevine* court squarely considered a federal agency's authorization of a project subject to the applicant's subsequently fulfilling certain conditions. There, petitioners protested the FAA's approach whereby it first issued a conditional approval for a runway, and then took seven months to complete its final assessment after reviewing the conclusions and recommendations arising out of the consultation process required by NHPA section 106, and then took six more months of deliberation before submitting a multiple-agency agreement concluding that there would be no adverse effect within the meaning of the NHPA. The court accepted this multi-stage procedural approach, stating that:

Much of the relevant activity . . . took place after the FAA had issued its Decision. Although it is of course desirable for the § 106 process to occur as early as possible in a project's planning stage, we do not agree with the petitioners that in this case the FAA's conditional approval of the West Runway violated any requirement of the NHPA. Merely by issuing its Decision the FAA did not "approve the expenditure of any Federal funds" for the runway . . . [and] if the [applicant] commits its own resources to the West Runway – for further planning, engineering, or what have you short of construction

⁵⁴ 17 F.3d 1502 (D.C. Cir. 1994) (*City of Grapevine*).

⁵⁵ *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 72 (2009); *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 60 (2008); *Georgia Strait Crossing Pipeline LP*, 108 FERC ¶ 61,053, at P 16 (2004).

⁵⁶ *Id.*

– although the runway was only conditionally approved, then it does so at the risk of losing its investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval. In sum, because the FAA’s approval of the West Runway was expressly conditioned upon completion of the § 106 process, we find here no violation of the NHPA.⁵⁷

47. We interpret the court’s reasoning and result to establish the principle that an agency can authorize a project conditioned on the subsequent compliance with pending applications for other necessary project authorizations. That is the approach we adopted in this proceeding.

G. Statement of Purpose and Need Regarding the Commission’s Alternatives Analysis

48. Section 102(C)(iii) of NEPA requires that an agency discuss alternatives to the proposed action in an environmental document.⁵⁸ Based on a brief statement of the purpose and need for the proposed action,⁵⁹ CEQ regulations require agencies to evaluate all reasonable alternatives, including no-action alternatives and alternatives outside the lead agency’s jurisdiction.⁶⁰ Agencies use the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives.⁶¹ Guidance from CEQ explains that reasonable alternatives “include those that are practical or feasible from the technical and economic standpoint and using common sense rather than simply desirable from the standpoint of the [permit] applicant.”⁶² Yet CEQ has also

⁵⁷ *City of Grapevine*, 17 F.3d at 1509.

⁵⁸ 42 U.S.C. § 4332(C)(iii) (2012). Section 102(E) of NEPA also requires agencies “to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” *Id.* § 4332(E).

⁵⁹ 40 C.F.R. § 1502.13 (2015).

⁶⁰ *Id.* § 1502.14.

⁶¹ *See Col. Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999).

⁶² *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

stated that there is “no need to disregard the applicant’s purposes and needs and the common sense realities of a given situation in the development of alternatives.”⁶³ For eliminated alternatives, agencies must briefly discuss the reasons for the elimination.⁶⁴ An agency’s specification of the range of reasonable alternatives is entitled to deference.⁶⁵

49. Delaware Riverkeeper asserts that the Commission defined the Leidy Southeast Project’s purpose and need so narrowly that all other alternatives were ruled out by definition. Delaware Riverkeeper also states that no system alternatives were analyzed, with the exception of pipeline replacement on Transco’s existing system.

50. We disagree. The EA did not narrowly interpret the project purpose so as to preclude consideration of other alternatives. While an agency may not narrowly define the proposed action’s purpose and need, the alternative discussion need not be exhaustive.⁶⁶ When the purpose of the project is to accomplish one thing, “it makes no sense to consider the alternative ways to which another thing might be achieved.”⁶⁷

51. The EA adopted Transco’s stated project purpose⁶⁸ “to provide 525,000 dekatherms per day of firm natural gas transportation capacity to delivery points that would be accessible by customers in the mid-Atlantic and Southern states.”⁶⁹ That purpose is supported by precedent agreements executed for the full gas volumes associated with the project and designating primary receipt and delivery points. With that in mind, the alternatives analysis was conducted. The EA concedes that the no action

⁶³ *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34,262, 34,267 (July 22, 1983).

⁶⁴ *See* 40 C.F.R. § 1502.14(a) (2015).

⁶⁵ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

⁶⁶ *See State of N.C. v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976).

⁶⁷ *City of Angoon et al. v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986).

⁶⁸ *City of Grapevine, Texas v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (upholding federal agencies’ use of applicants’ identified objectives as the basis for evaluating alternatives).

⁶⁹ EA at 7.

alternative would be environmentally superior in that the impacts associated with the project would not occur; however, it also recognized the need for capacity to provide the incremental transportation service subscribed in the precedent agreements.

52. The EA considered that other pipeline systems could potentially meet the Leidy Southeast Project's need, but concluded that systems in the general area were fully subscribed and would require modifications that would result in environmental impacts that are similar to, or greater in magnitude than, those associated with the Leidy Southeast Project.⁷⁰ It was reasonable, on that basis, to dismiss such alternatives from further analysis. Delaware Riverkeeper has not provided documentation or evidence on the record that contradicts the EA or discloses pipelines systems that could, without similar modifications to the Leidy Southeast Project, provide the required capacity.

53. As thoroughly described in the EA and the December 18 Order, the Leidy Southeast Project would be constructed adjacent to existing rights-of-way, thereby minimizing environmental impact. Based on the scope of the project, we conclude that the alternatives analysis was appropriate.

H. Rejection of a Construction Alternative for the Skillman Loop

54. Princeton Ridge Coalition alleges that the Commission improperly rejected the horizontal directional drill (HDD) alternative to install the Skillman Loop in Princeton Ridge based on a mischaracterization of evidence in the public record. The December 18 Order notes that Princeton Ridge Coalition's preference for the HDD method is based primarily on the assertion that overland construction would result in significant environmental impacts and unacceptable safety risks related to potential damage to Transco's existing Caldwell B pipeline.⁷¹

55. Princeton Ridge Coalition supports its claim by stating that Transco never indicated that using an HDD to construct the Skillman Loop in Princeton Ridge was likely to fail; therefore, the Commission made a significant error in its statement and should require Transco to implement the HDD for construction of the Skillman Loop.

56. Contrary to the Princeton Ridge Coalition's claims, Transco did in fact state that an HDD for a 42-inch-diameter pipeline along a 7,120-foot-long portion of the Skillman

⁷⁰ EA at 197.

⁷¹ December 18 Order, 149 FERC ¶ 61,258 at P 121.

Loop, specifically in the Princeton Ridge, has a “very high risk of failure.”⁷² However, this was not the only factor underlying the Commission’s conclusion. In practice, the HDD construction method is used to avoid specific sensitive resources, such as wetlands or waterbodies, or areas that may pose difficulties for overland construction. However, as discussed below, the EA concluded that employing HDD in the Princeton Ridge would not provide a significant advantage. Further, as discussed in the December 18 Order, Transco committed to installing the Skillman Loop in its existing right-of-way, significantly reducing the environmental impact of the pipeline and addressing many of the Princeton Ridge Coalition’s concerns regarding impacts on the existing canopy and forest fragmentation, vegetation, and wildlife.⁷³ The December 18 Order also explained that Transco responded to the Princeton Ridge Coalition’s concerns regarding the safety of overland construction by implementing safety measures beyond industry standard, including commitments made in its October 1, 2014 filing.⁷⁴

57. The EA stated that the HDD of the Princeton Ridge would take an estimated 240 days to complete and occur primarily through bedrock. An HDD operation of this size and over this extensive period would result in other environmental impacts, such as water requirements for drill passes, surface workspace requirements for entry and exit holes, and continuous 24-hour air and noise emissions monitoring.

58. As described in the December 18 Order, Transco engaged experts to determine the site specific geology and soil conditions of the Princeton Ridge through geotechnical borings, geophysical techniques, and laboratory analysis.⁷⁵ To alleviate concerns raised by Princeton Ridge Coalition, Transco developed a detailed Rock Handling Plan and a separate Princeton Ridge Construction Restoration Plan for installing the Skillman Loop by overland construction in the Princeton Ridge. These plans thoroughly address environmental and safety concerns raised for overland construction by the Princeton Ridge Coalition.

59. Ultimately, the Princeton Ridge Coalition did not present compelling arguments to suggest that an HDD in the Princeton Ridge would provide a significant advantage over overland construction. Further, in *Myersville Citizens for a Rural Community, Inc. v.*

⁷² See Transco’s September 2013 Resource Report 10 at 10-18.

⁷³ December 18 Order, 149 FERC ¶ 61,258 at P 122.

⁷⁴ *Id.* at P 121.

⁷⁵ *Id.*

FERC,⁷⁶ the D.C. Circuit Court found that “NEPA does not compel a particular result. Even if an agency has conceded that an alternative is environmentally superior, it nevertheless may be entitled under the circumstances not to choose that alternative.”⁷⁷ Based on Transco’s commitment to limit its construction and operational right-of-way, the numerous measures it will take to reduce environmental and safety impacts, and the lack of evidence that overland construction would result in significant environmental impacts, we find that HDD would not provide a significant advantage to overland construction of the Skillman Loop in Princeton Ridge.

I. Adoption of Transco’s Construction Mitigation Measures

60. Princeton Ridge Coalition asserts that the Commission failed to expressly include Transco’s proposed construction mitigation measures, in particular those measures contained in Transco’s October 1, 2014 supplement. As a result, Princeton Ridge Coalition requests that the Commission modify Environmental Condition 1 to expressly provide for the mitigation measure contained in the October 1, 2014 supplement.

61. We find it unnecessary to modify Environmental Condition 1, which requires Transco to “follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order.”⁷⁸ Environmental Condition 1 explicitly requires Transco to comply with all of the measures it proposed in its application and any supplements, including those outlined in Transco’s October 1, 2014 filing.

J. Measures to Protect Landowners

62. Princeton Ridge Coalition states that the Commission improperly rejected “reasonable” measures to protect landowners, such as requiring Transco to provide an environmental performance bond or require Transco to utilize the Commission’s dispute resolution process to resolve disputes.

⁷⁶ 783 F.3d 1301 (D.C. Cir. 2014).

⁷⁷ *Id.* at 1324 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

⁷⁸ December 18 Order, 149 FERC ¶ 61,258 at Appendix B, Environmental Condition 1.

63. We disagree. As detailed in the December 18 Order, the Commission ensures proper environmental restoration and addresses landowner concerns.⁷⁹ Transco has adopted our *Upland Erosion Control, Revegetation, and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*, which were established to ensure environmental protection during construction and adequate restoration after construction. In addition, Commission staff or its contractors conduct routine construction compliance inspections that are published in the project docket. Finally, in addition to Transco's Landowner Complaint Resolution Procedures,⁸⁰ landowners may contact the Commission using our Landowner Helpline, which is a voluntary option.⁸¹ The Commission addresses landowner concerns throughout the life of the project. We, again, conclude these procedures are sufficient to address landowner concerns. Further, we do not require bonds because the Commission has authority to require restoration and remediation to satisfactory levels.

K. Transco's Exercise of Eminent Domain

64. Princeton Ridge Coalition states that the Commission should not allow Transco to initiate any eminent proceedings until it has acquired all of its necessary federal and state authorizations. Princeton Ridge Coalition explains that without these approvals, such as its section 401 Water Quality Certification, the pipeline route remains uncertain and as a result, landowners may incur time and resources defending themselves in an eminent domain proceeding that could be rendered unnecessary.

65. Pursuant to section 7(h) of the NGA, any holder of a certificate of public convenience and necessity has the ability to acquire the necessary rights to construct and operate the authorized facilities by exercise of the right of eminent domain if it cannot obtain the rights by contract or is unable to agree with the owner of the property regarding compensation. No additional action by the Commission is required before the certificate holder can exercise that statutory right. As discussed above, the Commission

⁷⁹ December 18 Order, 149 FERC ¶ 61,258 at P 33.

⁸⁰ Transco stated that two to three weeks prior to beginning planned construction, it will send its complaint resolution letters to affected landowners on the project's mailing list. *See* Transco's December 23, 2013 Filing at 116. *See also* Transco's Application at Appendix C (Transco's Complaint Resolution Letter Template).

⁸¹ Landowners and interested parties may contact the Commission's Landowner Helpline at (202) 502-6651, toll-free at (877) 337-2237, or by email at LandownerHelp@ferc.gov.

does not believe it is necessary or practical for it to defer issuance of certificates pending action by other agencies on all required authorizations. Moreover, it is sometimes impossible for companies to gain access to property to complete studies which might be required prior to receipt of those authorizations without the ability to exercise the right of eminent domain afforded by the issuance of a certificate. In any event, we note that Transco has received all the authorizations necessary for construction of its project. Therefore, Princeton Ridge Coalition's arguments with regard to this project are moot.⁸²

L. Property Values and Property Insurance

66. The Princeton Ridge Coalition alleges that the Commission did not adequately consider impacts on property values and property insurance. We disagree. As stated in the December 18 Order, the pipeline segments to be constructed in conjunction with the Leidy Southeast Project will largely consist of looping and will be constructed in or adjacent to an existing right-of-way that contains as many as three other pipelines, which have been in operation for approximately 60 years.⁸³ Therefore, the Leidy Southeast Project will not necessarily adversely affect current property values.⁸⁴ Further, the Princeton Ridge Coalition has not provided any first-hand accounts or documentation from insurance providers identifying the potential for the modification or cancellation of any policy based on the construction of a pipeline. We agree with the EA's finding that there is no conclusive evidence suggesting that locating a pipeline on a property will result in the cancellation of policy or increase premiums.⁸⁵

⁸² While the Commission has no role in a company's acquisition of property rights, whether by negotiation or use of the eminent domain process, we note that the right of eminent domain afforded a certificate holder by NGA section 7(h) only extends to the "necessary right-of-way to construct, operate, and maintain" the facilities authorized by the certificate. *See* December 18 Order, 149 FERC ¶ 61,258 at Appendix B, Environmental Condition 4. Thus, it might be possible for property owners to negotiate, or argue in condemnation proceedings, for easement provisions which would result in the reversion

of, or the ability of the property owner to reacquire, any property rights associated with a project that does not ultimately go forward.

⁸³ December 18 Order, 149 FERC ¶ 61,258 at P 91.

⁸⁴ EA at 130-31.

⁸⁵ *Id.*

M. Impacts to and Disclosure of Cultural Resources

67. Ms. Cherry contends that the December 18 Order did not adequately address the potential loss of historical and archaeological resources due to the Leidy Southeast Project. Ms. Cherry questions the Leidy Southeast Project's potential to adversely impact cultural resource sites on the Skillman Loop, specifically the 28-Me-304 Site, Tulane Site, Upton Sinclair Site, and Petit Site.⁸⁶ Ms. Cherry believes that the Area of Potential Effect⁸⁷ determined by the Commission and the New Jersey and Pennsylvania Historic Preservation Officers (SHPO) was improperly limited to those that will occur inside existing easement areas since some construction activities, removal of trees, storage of materials, and other related impacts will occur outside of the existing right-of-way boundaries. Ms. Cherry also contends that the 28-Me-304 Site and Tulane Site "may be much closer than 2,000 feet" to the Area of Potential Effect.⁸⁸ Ms. Cherry states that the Area of Potential Effect for the Leidy Southeast Project was not publicly available and the public is unaware of which surveys have been completed and what methodology was used to determine impacts on the four sites in question. Finally, Ms. Cherry indicates that she does not know the identities of the "consulting parties" referenced in a December 15, 2014 letter from the New Jersey Department of Environmental Protection's Historic Preservation Office.

68. Since the issuance of the EA and December 18 Order, all cultural resources surveys were completed for the Leidy Southeast Project, in accordance with Environmental Condition 20.⁸⁹ Surveys for the project utilized methods approved by the New Jersey State Historic Preservation Office (SHPO) and were consistent with the *Secretary of the Interior's Standards and Guidelines for Archaeological Documentation*. The SHPO concurred that Transco's project will avoid all sites identified by the cultural resource surveys for the Skillman Loop.⁹⁰ Transco detailed the avoidance and protection

⁸⁶ EA at 136.

⁸⁷ The "area of potential effects" is "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.16(d) (2015).

⁸⁸ Ms. Cherry's Request for Rehearing at 5.

⁸⁹ December 18 Order, 149 FERC ¶ 61,258 at Appendix B, Environmental Condition 20.

⁹⁰ See New Jersey SHPO's letter filed February 23, 2015.

of these sites in its February 27 and April 8, 2015 filings. Therefore, there will be no loss of historical and archaeological resources, no damage of resources by construction, and no adverse impacts on the 28-Me-304 Site, Tulane Site, Upton Sinclair Site, or Petit Site.

69. We disagree that the public was not provided with sufficient information to make informed comments. As we discussed in the December 18 Order,⁹¹ the EA thoroughly addressed survey methodologies, clearly identified the survey corridor widths for pipeline routes (200 to 400 feet) and access roads (50 feet), which provided a buffer well beyond the limits of disturbance for the project, and the results presented in the survey reports. Contrary to Ms. Cherry's assertions, construction activities are limited to the construction areas identified and analyzed in the EA and authorized by the order. Therefore, we do not believe any interested stakeholder was hampered in its ability to comment on cultural resources because it did not receive the primary reports. The primary reports were withheld in compliance with Section 304 of the National Historic Preservation Act (NHPA) and Commission regulations.⁹²

70. Finally, the New Jersey and Pennsylvania SHPOs and the Commission were the consulting parties for the project under section 106 of the NHPA.⁹³ No other consulting parties were identified by the SHPOs or the Commission.

⁹¹ December 18 Order, 149 FERC ¶ 61,258 at P 104.

⁹² NHPA Section 304 provides that Federal agencies shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. *See* Section 304 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 307103, Pub. L. No. 113-287, 128 Stat. 3188, 3231-32 (2014). (The National Historic Preservation Act was recodified in Title 54 in December 2014).

⁹³ To fulfill an agency's obligations under section 106 of the NHPA, the Advisory Council on Historic Preservation's regulations administering NHPA requires agencies to consult with SHPOs; Indian Tribes and Native Hawaiian Organizations; representatives of local governments; applicants for federal assistance, permits, licenses, and other approvals; and the public. *See* 36 C.F.R. § 800.2(c) (2015).

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The Commission orders:

The requests for rehearing are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

CP13-551-001.DOCX.....1-29

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 11, FERC Order Granting Rehearing for Further Consideration, Tennessee Gas Pipeline, Docket No. CP11-161, July 9, 2012; and FERC Order On Rehearing, Tennessee Gas Pipeline, Docket No. CP11-161, January 11, 2013.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.

Docket No. CP11-161-001

ORDER GRANTING REHEARING FOR
FURTHER CONSIDERATION

(July 9, 2012)

Rehearings have been timely requested of the Commission's order issued on May 29, 2012, in this proceeding. *Tennessee Gas Pipeline Company, L.L.C.*, 139 FERC ¶ 61,161 (2012). In the absence of Commission action within 30 days from the date the rehearing request was filed, the request for rehearing (and any timely requests for rehearing filed subsequently)¹ would be deemed denied. 18 C.F.R. § 385.713 (2012).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Kimberly D. Bose,
Secretary.

¹ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Document Content(s)

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142 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Tennessee Gas Pipeline Company, L.L.C.

Docket No. CP11-161-001

ORDER ON REHEARING, CLARIFICATION, AND STAY

(Issued January 11, 2013)

1. On May 29, 2012, the Commission issued an order granting Tennessee Gas Pipeline Company, L.L.C. (Tennessee) authorization under section 7 of the Natural Gas Act (NGA) to construct and operate its Northeast Upgrade Project located in Pennsylvania and New Jersey.¹ The project is designed to provide up to 636,000 dekatherms (Dth) per day of firm transportation service on Tennessee's existing 300 Line System. This order grants, in part, and denies, in part, the requests for rehearing and/or clarification and denies requests for stay of the May 29 Order.

I. Background

2. On March 31, 2011, Tennessee filed its application in this proceeding requesting authorization to construct and operate the Northeast Upgrade Project consisting of five pipeline loop segments totaling 40.3 miles of 30-inch-diameter pipeline, and modifications and upgrades at four compressor stations and one meter station. The pipeline loops would be collocated with Tennessee's existing 24-inch-diameter 300 Line pipeline for 33.8 miles (84 percent) of the proposed project. The remaining 6.4 miles of pipeline (16 percent) is part of Loop 323, and would be installed outside of the existing right-of-way, in order to route around the Delaware Water Gap National Recreation Area (Delaware Water Gap NRA), part of the National Park System.

3. Tennessee entered into binding precedent agreements for long-term transportation services utilizing the full capacity of the project with Chesapeake Energy Marketing, Inc. (Chesapeake) and Statoil Natural Gas LLC (Statoil).

¹*Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (2012) (May 29 Order).

4. To satisfy the requirements of the National Environmental Policy Act (NEPA), Commission staff prepared an Environmental Assessment (EA) for the Northeast Upgrade Project that addresses geology and soils, water resources, fisheries and wetlands, vegetation and wildlife, land use, recreation and visual resources, socioeconomics, cultural resources, air quality and noise, reliability and safety, cumulative impacts, and alternatives. The EA concludes that, with the imposition of the recommended mitigation measures, the project would not constitute a major federal action significantly affecting the quality of the human environment.² The May 29 Order adopted the findings in the EA and authorized Tennessee to construct and operate the Northeast Upgrade Project, subject to modifications and 19 environmental conditions recommended by staff.³ The majority of the issues raised on rehearing relate to the Commission's environmental analysis in the EA.

5. Relevant to issues raised on rehearing, the Northeast Upgrade Project is one of four projects that Tennessee has proposed in separate certificate applications on its 300 Line System over the last few years. A summary of the other three projects follows:

- In July 2009, Tennessee filed its 300 Line Project proposing to construct and operate pipeline facilities and replace certain compression facilities in Pennsylvania and New Jersey on its 300 Line System to increase overall system reliability (the Reliability Component) and increase pipeline capacity by an incremental 350,000 Dth per day (the Market Component). The Market Component included the construction of eight pipeline loop segments totaling 127.4 miles of 30-inch diameter pipe, two new compressor stations and the upgrading/restaging of compressor units at three other compressor stations. The incremental capacity was fully subscribed by EQT Energy LLC. The Commission approved the project subject to conditions by order issued on May 14, 2010.⁴ Tennessee completed construction of its 300 Line Project and placed the facilities in service on November 1, 2011.⁵
- In November 2010, Tennessee filed its Northeast Supply Diversification (NSD) Project proposing to increase capacity on its 200 Line and 300 Line by 250,000 Dth per day by reserving unsubscribed capacity on its system,

² EA at 4-1.

³ The environmental conditions are listed in Appendix B of the May 29 Order.

⁴ *Tennessee Gas Pipeline Co.*, 131 FERC ¶ 61,140 (2010).

⁵ Tennessee's Notification of Placing Facilities In-Service dated November 4, 2011.

installing 6.8 miles of looped pipeline in one segment on its 300 Line in Northern Pennsylvania, and leasing capacity from Dominion Transmission, Inc. The incremental capacity was fully subscribed by Anadarko Energy Services Company, Seneca Resources Corporation, Cabot Oil & Gas Corporation, and Mitsu E&P USA, LLC. The Commission approved the project subject to conditions by order issued on September 15, 2011.⁶ The NSD Project was placed in-service on November 1, 2012.⁷

- In December 2011, Tennessee filed its MPP Project proposing to increase capacity on its 300 Line by 240,000 Dth per day by reserving unsubscribed existing capacity, and installing 7.9 miles of looped pipeline in one segment in Pennsylvania. Tennessee also proposed facility modifications to allow for bidirectional flow at four existing compressor stations in Pennsylvania. The capacity of the project was fully subscribed by Southwestern Energy Company and Chesapeake Energy Marketing, Inc. The Commission approved the project subject to conditions by order issued on August 9, 2012.⁸ On December 11, 2012, Tennessee was authorized to commence construction of the MPP Project in certain counties in Pennsylvania.⁹

II. Requests for Late Intervention and Rehearing

6. Over 30 individuals and entities filed motions for late intervention after issuance of the May 29 Order.¹⁰ On June 28 and August 23, 2012, Tennessee filed answers in opposition to the untimely interventions.

7. In ruling on a motion to intervene out-of-time, the Commission applies the criteria set forth in Rule 214(d),¹¹ and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether

⁶ *Tennessee Gas Pipeline Co.*, 136 FERC ¶ 61,173 (2011).

⁷ Tennessee's Notification of Placing Facilities In-Service dated November 2, 2012.

⁸ *Tennessee Gas Pipeline Co., L.L.C.*, 140 FERC ¶ 61,120 (2012).

⁹ Delegated letter order issued in Docket No. CP12-28-000.

¹⁰ A list of individuals and entities that filed motions to intervene out of time after the issuance of the May 29 Order is included as Appendix A to this order.

¹¹ 18 C.F.R. § 385.214(d) (2012).

any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.¹²

8. None of the movants requesting late intervention adequately addressed the factors required to grant a late intervention under Rule 214(d) nor explained why they waited until after the issuance of a dispositive order to request to intervene in this proceeding. Accordingly, we find that these individuals and entities have not shown good cause to be granted intervention at this late stage of the proceeding. Allowing late intervention at this point in the proceeding could create prejudice and additional burdens to the Commission, other parties, and the applicant. Therefore, we deny the late motions to intervene filed after the issuance of the May 29 Order.

9. The majority of the individuals and entities that filed late motions to intervene also filed requests for rehearing. On October 26, 2012, Barbara Buono, a New Jersey State Senator, filed a separate request that the Commission hold a rehearing in this docket based on concerns raised by constituents that they were not given sufficient opportunity to comment regarding the project. Under Rule 713(b) of the Commission's Rules of Practice and Procedure, only parties to a proceeding are entitled to request rehearing of a Commission decision.¹³ Because none of these entities are parties to this proceeding, they have no standing to seek rehearing of the May 29 Order. However, we note that most of these movants raised issues similar to those raised on rehearing by Mr. George Feighner regarding the pipeline loop around the Delaware Water Gap NRA, which are addressed below. Other issues raised, including public safety and opportunity to comment, have been addressed in the EA and the May 29 Order.¹⁴

¹² See, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 17-19 (2003); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹³ 18 C.F.R. § 713(b) (2012).

¹⁴ See, e.g., May 29 Order, 139 FERC ¶ 61,161 at P 129 (public safety); May 29 Order, 139 FERC ¶ 61,161 at P 63 (opportunity to comment). We also note that a number of individuals and entities submitted comments after issuance of the May 29 Order that raised similar concerns.

III. Requests for Rehearing, Clarification, and Stay

10. Requests for rehearing were timely submitted by Tennessee; jointly by Delaware Riverkeeper Network, New Jersey Highlands Coalition, and the New Jersey Chapter of the Sierra Club (collectively, Sierra Club); and by Mr. George Feighner, a landowner in New Jersey. Mr. Feighner also requested a stay of the Commission's May 29 Order.

11. On July 11, 2012, Mr. Feighner filed an answer in opposition to Tennessee's rehearing request. On July 27, 2012, as supplemented on July 30, 2012, Tennessee filed a request for leave to answer and answer to the requests for rehearing of the Sierra Club and Mr. Feighner. On August 3, 2012, Sierra Club filed a motion to strike Tennessee's answer to the extent it addressed arguments it raised on rehearing, or alternatively, if the Commission considers Tennessee's answer, an opportunity to respond. On August 13, 2012, Mr. Feighner filed an answer in opposition to Tennessee's motion for leave to file an answer and a motion to expedite. On August 23, 2012, Tennessee filed a motion for leave to answer and answer to Mr. Feighner's answer, and on September 7, 2012, Mr. Feighner filed an answer to Tennessee's motion. Answers to requests for rehearing are prohibited under Rule 713(d)(1) of the Commission's Rules of Practice and Procedure¹⁵ and neither Mr. Feighner nor Tennessee has established any need for an exception to this rule. Accordingly, we reject Mr. Feighner's and Tennessee's answers to the requests for rehearing. Mr. Feighner's and Tennessee's subsequent responses are dismissed as moot.

12. On November 12, 2012, Sierra Club filed a motion to expedite consideration of intervenors' rehearing requests and a motion to stay construction activity.¹⁶ On December 7, 2012, Sierra Club filed a motion for a stay of the Commission's May 29 Order and a stay of any construction activity pending review of the May 29 Order on rehearing. On December 13, 2012, Mr. Feighner filed a motion to join in Sierra Club's motions for stay. On December 14, 2012, Tennessee filed an answer in opposition to the requests to stay construction activity.

A. Tennessee's Request for Rehearing

1. Mr. Feighner's Party Status

13. On November 28, 2011, Mr. Feighner filed a motion to intervene in the subject proceeding. Appendix A of the May 29 Order identifies Mr. Feighner as a party filing a timely, unopposed motion to intervene.

¹⁵ 18 C.F.R. § 385.713(d)(1) (2012).

¹⁶ On July 13 and December 3, 2012, Sierra Club filed separate motions to expedite consideration of intervenors' request for rehearing.

14. Tennessee opposes granting Mr. Feighner party status and asserts that the Commission erred in considering Mr. Feighner's intervention as timely under Rule 214(c).¹⁷ Tennessee points out that while Mr. Feighner commented on the application during the environmental scoping process, he did not move to intervene until November 28, 2011, almost seven months after the May 4, 2011 deadline for interventions. Tennessee contends that Mr. Feighner's late motion to intervene should be denied because he has not shown any cause for such an untimely request to become a party.

Commission Response

15. Rule 214(c) of the Commission's Rules of Practice and Procedure provides that timely, unopposed motions to intervene in Commission proceedings are those filed within the time period prescribed by the Commission's notice of the proceeding for filing interventions.¹⁸ In this case, interventions were due by May 4, 2011. Further, the Commission regulations provide that any person who files a motion to intervene on environmental grounds on the basis of a draft Environmental Impact Statement (EIS) is deemed to have filed a timely motion to intervene so long as it is filed within the comment period for the draft EIS.¹⁹ Here, the Commission prepared an EA, not an EIS. However, even if we consider Mr. Feighner's motion to intervene as untimely, we would grant intervention.²⁰ In the interests of giving full consideration to the issues raised during proceedings for authorization of natural gas projects, the Commission has a liberal intervention policy prior to the time an order on the merits has been issued.²¹ Here, Mr. Feighner moved to intervene during the comment period on the EA and six months before we issued the May 29 Order. Mr. Feighner has demonstrated an interest in this proceeding as a land owner whose property will be impacted by the project. Further,

¹⁷ Tennessee Request for Rehearing at 6-8.

¹⁸ 18 C.F.R. § 385.214(c) (2012).

¹⁹ 18 C.F.R. §§ 157.10 and 380.10(a) (2012).

²⁰ The Commission's regulations addressing motions for late intervention state that, in acting on such a motion, the decisional authority may consider: whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting intervention. 18 C.F.R. § 385.214(d) (2012).

²¹ *Cameron LNG, LLC*, 118 FERC ¶ 61,019, at P 21 (2007) (citing *Gulfstream Natural Gas System, L.L.C.*, 95 FERC ¶ 61,100 (2001) and *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094, at 61,358 (1992)).

granting Mr. Feighner's intervention filed during the comment period of the EA did not cause undue delay or disruption or otherwise prejudice the applicant or other parties.²²

16. Thus, we affirm our determination in the May 29 Order to grant party status to Mr. Feighner and deny Tennessee's rehearing request on this point.

2. Initial Rates

17. In the May 29 Order, the Commission rejected Tennessee's proposal to base the initial recourse rate for the Northeast Upgrade Project on the combined costs and capacities of both the Northeast Upgrade Project and the Market Component of the 300 Line Project. The Commission found that although it would have been possible to amend the previously-authorized initial rate for the 300 Line Project Market Component to reflect the costs of the instant project in an NGA section 7 proceeding before that project went into service, once the 300 Line Project Market Component went into service in November 2011, the rate for service on that project can only be changed pursuant to section 4 of the NGA. The Commission further stated that this rejection "is without prejudice to Tennessee proposing in an NGA 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."²³

18. Tennessee requests clarification that it may file a limited-purpose section 4 filing to consolidate the rates of the Northeast Upgrade Project and the 300 Line Project into a single incremental rate. Tennessee argues that both the 300 Line Project and the Northeast Upgrade Project involve looping and compression along Tennessee's existing 300 Line System in northern Pennsylvania and New Jersey. Tennessee explains that the Northeast Upgrade Project created more capacity at lower costs because of the pipeline loops and compression added with the 300 Line Project and consolidating the rates conforms to the Commission policy for rolling cheap expansibility into prior projects that enabled the expansion. Furthermore, Tennessee points out that the Commission recently approved a settlement of Tennessee's first general rate proceeding in 16 years²⁴ and the settlement includes a moratorium in which Tennessee's next general rate proceeding may not become effective until at least April 2014. Thus, Tennessee maintains that requiring the filing of a general section 4 rate proceeding to consolidate the rates would delay the rolling in of the cheap expansibility into the initial rates of the 300 Line Project.

²² We note that no party, including Tennessee, filed an answer opposing Mr. Feighner's motion to intervene within the 15 days prescribed in the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.213(d) (2012).

²³ May 29 Order, 139 FERC ¶ 61,161 at P 25.

²⁴ *Tennessee Gas Pipeline Co., L.L.C.*, 137 FERC ¶ 61,182 (2011) (Settlement).

Commission Response

19. Under these circumstances, we grant Tennessee's requested clarification and find that Tennessee may make a filing under section 4 of the NGA for the limited purpose of consolidating the rates of the Northeast Upgrade Project and the 300 Line Project into a single incremental rate.²⁵ Our ruling is procedural in nature and does not address the merits of Tennessee's specific proposal or Tennessee's right to make such a rate filing under the terms of the Settlement.²⁶

3. Commencement Date of Service

20. Ordering Paragraph (C) of the May 29 Order requires Tennessee to construct and make available for service the project facilities within one year from the date of the order, May 29, 2013. Tennessee explains that its precedent agreements with the project's shippers, Chesapeake and Statoil, do not require Tennessee to commence service until November 1, 2013. Therefore, Tennessee requests that the Commission clarify that Tennessee has until November 1, 2013, to place the project facilities in service.

Commission Response

21. Given the terms of the precedent agreements Tennessee has entered into for service on the project, we find it is reasonable to provide Tennessee until November 1, 2013, to place the project facilities in service and we amend Ordering Paragraph (C), accordingly.

B. Sierra Club's Requests for Rehearing and Stay

1. Request for Stay

22. In its November 12, 2012 motion for stay of construction activities, Sierra Club asserts that a number of federal and state permits have not been issued for the project, and therefore any construction activity that occurs prior to the issuance of all required permits violates Environmental Condition No. 8 of the May 29 Order. Sierra Club also alleges

²⁵ The Commission permitted Tennessee to make a limited section 4 filing in a similar situation in *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022, at 61,109 (1996) (authorizing incremental rates and stating that Tennessee could make a limited section 4 filing to combine the Phase II and Phase III rates as approved).

²⁶ As we explained in the May 29 Order, if Tennessee seeks to accomplish this rate change before the in-service date of the Northeast Upgrade Project, it should combine its limited NGA section 4 filing with a filing under section 7 to amend the initial rate approved in the May 29 Order.

that Tennessee failed to provide construction status reports for the Northeast Upgrade Project pursuant to Environmental Condition No. 7.²⁷

23. In its December 7, 2012 motion, Sierra Club requests that the Commission grant a stay and prohibit Tennessee from commencing any construction or land disturbing activity until the Commission completes its review of the May 29 Order on rehearing. Sierra Club notes that Tennessee has submitted a Notice to Proceed that includes a construction schedule that indicates Tennessee plans on beginning construction on January 2, 2013. Sierra Club asserts that unless a stay is granted, irreparable harm to the environment will occur. Sierra Club also claims that Tennessee is either unwilling or unable to comply with the terms and conditions of its underlying permits, referring to compliance matters related to the 300 Line Project. Sierra Club asserts that the balance of equities favors the granting of a stay because any short-term delay to Tennessee's construction schedule that would result from the grant of a stay would not outweigh the permanent environmental damage that will occur absent a stay. In addition, Sierra Club claims that a stay is in the public interest because it will preserve existing environmental conditions pending review of the adequacy of the review of the environmental impacts of the project. Finally, Sierra Club asserts that it is likely to succeed on the merits for the reasons specified in its rehearing request. Sierra Club maintains that the Commission's decision to rely on an EA 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.

Commission Response

24. The Commission's standard for granting a stay is whether justice so requires.²⁸ The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. Our general policy is to refrain from granting stay to assure definiteness and finality in our proceedings.²⁹ For the reasons discussed below, we deny the stay requests.

²⁷ Sierra Club states that the status report from October 4 through October 10, 2012, is missing and Tennessee had not filed construction status reports from October 25, 2012.

²⁸ Administrative Procedure Act, 5 U.S.C. § 705 (2006); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

²⁹ See, e.g., *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

25. Sierra Club makes no showing that it will be irreparably harmed. The Northeast Upgrade Project consists of approximately 40 miles of pipeline, the majority (84 percent) of which will be collocated with Tennessee's existing 300 Line. In its environmental review, the Commission fully considered and addressed the comments of the Sierra Club and others individuals and entities. The EA in this proceeding took a hard look at the environmental impacts and concluded that the proposed action would not have a significant impact on the human environment, which, according to the Council on Environmental Quality (CEQ) regulations, provides a basis for proceeding without preparing an EIS.³⁰ Under these circumstances, we deny Sierra Club's requests for stay. In any event, this order addresses the requests for rehearing and affirms our finding in the May 29 Order that, with the imposition of the adopted mitigation measures, the project would not constitute a major federal action significantly affecting the quality of the human environment.

26. On December 14 and December 19, 2012, notices to proceed were issued authorizing Tennessee to, among other things, commence construction and tree clearing for certain limited portions of the Northeast Upgrade Project in Pennsylvania, and to commence construction at Compressor Station 325 in Sussex County, New Jersey. These notices found that Tennessee had met the pre-construction conditions of the Commission's May 29 Order for the authorized construction activities, including providing documentation that it had received all relevant federal authorizations.³¹

2. New Studies/Reports Submitted with Rehearing Request

27. Sierra Club attaches four new documents, studies, or reports to its rehearing request that it relies on, in part, to support certain issues it raises on rehearing. These include: a Tennessee Combined Project Map (Attachment A); *Accufacts' Evaluation of Tennessee Gas Pipeline 300 Line Expansion Projects in PA and NJ*, dated June 27, 2012 (*Accufacts*) (Attachment B); a letter from Demicco and Associates, LLC detailing the results of its review of potential impacts to ground water resources from pipeline installation associated with the project, dated June 27, 2012 (Attachment C); and *Impacts of Shale Development on Bat Populations in the Northeast United States*, dated June 2012 (*Impacts of Shale Development*) (Attachment D). All four studies are introduced for the first time in Sierra Club's rehearing request.

³⁰ See 40 C.F.R. §§ 1501.4(e), 1508.13 (2012).

³¹ The status reports for weeks October 4 through October 10, 2012, and October 25 through October 31, 2012 were filed by Tennessee on November 14, 2012. Tennessee states that the reports were late due to administrative oversight. As we discuss *infra*, compliance matters related to the 300 Line Project are appropriately addressed in that proceeding, not here.

Commission Response

28. The Commission's long-standing policy is not to accept additional evidence at the rehearing stage of a proceeding, absent a compelling showing of good cause.³² Because other parties are precluded under Rule 713(d)(1)³³ from filing answers to requests for rehearing, allowing these parties to introduce new evidence at this stage would raise concerns of fairness and due process for other parties to the proceeding. In addition, accepting such evidence at the rehearing stage disrupts the administrative process by inhibiting the Commission's ability to resolve issues with finality. Sierra Club does not explain or justify why the additional studies should be admitted after the close of the record and after the issuance of a dispositive order in this proceeding. Accordingly, we reject the efforts of Sierra Club to introduce supplemental evidence at the rehearing stage of this proceeding.

29. In any event, as discussed below, even if we considered the information in these studies, it would not change our rulings in the May 29 Order.

3. Segmentation

30. Sierra Club argues that the Commission violated NEPA and erred by unlawfully segmenting NEPA review of the environmental impacts of the Northeast Upgrade Project from the three other projects proposed by Tennessee on the eastern leg of the 300 Line System; namely, the 300 Line Project, the MPP Project, and the NSD Project (collectively, Eastern Leg Projects).³⁴ According to Sierra Club, the Commission should have completed a single EIS on these projects because they loop the entire eastern leg of Tennessee's 300 Line and are inter-related and functionally inter-dependent projects.

31. Sierra Club argues that the Northeast Upgrade Project and the other projects fail to meet the independent utility test, the factor it states is most often dispositive in a segmentation analysis, because all four projects are functionally dependent. In support, Sierra Club references Tennessee's certificate application for the MPP Project that states that the availability of this project capacity is based on the assumption that the Northeast Upgrade Project, 300 Line Project, and NSD Project will all be operational by November 2013.³⁵ Sierra Club also relies on the study from *Accufacts* that it states it recently

³² See, e.g., *Nevada Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005), *Midwest Independent Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,178, at P 11 (2008).

³³ 18 C.F.R. § 385.713(d) (2012).

³⁴ Sierra Club Request for Rehearing at 8-27.

³⁵ *Id.* at 15 (citing MPP Project Certificate Application at 4).

commissioned for the purpose of presenting this argument on rehearing. According to Sierra Club, that study shows that all four projects are one master inter-dependent project to complete the looping of the 300 Line because: (1) the four projects provide a total of 1,500,000 Dth per day above what the original 24-inch pipeline could transport demonstrating that the projects are designed and intended to act as a full loop of the 300 Line System; (2) the distribution of horsepower by compressor station demonstrates that the 30-inch pipeline is designed to act as a complete loop; (3) the addition of greater capacity on the Northeast Upgrade Project compared to the capacity created by the Line 300 Project shows that the Northeast Upgrade Project is piggybacking off the 300 Line Project; (4) the NSD and MPP Projects rely on the 300 Line Project and Northeast Upgrade Project because the NSD and MPP Projects only add a relatively small amount of pipe and no compression and yet are able to add almost 500,000 Dth per day of capacity; and (5) the ability of the MPP Project to reverse gas flow on the western leg of Tennessee's 300 Line relies on excess capacity from previously installed compressor station horsepower.

32. Sierra Club also claims that the unlawful segmentation of the Northeast Upgrade Project and the other Eastern Leg Projects is further demonstrated by specific factors that show the projects were sufficiently connected, or cumulative, or related pursuant to NEPA.³⁶ Sierra Club maintains that the four projects were conceived as an integrated whole because the common overarching design of the four projects demonstrate that Tennessee meant those four projects to complete the eastern leg of the 300 Line.³⁷ In support, Sierra Club refers to Tennessee's statement in the certificate application for its MPP Project that the availability of project capacity is based on the assumption that the other three projects (300 Line Project, NSD Project and the Northeast Upgrade Project) are placed in service before, or contemporaneously with, the MPP Project. In addition, Sierra Club refers to Tennessee's certificate application for the Northeast Upgrade Project where it contends that Tennessee admits that the Northeast Upgrade Project will activate additional capacity that otherwise would not have been available without the 300 Line Project.

33. Sierra Club contends that the projects are economically interdependent because the 300 Line Project would allow Tennessee to create capacity on the Northeast Upgrade Project at a lower cost than what would be possible in the absence of the 300 Line Project and that construction of the Northeast Upgrade Project would lower rates on the 300 Line Project.³⁸ According to the Sierra Club, Tennessee failed to demonstrate that it would

³⁶ *Id.* at 18-27.

³⁷ *Id.* at 19-21 (citing *Florida Wildlife Federation v. United States Army Corps of Engineers*, 401 F. Supp. 2d 1298 (S.D. Fla. 2005) (*Florida Wildlife*)).

³⁸ *Id.* at 21-24.

have been able to successfully negotiate the contracts with their shippers solely on the basis of the costs associated with a single project without cost savings resulting from the related upgrade projects. In addition, Sierra Club argues the projects are not economically independent because the primary term of the contracts for the Northeast Upgrade Project last 20 years with an option to extend for five-year terms compared to the 40-year lifespan of the pipeline.

34. Sierra Club adds that the subsequent projects are reasonably foreseeable because Tennessee was always contemplating extending the new 30-inch looped sections across the entire eastern leg of the 300 Line into New Jersey based on maps and documents submitted by Tennessee.³⁹ In support, Sierra Club cites to Tennessee's statement in the subject certificate application that 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 frame."⁴⁰

35. Sierra Club asserts that under 40 C.F.R. § 1508.25(a)(3), the "common timing" of the projects weighs in favor addressing them all together in a single EIS. Sierra Club asserts that all four projects are to be placed in service within 24 months of each other with the Northeast Upgrade Project and the MPP Project having the same in-service date.

36. Finally, Sierra Club argues under 40 C.F.R. § 1508.25(a)(3) the fact that the projects share a geographic proximity weigh in favor of a combined EIS. Sierra Club argues that all four projects are being constructed in a contiguous, uninterrupted pipeline across Pennsylvania into New Jersey.

Commission Response

37. The issue of whether we had improperly segmented the environmental review of the Northeast Upgrade Project from the 300 Line Upgrade Project was raised on comments to the EA and addressed in the May 29 Order. We found that each project is a stand-alone project and designed to provide contracted-for volumes of gas to different customers within different timeframes.⁴¹ We also found that the 300 Line Project is currently in operation and is not dependent on the Northeast Upgrade Project facilities. As further discussed below, we affirm our ruling in the May 29 Order.

³⁹ *Id.* at 24-25 (citing *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998) (*Blue Mountain Biodiversity*)).

⁴⁰ *Id.* at 25 (citing certificate application at 14).

⁴¹ May 29 Order, 139 FERC ¶ 61,161 at P 92.

38. Here, Sierra Club contends that we unlawfully segmented for environmental review the environmental impacts of the Northeast Upgrade Project from not only the 300 Line Project but from two other certificate projects proposed by Tennessee (the MPP and NSD Projects). Sierra Club asserts that all four Eastern Leg Projects are interrelated and inter-dependent projects and the environmental impacts should have been reviewed in a single EIS. The issue of whether we improperly segmented environmental review of the Northeast Upgrade Project from the NSD and MPP Projects is being raised for the first time in this proceeding on rehearing. We find no reason that this argument could not have been raised prior to our issuance of our May 29 Order on the merits. As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances.⁴² We do so because (1) our regulations preclude other parties from responding to a request for rehearing,⁴³ and (2) "such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."⁴⁴ We therefore will not entertain this new argument on rehearing.

39. In any event, if we determined not to dismiss this issue on procedural grounds, we would dismiss it on substantive grounds. Sierra Club claims that we should have completed a single EIS for all four Eastern Leg Projects. As an initial matter, we note that the 300 Line Project was filed in July 2009, more than 18 months before the certificate filing for the MPP Project, the most recent project Sierra Club claims was improperly segmented from the rest, in December 2011. The 300 Line Project was placed in service on November 1, 2011, before the MPP Project application was even filed. To accomplish what Sierra Club requests, the Commission presumably would have had to hold up environmental review of the 300 Line Project, as well as the NSP and Northeast Upgrade Projects, until the MPP Project was proposed. Sierra Club's approach is unworkable, would unduly delay natural gas infrastructure development, and is not required by NEPA.

40. The CEQ regulations provide that actions are "connected," thus requiring consideration in the same environmental analysis, if they: (1) automatically trigger other actions which may require an environmental impact statement; (2) cannot or will not

⁴² See Rule 713(c)(3) of our Rules of Practice and Procedure, which states that any request for rehearing must "[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought, based on matters not available for consideration by the Commission at the time of the final decision or final order." 18 C.F.R. § 385.713(c)(3) (2012).

⁴³ 18 C.F.R. § 385.713(d) (2012).

⁴⁴ *Westar Energy, Inc.*, 134 FERC ¶ 61,176, at P 23 (2011).

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.⁴⁵ Where “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.”⁴⁶ The courts have held that improper segmentation is usually concerned with projects that have reached the proposal stage.⁴⁷ Applying these principles here, we conclude that there was no reason to consider all four projects together for environmental review.

41. Sierra Club’s assertion that the environmental consequences of all four Eastern Leg projects must be evaluated together because the projects are functionally dependent and designed to act as a complete loop of the 300 Line has no merit. Sierra Club’s arguments are largely premised on the fact that the subsequent expansion projects are designed based on the facilities proposed in earlier projects. For example, Sierra Club references Tennessee’s certificate application for the MPP Project that states that the availability of the MPP project capacity is based on the assumption that the Northeast Upgrade Project, 300 Line Project, and NSD Project will all be operational by November 2013. But the fact that existing or previously proposed infrastructure will have an impact on the design of subsequent capacity reflects engineering principles; it does not demonstrate these actions are connected for NEPA purposes and cannot move forward independently. Each of the four projects that Sierra Club identifies has independent utility. Each project is designed to provide contracted-for volumes of gas to specific customers and can stand alone.⁴⁸

42. For example, the Line 300 Upgrade Project was constructed and placed in service on November 1, 2011, more than six months before the Commission authorized the Northeast Upgrade Project, thus demonstrating the independent utility of this project. Here, Tennessee has signed binding precedent agreements for the full incremental capacity of the Northeast Upgrade Project. It is reasonable to assume Tennessee would have proposed a project to provide this contracted-for service, even in the absence of the

⁴⁵ 40 C.F.R. §§ 1508.25(a)(1)(i)-(iii) (2012).

⁴⁶ *Reilly v. United States Army Corps of Engineers*, 477 F.3d 225, 236 (5th Cir. 2007) (citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1241, n. 10 (5th Cir. 1985) (*Reilly*)).

⁴⁷ *Id.* at 236-237.

⁴⁸ Of course, the design of the subsequent projects may have looked different had any of the preceding projects not received Commission authorization.

300 Line Project and/or the NSD Project.⁴⁹ Similarly, there is no support in this record that Tennessee will not move forward with the Northeast Upgrade Project if the MPP Project is not constructed and placed in service.

43. We also find that the *Accufacts* study does not support Sierra Club's position that the Eastern Leg Projects are interdependent projects. The study makes several assertions regarding the design of Tennessee's 300 Line Project, Northeast Upgrade Project, MPP Project and NSD Project, including that the four projects were inter-related and functionally dependent on one another, that some of the projects created excess capacity, and that some of the projects did not include enough facilities. The study also asserts that the projects are potentially unsafe because of the potentially high gas velocities and bi-directional flow. However, the study provided no engineering support, such as hydraulic studies, to support the operational claims. Nor did the study cite to any scientific papers or industry studies supporting the claims about problems resulting from gas velocities and bi-directional flow. The study acknowledges that the analysis utilized only public documents, thus excluding critical information related to the operational design of the facilities such as flow diagrams and pipeline simulations provided by Tennessee. Commission staff analyzed each of these proposals based upon all of the information in the record and confirmed that the design of each project was appropriate to meet the specified contractual demand.

44. As noted above, the courts have held that improper segmentation is usually concerned with projects that have reached the proposal stage.⁵⁰ This is not the case with the projects here. For instance, the EA for the 300 Line Project was issued in February 2010, before the certificate proposals for any of the other three projects were filed.

45. We also disagree with Sierra Club's assertion that the subsequent projects are "reasonably foreseeable" and thus the EA's failure to consider them provides further proof of improper segmentation. In *Reilly v. United States Army Corps of Engineers*, the court explained that, whether subsequent projects are "reasonably foreseeable" is relevant to the issue of the sufficiency of a cumulative impact analysis, not to the issue of segmentation.⁵¹ Moreover, as discussed in more detail below, we find that the EA adequately addressed the cumulative impacts of the 300 Line, as well as other

⁴⁹ If the assumptions on which Tennessee's certificate application were based had changed during the pendency of the proceeding, Tennessee could have filed an amended application to add, delete, or modify facilities.

⁵⁰ *Reilly*, 477 F.3d at 236-237.

⁵¹ 477 F.3d at 237.

jurisdictional pipeline projects that could potentially cause a cumulative impact with the project.⁵²

46. While all four projects are proposed to be connected to Tennessee's 300 Line, the record does not support Sierra's Club's contention that Tennessee contemplated these four actions as an integrated whole that would progress in phases.⁵³ The *Florida Wildlife* case cited by Sierra Club is inapposite. In *Florida Wildlife* the court held that the U.S. Army Corps of Engineers should have evaluated the 1,919 acres planned for an integrated development, rather than issuing a permit to develop 535 acres.⁵⁴ The *Florida Wildlife* case involved breaking down a larger project into component parts, a situation not present here, as discussed above. Sierra Club also has not demonstrated that the four actions are so interconnected in geography and timing that any one is dependent on the other to require a single environmental review.

47. Sierra Club has not shown that these projects are economically interdependent. The fact that the 300 Line Project would allow Tennessee to create capacity on the Northeast Upgrade Project at a lower cost than would be possible in the absence of the 300 Line Project and that the construction of the Northeast Upgrade Project may lower rates on the 300 Line Project reflects the fact that some expansion projects are less costly because of earlier construction and Commission policy permits rolled-in pricing in this situation.⁵⁵ This, too, is a function of pipeline engineering and does not demonstrate that the projects are economically interdependent. Sierra Club does not offer any support for

⁵²For this reason, Sierra Club's cite to *Blue Mountains Biodiversity* is unavailing. In that case, the court found multiple deficiencies in the EA for a salvage logging project, including the agency's failure to mention, much less analyze and address, the cumulative impacts of three other salvage logging projects that were part of the agency's coordinated recovery strategy for the same area.

⁵³An agency need not evaluate an entire universe in a single environmental document. "[J]ust because the [new highway] project at issue connects existing highways does not mean that it must be considered as part of a larger highway project; all roads must begin and end somewhere [citations omitted]." *Preserve Endangered Areas of Cobb's History, Inc. v. Army Corps of Engineers*, 87 F.3d 1242, 1247 (11th Cir. 1996).

⁵⁴401 F. Supp. 2d 1298, 1317 (S.D. Fla. 2005).

⁵⁵*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). We fail to understand how the terms of the precedent agreements (e.g., 20 years plus 5 year extensions) Tennessee has entered into for the capacity of the Northeast Upgrade Project have any bearing on whether the project has independent utility under NEPA.

its contention that without cost savings resulting from the 300 Line Project, Tennessee would not have been able to successfully negotiate the contracts with their shippers solely on the basis of the costs associated with the single project.

48. Finally, since the 300 Line Upgrade Project and the NSD Project are completed and in service, there would be no purpose in conducting a single environmental document that included those projects.⁵⁶

49. In sum, we find that the Commission's environmental review of the Northeast Upgrade Project in a single environmental document is consistent with NEPA.

4. Whether the Northeast Upgrade Project is a Major Pipeline Project

50. Sierra Club contends that the Commission erred in not treating the Northeast Upgrade Project as a major new pipeline project necessitating an EIS.⁵⁷ Sierra Club argues that the project, standing alone, should be treated as a major new project given the doubling of the width of the right-of-way, the miles of the new 30-inch pipeline to be installed, and the undisturbed area to be affected by new right-of-way for the project.

51. Sierra Club also maintains that the Commission has considered other pipeline construction projects similar in scope to the Northeast Upgrade Project and the other Eastern Leg Projects as a whole to be major and require an EIS. Specifically, Sierra Club argues that in *Floridian Natural Gas Storage Co.*,⁵⁸ the Commission prepared an EIS for a liquefied natural gas storage facility that utilized 55.58 acres for the storage facility and 71.45 acres for the construction right-of-way area and other facilities. According to the Sierra Club, the Northeast Upgrade Project exceeds these figures, asserting that the project will disturb over 640 acres of land, require over 120 acres of permanent right-of-way across over 300 water bodies, as well as have significant portions of the right-of-way cut through virgin forests and sensitive habitats.

52. Sierra Club also points out that the Commission prepared an EIS for a proposed project by Colorado Interstate Gas Company that consisted of four segments of 24-inch and 30-inch pipeline totaling approximately 164 miles in length, where a significant

⁵⁶ See *U.S. Dep't of Transp. v. Public Citizen (Public Citizen)*, 541 U.S. 752, 767-768 (2004) ("Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS").

⁵⁷ Sierra Club Request for Rehearing at 27-29.

⁵⁸ 124 FERC ¶ 61,214 (2008) (*Floridian*).

portion of the proposed pipeline route was along an exiting utility right-of-way.⁵⁹ Again, Sierra Club faults the Commission for not considering the Eastern Leg Projects as a whole and requiring an EIS because the combined eastern leg is larger than the project in *Colorado Interstate*, because it involves, among other things, over 185 miles of pipeline and requires over 620 acres of new permanent right-of-way.

Commission Response

53. The Commission's regulations implementing NEPA only require preparation of an EIS for "[m]ajor pipeline construction projects under section 7 of the Natural Gas Act using rights-of-way in which there is no existing natural gas pipeline."⁶⁰ As we explained in the May 29 Order, based on our regulations and the Commission's years of experience with NEPA implementation for pipeline projects, a new 40.3-mile-long, 30-inch-diameter pipeline that will be co-located within or adjacent to existing rights-of-way for 84 percent of its length normally would not fall under the "major" category for which an EIS is automatically prepared.⁶¹ We have prepared EAs for a number of natural gas pipeline projects similar in scope to the Northeast Upgrade Project.⁶² We affirm our ruling that the Northeast Upgrade Project is not a "major" pipeline project for which an EIS is automatically prepared.

54. The cases cited by Sierra Club where the Commission performed an EIS are distinguishable. In *Floridian*, the project involved a large permanent aboveground liquefied natural gas facility, as opposed to the proposal here involving buried underground pipeline and work at existing above ground facilities. In addition, Sierra Club's comparison of the Northeast Upgrade Project combined with Tennessee's other three projects on the 300 Line with *Colorado Interstate* is not appropriate. As we

⁵⁹ Sierra Club Rehearing Request at 29 (citing *Colorado Interstate Gas Co.*, 122 FERC ¶ 61,256 (2008) (*Colorado Interstate*)).

⁶⁰ 18 C.F.R. § 380.6(a)(3) (2012).

⁶¹ May 29 Order, 139 FERC ¶ 61,161 at P 42.

⁶² See, e.g., *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197 (2011) (EA issued for new Magnum Gas Storage Project which included gas storage field on 2,050-acre site in Millard County, Utah, and associated 61.6-mile, 36-inch-diameter pipeline traversing three counties in Utah); *Colorado Interstate Gas Co.*, 131 FERC ¶ 61,086 (2010) (EA issued for Colorado Interstate Gas Co.'s Raton 2010 Expansion Project which included two new 16-inch-diameter pipeline laterals totaling 118 miles in length traversing four counties in southeastern Colorado); *Equitrans L.P.*, 117 FERC ¶ 61,184 (2006) (EA issued for Big Sandy Pipeline Project which included 68 miles of new 20-inch-diameter pipeline traversing four counties in eastern Kentucky).

discussed in the May 29 Order and *infra*, the Northeast Upgrade Project is a stand-alone project and, as such, is considerably smaller in scope than the project in *Colorado Interstate*. For example, the Northeast Upgrade Project involves approximately 40 miles of new pipeline, while the proposal in *Colorado Interstate* involved over 160 miles of new pipeline.

5. Finding of No Significant Impact

55. Sierra Club contends that the Commission erred in concluding the Northeast Upgrade Project would not have a significant impact of the quality of the human environment and therefore that an EIS is not warranted.⁶³

56. Sierra Club asserts that the EA is full of significant information gaps, which Sierra Club argues the Commission admits when it states that such information will become available on completion of further studies, surveys, and permitting requirements by Tennessee. Sierra Club argues the May 29 Order also fails to respond to the list of alleged deficiencies identified. Sierra Club argues that because the missing information increases the uncertainty of the project's impacts, the Commission should have prepared an EIS.

57. Sierra Club argues the Commission's defense that it had sufficient information to complete the EA, that Tennessee's belated submission of data before the May 29 Order informed the Commission's decision in reaching its finding of no significant impacts, or that more details would be worked out during other federal and state permitting processes is unavailing. Sierra Club argues that these alleged deficiencies render the EA insufficient as a matter of law because it is the EA, not some outside permit, which must contain the Commission's environmental impacts review.⁶⁴ Furthermore, Sierra Club argues that by denying Sierra Club and the public the right to review and comment on the information upon which the finding of no significant impact was based, the Commission violated NEPA.⁶⁵

58. Sierra Club also maintains that the Commission failed to adequately consider the context and intensity of the project when determining to prepare an EA. Sierra Club argues the EA failed to analyze the context of the project, which it considers to be the rapid industrialization of rural areas in Pennsylvania and the construction of the project in

⁶³ Sierra Club Rehearing Request at 29-38.

⁶⁴ *Id.* at 32 (citing *Blue Mountains Biodiversity Project*, 161 F.3d 1208, 1214 (9th Cir. 1998)).

⁶⁵ *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (*Robertson*)).

high-value resource areas, and that, therefore, the Commission should reconsider its analysis of the context of the project in order to determine whether an EIS is necessary. Furthermore, Sierra Club argues the Commission erred in determining that the NEPA intensity factors do not warrant preparation of an EIS, specifically intensity factors 3, 4, 6, 8, and 9.⁶⁶

59. Based on intensity factors 3 and 8, Sierra Club argues that the project will affect each and every one of the six categories of unique geographic characteristics identified by CEQ regulations including, historically and culturally significant areas, park lands, prime farmlands, wetlands,⁶⁷ ecologically critical areas, and under the Delaware River, a federally-designated Wild and Scenic River. In addition, Sierra Club argues that the May 29 Order failed to address the expert comments in the Heatley Report that it states details the EA's deficiencies in addressing the significance of short-and long-term impacts of forest fragmentation and edge effects, adverse impacts to forest regeneration, biological invasion by invasive species, and the cumulative impacts of maintaining the right-of-way throughout the service life of the project.

60. Sierra Club argues that it and other commenters submitted evidence with their comments showing that a substantial dispute existed, intensity factor 4. Sierra Club argues that the substantial expert comments submitted in response to the EA demonstrate that the project's effects are highly controversial with regard to many affected resources.

⁶⁶ The CEQ regulations state that determinations of whether a project will have significant impacts on the environment depend on consideration of both "context" and "intensity." Context means the "significance of an action must be analyzed in several contexts," including "the affected region, the affected interest, and the locality." With respect to "intensity," the CEQ regulations set forth 10 factors agencies should consider, including: the unique characteristics of the geographic area (1508.27(b)(3)); the degree to which the effects are likely to be highly controversial (1508.27(b)(4)); the degree to which the action may establish a precedent for future actions (1508.27(b)(6)); the degree to which the action may adversely affect districts, sites, highway, structures, or objects listed in the National Register of Historic Places (1508.27(b)(8)); and the degree to which the action may adversely affect threatened and endangered species (1508.27(b)(9)). *See* CEQ regulations at 40 C.F.R. §§ 1508.27(a) and (b) (2012).

⁶⁷ Sierra Club states that the Demicco and Associates report that it submitted with its rehearing request documents 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.

Sierra Club also argues the Commission cannot “ignore[] the conflicting view of other agencies having pertinent expertise.”⁶⁸

61. Sierra Club submits that the precedent setting action, intensity factor 6, the Commission took in deciding to prepare an EA rather than an EIS was the alleged segmentation of the project from the 300 Line, NSD, and MPP Projects. Sierra Club argues it is reasonable to assume that pipeline companies will continue to file certificate applications to develop pipeline projects in the Marcellus Shale region and it is reasonable to assume that the Commission will permit these companies to segment their applications, therefore implicating intensity factor 6.

62. Sierra Club reiterates that the project will affect endangered species and, therefore, intensity factor 9 weighs in favor of the preparation of an EIS. Sierra Club argues that the EA failed to describe the methodologies used to gather the data discussed in the EA, and that given the difficulties in determining whether or not Indiana bats and their habitat are present in a given area based on mist net surveys, more in-depth study and an EIS was necessary. In addition, Sierra Club argues the Commission failed to respond to the expert opinion of Dr. DeeAnn Reeder regarding the inadequacy of mist net surveys for an already-endangered species whose numbers have dropped due to White Nose Syndrome.⁶⁹ In addition, Sierra Club argues that data deficiencies cannot be cured by the subsequent submission of surveys for threatened and endangered species because the data must be contained in the EA. Sierra Club asserts that the Commission denied intervenors’ requests to examine endangered species surveys completed by Tennessee and that the Commission’s Endangered Species Act section 7 consultation does not remedy deficiencies.

Commission Response

63. CEQ regulations implementing NEPA state that one of the purposes of an EA is to assist agencies in determining whether to prepare an EIS or a finding of no significant impact.⁷⁰ Here, staff prepared an EA to determine whether the Northeast Upgrade Project would indeed have significant impacts, thus necessitating the preparation of an EIS. As explained in the May 29 Order, the EA concludes, and we agree, that the

⁶⁸ Sierra Club Rehearing Request at 36 (citing *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002)).

⁶⁹ Sierra Club also refers to the *Report on Shale Gas Development* that it states further documents the significant impacts to endangered bats from shale gas development.

⁷⁰ 40 C.F.R. § 1501.4(c) (2012).

Northeast Upgrade Project would not have a significant impact on the quality of the human environment. Therefore, an EIS is not required.

64. We disagree that the EA for the Northeast Upgrade Project was based on inadequate information. Our review of Tennessee's application under the requirements of the NGA and NEPA, discusses and identifies those limited NEPA issues requiring further study treatment and requires their completion and review prior to commencement of construction. The extensive record on environmental issues provided sufficient information regarding the proposed action to be able to fashion adequate mitigation measures to support a determination that the Northeast Upgrade Project will cause no significant environmental impacts upon compliance with those mitigation measures.

65. As the Supreme Court stated in *Robertson* "NEPA does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated."⁷¹ Here, the Commission made extensive efforts to assure that environmental issues were resolved appropriately. The issues the parties raise were discussed in considerable detail in the EA and were subject to public comment. Based on the information in the record, we imposed additional measures to mitigate any adverse environmental impact associated with the project. As is the case with virtually every order issued by the Commission that authorizes construction of facilities, the instant approval is subject to Tennessee's compliance with the environmental conditions set forth in the order.

66. We also disagree with Sierra Club's assertion that we have improperly deferred determinations of potential negative impacts to other agencies that will determine and require mitigation. We rely on other agencies to conduct certain studies because they are the resource agencies with expertise and responsibilities over the particular subject matters. Moreover, the Commission requires that the results of these studies be filed in this proceeding. To the extent any of the pending consultations or studies in this case indicate a need for further review, or indicate a potential for significant adverse environmental impacts, the Director of the Office of Energy Projects (OEP) will not provide the necessary clearances for commencement of construction. Additionally, that office's final resolution of those conditions will be subject to Commission rehearing, which is also part of the paper hearing for this proceeding. Thus, Sierra Club's claim that our process denies them the right to review and comment on information the Commission relies on in its environmental review is unavailing.

67. Sierra Club's contention that in assessing significance we failed to properly consider the context or intensity factors set forth in CEQ regulations is without merit. Context, as used in the NEPA regulations, requires the significance of an action to be analyzed with respect to the affected region and the affected interest. Here, we

⁷¹ 490 U.S. at 352.

considered Tennessee's proposal to construct approximately 40 miles of pipeline, the majority of which is collocated with Tennessee's existing 300 Line, and evaluated the project impacts on resources including geology and soils, water resources, fisheries and wetlands, vegetation and wildlife, land use, recreation and visual resources, socioeconomics, cultural resources, air quality and noise. We found that any impacts of the project would be limited.

68. The May 29 Order addressed Sierra Club's arguments that the project will affect numerous unique geographic areas and may cause destruction of significant scientific, cultural, and historical resources, the third and eighth intensity factors, respectively.⁷² We explained that the EA considered these issues in depth, including impacts to waterbodies/wetlands and groundwater,⁷³ satisfying our responsibility under NEPA to take a hard look at the project's impacts, and concludes with a finding of no significant impact. Sierra Club incorrectly asserts that we did not address the expert comments in the Heatley Report attached to the Sierra Club's scoping comments. The May 29 Order addresses issues raised in the Heatley report including fragmentation and found that these impacts would be minimized by Tennessee expanding its existing right-of-way in most areas and that edge effects would be offset to the new right-of-way edge.⁷⁴ The order also acknowledged that fragmentation would impact areas where a new right-of-way was created and species composition in these areas would change.

69. The May 29 Order explained why we disagreed with Sierra Club's claim that the potential environmental impacts of the proposed project are "highly controversial," intensity factor 4. For an action to qualify as highly controversial, there must be a "dispute over the size, nature or effect of the action, rather than the existence of opposition to it."⁷⁵ Although we found Sierra Club presented some evidence of the potential for the degradation of habitat, we found that the EA thoroughly analyzed these issues, and appropriately concluded there would be no significant impacts. We also find that Sierra Club's assertion that we ignored the conflicting views of other agencies having pertinent expertise is without merit. While the Sierra Club does not specify which agencies comments it refers to, the Commission considered and addressed all substantive

⁷² May 29 Order, 139 FERC ¶ 61,161 at PP 132-136, 196.

⁷³ Nothing in the Demicco and Associates report alters our conclusion that, based on measures within Tennessee's Environmental Construction Plan, the impact on groundwater will be minimized.

⁷⁴ May 29 Order, 139 FERC ¶ 61,161 at PP 139-140.

⁷⁵ *Id.* P 138 (citing *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982) (quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973))) (internal quotations omitted).

comments including those of other agencies participating in this proceeding. Indeed, the EA recommended and we adopted mitigation measures put forth by other agencies.⁷⁶

70. The May 29 Order also disagreed with Sierra Club's claim that intensity factor 6, precedent setting action, is implicated here. We found that Sierra Club's argument that Commission staff's EA for the project would establish a precedent is without merit because the EA is a non-binding document and creates no precedent to which the Commission is bound.⁷⁷ Further, we pointed out that each proposed project is unique and has different effects on different resources. Sierra Club's contention that the precedent setting action is the segmentation of the project from the 300 Line, NSD, and MPP Projects is equally unavailing. As we explain *infra*, we did not improperly segment the Northeast Upgrade Project from other projects Tennessee proposed on its 300 Line. The Northeast Upgrade Project has independent utility and we based our decision to perform an EA, as opposed to an EIS, on our evaluation of the project and its affects on different resources informed by the Commission's many years of implementing NEPA requirements.

71. The May 29 Order addressed Sierra Club's comments on the impact to endangered species, factor 9, and concluded that no significant impact would occur.⁷⁸ As relevant to Sierra Club's rehearing request, we explained that Tennessee had completed the necessary Indiana bat surveys in Pennsylvania and New Jersey.⁷⁹ In order to avoid any effects of the project on the Indiana bat in New Jersey, the U.S. Fish and Wildlife Service (FWS), New Jersey Field Office, recommended that Tennessee implement a seasonal

⁷⁶ See, e.g., May 29 Order, 139 FERC ¶ 61,161 at P 73 (addressing Pennsylvania and New Jersey concerns regarding the Indiana bat).

⁷⁷ *Id.* P 151 (citing *Town of Cave Creek v. FAA*, 325 F.3d 320, 332 (D.C. Cir. 2003) (finding that the Federal Aviation Administration reasonably concluded that an EIS was unnecessary and preparing an EA for the agency review of high-altitude arrival and departure procedures would not be binding precedent)).

⁷⁸ *Id.* PP 153-160. Sierra Club's issues with survey protocol should be taken up with the United States FWS and/or the appropriate state agency for state-listed species.

⁷⁹ Sierra Club erroneously asserts that the Commission denied its requests to examine endangered species surveys completed by Tennessee. On November 9, 2011, Sierra Club filed a letter in this proceeding requesting that Tennessee's designation of these studies as privileged and confidential be denied. However, we have no record of Sierra Club filing a request to obtain these documents in accordance with the requirements set forth in 18 C.F.R. § 388.108 of the Commission's Rules of Practice and Procedure (Requests for Commission Records not available through the Public Reference Room (FOIA requests)).

tree-clearing restriction for the eastern 2.5 miles of Loop 323. The Commission adopted this recommendation in Environmental Condition No. 13 in the May 29 Order. The Pennsylvania Field Office of the FWS recommended mitigation and stated that with the implementation of the mitigation, the effects of the project on Indiana bats will be insignificant or discountable. Environmental Condition No. 14 of the May 29 Order requires Tennessee to file a plan that addresses Indiana bat habitat loss with the Pennsylvania FWS and the Secretary before starting construction over those loops. Tennessee will not receive our approval to proceed until it completes the studies that confirm the project will be consistent with our and other agencies' federal or federally-delegated authorizations.⁸⁰ As the Commission has found, "if the studies do not support such a finding, the project cannot proceed until it is modified or measures are put in place to ensure the project will not cause any unacceptable adverse environmental impacts."⁸¹

6. Cumulative Impact Analysis

72. Sierra Club argues the Commission failed to adequately address the cumulative impacts of past, present, and reasonably foreseeable projects when it ignored not only the impacts of other Eastern Leg Projects but also the impacts of shale gas development on resources affected by the project.⁸²

73. Sierra Club argues that the Commission improperly found that the analysis of 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.⁸³ Sierra Club claims knowledge of the exact location is not necessary under NEPA, which requires the agency engage in reasonable forecasting. According to the Sierra Club, the Commission inappropriately ignored available sources of information provided in the comment period, including publicly available maps of permitted wells in Pennsylvania. Sierra Club points out that the EA states that Tennessee has had numerous requests from producers for interconnections to Tennessee's system, but the Commission then claims ignorance of ongoing and future related development. Further, Sierra Club argues that

⁸⁰ Consultation required under section 7 of the Endangered Species Act has been completed with both the Pennsylvania and New Jersey Field Offices of the FWS. All surveys required for the completion of section 7 of the Endangered Species Act consultations were completed according to FWS protocols and reviewed by that agency. Thus, Tennessee has met the requirements of Environmental Conditions Nos. 13 and 14.

⁸¹ *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245 (2009) (citing *Cal. Public Utilities Comm'n*, 900 F.2d 269, 282 (D.C. Cir. 1990)).

⁸² Sierra Club Request for Rehearing at 39-50.

⁸³ *Id.* at 40.

courts have held that induced development related to large scale development projects has properly been considered cumulative actions under NEPA.

74. Sierra Club also contends that the scope of a cumulative impact analysis is not categorically delimited by a requirement of causality. According to Sierra Club, the impacts of past, present, and reasonably foreseeable future actions considered in the cumulative impact analysis need not be directly initiated by the project as the Commission suggests.⁸⁴ Thus, Sierra Club contends that the fact that some natural gas development may or may not occur with or without the project's construction is irrelevant. Rather, Sierra Club contends that what controls here is that there will be significant natural gas development around the project. Furthermore, Sierra Club maintains that even if there is some "independent utility" for the project, the Commission's failure to consider reasonably foreseeable natural gas development the project will induce, as well as related and other projects within the project area, is still unlawful.

75. Sierra Club maintains that the Commission is a "gatekeeper" for private action arguing that upstream activities in the Marcellus Shale region will only proceed if the Commission continues to expand access to markets through approval of interstate pipeline projects.⁸⁵ Sierra Club argues there is no doubt that construction of an interstate transmission line to enable producers to bring gas to market is causally related to the development of shale gas resources in the project area. But for the approval of the pipeline by the Commission, Sierra Club argues, producers would be unable to access interstate transmission lines.

76. To the extent that the EA addresses impacts related to gas development, Sierra Club asserts that 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. According to Sierra Club this does not suffice as a hard look under NEPA.⁸⁶

77. Furthermore, Sierra Club argues that the cumulative effects analysis in the EA is insufficient because it failed to consider the scope of the project individually, and as an

⁸⁴ *Id.* at 41-42 (citing *Nat. Res. Def. Council v. Hodel*, 865 F.2d, 288, 298 (D.C. Cir. 1988)).

⁸⁵ *Id.* at 46-47 (citing *Humane Society of U.S. v. Johanns*, 520 F.Supp.2d 8, 25 (D.D.C. 2007)).

⁸⁶ *Id.* at 43 (citing *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1123 (D.C. Cir. 1971)).

integrated whole with the 300 Line, NSD, and MPP Projects.⁸⁷ Sierra Club argues that although the EA identifies ten other pipelines within 50 miles of the project, the EA provides no detailed information or analysis relating to the additive environmental impacts of these other projects. Specifically, Sierra Club argues the cumulative impacts section of the EA contains five omissions, namely: (1) it does not mention the MPP Project; (2) it references the NSD Project but discusses none of its impacts, such as acreage affected, stream and wetland crossings, and sensitive habitat disturbance; (3) it does not analyze or mention the specific acreage and stream crossing affected by the 300 Line Project ; (4) it fails to consider Tennessee's violations from construction of the 300 Line Project; and (5) it fails to consider the Northeast Upgrade Project as an integrated whole with regards to the simultaneous and cumulative impacts of the 300 Line, NSD, and MPP Projects.

78. Sierra Club maintains that the cumulative impacts analysis is devoid of detailed, reasoned conclusions and quantified information and thus the EA fails to take a hard look to justify its conclusions.⁸⁸ For example, Sierra Club argues the EA lists gathering line projects in the project area, but only states that land requirements would be less significant for a gathering system. Sierra Club maintains that a more comprehensive analysis is necessary. Additionally, Sierra Club argues the EA failed to adequately assess information that quantifies the increased long-term emissions of criteria pollutants, hazardous air pollutants (HAP), and greenhouse gases (GHG) within the region or to consider how such emissions might contribute to climate change or impact the public health under 40 CFR § 1508.27(b)(2), but instead disregards such significant impacts as outside the scope of our analysis. In addition, Sierra Club argues the Commission's greenhouse and climate change analysis is deficient because it only includes direct emissions, rather than indirect emissions cumulatively resulting from the project like pipeline leaks, well pad flaring, and compressor station emissions.

Commission Response

79. The EA includes an analysis of the cumulative impacts of related past, present, and reasonably foreseeable activities in the project area.⁸⁹ Here, the EA describes the impacts of existing and pending jurisdictional natural gas pipelines, natural gas facilities associated with the project but that are not under the Commission's jurisdiction, unrelated projects, and development of the Marcellus Shale.

⁸⁷ *Id.* at 43-45.

⁸⁸ *Id.* at 49-50.

⁸⁹ EA at 2-121 to 2-134.

80. The EA considered the general development of the Marcellus Shale region in the vicinity of the project. Specifically, the EA considered the impact of Marcellus Shale development on the following resources: soils; ground water; surface water and wetlands' vegetation and wildlife; land use; air quality; land use; socioeconomics; and air quality and noise.⁹⁰ We disagree with Sierra Club's contention that this level of discussion is not adequate. As explained in the May 29 Order, we correctly determined that a fuller analysis is not required by NEPA because the Marcellus Shale development is not causally-related, and anticipated future activities are not reasonably foreseeable.

81. The May 29 Order discussed and dismissed Sierra Club's argument that there is no causality requirement for cumulative impacts.⁹¹ We explained that the Supreme Court has found that NEPA requires a "reasonably close causal relationship" between the environmental effect and the alleged cause.⁹² Sierra Club fails to distinguish this precedent.

82. The May 29 Order addressed and rejected Sierra Club's claim that the Commission is a gatekeeper for approval of development of Marcellus Shale upstream activities because it is able to promote, prevent, or otherwise affect upstream development in the Marcellus Shale region.⁹³ We relied on the court decision in *Sylvester v. U.S. Army Corps of Engineers*, where the court explained the definition of cumulative impacts as follows:

Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide. A better image is that of scattered bits of broken chain, some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within a segment does not.⁹⁴

⁹⁰ *Id.* 2-128 to 2-133.

⁹¹ May 29 Order, 139 FERC ¶ 61,161 at PP 183-188.

⁹² *Public Citizen*, 541 U.S. at 767 (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

⁹³ May 29 Order, 139 FERC ¶ 61,161 at PP 186-188.

⁹⁴ 884 F.2d 394, 400 (9th Cir. 1989).

83. Contrary to Sierra Club's claims, Marcellus Shale production activities are not links in the same chain that requires a more detailed cumulative impact analysis. As we explained in the May 29 Order, the Northeast Upgrade Project is designed as a high-pressure, high-capacity pipeline to transport natural gas in interstate commerce supporting Tennessee's entire system, not as a gathering system for shale gas produced in the region.⁹⁵ Development of natural gas resources in the Marcellus Shale region will continue even without the project and unregulated developers will continue to build new wells and gathering systems to serve the shale gas.

84. While NEPA requires reasonable forecasting it does not require an agency to "engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."⁹⁶ As we explained in the May 29 Order, the available maps do not provide the degree of specificity necessary for an in-depth review and meaningful analysis in the EA.⁹⁷ Knowing the location of a permitted, yet unconstructed, well does not mean that other specific factors are known such as the specific location of gathering lines, access roads, and other associated infrastructure and related facilities, information that is not provided in the maps cited by Sierra Club.⁹⁸ As we noted, Pennsylvania has issued thousands of well permits, and continues to do so, and it is unknown when, or even if, these wells will be drilled. Accordingly, we affirm our determination that a more in-depth analysis of potential impacts from Marcellus Shale development is not required.

85. The May 29 Order also addressed Sierra Club's assertion that we improperly deferred our NEPA responsibilities to other agencies.⁹⁹ For instance, we explained that the EA finds that based on the regulation of natural gas producers by Pennsylvania, the Susquehanna River Basin Commission, the Delaware River Basin Commission, and other federal agencies, cumulative impacts of the project will not be significant. The fact that we take these laws and measures into account in assessing the environmental impact of the project is not an abdication of our responsibility.

⁹⁵ May 29 Order, 139 FERC ¶ 61,161 at P 188.

⁹⁶ *N. Plains Res. Council v. Surface Trans. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (citation omitted).

⁹⁷ May 29 Order, 139 FERC ¶ 61,161 at P 190.

⁹⁸ We fail to see how the fact that Tennessee has had numerous requests from producers for interconnections to Tennessee's system provides the Commission with sufficient details regarding Marcellus Shale development to perform a more in-depth analysis.

⁹⁹ May 29 Order, 139 FERC ¶ 61,161 at P 199.

86. We also disagree with Sierra Club's assertion that our cumulative analysis was deficient because we failed to consider the scope of the project individually, or as an integrated whole with the 300 Line, NSD, and MPP projects. These three projects are also expansions of Tennessee's existing 300 Line System. Concerning the MPP Project, the certificate application was submitted in December 2011, after the NEPA evaluation was completed for the Northeast Upgrade Project; therefore, the potential impacts of the MPP Project were not known during environmental review of the subject project. The 300 Line Project has been in service since November 1, 2011 and restoration activities were also completed in 2012. The EA examines the other jurisdictional pipelines in the region and concludes that the impacts from some of these projects are too distant from the Northeast Upgrade Project (over 25 miles) to include in the cumulative impact analysis. In addition, the EA found that these projects would be constructed and maintained in accordance with our approved procedures which would, in effect, minimize these projects' contribution to cumulative impacts in the project area. The other FERC projects were examined within the context of the cumulative discussion, which concluded that the Northeast Upgrade Project, along with these other projects, would not result in any significant cumulative impacts. While the MPP Project was not specifically addressed in the EA, it is also located over 25 miles from the Northeast Upgrade Project and would also follow existing rights-of-way. Therefore, we do not believe the MPP Project would result in significant cumulative impacts when added to the effects of the other projects in the Northeast Upgrade Project area.

87. Sierra Club's contention that the EA is devoid of detailed information regarding long-term emissions of criteria pollutants, HAPs, and GHGs within the region is unavailing. The EA states that the project, the ongoing drilling activities of Marcellus Shale natural gas reserves, and other projects in the area would cumulatively generate air emissions.¹⁰⁰ However, the EA concludes that pipeline construction is intermittent and short-term, and many of the cumulative impacts would occur over a large geographical area with varying construction schedules, and therefore, they are not likely to significantly affect long-term air quality in the region. The EA also addresses air emissions related to operation of the project, ongoing drilling activities, and other projects in the area.¹⁰¹ The EA states that each of these projects would need to comply with federal, state and local air regulations and that drilling activities would result in increased long-term emissions of criteria pollutants, HAPs, and GHGs within the region. The EA concludes that the project's operating emissions would be mitigated by federal, state, and local permits and approvals and is not anticipated to contribute to the cumulative impact on regional air quality. Fugitive methane emissions are typically estimated as part of the operating emissions for projects that include compressor stations.

¹⁰⁰ *Id.* at 2-133.

¹⁰¹ *Id.*

The EA quantifies GHG emissions associated with compressor station construction and operation.¹⁰² Although the exact location, scale, and timing of future Marcellus shale facilities are unknown, and therefore a comprehensive analysis is not provided, the EA does recognize that Marcellus shale development, which includes well pad flaring, would result in long-term emissions of GHG in the project area.

7. Mitigation Measures

88. Sierra Club argues that the Commission erred in concluding that the mitigation measures proscribed in the EA, and incorporated in the May 29 Order will be fully complied with and will be sufficient to avoid significant adverse impacts.

89. Sierra Club contends that the Commission failed to consider Tennessee's record of false promises regarding environmentally damaging construction techniques for the 300 Line Project.¹⁰³ Specifically, Sierra Club asserts that Tennessee failed to follow through on a promise to minimize open-cut stream crossings on the 300 Line Project pointing out that Tennessee used a wet open-cut crossing method at the West Branch of the Lackawaxen in Pike County. On this basis, the Sierra Club contends that the ecosystem was impacted in ways that were not anticipated and thus not addressed in the EA. According to the Sierra Club, Tennessee makes the same promises here and suggests that similar likely impacts were not addressed in the EA for the Northeast Upgrade Project.

90. Sierra Club also faults the Commission for assuming 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, and restoration activities, to addressing landslide risks.¹⁰⁴ Sierra Club argues that Tennessee's record of non-compliance with environmental mitigation measures warrants stricter scrutiny in the form of an EIS rather than an EA to determine whether Tennessee's failure to comply with environmental laws and requirements increase the likelihood of significant environmental impacts. Sierra Club argues Tennessee's past compliance record on the 300 Line Project suggests a risk that in constructing the Northeast Upgrade Project Tennessee will violate the Clean Water Act, Federal Safe Drinking Water Act, and Pennsylvania Clean Streams Act, weighing in favor of an EIS based on Tennessee's reputation for non-compliance and accumulated violations based on failed environmental inspections. Specifically, Sierra Club states that it pointed to more than 45 violations of the Clean Streams Law in its comments on the EA, including 10 violations in Pike County, Pennsylvania and 15 violations in Wayne County, Pennsylvania. In addition,

¹⁰² *Id.* at 2-105.

¹⁰³ Sierra Club Rehearing Request at 52-53.

¹⁰⁴ *Id.* at 53-56.

Sierra Club states that in 28 out of 38 weekly summary reports for the environmental compliance monitoring program for the 300 Line Project, there was at least one recorded incident where construction activity was not in compliance with the project specifications, mitigation measures, and Commission-approved plans and there were 10 incidents where the summary reports stated that a follow-up report would be provided, but which never appeared online. According to Sierra Club all this information was before the Commission in this proceeding, but was not sufficiently addressed in the EA or the May 29 Order.

91. In addition, Sierra Club argues the Commission abrogated its NEPA responsibilities to ensure proper mitigation techniques are identified, established, and enforced. Sierra Club argues that the mitigation measures identified in the EA are not mitigation measures, but rather conditions for approval of the project, as listed in Appendix B of the May 29 Order, and a number of the conditions are the environmental and cultural studies that are normally performed during an EIS. Sierra Club argues this is tacit recognition by the Commission that Tennessee's design is not final, and that numerous permits and studies need to be completed before construction can begin. Therefore, Sierra Club maintains, the Commission should not have approved the project before it could demonstrate that Tennessee had secured the proper permits and that proper environmental mitigation had been agreed upon.

Commission Response

92. The Commission takes matters of non-compliance seriously but such matters must be addressed in the proper venue. The non-compliance issues that Sierra Club raises here involve completely different proceedings and are properly addressed in those proceedings, not here. Although, we note that the information supporting Tennessee's request to use a different crossing method at the West Branch of the Lackawaxen River was filed in the record and independently evaluated by the Commission prior to being approved by the Director of OEP. It is often the case during construction that circumstances may be encountered in the field that are slightly different from what was expected. For this reason, the environmental conditions in most Commission orders proscribe the criteria under which changes can be made.

93. We find that the conditions imposed in the May 29 Order, viewed as a whole, are sufficient to ensure Tennessee's compliance with the requirements of the Commission order. The EA discusses Tennessee's environmental inspection program, which will consist of trained individuals to ensure implementation of appropriate measures to minimize impacts and ensure compliance with federal, state, and local permit stipulations. In addition, Tennessee has agreed to fund a third-party environmental monitoring program that will include full-time personnel working under the direction of the Commission. Environmental Condition No. 7 requires that the applicant identify any area of non-compliance during construction in the weekly status reports, as well as the report filed after the in-service date of the facilities, so that we can take appropriate action. We will ensure that Tennessee is fulfilling its duties by conducting our own compliance

monitoring during construction, including regular field inspections. We impose sanctions and/or penalties for non-compliance on a case-by-case basis in order to tailor our remedies to the specific facts presented (e.g., degree of non-compliance and resulting impacts). If Tennessee fails to comply with the conditions of the order, it is subject to sanctions and the potential assessment of civil penalties.¹⁰⁵

94. The Environmental Conditions adopted in the May 29 Order are mandatory and enforceable. Sierra Club's suggestion that studies or mitigation measures would have been completed if an EIS had been prepared instead of an EA is without merit. The Commission typically authorizes natural gas projects pursuant to its NGA jurisdiction subject to conditions that must be satisfied by an applicant or others before the authorizations can be effectuated by constructing and operating the project, including projects where an EIS has been prepared,¹⁰⁶ and this approach has been sanctioned by the courts.¹⁰⁷

8. Evaluation of Project Alternatives

95. Sierra Club claims that the EA failed to adequately analyze and consider reasonable and viable project alternatives as required by NEPA.¹⁰⁸ Sierra Club argues that the Commission's decision to issue a finding of no significant impact based on the deficient EA violated NEPA by relying on inflated or unrealistic assessments of market demand for natural gas. Specifically, Sierra Club argues need for this project is dubious at best because there is an oversupply of natural gas with prices at historic lows, prompting project sponsors to propose the construction of LNG export terminals.

96. Sierra Club asserts that the Commission failed to analyze whether renewable energy sources or conservation measures would have adequately met whatever energy demands do exist. Sierra Club takes issue with the EA's definition of the purpose and need for the project "to expand the natural gas delivery capacity to the northeast U.S." and "meet market demand for new transportation services." Sierra Club asserts that by so narrowly defining the purpose and need for the project, the Commission precluded adequate analysis and consideration of other alternatives, thereby violating NEPA.

¹⁰⁵ See 15 U.S.C. § 717t-1(c) (2006).

¹⁰⁶ See, e.g., *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

¹⁰⁷ See *Robertson*, 490 U.S. at 352 (mitigation measures need not be laid out to the finest detail, even in an EIS).

¹⁰⁸ Sierra Club Rehearing Request at 57-59.

Commission Response

97. Sierra Club's assertions are without merit. Section 1.2 of the EA explains that Tennessee's stated purpose of the project is to expand the natural gas delivery capacity to the northeast region of the United States by up to 636,000 Dth per day. Section 3 of the EA sets forth the criteria that were employed for evaluating potential alternatives to the project proposed by Tennessee. These criteria include whether they were technically feasible and practical, offered significant environmental advantage over the proposed project, and met project objectives. The EA identified and evaluated alternatives to the project including No Action or Postponed Action Alternatives, system alternatives; and route alternatives and variations.

98. We disagree with Sierra Club's assertion that we narrowly defined the purpose and need for the project so as to preclude adequate analysis and consideration of other alternatives thereby violating NEPA. As explained in the EA, we adopted the applicant's objectives and goals for NEPA purposes. The courts have upheld federal agencies' use of applicants' identified objectives as the basis for evaluating alternatives.¹⁰⁹ This general principle, however, is subject to the admonition that the goals of a project may not be so narrowly defined as to preclude consideration of what may actually be reasonable choices.¹¹⁰ Thus, objectives must be reasonably identified and defined. Sierra Club provides no basis to support its contention that objectives were not reasonably identified or defined except to note that the EA did not examine renewable sources or conservation measures. We note that, since this issue was not raised in the environmental review process, we have had no previous opportunity to respond. In any event, we did not examine renewable sources or conservation measures because they did not meet the definition of reasonable alternatives (e.g., there is no indication that such alternatives would be feasible or practical within the time frame of the project).

99. Sierra Club's claim that the EA was deficient and violated NEPA by relying on inflated or unrealistic assessments of market demand for natural gas is equally unpersuasive. Tennessee has signed binding precedent agreements with two shippers for

¹⁰⁹ *City of Grapevine, Texas v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

¹¹⁰ *Simmons v. U.S. Army Corps. of Engineers*, 120 F.3d 664 (7th Cir. 1997); *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

the full capacity of the project, demonstrating there is strong market demand for the project.¹¹¹

9. Whether the Northeast Upgrade Project Is Required by the Public Convenience and Necessity

100. Sierra Club argues the Commission erred in concluding that certification of the project is required by the public convenience and necessity.¹¹² Sierra Club asserts the Commission erred in determining that the project will not have significant environmental impacts and erred in failing to conduct an adequate analysis of the public need for the project. Therefore, Sierra Club argues that the Commission cannot show that the environmental impacts of the project are outweighed by Tennessee's purported demonstrated need and claimed benefits of the project.

101. We affirm our finding in the May 29 Order that authorizing the Northeast Upgrade Project is in the public convenience and necessity. As explained in the May 29 Order, under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of (1) the applicant's existing customers, (2) existing pipelines in the market and their captive customers, and (3) landowners and communities affected by the construction.

102. The May 29 Order concluded that the Northeast Upgrade Project would have no adverse economic impacts on either Tennessee's existing customers or on other existing pipelines or their captive customers. Further, the Commission found that Tennessee had taken steps to minimize any adverse economic impacts on landowners and surrounding communities by, among other things, proposing to locate the pipeline loop segments within or parallel to existing rights-of-way for approximately 84 percent of the length of the proposed segments.¹¹³ As noted in the May 29 Order, Tennessee has executed

¹¹¹ As discussed in our Certificate Policy Statement, service commitments for new capacity constitute "important evidence of demand for a project." Consequently, when "an applicant has entered into contracts or precedent agreements for the proposed capacity," we take this as "significant evidence of demand for the project." Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

¹¹² Sierra Club Rehearing Request at 59-60.

¹¹³ May 29 Order, 139 FERC ¶ 61,161 at P 16. One goal of the Certificate Policy Statement was to protect the interests of landowners whose land might be condemned for right-of-way under the eminent domain rights conferred by the Commission's certificates from unnecessary construction. *See* 88 FERC ¶ 61,227 at 61,737, 61,746, 61,748, and 61,749.

binding precedent agreements for firm service utilizing 100 percent of the design capacity of the Northeast Upgrade Project with initial terms of 20 years. Based upon the strong showing of public benefits (i.e., the creation of capacity to meet the firm contractual commitments of the project shippers) and the localized and relatively minimal, though not non-existent, impacts the project may have on the economic interests of landowners in the vicinity, the Commission found and continues to find that, on balance, pursuant to the criteria set forth in the Certificate Policy Statement, the Northeast Upgrade project will serve the public interest.

103. Moreover, after finding that the project will serve the public interest under the criteria of the Certificate Policy Statement, we turned to the completion of the analysis and consideration of the environmental impacts of the project pursuant to the requirements of the NEPA and found that record developed supported a finding that the project would have no significant impacts.

C. Mr. Feighner's Request for Rehearing and Stay

1. Routing of Loop 323

a. Background

104. As explained in the EA, Tennessee initially proposed to construct Loop 323 adjacent to its existing 24-inch-diameter pipeline across the Delaware Water Gap NRA. Tennessee's existing pipeline crosses the Delaware Water Gap NRA for 1 mile in Pike County, Pennsylvania and Sussex County, New Jersey, and was installed prior to the 1965 establishment of the Delaware Water Gap NRA.¹¹⁴ The National Park Service (NPS), which has statutory responsibility to preserve the Delaware Water Gap NRA, commented that any new right-of-way across the Delaware Water Gap NRA would have significant impacts on natural and cultural resources of the area and would require legislation by the U.S. Congress, which NPS would likely oppose. In response, Tennessee revised its original alignment and proposed to route Loop 323 around the northern end of the Delaware Water Gap NRA.

105. The EA analyzes two route alternatives that would cross the Delaware Water Gap NRA and finds that each of the alternatives would result in fewer environmental impacts than the proposed alignment in this area.¹¹⁵ However, the EA does not recommend either alternative because of a substantial land use conflict. The EA explains that the legislation that created Delaware Water Gap NRA precludes the NPS, which manages the Delaware Water Gap NRA, from approving any route across the Delaware Water Gap NRA

¹¹⁴ EA at 3-3 to 3-4.

¹¹⁵ *Id.* at 3-4 to 3-8.

without federal legislation allowing it to do so, and the NPS has stated its opposition to any routing across the Delaware Water Gap NRA. Therefore, if the Commission were to approve one of the alternatives crossing the Delaware Water Gap NRA, Tennessee would not, at least in a timely manner, be able to construct the project as approved.

Accordingly, the EA finds that neither alternative is reasonable or feasible. As a result, the EA concludes that while the alternative routes may be environmentally preferable, the proposed route for Loop 323, with the mitigation proposed by Tennessee and recommended by staff, is considered environmentally acceptable and would not result in significant impacts.

106. The May 29 Order also addressed an additional recommendation for an alternative that would replace the existing 24-inch-diameter pipeline with a new 36-inch-diameter pipeline for the stated purpose of obviating the need for Tennessee's proposed route outside of the Delaware Water Gap NRA.¹¹⁶ We noted that because of concerns with the Delaware River being designated as a National Scenic and Recreational River within the Delaware Water Gap NRA and the possible presence of the federally-listed endangered dwarf wedgemussel, this alternative would require an horizontal directional drill (HDD) to avoid impacts. An HDD at this river location would require workspace outside of Tennessee's existing easement on NPS property, which would still require congressional approval. In addition, we explained that Tennessee would be required to take its existing line out of service to install the new line within the same trench, and this would require Tennessee to stop service for an extended amount of time during construction, preventing it from fulfilling its existing contractual obligations during that time. Therefore, we considered this alternative infeasible due to the NPS opposition, the permitting conflicts within the Delaware Water Gap NRA, and contractual obligation conflicts for operation of Tennessee's existing pipeline.

b. Mr. Feighner's Rehearing Request

107. Mr. Feighner opposes the Commission's approval of Tennessee's proposed route of Loop 323, that deviates from the existing right-of-way to avoid the Delaware Water Gap NRA, in lieu of adopting an alternative route using the existing easement through the park. Mr. Feighner asserts that condemnation of private land on this record does not meet the standard of public convenience and necessity.

108. Mr. Feighner argues that it was error for the Commission to accept the NPS' determination that Tennessee could not use its existing easement through the park and across park service land. He cites extensively to state and federal law, including NPS'

¹¹⁶ May 29 Order, 139 FERC ¶ 61,161 at P 105.

authorizing legislation and “the Organic Act,”¹¹⁷ as support for his contention that the existing easement allows for construction of Loop 323 through the park. Mr. Feighner faults the Commission for not examining the specific provisions of Tennessee’s existing easements across the land that traverses the Delaware Water Gap NRA.

109. In addition, Mr. Feighner argues that Tennessee should have applied to the NPS or litigated the issue for the use of the easement rather than accede to the NPS’s opinion.¹¹⁸ Mr. Feighner submits that Tennessee should have also shown it tried to obtain legislation to expand its easement through the park. Mr. Feighner contends that hypothetical service interruptions, which he claims the Commission partially relied upon for its decision in the May 29 Order, are not sufficient grounds to abandon the alternative routes through the Delaware Water Gap NRA.

Commission Response

110. As discussed above, the Commission has found that the strong showing of public benefits associated with this project outweigh the localized and relatively minimal, adverse impacts the project may have on the economic interests of landowners in the vicinity.

111. In addition, the Commission has taken a hard look at the impacts of the project on environmental resources, and has analyzed reasonable alternatives to the proposal. However,

it is well settled that NEPA does not mandate that agencies reach particular substantive results. Instead, NEPA simply sets forth procedures that agencies must follow to determine what the environmental impacts of a proposed action are likely to be. If an agency adequately identifies and evaluates the adverse environmental effects of a proposed action, ‘the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.’¹¹⁹

¹¹⁷ Mr. Feighner cites to 16 U.S.C. 1 and “subsequent amendments” for the proposition that, among other things, the Organic Act “is a basis for the NPS to have the latitude to allow for access to pipeline easement areas in order to protect the environment.”

¹¹⁸ Mr. Feighner refers to a letter dated June 25, 2012, from the NPS to United States Senator Toomey, where he states “NPS acknowledged the existing easement rights and stated they would be available for appropriate use” and “NPS also state that improper denial of an application would be an unlawful taking.” Mr. Feighner’s Rehearing Request at 13 (citing June 25 letter attached as Exhibit H to his rehearing request).

¹¹⁹ *KN Wattenberg Transmission Limited Liability Co.*, 90 FERC ¶ 61,322, at

112. In this proceeding, we approved the proposed route of Loop 323 finding that it did not result in significant impacts. We did so after considering three alternatives to the proposed route of Loop 323, two in the EA and one in the May 29 Order. While we recognized that the two alternative routes considered in the EA would result in less environmental impact, we found that they were not reasonable or practical because of the land use conflict raised by the NPS. We also found that the alternative to replace the existing 24-inch-diameter pipeline with a larger diameter pipe would similarly require a new easement in the park and additionally would require that Tennessee curtail service.¹²⁰ We disagree with Mr. Feighner's contention that our findings in the EA and the May 29 Order regarding the feasibility or reasonableness of the route alternatives were not supported.

113. We do not agree with Mr. Feighner's assertion that our finding that the alternative routes were not feasible unreasonably relied on the position taken by the NPS. The NPS is the federal agency that has jurisdiction and management authority over the Delaware Water Gap NRA and their position on this matter was given appropriate weight. We note that the NPS has not filed any pleadings in this proceeding to indicate that their position on this matter has changed.¹²¹ As we explained in the EA, given the uncertainty of obtaining favorable legislation, as well as the timing of any such legislation or action, approving one of the alternative routes and requiring Tennessee to pursue Congressional authorization would likely result in the project not getting built in time to meet the demand evidenced by the precedent agreements. We find that this result is not in the public interest. This reasoning holds true regarding Mr. Feighner's position that Tennessee be required to file an easement application. Finally, we did not examine or interpret the existing easement in question because we have no jurisdiction to do so.

114. While Mr. Feighner's property and that of other landowners will be impacted by construction of Loop 323 as approved in the May 29 Order, Tennessee's construction plans would minimize impacts on these resources including those specific to Mr. Feighner's property. As we explained in the May 29 Order, Tennessee would be required to complete all remaining surveys, conduct any necessary agency consultations, and

62,083 (2000) (citing and quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

¹²⁰ This route alternative was found not to be reasonable or feasible because it would require a new easement in the park, in addition to requiring Tennessee to take its existing line out of service for some time period. Under this alternative, we believe that service interruptions would be real, not hypothetical as Mr. Feighner contends.

¹²¹ We do not view the June 25, 2012 letter from the NPS to United States Senator Toomey as indicating a change of position on this matter.

implement measures to address issues identified by the surveys.¹²² We believe that this process, coupled with the construction and restoration measures described in the EA and input from Mr. Feighner and other landowners, will minimize effects on property impacted by the project to the greatest extent practicable. The loss of some mature trees may be unavoidable; however, Tennessee will compensate landowners for damages and the temporary and permanent easement on their land.

c. **Mr. Feighner's Request for a Stay**

115. Mr. Feighner requests a stay of the proceeding in order to provide time to properly analyze the easement issue.

116. We deny Mr. Feighner's request. As explained above, the Commission's standard for granting a stay is whether justice so requires.¹²³ The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. Mr. Feighner makes no attempt to argue that it meets this standard. Moreover, as described above, the Commission has found that the approved route for Loop 323 would result in no significant impacts and Tennessee is required to compensate landowners for damages and the temporary and permanent easement on their land.

The Commission orders:

(A) The requests for rehearing and/or clarification are granted, in part, and denied, in part, as discussed in the body of this order.

(B) The requests for stay of the May 29 Order and construction activities are denied, as discussed in the body of this order.

(C) Mr. Feighner's and Tennessee's answers to the requests for rehearing are dismissed and Mr. Feighner's and Tennessee's subsequent responses are dismissed as moot.

(D) The late motions to intervene filed after the issuance of the May 29 Order are denied. The requests for rehearing filed by non-parties are dismissed.

¹²² May 29 Order, 139 FERC ¶ 61,161 at P 58.

¹²³ 5 U.S.C. § 705 (2006); *Duke Energy Carolinas*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

(E) Ordering Paragraph (C) of the May 29 Order is amended to read as follows:

(C) Tennessee shall complete the construction of the facilities and make them available for service by November 1, 2013, pursuant to section 157.20(b) of the Commission's regulations.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A

Motions to Intervene Out of Time Filed After May 29, 2012

Eileen Ahearn
Oscar J. Alvarado
Richard E. Buckley
Susan Carroll
Crawford Hills Community Association
Twila L. Decker
Jolie DeFeis
Susana and Bertrand Delanney
Judith Falk
Robert Fean
Kari Goginsky
Natalie Green
Mark Heiblim
Rebecca R. Hoffman
Nora T. Hoffman
Sharon Kinard
Gregg N. Kirsopp
Linda C. Klee
Daniel E. Lawson
Julius Litman
Tim Lovely
Patricia Melzer
Marie More
Rita Pecoriello
Pike County Commissioners, PA
Kenneth Rosanelli
Jade Ruben
Carlos F. Torres
Michael Trenner
Walter Van Beers
Steven Vitale
Westfall Township
Kathleen C. Wieboldt
Debra Wildick
Sharon T. Woll
Marlene D. Zimmerman

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

**Stripping People's Rights Attachment 12, FERC Order
Denying Rehearing, Algonquin Gas Transmission,
Docket No. CP14-96, January 28, 2016.**

154 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Algonquin Gas Transmission, LLC

Docket No. CP14-96-001

ORDER DENYING REHEARING AND DISMISSING STAY REQUEST

(Issued January 28, 2016)

1. On March 3, 2015, the Commission issued an order granting Algonquin Gas Transmission, LLC (Algonquin)¹ a certificate of public convenience and necessity (March 3 Order) under section 7(c) of the Natural Gas Act (NGA)² authorizing Algonquin to construct and operate pipeline and appurtenant facilities in New York, Connecticut, Rhode Island, and Massachusetts (Algonquin Incremental Market Project or AIM Project).³ The Commission also granted Algonquin authorization under section 7(b)⁴ of the NGA to abandon a meter station and certain aboveground facilities.

2. The Commission received eight timely requests for rehearing from Allegheny Defense Project (Allegheny); City of Boston Delegation (Boston Delegation); Coalition of Environmental and Community Organizations, Impacted Landowners, and Municipalities (Coalition); Town of Cortlandt, New York; Town of Dedham, Massachusetts; Peter Harckham; Riverkeeper, Inc. (Riverkeeper); and West Roxbury

¹ Algonquin is a subsidiary of Spectra Energy Partners, LP (Spectra).

² 15 U.S.C. § 717f(c) (2012).

³ *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163 (2015) (March 3 Order).

⁴ 15 U.S.C. § 717f(b) (2012).

Intervenors.⁵ Coalition and the Town of Cortlandt also request a stay of Algonquin's certificate. Algonquin filed an answer to the rehearing and stay requests.⁶

3. As discussed below, we deny the rehearing requests and dismiss the stay request.

I. Background

4. The March 3 Order authorized Algonquin to construct and operate the AIM Project to expand the pipeline capacity on its existing pipeline system, which extends from points near Lambertville and Hanover, New Jersey, through the States of New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, to points near the Boston area.

5. The AIM Project involves the construction, installation, operation, and maintenance of 37.4 miles of pipeline and related facilities in New York, Connecticut, and Massachusetts. A majority of the pipeline installation will replace existing pipeline with larger diameter pipeline. The remaining pipeline installation will be new pipeline, including the new West Roxbury Lateral, an approximately 5-mile lateral that will be constructed off Algonquin's existing I-4 System Lateral in Norfolk and Suffolk Counties, Massachusetts, and will connect to the new West Roxbury Meter Station in Suffolk County, Massachusetts.

6. The AIM Project will also add 81,620 horsepower (hp) of compression at six existing compressor stations in New York, Connecticut, and Rhode Island; involve the abandonment of certain facilities; include the construction of three new meter stations, including the West Roxbury Meter Station; and modify 24 existing meter stations. Through these expansion upgrades, the AIM Project will provide 342,000 dekatherms (Dth) per day of firm transportation service from an existing receipt point in Ramapo, New York, to eight local distribution companies and two municipal utilities (collectively,

⁵ The parties joining the rehearing requests filed by Boston Delegation, Coalition, and West Roxbury Intervenors are listed in Appendix A.

⁶ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to rehearing requests. 18 C.F.R. § 385.215(a)(2) (2015). However, because Algonquin's answers have assisted in our decision-making process, we will waive Rule 213(a)(2) to admit its answers.

the Project Shippers)⁷ at their various city gate delivery points in Connecticut, Rhode Island, and Massachusetts.

7. On August 6, 2014, Commission staff issued a draft environmental impact statement (EIS), which established a 45-day comment period ending on September 29, 2014.⁸ Commission staff held five public meetings to receive comments on the draft EIS, and continued to accept comments past the comment deadline. On January 23, 2015, Commission staff issued a final EIS.⁹ The final EIS concluded that the impacts from the construction and operation of the AIM Project, some of which would be adverse, would be reduced to less-than-significant levels with the implementation of Algonquin's proposed mitigation and Commission staff's 32 recommended mitigation measures.

8. The March 3 Order concurred with the final EIS's findings and adopted the EIS's recommended mitigation measures as conditions of the order. The March 3 Order determined that the AIM Project, if constructed and operated as described in the final EIS, was an environmentally acceptable action and was required by the public convenience and necessity.

II. Procedural Issues

A. Late Interventions and Non-Parties Requesting Rehearing

9. On March 3, 2015, Paul Nevins filed a late motion to intervene followed by Karen L. Weber's on March 16; David Ludlow's and the Foundation for a Green Future, Inc.'s (Foundation) on March 17; and Paul D. Horn's on March 23. These late interventions have been filed nearly one year after the initial intervention deadline of April 8, 2014, more than five months after the draft EIS intervention deadline of September 29, 2014,¹⁰ and on the date of, or after, the issuance of the Commission's

⁷ The Project Shippers are Bay State Gas Company; Boston Gas Company; Colonial Gas Company; Connecticut Natural Gas Corporation; Middleborough Gas and Electric; The Narragansett Electric Company; Norwich Public Utilities; NSTAR Gas Company; The Southern Connecticut Gas Company; and Yankee Gas Services Company.

⁸ 79 Fed. Reg. 47,100 (2014).

⁹ 80 Fed. Reg. 5,104 (2015).

¹⁰ Pursuant to sections 157.10(a)(2) and 380.10(a)(1)(i) of the Commission's regulations, motions to intervene based on environmental grounds are deemed timely if they are filed within the comment period on a draft EIS. 18 C.F.R. §§ 157.10(a)(2), 380.10(a)(1)(i) (2015).

March 3 Order on the merits. On March 23, 2015, Algonquin filed a timely answer to Ms. Weber's, Mr. Ludlow's, and the Foundation's pleadings, stating that the Commission should deny their late motions to intervene.

10. In ruling on a late motion to intervene, the Commission applies the criteria set forth in Rule 214(d),¹¹ and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden on the Commission of granting late intervention may be substantial. Thus, movants seeking intervention after a dispositive order's issuance bear a higher burden to demonstrate good cause for the granting of late intervention.¹²

11. None of these movants requesting late intervention adequately address the factors required to grant a late intervention under Rule 214(d) nor explain why they waited to request to intervene in this proceeding. Accordingly, we find that these late movants have not shown good cause to be granted intervention at this late stage. Allowing late intervention at this point would create prejudice and additional burdens to the Commission, other parties, and the applicant. Therefore, we deny these late motions.

12. The late movants also joined either Coalition's or West Roxbury Intervenors' request for rehearing. Under section 19(a) of the NGA¹³ and Rule 713(b) of the Commission's Rules of Practice and Procedure, only parties to a proceeding are entitled to request rehearing of a Commission decision.¹⁴ Because the late movants are not parties to this proceeding, they have no standing to seek rehearing of the March 3 Order, and cannot join the rehearing applicants. Joseph Matthew Hickey also joined Coalition's request for rehearing but never filed a motion to intervene.¹⁵ Therefore, he is not a party to this proceeding and has no standing to seek rehearing along with Coalition's members.

¹¹ 18 C.F.R. § 385.214(d) (2015).

¹² See, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 17-19; *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹³ 15 U.S.C. § 717r(a) (2012).

¹⁴ 18 C.F.R. § 385.713(b) (2015).

¹⁵ See Coalition April 2, 2015 Rehearing Request at Exhibit 1 "List of Intervenors" at 5.

Nevertheless, by answering Coalition's and West Roxbury Intervenors' concerns below, we also address the late movants' and Mr. Hickey's concerns.

B. Late Rehearing Request

13. On Thursday, April 2, 2015, at 11:22:56 p.m., William Huston electronically filed a request for rehearing. Because Mr. Huston's rehearing request was filed after 5:00 p.m. Eastern time, the end of the Commission's regular business hours,¹⁶ we consider the rehearing request filed on the next business day, April 3, 2015.¹⁷ Pursuant to section 19(a) of the NGA,¹⁸ an aggrieved party must file a request for rehearing within 30 days after the issuance of a final Commission decision, in this case no later than April 2, 2015. The Commission cannot waive the 30-day statutory deadline for filing requests for rehearing. Consequently, because Mr. Huston filed his rehearing request on April 3, 2015, we will deny his rehearing request.

14. Nevertheless, below we address the issues raised by Mr. Huston in our response to the same issues raised by the rehearing applicants regarding whether the Commission's issuance of conditional approval violated section 401 of the Clean Water Act, whether Commission staff improperly segmented its environmental review of the AIM Project, whether the AIM Project is overbuilt, and whether the Commission sufficiently assessed project need, safety, indirect and cumulative impacts, and health impacts.¹⁹

¹⁶ 18 C.F.R. § 375.101(c) (2015).

¹⁷ See 18 C.F.R. § 385.2001(a)(2) (2015) ("Any document received after regular business hours is considered filed on the next regular business day.").

¹⁸ 15 U.S.C. § 717r (2012).

¹⁹ Mr. Huston's rehearing request also alleges that the Commission delegated its authority to the American Petroleum Institute, allowed pipelines to begin construction before issuing a certificate, and violated Title V of the Clean Air Act by issuing the certificate order before states issued their air quality permits. Mr. Huston's claims are unfounded. The Commission independently evaluates pipeline applications based on the available public record. Pipelines cannot begin construction before receiving authorization from the Director of the Commission's Office of Energy Projects pursuant to a certificate order's conditions. Pipeline companies that violate certificate conditions are subject to general and civil penalties. See 15 U.S.C. §§ 717t; 717t-1 (2012). Further, the Commission may issue certificates conditioned on a pipeline obtaining Clean Air Act permits. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1321 (D.C. Cir. 2015) (*Myersville*).

C. Late Comments

15. Several individuals filed comments after the March 3 Order's issuance without requesting rehearing.²⁰ These comments raised safety and environmental concerns that were previously addressed in the final EIS and the March 3 Order, and are addressed in this order below. Many of these individuals requested that we vacate the tolling order so parties may file an appeal in court.²¹ Because we are issuing the rehearing order, and parties to this proceeding may seek judicial review, this issue is moot.

16. Occupy Providence, an entity that filed comments at a public meeting discussing the draft EIS but did not intervene, also filed nine reports after the March 3 Order's issuance for Commission staff to use in its environmental review. The Commission's longstanding policy is not to accept additional evidence at the rehearing stage of a proceeding, absent a compelling showing of good cause.²² Because other parties are precluded under Rule 713(d)(1) of our Rules on Practice and Procedure²³ from filing answers to requests for rehearing, allowing the late commenters to introduce new evidence at this stage would raise concerns of fairness and due process for other parties to the proceeding. In addition, accepting such evidence at the rehearing stage disrupts the administrative process by inhibiting the Commission's ability to resolve issues with finality. Occupy Providence neither explains nor justifies why the additional information should be admitted after the close of the record and after the issuance of a dispositive order in this proceeding. Therefore, we will not accept the additional reports as evidence.

²⁰ Bernard Vaughey labeled his two August 14, 2015, filings as requests. We treat these filings as comments.

²¹ We note that section 19(b) of the NGA prohibits any entity from requesting judicial review of any order of the Commission if that entity did not request the Commission to rehear that order. 15 U.S.C. § 717r(b) (2012) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure [to do so].”).

²² See *Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025, at P 28 (2013); *Nevada Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005).

²³ 18 C.F.R. § 385.713(d)(1) (2015).

D. Motion to Assign Intervenor Status

17. On June 2, 2015, Mr. Harckham filed a motion requesting to assign his intervenor status to Mary Jane Shimsky, his successor as the chair to the Westchester County, New York, Board of Legislators' Labor, Parks, Planning, and Housing Committee (Committee).

18. Mr. Harckham filed a timely motion to intervene on April 8, 2014. Mr. Harckham's motion, however, does not clearly state that he acted on behalf of the Committee nor has Mr. Harckham provided us with evidence that he was authorized by the Westchester County Board of Legislators to intervene on behalf of the Committee. Therefore, we find that Mr. Harckham intervened as an individual. Because individuals represent themselves, an individual's interest or intervention cannot be assumed by another individual. We thus deny Mr. Harckham's motion to assign his status to Ms. Shimsky.

III. Rehearing Request

19. In the rehearing requests, the parties raise arguments concerning whether we erred in declining to hold an evidentiary hearing, whether our conditioned approval violated section 401 of the Clean Water Act, whether the project is required by the public convenience and necessity, as well as numerous issues related to the adequacy of the Commission staff's NEPA analysis. We address these arguments in turn below.

A. Evidentiary Hearing

20. Coalition argues that the Commission erred when it declined to hold a trial-type hearing to resolve disputed issues of material fact as requested by Mr. Huston. Mr. Huston requested a formal hearing to address issues regarding segmentation of planned Northeast natural gas pipeline projects, unconventional natural gas development impacts, project need, the project's potential to export natural gas, and general pipeline safety.²⁴ Coalition adds that an evidentiary hearing is necessary to resolve whether the project is overbuilt.

21. A trial type hearing is appropriate where resolution of the controversy would be facilitated by cross-examination of witnesses. Coalition correctly cites *Cajun Electric Power Co-op., Inc. v. FERC (Cajun)*²⁵ as stating that the Commission must hold a hearing to resolve disputed issues of material fact; however, the *Cajun* court goes on to

²⁴ See William Huston September 9, 2014 Motion to Intervene and Request for Full Hearing.

²⁵ 28 F.3d 173 (D.C. Cir. 1994).

say that the Commission “need not conduct such a hearing if [the disputed issues] may be adequately resolved on the written record.”²⁶

22. Here, we found that the written record was sufficient for us to resolve any material issue of fact, and therefore, we conducted a paper proceeding. We addressed Mr. Huston’s concerns and Coalition’s additional concern in the final EIS and the March 3 Order. Neither discovery nor cross-examination was necessary to address Mr. Huston’s and Coalition’s arguments.

B. Conditioned Approval and Section 401 of Clean Water Act

23. Section 401 of the Clean Water Act (CWA) provides that no federal “license or permit shall be granted until the” state certifies that any activity “which may result in a discharge into the navigable waters” will comply with the applicable provisions of the Act.²⁷ Several rehearing applicants argue that the Commission violated section 401 of the CWA by issuing a conditioned certificate order before the respective state agencies in Connecticut, Massachusetts, and New York had issued their water quality certifications for the proposed project. They argue that the language of section 401 is unambiguous when it states that “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived”²⁸ The rehearing applicants also cite *PUD No. 1 of Jefferson County v. Washington Department of Ecology* and *City of Tacoma, Washington v. FERC* to bolster their argument that the Commission cannot issue a certificate order before a state issues its CWA section 401 water quality certification.²⁹

24. The rehearing applicants argue that by issuing the certificate first, the Commission usurped the states’ authority to issue their own, potentially more stringent, conditions. Rehearing applicants assert that the Commission cannot override the section 401 bar by relying on the Commission’s authority under section 7(e) of the NGA. Rehearing applicants add that the certificate order limits the state’s power by requiring that “any state

²⁶ *Id.* at 177. See also *Louisiana Ass’n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113-15 (D.C. Cir. 1992).

²⁷ 33 U.S.C. § 1341(a) (2012).

²⁸ See, e.g., Mr. Harckham April 1, 2015 Rehearing Request at 3 (citing 33 U.S.C. § 1341(a)(1) (2012)).

²⁹ *Id.* (citing and *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707 (1994); *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006)).

or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate.”³⁰

25. As an initial matter, we note that the respective state water quality agencies in the States of Connecticut, Massachusetts, and New York have all issued their section 401 water quality certifications. In fact, Massachusetts Department of Environmental Protection issued its water quality certification on November 14, 2014, before the Commission’s March 3 authorization of the AIM Project.³¹ Therefore, the rehearing applicants’ argument on whether our March 3 Order violates the CWA is moot.

26. Even so, our March 3 Order complies with the CWA. The Commission routinely issues certificates for natural gas pipeline projects subject to the federal permitting requirements of the CWA, among other statutes. The practical reason is that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission’s issuance of its certificate without unduly delaying the project. It is entirely appropriate for the Commission to issue an NGA certificate conditioned on the certificate holder subsequently obtaining necessary permits under other federal laws. Section 7(e) of the NGA vests the Commission with broad power to attach to any certificate of public convenience and necessity “such reasonable terms and conditions” as it deems appropriate.³²

27. The order is an “incipient authorization without current force or effect,” since it does not allow the pipeline to begin the activity it proposes before the relevant environmental conditions are satisfied.³³ Section 401(a)(1) of the CWA prohibits licenses

³⁰ March 3 Order, 150 FERC ¶ 61,163, at P 151.

³¹ On March 9, 2015, the Connecticut Department of Energy and Environmental Protection issued its section 401 water quality certification, and on May 5, 2015, the New York Department of Environmental Conservation issued its section 401 water quality certification.

³² 15 U.S.C. § 717f(e) (2012). *See also Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091, at 61,402 n.195 (1990) (“The Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or the adherence by the applicants to environmental conditions”) (citing *Texas Eastern Transmission Corp.*, 47 FERC ¶ 61,341 (1989); *CNG Transmission Corp.*, 51 FERC ¶ 61,267 (1990); *Columbia Gas Transmission Corp.*, 48 FERC ¶ 61,050 (1989)).

³³ *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 21 (2006). *See also Pub. Utils. Comm’n of Cal.*, 900 F.2d 269, 282 (D.C. Cir. 1990) (finding that the Commission did not

(continued...)

or permits that allow the licensee or permittee “to conduct any activity . . . which may result in any discharge into the navigable waters.”³⁴ Consistent with such language, the March 3 Order ensured that until Connecticut, Massachusetts, and New York issued their water quality certifications, Algonquin could not begin an activity in the respective state that may result in a discharge into navigable waters.³⁵ Indeed, the rehearing applicants have not identified any activities authorized by the March 3 Order that may have resulted in such discharge before state approval or Commission staff’s issuance of a notice to proceed. In fact, Commission staff issued all of its notices to proceed to begin construction of a pipeline segment that could result in a discharge after Connecticut, New York, and Massachusetts issued their water quality certifications.³⁶

28. Conditioned certificates are a common Commission practice, affirmed by the courts. In *Myersville Citizens for a Rural Community, Inc. v. FERC*,³⁷ the D.C. Circuit found that the Commission had not violated the NGA or the Clean Air Act by conditioning its approval of new compressor station on the review process required by the Clean Air Act. The D.C. Circuit stated “. . . the certificate order has only whatever preemptive force it can lawfully exert, and no more. It did not purport to contravene the Natural Gas Act’s savings clause [15 U.S.C. § 717b(d)(3) (2012)]. Nor did it purport to compel the [Maryland Department of Environment’s] interpretation of Maryland’s SIP.”³⁸ Similarly, in *City of Grapevine v. Department of Transportation*,³⁹ the D.C. Circuit upheld the use of analogous federal conditioning authority. There, the court found that the U.S. Department of Transportation had not violated the National Historic Preservation Act by conditioning its approval of a new airport runway on the review process required by that federal

err in granting certificate before environmental hearing was finished because agency can make “even a final decision” as long as it assesses the environmental data before the decision’s effective date); *Finavera Renewables Ocean Energy, Ltd.*, 122 FERC ¶ 61,248, at P 15 (2008).

³⁴ 33 U.S.C. § 1341(a) (2012).

³⁵ See March 3 Order, 150 FERC ¶ 61,163, at Environmental Condition 9.

³⁶ On April 13, 2015, Commission staff did issue a notice to proceed to use four ware yards.

³⁷ *Myersville*, 783 F.3d 1301 (D.C. Cir. 2015).

³⁸ *Id.* at 1321.

³⁹ *City of Grapevine, Tex. v. Dep’t of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994).

statute.⁴⁰ In contrast, the cases that the rehearing applicants cite in support are inapplicable as they do not evaluate the Commission's authority to condition its project approval on the successful completion of the state review process required by the CWA.⁴¹

29. We also find no merit in the claim that the March 3 Order limits state authority to issue state water quality conditions. Section 401(d) of the CWA states that any limitations or monitoring prescribed in the water quality certification to ensure that the applicant will comply with federal or state standards under the CWA shall become conditions of the federal license or permit and thus control the construction and operation of the project.⁴² The Commission did not authorize Algonquin to disturb the environment before the states acted.

30. Further, our preemption language that the rehearing applicants cite does not apply to section 401 water quality certifications, which are federal permits administered by the respective state agency.⁴³ Accordingly, we deny rehearing on these issues.

C. Preemption

31. Mr. Harckham and the West Roxbury Intervenors raise preemption arguments on rehearing. Mr. Harckham states that New York State's parkland alienation law requires Algonquin to receive approval from the New York State Legislature in order to obtain

⁴⁰ *Id.* at 1508-09.

⁴¹ *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006) (regarding whether an operating dam to produce hydroelectricity may discharge into navigable waters of the United States and would thus require a section 401 water quality certification); *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994) (regarding minimum stream flow rates as part of a section 401 water quality certificate); *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006) (requiring the Commission to seek affirmation from the state agency that it complied with state law notice requirements when it issued its water quality certification); *State of N.C. v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) (regarding whether a decrease in volume of a preexisting discharge at a hydropower project required a section 401 water quality certification before the Commission issued a license amendment).

⁴² 33 U.S.C. § 1341(d) (2012).

⁴³ *See Islander E. Pipeline Co. et al.*, 102 FERC ¶ 61,054, at P 115 (2003) ("While state and local permits are preempted under the NGA, state authorizations required under federal law are not.").

its proposed additional temporary workspace area outside its existing easement in the Blue Mountain Reservation.⁴⁴ Mr. Harckham argues that the NGA will not preempt the parkland alienation law in New York because the parkland alienation law is unrelated to the regulation of natural gas facilities and does not involve state public service commissions as was the case in the preemption cases, *Schneidewind v. ANR Pipeline Company*⁴⁵ and *Natural Fuel Gas Supply v. Public Service Commission*.⁴⁶ Moreover, Mr. Harckham argues that the Commission's certificate should not preempt the parkland alienation law because the environmental conditions in a Commission certificate inadequately avoid environmental harms and would conflict with state delegated authority under the Clean Air Act and Clean Water Act.

32. West Roxbury Intervenors argue that Article 97 of the Massachusetts Constitution⁴⁷ would apply to the West Roxbury Lateral's route along certain streets and across the Gonzalez Field in the Town of Dedham, Massachusetts. Article 97 mandates that a change in use or a disposal of lands held for public purposes must be approved by a two-thirds vote from both houses of the Massachusetts Legislature. While West Roxbury Intervenors acknowledge that the NGA grants the Commission broad authority to regulate interstate pipelines, West Roxbury Intervenors appear to argue that federal preemption should be limited in this case because Algonquin has not demonstrated project need or that the gas supplies will not be exported.⁴⁸

33. The Commission does not take preemption lightly. Whether or not a state or local law is related to natural gas activities or public service commissions, the NGA and the Commission's regulations implementing that statute generally preempt state and local law that conflict with federal regulation, or would unreasonably delay the construction and

⁴⁴ The requirement that a municipality obtain legislative authorization to alienate parkland is founded in New York State case law and common law. *See* State of New York, New York State Office of Parks, Recreation and Historic Preservation, *Handbook on the Alienation and Conversion of Municipal Parkland in New York* at 7 (2012), <http://parks.ny.gov/publications/documents/AlienationHandbook.pdf>.

⁴⁵ 485 U.S. 293 (1988).

⁴⁶ 894 F.2d 571 (2d Cir. 1990).

⁴⁷ Mass. Const. Amend. Art. 97 (2015).

⁴⁸ We note the March 3 Order found that Algonquin demonstrated need for the AIM Project, and that there is no evidence that the natural gas supplies transported on the project will be exported. *See* March 3 Order, 150 FERC ¶ 61,163, at PP 22-25.

operation of facilities approved by the Commission.⁴⁹ The Commission, however, encourages applicants to cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures.

34. That a state or local authority requires something more or different than the Commission does not necessarily make it unreasonable for an applicant to comply with both the Commission's and state or local agency's requirements. It is true that additional state and local procedures or requirements could impose more costs on an applicant or cause some delays in constructing a pipeline. Not all additional costs or delays, however, are unreasonable in light of the Commission's goal to include state and local authorities to the extent possible in the planning and construction activities of pipeline applicants. The Commission's practice of encouraging cooperation between interstate pipelines and local authorities does not mean, however, that those agencies may use their regulatory requirements to undermine the force and effect of a certificate issued by the Commission.⁵⁰ A rule of reason must govern both the state and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements.

35. If a conflict arises between the requirements of a state or local agency and the Commission's certificate conditions, the principles of preemption will apply and the federal authorization will preempt the state or local requirements. Having said this, we note that the Commission cannot act as a referee between applicants and state and local authorities regarding each and every procedure or condition imposed by such agencies. In the event compliance with a state or local condition conflicts with a Commission certificate, parties are free to bring the matter before a Federal court for resolution.

⁴⁹ See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) (holding state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by the Commission); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

⁵⁰ See *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240, at P 68 (2012) (finding “state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by this Commission.”) See also *Transcontinental Gas Pipe Line Corp., LLC*, 145 FERC ¶ 61,152, at P 75 n.36 (2013).

36. In response to Mr. Hareckham's comments, we emphasize that state permits required under federal law are not preempted by the NGA.⁵¹ Further, as discussed below, we also find that the final EIS found based on substantial evidence that impacts to the Blue Mountain Reservation would be adequately minimized.⁵²

D. Certificate Policy Statement

1. Project Need

37. Several rehearing applicants argue that the Commission failed to demonstrate project need as required by the public convenience and necessity and the Certificate Policy Statement. Town of Dedham argues that the Commission should evaluate project need on a regional basis. Coalition and West Roxbury Intervenors argue that Algonquin cannot demonstrate need for the AIM Project when other alternatives may serve the demand, such as alternative energy sources (i.e., wind, solar, geothermal, and kinetic technologies), importing liquefied natural gas (LNG), and repairing leaking natural gas pipelines.

38. In support of repairing leaking gas pipelines, Coalition and West Roxbury Intervenors cite a *Boston Globe* article summarizing a study, published after the final EIS, conducted by Harvard University scientists.⁵³ The study evaluated methane emissions from leaking natural gas distribution pipelines in the greater Boston area (Boston Methane Emissions Study). Coalition argues that repairing pipelines should have been considered because it is consistent with the Commission's cost-recovery policy.⁵⁴ Coalition and West Roxbury Intervenors also for the first time on rehearing introduce new findings from the February 2015 U.S. Department of Energy report, "Natural Gas Infrastructure Implications

⁵¹ See *Islander E. Pipeline Co. et al.*, 102 FERC ¶ 61,054, at 61,130 (2003) ("While state and local permits are preempted under the NGA, state authorizations required under federal law are not.").

⁵² See paragraphs 164-167 of this order.

⁵³ Kathryn McKain *et al.*, *Methane emissions from natural gas infrastructure and use in the urban region of Boston, Massachusetts*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, February 17, 2015, <http://www.pnas.org/content/112/7/1941.full.pdf?sid=5a42b412-77c8-4326-a6d4-bcced7c4ac13> (Boston Methane Emissions Study).

⁵⁴ See *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, 151 FERC ¶ 61,047 (2015).

of Increased Demand from the Electric Power Sector” (DOE Report), which studies the potential infrastructure needs of the U.S. interstate natural gas pipeline transmission system under multiple future natural gas demand scenarios.⁵⁵ The DOE Report, they argue, states that diverse sources of natural gas supply and demand as well as the increased utilization of existing interstate natural gas infrastructure will reduce the need for additional interstate natural gas pipeline infrastructure.⁵⁶

39. We reaffirm our March 3 Order’s finding that Algonquin demonstrated project need for the AIM Project.⁵⁷ Algonquin executed long-term firm transportation agreements with its ten Project Shippers for the full capacity being offered, which the Certificate Policy Statement states constitutes “significant evidence of demand for the project.”⁵⁸ It is Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.⁵⁹ The D.C. Circuit affirmed this policy in *Minisink Residents for Environmental Preservation & Safety v. FERC*,⁶⁰ finding that the petitioners identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project’s benefits by looking beyond

⁵⁵ U.S. Department of Energy, *Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector* (2015), http://energy.gov/sites/prod/files/2015/02/f19/DOE%20Report%20Natural%20Gas%20Infrastructure%20V_02-02.pdf (DOE Report).

⁵⁶ *Id.* at vi.

⁵⁷ March 3 Order, 150 FERC ¶ 61,163, at PP 22-25.

⁵⁸ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁵⁹ *See id.*, 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)). Indeed, since the advent of unbundling and open-access transportation, it is often impossible to discern who the ultimate consumers of gas transported under any particular agreement will be.

⁶⁰ *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) (*Minisink*).

the market need reflected by the applicant's existing contracts with shippers.⁶¹

40. We decline the Town of Dedham's request for an assessment of project need on a regional basis. Under the Certificate Policy Statement, the Commission considers all relevant factors reflecting on the need for the project. Although not the exclusive means of establishing need, precedent agreements "always will be important evidence of demand for a project."⁶² Here, Algonquin has executed precedent agreements with the shippers for 15-year firm transportation service agreements subscribing the entire 342,000 Dth per day of service that will be created by the AIM Project. In addition, all of the shippers are local distributors of gas to residential and commercial end users in their service areas and will use the expansion capacity on Algonquin's pipeline system to receive system supplies. Given this strong evidence of market demand for the project under review, the Commission does not believe it is necessary in this case to separately assess need across the region.

41. Notwithstanding our finding that Algonquin's executed long-term firm transportation agreements with its ten Project Shippers for the full capacity being offered demonstrates need under the Certificate Policy Statement, we note that, as stated in the March 3 Order, staff's environmental review considered the potential for energy conservation and renewable energy sources to serve as alternatives to the AIM Project. Staff's review, however, concluded that these alternatives were not practical project alternatives. We agreed, and also stated that we cannot assume that the Project Shippers failed to consider the feasibility of additional gas storage, including LNG storage, before committing to additional pipeline capacity. Nor can we assume that project shippers failed to consider importing natural gas to LNG import facilities.⁶³

42. Similarly, Commission staff was not required to consider repairing leaking pipelines as an alternative. Section 102(C)(iii) of the National Environmental Policy Act of 1969 (NEPA) requires an agency to discuss in its environmental document alternatives to the proposed action.⁶⁴ While the Council on Environmental Quality's (CEQ) regulations require agencies to evaluate all reasonable alternatives,⁶⁵ CEQ provides that

⁶¹ *Id.* at 111 n.10.

⁶² Certificate Policy Statement, 88 FERC P 61,227 at 61,748.

⁶³ *See* March 3 Order, 150 FERC ¶ 61,163, at P 25.

⁶⁴ 42 U.S.C. § 4332(C)(iii) (2012).

⁶⁵ *See* 40 C.F.R. § 1502.14 (2015).

agencies need to only consider feasible alternatives and not remote and conjectural alternatives.⁶⁶ The Boston Methane Emissions Study, which was issued after the final EIS, approximates that 15 billion cubic feet (Bcf) of methane is emitted annually in the Greater Boston Area.⁶⁷ In comparison, the AIM Project will provide 342,000 Dth per day of additional firm transportation service, potentially delivering more than 100 Bcf per year of natural gas. Therefore, the repair of leaking pipelines is not a reasonable alternative to the AIM Project as there would still be a need for delivery of additional natural gas supplies. Further, the AIM Project is an expansion project, with the entirety of the replacement pipe being a larger diameter than the current pipe. Thus, Algonquin's current pipeline system is too small to handle the additional volumes, invalidating this option as an alternative.

43. We also need not consider the DOE Report as the Commission has a longstanding policy to not accept additional evidence at the rehearing stage of a proceeding, absent a compelling showing of good cause.⁶⁸ Even so, the DOE Report does not undermine our finding that Algonquin has demonstrated project need. The DOE Report studies the potential aggregate infrastructure needs of the U.S. interstate natural gas pipeline transmission system under multiple future natural gas demand scenarios. The DOE Report does not, however, evaluate the need for natural gas infrastructure in any specific region, including New England.

2. Landowner Impact

44. Boston Delegation argues that the Commission violated the Certificate Policy Statement by concluding, without evidentiary support, that Algonquin had taken steps to minimize adverse safety impacts on landowners and surrounding communities.

45. Boston Delegation misconstrues our Certificate Policy Statement discussion regarding landowner impacts. Our discussion on landowner impacts is concerned with the

⁶⁶ CEQ, *Guidance Regarding NEPA Regulations*, at 9 (1983), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-GuidanceRegulations.pdf. See also CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act*, at 4 (1981), <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act> (“Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense.”).

⁶⁷ Boston Methane Emissions Study at 1945.

⁶⁸ See, e.g., *Tennessee Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025, at P 28 (2013); *Nevada Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005).

pipeline's use of eminent domain authority and the steps the pipeline has taken to minimize the economic impacts on landowners. Safety impacts are evaluated in the Commission's NEPA environmental analysis. As discussed below, the Commission did conduct a careful safety review, as demonstrated by section 4.12 of the final EIS.⁶⁹

E. Segmentation of the Atlantic Bridge and Access Northeast Projects from Commission Staff's Environmental Review

46. CEQ regulations require the Commission to include "connected actions," "cumulative actions," and "similar actions" in its NEPA analyses.⁷⁰ "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."⁷¹ "Connected actions" include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; (c) are interdependent parts of a larger action and depend on the larger action for their justification.⁷²

47. In evaluating whether connected actions are improperly segmented, courts apply a "substantial independent utility" test. The test asks "whether one project will serve a significant purpose even if a second related project is not built."⁷³ For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. Similar to a highway network, "it is inherent in the very concept of" the interstate pipeline grid "that

⁶⁹ See final EIS at 4-264 to 4-282.

⁷⁰ 40 C.F.R. § 1508.25(a)(1)-(3) (2015).

⁷¹ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Unlike connected and cumulative actions, analyzing similar actions is not always mandatory. See *San Juan Citizens' Alliance v. Salazar*, CIV.A.00CV00379REBCBS, 2009 WL 824410, at *13 (D. Colo. 2009) (citing 40 C.F.R. § 1508.25(a)(3) for the proposition that "nothing in the relevant regulations compels the preparation of a single EIS for 'similar actions'").

⁷² 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2015).

⁷³ *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). See also *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project "can stand alone without requiring construction of the other [projects] either in terms of the facilities required or of profitability.").

each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”⁷⁴

48. In *Del. Riverkeeper Network v. FERC (Del. Riverkeeper)*, the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and where those projects were financially interdependent.⁷⁵ The court put a particular emphasis on the four projects’ timing, noting that, when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.⁷⁶ Courts have indicated that, in considering a pipeline application, the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.⁷⁷ Further, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.⁷⁸

49. In the March 3 Order, we dismissed the argument that the AIM Project was improperly segmented from Algonquin’s and its affiliate Maritimes & Northeast Pipeline, L.L.C.’s (Maritimes)⁷⁹ Atlantic Bridge Project and Algonquin’s Access Northeast Project, which were at the time both contemplated expansion projects. The March 3 Order found that because an application was not yet filed for either the Atlantic Bridge Project or the

⁷⁴ *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

⁷⁵ *Del. Riverkeeper*, 753 F.3d at 1308.

⁷⁶ *Id.*

⁷⁷ *Minisink*, 762 F.3d at 113 n.11 (D.C. Cir. 2014). *See also Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (“ . . . an EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*”) (emphasis in original); *Del. Riverkeeper*, 753 F.3d at 1318 (“NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed.”)

⁷⁸ *See Myersville*, 783 F.3d at 1326.

⁷⁹ Maritimes is a joint venture of Spectra, Emera, Inc., and ExxonMobil. Maritimes pipeline system extends approximately 684 miles and transports natural gas from developments offshore Nova Scotia to markets in Atlantic Canada and the northeastern United States. The Atlantic Bridge Project will modify the Maritimes system to be bidirectional.

Access Northeast Project, neither project was a proposal, and without a proposal, improper segmentation did not apply.⁸⁰ Even so, the March 3 Order discussed the potential cumulative impact that the AIM Project would have when added to the Atlantic Bridge and Access Northeast Projects.⁸¹

50. Since the March 3 Order, Algonquin and Maritimes filed their application for the Atlantic Bridge Project, and Algonquin requested Commission approval to use the pre-filing process for the Access Northeast Project.⁸²

51. The Atlantic Bridge Project as proposed is designed to provide capacity to enable Algonquin to provide 132,705 Dth per day of firm transportation service, and Maritimes to provide 106,276 Dth per day of firm transportation service, to project shippers. Algonquin will provide service on its system from receipt points at Mahwah, New Jersey, and Ramapo, New York, to various new and existing delivery points on Algonquin's system in Massachusetts and Maine, including its interconnection with Maritimes in Beverly, Massachusetts. The Atlantic Bridge Project will consist of 6.3 miles of replacement pipeline across two segments, and 26,500 hp of new compression through the modification of three existing compressor stations and the construction of a new compressor station. These activities will occur in New York, Connecticut, and Massachusetts, and some of these activities may physically overlap or abut with AIM Project facilities, including modifications to the Stony Point, Oxford, and Chaplin Compressor Stations and pipeline installations in Westchester County, New York; Fairfield County, Connecticut; and Norfolk County, Massachusetts.

52. Details regarding the Access Northeast Project are limited. In its request to use the pre-filing process, Algonquin states that it has executed memoranda of understanding with seven electric distribution companies. Further, currently Algonquin anticipates that the Access Northeast Project will consist of 123 miles of various pipeline facilities; modifications to seven existing compressor stations; construction of a new compressor station; construction of associated facilities, such as meter stations; and the construction of an LNG peaking facility. These activities will occur in New York, Connecticut, Rhode Island, and Massachusetts, and some of these activities may physically overlap or abut

⁸⁰ See March 3 Order, 150 FERC ¶ 61,163, at P 110.

⁸¹ See *id.* PP 117-119.

⁸² On October 22, 2015, Algonquin and Maritimes filed their application for the Atlantic Bridge Project in Docket No. CP16-9-000. On November 3, 2015, Algonquin requested Commission approval to initiate the pre-filing review process for the Access Northeast Project in Docket No. PF16-1-000.

with AIM Project facilities, including modifications to the Stony Point, Southeast, Burrillville, and Chaplin Compressor Stations and pipeline installations in Rockland, Putnam, and Westchester Counties, New York; Fairfield and Hartford Counties, Connecticut; and Norfolk County, Massachusetts.

53. Several rehearing applicants renew their argument that the Commission improperly segmented the environmental review of the AIM Project from that of the Atlantic Bridge and Access Northeast Projects.

1. **Atlantic Bridge and Access Northeast Projects did not Constitute Proposals**

54. As noted above, the courts have found that the Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application.⁸³ Section 102(C) of NEPA requires agencies to prepare an environmental document for “proposals” for major federal actions affecting the human environment.⁸⁴ The CEQ’s regulations state that “proposals” exist when the action is at the stage when an agency “has a goal and is actively preparing to make a decision . . . and the effects [of that action] can be meaningfully evaluated.”⁸⁵ The courts have described proposed actions as “proposals in which action is imminent.”⁸⁶

55. The rehearing applicants argue that the Atlantic Bridge Project was a proposal because it was in pre-filing and therefore could be meaningfully evaluated. Riverkeeper states that at the pre-filing stage, the Commission’s immediate goal is determining whether and to what extent a project will be subject to NEPA environmental review. Mr. Harckham argues that being in pre-filing means there is a proposal because it is reasonably foreseeable that the pipeline in pre-filing will file an application. Further, Mr. Harckham argues that because Commission staff analyzed the cumulative effects of the Atlantic Bridge Project, the Commission admitted that the project was a proposal. As for the Access Northeast Project, Riverkeeper argues it was a proposal because Algonquin publicly announced the project and said it planned to begin pre-filing later in the year. In

⁸³ See *supra* note 79.

⁸⁴ 42 U.S.C. § 4332(2)(C) (2012).

⁸⁵ 40 C.F.R. § 1508.23 (2015).

⁸⁶ *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1229 (10th Cir. 2008) (citing *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 236 (5th Cir. 2007)).

addition, Riverkeeper argues that the *Transcontinental Gas Pipe Line Company, LLC*⁸⁷ case, which the March 3 Order cites in support of its argument that the Atlantic Bridge and Access Northeast Projects were not proposals, is inapposite to the facts here.

56. By finding that the Atlantic Bridge and Access Northeast Projects did not constitute proposals, Allegheny and Riverkeeper assert that the Commission allowed Algonquin to shield its broader plans from a more comprehensive review. Riverkeeper adds that the Commission's alleged segmentation inhibited the public's ability to evaluate project costs to the environment and communities.

57. We disagree. A project at the pre-filing stage is not a proposal, but is in its early stages of development and the NEPA process. The purpose of pre-filing is to involve interested stakeholders early in project planning and to identify and resolve issues before an application is filed.⁸⁸ Commission staff gathers information for its environmental review and solicits the public's and agencies' participation. Commission staff then determines the scope of issues to be addressed and identifies the significant environmental issues related to a proposed action. By raising environmental issues at an early stage, we avoid a situation where the pipeline completes planning and eliminates all alternatives to the proposed action before staff commences its environmental review.⁸⁹

58. When Commission staff conducted and completed its environmental review, both the Atlantic Bridge and Access Northeast Projects were in the early stages of project development. On January 30, 2015, Algonquin and Maritimes, had only requested Commission approval for the pre-filing process for the Atlantic Bridge Project, which Commission staff approved on February 20, 2015. On April 27, 2015, nearly two months after the March 3 Order's issuance, Commission staff began its environmental scoping process when it issued a *Notice of Intent to Prepare an Environmental Assessment for the*

⁸⁷ 149 FERC ¶ 61,258 (2014).

⁸⁸ See *Weaver's Cove Energy, LLC*, 107 FERC ¶ 61,022, at P 11 (2004).

⁸⁹ Our pre-filing process is consistent with section 1501.2(d) of the CEQ regulations, which provide in pertinent part:

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

40 C.F.R. § 1501.2 (2015).

Planned Atlantic Bridge Project. As for the Access Northeast Project, Spectra had only announced the project on its website. The Atlantic Bridge and Access Northeast Projects were far from proposals in which action was imminent.

59. Projects that are in the early stages of development have uncertain futures. Not all projects that enter the pre-filing process go on to be proposed in applications. In almost all cases, projects in the pre-filing process change in project scope, facilities, or location before an application is filed. Indeed, Algonquin reduced the size of the AIM Project during the pre-filing process. As Riverkeeper points out, Algonquin removed four of six miles of proposed pipeline in Yorktown and Sommers, New York, during the pre-filing process to match customer commitments. The removed facilities are currently contemplated as part of the Atlantic Bridge Project, which itself evolved based on customer agreements.

60. The Atlantic Bridge Project has been modified to eliminate originally contemplated facilities since Commission staff evaluated it in the AIM Project's final EIS using the generic details provided by Algonquin in September 2014. In January 2015, Algonquin and Maritimes filed a pre-filing request letter for the Atlantic Bridge Project that stated the scope of the project included fewer miles of pipe and less compression than the preliminary details that Algonquin previously provided. Since the time of that filing, the Atlantic Bridge Project has undergone even more changes, further reducing its scope.⁹⁰ As projects before and in the pre-filing stage are uncertain, without an application, the Commission cannot actively prepare to make a decision on the projects and the effects of the projects cannot be meaningfully evaluated.

61. Our finding is not inconsistent with our decision in the *Transcontinental Gas Pipe Line Co., LLC* case as Riverkeeper contends. Similar to the facts here, in that case the Commission found that two projects, among others, were not connected to the Leidy Project: one project that was in pre-filing (Atlantic Sunrise Project) and one project that had not reached pre-filing stage (Diamond East Project).⁹¹ The Commission explained that

⁹⁰ The Atlantic Bridge Project's design capacity was reduced by approximately 40 percent since the final EIS was issued (from 220,000 Dth per day to 137,705 Dth per day); its replacement pipeline was reduced by approximately 88 percent (52.5 miles to 6.3 miles); and the total additional compression was reduced by 11 percent (29,530 hp to 26,500 hp).

⁹¹ 149 FERC ¶ 61,258, at PP 64-66.

it did not have a proposal in front of it for either project to sufficiently examine the projects' environmental or landowner impacts.⁹²

62. Although the final EIS evaluates the cumulative impacts of the Atlantic Bridge Project, doing so does not mean that we found the Atlantic Bridge Project to constitute a proposal. A cumulative impacts analysis is not limited to the cumulative impacts that can be expected from proposed actions. Rather the cumulative impacts analysis extends to impacts that can be anticipated from proposed actions and “reasonably foreseeable actions,” i.e. contemplated actions.⁹³ CEQ regulations “mandate consideration of the impacts from actions that are not yet proposals and from actions – past, present, or future – that are not themselves subject to the requirements of NEPA.”⁹⁴ As discussed below in “Cumulative Impacts,” we appropriately considered the cumulative impacts of the Atlantic Bridge and Access Northeast Projects in accordance with NEPA and CEQ’s implementing regulations.

63. Accordingly, we find there has been no improper segmentation associated with our review of this project.

2. **Projects are not Cumulative, Connected, or Similar Actions**

64. Rehearing applicants argue that the AIM, Atlantic Bridge, and Access Northeast Projects are connected, cumulative, and similar actions that should have been evaluated in a single EIS.

a. **Connected Actions**

65. Citing *Del. Riverkeeper*, rehearing applicants argue that the AIM Project and the Atlantic Bridge Project are physically, temporally, and functionally connected. Riverkeeper also argues that the Access Northeast Project is also physically, temporally, and functionally connected to the AIM Project.

66. Rehearing applicants assert that the AIM and Atlantic Bridge Projects are physically connected because they involve the upgrade and expansion of Algonquin’s existing linear pipeline system in the same four states. Riverkeeper argues that both the

⁹² *Id.*

⁹³ 40 C.F.R. § 1508.7(a)(2) (2015).

⁹⁴ *Fritiofson v. Alexander*, 772 F.2d 1225, 1244 (5th Cir. 1985) (*Fritiofson*) overruled on other grounds by *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669 (5th Cir. 1992).

AIM Project and the Atlantic Bridge Project involve removing an existing 26-inch-diameter pipeline and installing a 42-inch-diameter pipeline. Mr. Harckham argues that the projects are physically connected because they impact the same watershed and airshed, they abut one another, and they have overlapping construction zones. Coalition adds that the projects are also physically connected because they will provide shippers an opportunity to obtain firm transportation service from Ramapo, New York, to deliver to New England, will transport shale gas, and are intended to meet local distribution company demand in New England. Even though few details were, and are still, available on the potential Access Northeast Project, Riverkeeper argues that the Access Northeast Project is also physically connected to the AIM Project because it will occur in the same general location.

67. Rehearing applicants argue that the AIM, Atlantic Bridge, and Access Northeast Projects are temporally connected because the projects will come online sequentially one year after the other. Coalition argues that Algonquin intentionally avoided simultaneous review of its projects by filing a deficient application for the AIM Project midway through the open season for the Atlantic Bridge Project and by filing its request to begin pre-filing for the Atlantic Bridge Project one week after Commission staff issued the final EIS for the AIM Project.

68. Lastly, rehearing applicants argue that the projects are functionally connected because the finished projects will function as a unified whole, and will upgrade and expand sections of the same linear pipeline system that will deliver gas to Northeast consumers and the Maritimes pipeline system. Coalition also reasserts the argument that the AIM Project and the Atlantic Bridge Project are functionally interdependent based on a report prepared by Richard Kuprewicz, a pipeline safety expert. Mr. Kuprewicz argued that Algonquin's proposed 42-inch-diameter replacement pipeline between the Stony Point and Southeast Compressor Stations overcompensated on one portion of the system, leaving the second portion in need of upgrade and, thus, suggested that the projects had been segmented.

69. Citing *Hammond v. Norton (Hammond)*,⁹⁵ Coalition notes that courts recognize that permit applicants are inclined to portray a project as an independent unit to evade review and expedite the permit process. Coalition argues that the facts in this case parallel those in *Hammond*. Coalition states that like *Hammond*, presentations and press releases by Spectra, Algonquin's corporate parent, show that the AIM and Atlantic Bridge Projects have been planned as a single unit. In addition, Coalition asserts that the draft EIS comment filed by U.S. Army Corps of Engineers (Corps) states the projects are connected, thereby corroborating Coalition's claim.

⁹⁵ *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005).

70. We disagree. The AIM, Atlantic Bridge, and Access Northeast Projects are not connected actions. First, the projects are not physically connected. The AIM Project will receive gas at Ramapo, New York, and will deliver gas to its Project Shippers' various city gates. In contrast, the Atlantic Bridge Project will receive gas at both Mahwah, New Jersey, and Ramapo, New York, and will deliver gas to its Project Shippers in New England and Atlantic Canada. As for the Access Northeast Project, Algonquin has not provided information on where the project will receive gas, but Algonquin has stated it plans to deliver gas to seven electric distribution companies in New England at their various delivery points. The fact that some of the projects' facilities will overlap does not mean that the projects are interdependent. Connectivity by itself does not equate to interdependence. If this were the case, no project in the interstate pipeline grid could be independently proposed, evaluated, or constructed. The needs of customers with nearby geography would all be held captive by one another.

71. Second, the projects are not connected temporally. The March 3 Order explained that the AIM Project construction is planned for 2015 and 2016 whereas construction of the Atlantic Bridge Project would likely take place after that time, as the earliest projected in-service date for the Atlantic Bridge Project is November 2017, and the Access Northeast Project would at the earliest be in service by the end of 2018.⁹⁶

72. While rehearing applicants contend that the timing is similar to that in *Del. Riverkeeper*, the *Del. Riverkeeper* court's rationale and concerns do not pertain to the facts here. As we noted above, the Atlantic Bridge and Access Northeast Projects were not proposals when Commission staff conducted its environmental review of the AIM Project. The *Del. Riverkeeper* court stated, "NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed."⁹⁷

73. Moreover, the *Del. Riverkeeper* court's project timing discussion was primarily concerned that the project's environmental review did not "take into account the condition of the environment reflected in the recently related and connected upgraded."⁹⁸ The court explained that the prior disturbance could not be ignored in the Commission's NEPA review. Here, the final EIS for the AIM Project considered whether there would be any cumulative impacts from the AIM Project, the Atlantic Bridge Project, and the Access Northeast Project.⁹⁹ Further, Commission staff's current environmental review of the

⁹⁶ March 3 Order, 150 FERC ¶ 61,163, at PP 118-119.

⁹⁷ *Del. Riverkeeper Network*, 753 F.3d at 1318.

⁹⁸ *Id.*

⁹⁹ See final EIS at 4-288 to 4-290.

Atlantic Bridge Project and potential review of Access Northeast Project will also take into account the condition of the environment reflected by the authorized projects.

74. Coalition erroneously states that Algonquin filed a deficient application for the AIM Project to evade an environmental review of both the AIM and Atlantic Bridge Projects. Algonquin filed its application for the AIM Project on March 11, 2014. At that time, the Atlantic Bridge Project was far from complete as Algonquin held a reverse open season for the project nearly a year later from January 16, through January 26, 2015. Even so, if Algonquin's application patently failed to comply with applicable statutory requirements or Commission rules for filing an application, Commission staff would have rejected Algonquin's application within ten business days.¹⁰⁰ On March 18, 2014, however, Commission staff accepted Algonquin's application.

75. Third, the projects are not functionally connected. Each project has independent utility and will serve a distinct transportation purpose. Algonquin held separate open seasons and reverse open seasons for all three projects at various periods from 2010 to 2015.¹⁰¹ As a result of these open seasons, Algonquin executed individual precedent agreements with ten project shippers for the AIM Project, seven project shippers for the Atlantic Bridge Project, and seven memoranda of understanding for the Access Northeast Project. While there is some overlap in project shippers for the three projects, there are several other shippers that contracted for firm transportation service on the projects.¹⁰² Each agreement for the AIM Project and Atlantic Bridge Project meets a project shipper's need to receive gas at a certain time. The projects also have different negotiated and recourse rates and separate in-service dates.

¹⁰⁰ 18 C.F.R. § 157.8(a) (2015).

¹⁰¹ Algonquin held an open season for the AIM Project from December 13, 2010, through February 11, 2011, and from September 20, 2012, through November 2, 2012. Algonquin held a supplemental open season and a reverse open season for AIM Project from June 11 through June 25, 2013. Algonquin held an open season for Atlantic Bridge Project from February 5, 2014, to March 31, 2014, and a reverse open season from January 16 through January 26, 2015. Algonquin held an open season for the Access Northeast Project from February 18, 2015, through May 1, 2015, and a reverse open season from October 2 through October 30, 2015.

¹⁰² Norwich Public Utilities and NSTAR Gas Company are shippers in both the AIM and Atlantic Bridge Projects. The Narragansett Electric Company is a shipper in both the AIM and Access Northeast Projects.

76. Mr. Kuprewicz's argument that Algonquin overcompensated in its design of the AIM Project and that demonstrates that the projects are functionally connected is incorrect. As confirmed by hydraulic models of Algonquin's system, Algonquin has appropriately sized the AIM Project facilities to meet the specific capacity requirements set forth by the Project Shippers. No additional facilities are needed on Algonquin's system to provide the requested services of the AIM Project Shippers and Algonquin has not over designed the proposed facilities to meet future expansions.

77. Contrary to Coalition's assertions, this case is not similar to *Hammond*. In *Hammond*, the court reviewed a challenge to the decision of the Bureau of Land Management (BLM) to consider two proposed pipeline projects as independent for NEPA purposes. The project was filed as a joint venture with the BLM for two pipelines to connect Salt Lake City to the national petroleum products grid. After the BLM decided to examine the entire pipeline as a single project for NEPA purposes, however, the joint venture dissolved and separate applications were filed for the two pipeline segments. The court found that the BLM improperly segmented the cases and violated NEPA based on the history of the two pipelines, the project proponents' manifest intention to circumvent the NEPA review process, and BLM's failure to support its finding that the two pipelines held independent utility.

78. Here, however, the projects do not depend on the other for access to the natural gas market and Algonquin did not jointly propose the AIM Project and Atlantic Bridge Project. While an early plan of the AIM Project included some modifications that are now part of the Atlantic Bridge Project, such a plan merely demonstrates the uncertainty of a project at its infancy stage and not that Algonquin deliberately used the pre-filing process to shield itself from a more comprehensive review. Market demand drives each application for transportation service. It is unrealistic to expect a pipeline to defer requesting approval of projects designed to serve discrete markets, and to require shippers to forgo receipt of needed service, until all projects on a pipeline's system can be packaged into one consolidated application.

79. Coalition also mischaracterizes the Corps' letter. The Corps did not find that the projects were connected. Rather, the Corps requested that the Commission elaborate on the independent utility and the cumulative impacts of these projects. Commission staff addressed the Corps' comments in the cumulative impacts section of the final EIS.¹⁰³

80. Accordingly, we find that the AIM, Atlantic Bridge, and Access Northeast Projects are not connected actions as they do not share a physical, temporal, or functional nexus.

¹⁰³ See final EIS at 4-288 to 4-290.

b. Cumulative Actions

81. Rehearing applicants also argue that the projects are cumulative actions because each would affect many of the same resources in the same area, and the combined incremental effect of each has the potential to be cumulatively significant.¹⁰⁴

82. We disagree. Cumulative actions are those “which when viewed with other proposed actions have cumulatively significant impacts”¹⁰⁵ As stated by the Fifth Circuit Court of Appeals, actions that are merely contemplated, as opposed to proposed, are not cumulative actions:

Proposed actions with potential cumulative impacts may mandate the preparation of a regional or comprehensive impact statement, contemplated actions with potential cumulative impacts cannot¹⁰⁶

83. Therefore, because when Algonquin filed its application for the AIM Project, the Atlantic Bridge and Access Northeast Projects were contemplated actions, they did not constitute cumulative actions. Many of the details of the Atlantic Bridge and the Access Northeast Projects had not yet been completed as the projects were in the planning and development stage. The courts have held that in such circumstance, it would be impractical for an agency to consider those actions in a single environmental document.¹⁰⁷

¹⁰⁴ Riverkeeper April 2, 2015 Rehearing Request at 16.

¹⁰⁵ 40 C.F.R. § 1508.25(a)(2) (2015).

¹⁰⁶ *Fritiofson*, 772 F.2d at 1242. See also *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 441-42 (5th Cir. 1981) (holding that comprehensive review is not required for contemplated but not yet proposed actions under 40 C.F.R. § 1508.25(a)(2)); *Del. Riverkeeper*, 753 F.3d 1304 (D.C. Cir. 2014) (noting that “NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed”).

¹⁰⁷ See *Wetlands Action Network v. U.S. Army Corps of Eng’s*, 222 F.3d 1105, 1119 (9th Cir. 2000) *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

84. Further, the courts have indicated that an agency is not required to analyze actions in a single EIS if that agency did not intend to segment review to minimize its cumulative impacts analysis.¹⁰⁸ Nothing in the record suggests that Commission staff's goal was to minimize its cumulative impact analysis of the AIM Project.¹⁰⁹ In fact, the March 3 Order and the final EIS explicitly discussed the cumulative impact of the AIM Project when added to the Atlantic Bridge and Access Northeast Projects. The courts have held that an agency may assess the cumulative impacts of an action but not consider that action with the proposed project in single environmental document,¹¹⁰ and that "an agency need not revise an almost complete environmental impact statement to accommodate new proposals submitted to the agency, regardless of the uncertainty of maturation."¹¹¹

c. Similar Actions

85. Riverkeeper contends that the projects are similar actions because they share similar project components, construction activities, and likely environmental impacts.

86. Actions are "similar" if they, 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.¹¹² Unlike connected and cumulative actions, analyzing similar actions is not always mandatory.¹¹³ As the CEQ states, "[a]n agency *may* wish to analyze [similar] 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

¹⁰⁸ *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9th Cir. 2003) (*Earth Island*) (citing *Churchill Cnty v. Norton*, 276 F.3d 1060, 1079-80 (9th Cir. 2001)).

¹⁰⁹ *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002).

¹¹⁰ *Earth Island*, 351 F.3d at 1305.

¹¹¹ *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010).

¹¹² *San Juan Citizens' Alliance v. Salazar*, CIV.A.00CV00379REBCB, 2009 WL 824410, at *13 (D. Colo. 2009) (citing 40 C.F.R. § 1508.25(a)(3) for the proposition that "nothing in the relevant regulations compels the preparation of a single EIS for 'similar actions'").

¹¹³ 40 C.F.R. § 1508.25(a)(3) (2015).

statement.”¹¹⁴ Given that Commission staff lacked the necessary information to assess potential impacts of the Atlantic Bridge and Access Northeast Projects, and that each project has independent utility, we find that a single EIS was neither required nor the best way to assess Algonquin’s proposal.¹¹⁵

F. Other Environmental Issues

1. Public Participation

87. Coalition and Mr. Harckham argue that the draft EIS did not provide sufficient information to allow meaningful analysis because the draft EIS requested that Algonquin provide supplemental information on environmental and safety issues. These arguments were raised in comments on the draft EIS and addressed in the March 3 Order. Coalition and Mr. Harckham raise no new arguments here. Accordingly, we find no cause to respond in detail, and will deny rehearing. As the March 3 Order states, Algonquin’s filings did not present new environmentally-significant information, pose substantial changes to the proposed action, or present previously undisclosed impacts, and therefore, Commission staff did not reissue a draft EIS or issue a supplemental EIS.¹¹⁶ The public had the opportunity to comment on the supplemental information and plans requested by Commission staff and filed by Algonquin after the draft EIS was issued, and Commission staff continued to review and respond to other comments filed after the publication of the draft EIS.

88. Rehearing applicants similarly argue that the environmental conditions in the final EIS and the March 3 Order require information that should have been received and analyzed before the certificate issuance. Town of Dedham argues that the final EIS’s

¹¹⁴ 40 C.F.R. § 1508.25(a)(3) (2015) (emphasis added). *See also Klamath-Siskiyou*, 387 F.3d 989, 1000-01 (9th Cir. 2004) (similarly emphasizing that agencies are only required to assess similar actions programmatically when such review is necessarily the *best way* to do so).

¹¹⁵ With respect to similar actions, “an agency should be accorded more deference in deciding whether to analyze such actions together.” *Klamath-Siskiyou*, 387 F.3d at 1000 (citing *Earth Island*, 351 F.3d 1291, 1306).

¹¹⁶ *See* March 3 Order, 150 FERC ¶ 61,163 at P 56 (citing 40 C.F.R. § 1502.9(c)(1) (2014)). Under section 1502.9(c)(1) of the CEQ’s regulations, an agency is only required to prepare a supplemental EIS if (1) “the agency makes substantial changes in the proposed action that are relevant to environmental concerns” or (2) “there are significant new circumstances or information relevant to environmental concerns.” *Id.*

environmental conditions demonstrate that the Commission rushed to issue the final EIS to meet self-imposed deadlines.¹¹⁷ Instead, Town of Dedham argues, the Commission should have withheld the certificate until the Commission received all required mitigation plans, including those required by Condition 22 that requires Algonquin to file a Residential Construction Plan and Condition 26 that requires Algonquin to file a construction schedule for the West Roxbury Lateral that would be shared with each affected municipality. Town of Dedham argues that by requiring Algonquin to develop mitigation measures after issuing the certificate, the Commission placed municipalities in an inferior negotiating position.

89. Riverkeeper argues that the final EIS violated NEPA because the final EIS is based on incomplete information as evident by the final EIS's conditions that require: a site-specific crossing plan for the Catskill Aqueduct (Environmental Condition 15); a revised site-specific crossing plan incorporating additional avoidance or mitigation measures for two vernal pools in New York (Environmental Condition 18); and a site-specific plan for Harriman State Park, including additional avoidance and mitigation measures (Environmental Condition 20). Citing *Northern Plains Resource Council, Inc. v. Surface Transportation Board (Northern Plains)*,¹¹⁸ Riverkeeper argues that by requiring these filings after issuing a certificate violates NEPA because baseline conditions, environmental impacts, and proposed mitigation measures must be included and evaluated in an EIS before project approval.

90. As our final EIS explains, we did not accelerate our environmental review.¹¹⁹ Algonquin utilized the pre-filing process for eight months, instead of the minimum six months. The draft EIS comment period was consistent with other Commission draft

¹¹⁷ West Roxbury Intervenors similarly argue that the Commission rushed to issue the March 3 Order. In support, West Roxbury Intervenors point out that the Commission issued the March 3 Order one day after receiving EPA's comments. *See* West Roxbury Intervenors April 2, 2015 Rehearing Request at 29. As we note below, we did not accelerate our review. Moreover, the majority of the issues that the EPA raised in its final EIS comments were the same issues that the EPA raised in its draft EIS comments, which Commission staff addressed in the final EIS.

¹¹⁸ 668 F.3d 1067, 1085 (9th Cir. 2011).

¹¹⁹ *See* final EIS at Vol. II, SA-7.

EIS comment periods. Further, Commission staff issued a revised schedule for environmental review adding time to complete the final EIS.¹²⁰

91. Environmental Conditions 22 and 26 also do not place the Town of Dedham or other municipalities at a disadvantage. While Condition 22 requires Algonquin to file revised residential construction plans based on any additional landowner input, the final EIS found Algonquin's original plans acceptable to minimize residential impact. As for Condition 26, it merely ensures communication about the timing of project construction; it does not require additional mitigation.

92. Further, our environmental conditions that require Algonquin to file mitigation plans do not violate NEPA. The purpose of NEPA is to ensure that an agency will carefully consider detailed information concerning significant environmental impacts in reaching its decisions. NEPA guarantees that relevant information will be made available to the larger audiences that may also play a role in both the decision making process and implementation of that decision. NEPA, however, "does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated."¹²¹

93. The required filings in the final EIS, and adopted in the March 3 Order, do not parallel the final EIS at issue in *Northern Plains* as Riverkeeper contends. In that case, the Surface Transportation Board issued a final EIS that gathered baseline data as part of mitigation measures to be completed after the NEPA process. Here, Commission staff published a final EIS that evaluated baseline data. Algonquin's filings will not present new environmentally-significant information nor pose substantial changes to the proposed action that would otherwise require a supplemental EIS.

94. Moreover, as we explain above and in other cases,¹²² practicalities require the issuance of orders before completion of certain reports and studies because large projects such as this, take considerable time and effort to develop. Perhaps more important, their development is subject to many significant variables whose outcomes cannot be predetermined. Accordingly, consistent with longstanding practice, and as authorized by

¹²⁰ FERC December 10, 2014 Notice of Revised Schedule for Environmental Review of the Algonquin Incremental Market Project.

¹²¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

¹²² See, e.g., *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 108-115 (2006); *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at PP 41-44 (2003).

NGA section 7(e),¹²³ the Commission typically authorizes natural gas projects subject to conditions that must be satisfied by an applicant or others before the authorizations can be effectuated by constructing and operating the project.¹²⁴

2. Programmatic EIS

95. As it has in other proceedings, on rehearing Allegheny contends that the Commission violated NEPA by failing to prepare a programmatic EIS for natural gas infrastructure projects in the Marcellus and Utica shale formations.¹²⁵

96. CEQ's regulations do not require broad or "programmatic" NEPA reviews. CEQ has stated, however, that such a review may be appropriate where an agency: (1) is adopting official policy; (2) is adopting a formal plan; (3) is adopting an agency program; or (4) is proceeding with multiple projects that are temporally and spatially connected.¹²⁶ The Supreme Court has held that a NEPA review covering an entire region (that is, a programmatic review) is required only "if there has been a report or recommendation on a proposal for major federal action" with respect to the region,¹²⁷ and the courts have concluded that there is no requirement for a programmatic EIS where the agency cannot identify the projects that may be sited within a region because individual permit applications will be filed at a later time.¹²⁸

¹²³ *Supra* note 30.

¹²⁴ *See, e.g., East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

¹²⁵ Allegheny April 1, 2015 Rehearing Request at 28-41.

¹²⁶ *See* CEQ, *Effective Use of Programmatic NEPA Reviews* at 13-15 (citing 40 C.F.R. § 1508.18(b)).

¹²⁷ *Kleppe*, 427 U.S. 390 (1976) (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

¹²⁸ *See Piedmont Env'tl. v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009).

97. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.¹²⁹ Rather, the Commission acts on individual applications filed by entities proposing to construct interstate natural gas pipelines. Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities “is or will be required by the present or future public convenience and necessity.”¹³⁰ What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. In the circumstances of the Commission’s actions, a broad, regional analysis would “be little more than a study . . . concerning estimates of potential development and attendant environmental consequences,”¹³¹ which would not present “a credible forward look and would therefore not be a useful tool for basic program planning.”¹³² As to projects that are closely related in time or geography, the Commission may, however, prepare a multi-project environmental document, where that is the most efficient way to review project proposals.¹³³

98. Allegheny claims that the Commission is engaged with the natural gas industry in regional development and planning. In support, Allegheny refers to the Commission’s participation in the development of the National Petroleum Council’s 2007 Prudent Development report, which it contends stresses the need to increase natural gas infrastructure, as well as the Commission’s Strategic Plan, which it states identifies the approval of natural gas infrastructure projects as a specific goal. It also contends that the Commission’s proceedings related to natural gas and electricity market coordination demonstrates that the Commission is engaged in long-term regional natural gas development and planning.¹³⁴ Further, Allegheny implies that because the Department of

¹²⁹ See, e.g., *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014); *Dominion Transmission, Inc.*, 152 FERC ¶ 61,138, at P 30 (2015).

¹³⁰ 15 U.S.C. § 717f(e) (2012).

¹³¹ *Kleppe*, 427 U.S. at 402.

¹³² *Piedmont Env'tl. Council*, 558 F.3d at 316.

¹³³ See, e.g., Environmental Assessment for the Monroe to Cornwell Project and the Utica Access Project, Docket Nos. CP15-7-000 & CP15-87-000 (filed Aug. 19, 2015); Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, Project Nos. 1888-030, 2355-018, and 405-106 (2015).

¹³⁴ Allegheny cites the following proceedings: Coordination Between Natural Gas and Electricity Markets, Docket No. AD12-12-000; *Coordination of the Scheduling*

(continued...)

Energy is the Commission's parent department, the Commission is involved with the Department of Energy's initiative to "analyze the natural gas infrastructure serving a large portion" of the areas where Marcellus and Utica shale gas are being delivered.¹³⁵

99. Allegheny adds that CEQ guidance and case law supports developing a programmatic EIS. Allegheny states CEQ's December 2014 guidance on programmatic NEPA reviews states that "[p]rogrammatic NEPA reviews may also support policy- and planning-level decisions when there are limitations in available information and uncertainty regarding the timing, location, and environmental impacts of subsequent implementing action(s)."¹³⁶ Thus, Allegheny argues that even if future pipeline projects may be theoretical, this does not mean that the Commission "would not be able to establish parameters for subsequent analysis."¹³⁷ Allegheny also contends that *Northern Plains* supports the need for a programmatic EIS because a programmatic EIS would provide the Commission information to conduct a cumulative impacts assessment of natural gas production activities.

100. Allegheny states CEQ's December 2014 guidance on programmatic NEPA reviews explicitly recommends a programmatic EIS when "several energy development programs proposed in the same region of the country. . . [have] similar proposed methods of implementation and similar best practice and mitigation measures that can be analyzed in the same document."¹³⁸ Allegheny cites *Kleppe v. Sierra Club (Kleppe)* to argue that, "when several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental impacts must be considered together."¹³⁹

Processes of Natural Gas Pipelines and Public Utilities (Docket No. RM14-2); *California Indep. Sys. Operator Corp.*, Order Initiating Investigation into ISO and RTO Scheduling Practices, 146 FERC ¶ 61,202 (2014), and *Posting of Offers to Purchase Capacity*, 146 FERC ¶ 61,203 (2014). See Allegheny April 1, 2015 Rehearing Request at 34.

¹³⁵ *Id.* at 37.

¹³⁶ Allegheny April 1, 2015 Rehearing Request at 29 (citing CEQ 2014 Programmatic EIS Guidance at 11).

¹³⁷ *Id.* at 29.

¹³⁸ *Id.* at 24 (citing 2014 CEQ Guidance).

¹³⁹ *Id.* at 25 (citing *Kleppe*, 427 U.S. 390, 410 (1976)).

101. Allegheny maintains that there is an enormous expansion of the natural gas pipeline system and much of it is due to gas drilling in the Marcellus and Utica shale formations. Allegheny points to, among other things, an Energy Information Administration publication and various maps on new pipeline projects to move Marcellus or Utica shale production.¹⁴⁰ Allegheny states that these projects have similar proposed methods of implementation and similar best practice and mitigation measures, and therefore, should be considered together in a programmatic EIS.

102. Allegheny argues that the Commission's alleged program to support natural gas development meets the two-prong test that the courts have used to determine whether a programmatic EIS is appropriate: (1) the programmatic EIS would be sufficiently forward looking to contribute to the decisionmaker's basic planning of the overall program, and (2) the decisionmaker purports to 'segment' the overall program, thereby unreasonably constricting the scope of primordial environmental evaluation.¹⁴¹ Allegheny argues that the Commission's alleged program satisfies the first prong because a programmatic EIS would assist the Commission and the public in understanding the broader reasonably foreseeable consequences of jurisdictional projects and non-jurisdictional gas drilling in the Marcellus and Utica shale formations. With respect to the second prong, Allegheny asserts that the Commission disingenuously described the pipelines as only an amalgamation of unrelated smaller projects to escape the existence of a comprehensive program.¹⁴²

103. We disagree. Documents cited by Allegheny, including the Commission's Strategic Plan and the Commission's proceeding on coordinating natural gas and electricity markets, do not show that the Commission is engaged in regional planning. Rather, the Strategic Plan sets forth goals for the efficient processing of individual pipeline applications to carry out the Commission's responsibilities under the NGA. Similarly, the focus of the proceedings regarding the coordination of the natural gas and electric industries is to better coordinate the scheduling of wholesale natural gas and electricity markets as well as to provide additional scheduling flexibility to all shippers on interstate natural gas

¹⁴⁰ Allegheny April 1, 2015 Rehearing Request at Attachments 6, 11.

¹⁴¹ *Id.* at 32 (citing *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001)).

¹⁴² *Id.* at 32-33 (citing *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001) (citing *Nat'l Wildlife Fed'n*, 677 F.2d 883, 890 (D.C. Cir. 1981))).

pipelines.¹⁴³ Further, while the Commission is established within the Department of Energy, the Commission is an independent regulatory agency and is not subject to any Department of Energy initiative regarding natural gas infrastructure.

104. The mere fact that there are a number of approved, proposed, or planned infrastructure projects to increase infrastructure capacity to transport natural gas from the Marcellus and Utica shale does not establish that the Commission is engaged in regional development or planning. Instead, this information confirms that pipeline projects to transport Marcellus and Utica shale gas are initiated solely by a number of different companies in private industry influenced by the market. As we have noted above, an agency is not required to prepare a programmatic EIS to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, that agency's federal plan or program in that region.¹⁴⁴ Thus, here, the Commission's environmental review of Algonquin's AIM Project in a discrete EIS is appropriate under NEPA.

105. Further, as among the various referenced proposed pipeline projects to provide additional transportation capacity within and from the northeastern United States, Allegheny has not shown any relationship in time or geography beyond the fact that they might share a general regional proximity to the Marcellus and Utica shale regions. Thus, a multi-project environmental document would not be the most efficient way to review the proposed projects.

106. In sum, there is no support for Allegheny's assertion that the AIM Project is part of a comprehensive federal program. Therefore, a programmatic EIS is neither required nor useful under the circumstances here.

¹⁴³ See, e.g., *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 55 (2015); (discussing *Coordination of Scheduling Processes of Interstate Gas Pipelines and Public Utilities*, 80 Fed. Reg. 23,198 (2015), FERC Stats. & Regs., ¶ 31,368 (2015)).

¹⁴⁴ *Kleppe*, 427 U.S. at 401-02 (“[The District Court] found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated Absent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region identified by respondents, and thus impossible to analyze the environmental consequences and the resource commitments involved in, and the alternatives to, such activity.”)

3. Indirect Effects

107. Allegheny, Coalition, and Mr. Harckham contend that the March 3 Order failed to adequately analyze the indirect effects of alleged induced natural gas production activities in the Marcellus and Utica shale plays and the associated environmental harms.

108. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.¹⁴⁵ Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."¹⁴⁶ Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

109. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"¹⁴⁷ in order "to make an agency responsible for a particular effect under NEPA."¹⁴⁸ As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."¹⁴⁹ Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if the causal chain is too attenuated.¹⁵⁰ Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."¹⁵¹

¹⁴⁵ See 40 C.F.R. § 1508.25(c) (2015).

¹⁴⁶ See 40 C.F.R. § 1508.8(b) (2015).

¹⁴⁷ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 at 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Metro. Edison*, 460 U.S. at 774.

¹⁵¹ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 at 770.

110. An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”¹⁵² NEPA requires “reasonable forecasting,” but an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”¹⁵³

111. The Commission does not have jurisdiction over natural gas production. The potential impacts of natural gas production, with the exception of greenhouse gases and climate change, would be on a local and regional level. Each locale includes unique conditions and environmental resources. Production activities are thus regulated at a state and local level. In addition, the Environmental Protection Agency regulates deep underground injection and disposal of wastewaters and liquids under the Safe Drinking Water Act, as well as air emissions under the Clean Air Act. On public lands, federal agencies are responsible for enforcing regulations that apply to natural gas wells.

112. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.¹⁵⁴ A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).¹⁵⁵ To date, the Commission has not been presented with a proposed

¹⁵² *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). See also *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).

¹⁵³ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

¹⁵⁴ See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2d Cir. 2012) (unpublished opinion).

¹⁵⁵ Cf. *Sylvester v. U.S. Army Corps of Engin'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project). See also *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport plan was not an indirect, “growth-inducing” impact); *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing

(continued...)

pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas. It would make little economic sense to undertake construction of a pipeline in the hope that production might later be determined to be economically feasible and that the producers will choose the previously-constructed pipeline as best suited for moving their gas to market.

113. Even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, we have found that the potential environmental impacts resulting from such production are not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. We are aware of no forecasts by such entities, making it impossible for the Commission to meaningfully predict production-related impacts, many of which are highly localized. Thus, even if the Commission knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depend on the applicable regulations in the various states. Accordingly, the impacts of natural gas production are not reasonably foreseeable because they are “so nebulous” that we “cannot forecast [their] likely effects” in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.¹⁵⁶

114. Nonetheless, we note that, although not required by NEPA, a number of federal agencies have examined the potential environmental issues associated with unconventional natural gas production in order to provide the public with a more complete understanding of the potential impacts. The Department of Energy has concluded that such production, when conforming to regulatory requirements, implementing best management practices, and administering pollution prevention concepts may have temporary minor impacts to

development led to planned freeway, rather than the reverse, notwithstanding the project’s potential to induce additional development).

¹⁵⁶ *Habitat Educ. Ctr.*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with sufficient specificity to make their consideration meaningful need not be included in the environmental analysis).

water resources.¹⁵⁷ The EPA has reached a similar conclusion.¹⁵⁸ With respect to air quality, the Department of Energy found that natural gas development leads to both short- and long-term increases in local and regional air emissions.¹⁵⁹ It also found that such emissions may contribute to climate change. But to the extent that natural gas production replaces the use of other carbon-based energy sources, the Department of Energy found there may be a net positive impact in terms of climate change.¹⁶⁰

115. Below, we discuss rehearing applicants' challenges to our causation and reasonable foreseeability findings.

a. Lack of Causality

116. Allegheny and Coalition argue that additional, future production is causally related to the AIM Project. Allegheny asserts that induced natural gas production and the AIM Project are "two links of a single chain" as allegedly shown by a Commission staff presentation and Algonquin's application.¹⁶¹ Allegheny states that a presentation by the Commission's Office of Energy Projects titled, "Natural Gas in the U.S.," demonstrates that shale gas extraction and natural gas infrastructure are causally related. In Algonquin's application, Allegheny cites to Algonquin's statements that the AIM Project will provide access to growing supply areas, which Allegheny assumes to mean Marcellus and Utica shale plays in the Appalachian Basin. Coalition also points to publications by Algonquin's parent company, Spectra, that marketed the open season for the AIM Project by promoting its potential to transport shale gas to New England markets.

¹⁵⁷ See U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From The United States* (August 2014) at 19, <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf> ("DOE Addendum").

¹⁵⁸ See U.S. Environmental Protection Agency, *Draft Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, at ES-6, http://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=244651#_ga=1.161236345.552502682.1445635975. See also Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16128, (2015) (BLM promulgates regulations for hydraulic fracturing on Federal and Indian lands to "provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health").

¹⁵⁹ DOE Addendum at 32.

¹⁶⁰ *Id.* at 44.

¹⁶¹ Allegheny April 1, 2015 Rehearing Request at 2, 12-14.

117. Further, Allegheny challenges the Commission's argument that gas drilling and the project are not casually related because natural gas development will continue with or without the project; Allegheny states that such argument is similar to the one rejected by the Eighth Circuit in *Mid States Coalition for Progress (Mid States)*.¹⁶² Overall, Allegheny claims that Commission staff conducted its environmental analysis using "tunnel vision" similar to the Corps' environmental analysis rejected by a district court in *Colorado River Indian Tribes v. Marsh (Colorado River)*.¹⁶³ Mr. Harckham argues that even if other pipelines may transport the capacity, which he states the final EIS fails to support, that does not alter the fact that the AIM Project has the potential to induce additional natural gas production and infrastructure development.

118. The record in this proceeding, including Algonquin's application, Spectra's marketing materials, and the presentation cited by Allegheny, does not demonstrate the requisite reasonably close causal relationship between the impacts of future natural gas production and the AIM Project that would necessitate further analysis. The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. This does not mean, however, that the Commission's approval of this particular pipeline project will cause or induce the effect of additional or further shale gas production.¹⁶⁴

119. As we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs, drive new drilling.¹⁶⁵ If the AIM Project was not

¹⁶² *Id.* at 11 (citing *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*)).

¹⁶³ *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985) (*Colorado River*).

¹⁶⁴ We note that our finding that we need not consider the environmental impacts of Marcellus shale region production when authorizing projects that may (or may not) make use of such supplies has been upheld in court. *See Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472 (2d Cir. 2012) ("FERC's analysis of the development of the Marcellus Shale natural gas reserves was sufficient. FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development are not sufficiently causally-related to the project to warrant a more in-depth analysis") (unpublished opinion).

¹⁶⁵ *See Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015) (*Rockies Express*). *See also Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Min. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil

(continued...)

constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.¹⁶⁶ Again, any such production would take place pursuant to the regulatory authority of state and local governments.¹⁶⁷

120. Further, future shale production is not an essential predicate for the AIM Project, which can receive natural gas through interconnections with other pipelines. The Algonquin pipeline system interconnects with the Texas Eastern Transmission pipeline system which spans an area from Texas to Illinois to Pennsylvania, crossing multiple other transmission systems and both shale and conventional gas plays, and with Maritimes' pipeline system, which transports onshore and LNG-source natural gas from Atlantic Canada to North American markets.

121. Allegheny asserts that the court's ruling in *Mid States* supports the contention that the Commission must analyze the effects of upstream gas drilling in the Marcellus and Utica shale formations. But *Mid States* involved the Surface Transportation Board's failure to analyze the downstream effects of a proposal to build and upgrade rail systems to reach coal mines in Wyoming's Powder River Basin.¹⁶⁸ The court found – and the project proponent did not dispute – that the proposed project would increase the use of coal for

production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Fla. Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

¹⁶⁶ See *Rockies Express*, 150 FERC ¶ 61,161 at 39.

¹⁶⁷ As reflected on a map in an attachment to Allegheny's request for rehearing, there are more than 217,000 miles of existing interstate gas transmission pipeline in the United States, and the Marcellus shale area is one of the regions with the greatest concentrations of interstate pipelines facilities. See Allegheny April 1, 2015 Rehearing Request at Attachment 2 "Natural Gas in the U.S.: Supply and Infrastructure = Security" at page 3 (slide presentation by Michael McGhee, Director of the Commission's Division of Pipeline Certificates, at October 2010 8th EU-US Energy Regulators Roundtable). Further, in some instances, producers proceed with the development of new wells that produce both oil and gas based on oil prices, and the associated gas production is flared because it is uneconomical to construct gathering lines to transport the gas to the pipeline grid.

¹⁶⁸ *Mid States* 345 F.3d at 550.

power generation. The court held that where such downstream effects are reasonably foreseeable, they must be analyzed, even if the extent of those effects is uncertain. Here, unlike *Mid States*, Allegheny asserts that construction of the AIM Project would increase production, rather than end use. And unlike *Mid States*, there is an insufficient causal link between our authorization of the project and any additional production. As we have explained, natural gas development will likely continue with or without the AIM Project. Thus, it is not merely the extent of production-related impacts that we find speculative, as was the case in *Mid States*, but also whether the project at issue will have any such impacts.

122. Similarly, we find *Colorado River* distinguishable. In *Colorado River*, a district court held that the Corps violated NEPA by not preparing a final EIS for a permit authorizing a developer to place riprap along a riverbank. The court stated that without the permit, the developer could not have received local government approval for its proposed residential and commercial development project along the riverbank.¹⁶⁹ The Corps originally prepared a draft EIS because proposed development along the banks would cause significant environmental impacts.¹⁷⁰ Before completing its final EIS, however, the Corps retracted its draft EIS because it determined that the appropriate scope of its environmental analysis should be limited to the activities within its jurisdiction, i.e., the river and the bank.¹⁷¹

123. The court disagreed, finding that the Corps violated NEPA because it narrowed the scope of its analysis to primary or direct impacts of its authorization, ignoring the indirect and cumulative effects analysis required by NEPA. Here, Commission staff analyzed the indirect and cumulative effects of the project. Commission staff did not analyze the effects of induced natural gas production because, unlike in *Colorado River*, there is no sufficient causal link between our authorization and any additional production. Natural gas development will likely continue with or without the AIM Project.

b. Lack of Reasonable Foreseeability

124. Allegheny and Mr. Harckham argue that induced production is a reasonably foreseeable effect of the AIM Project. Allegheny argues if gas production was not reasonably foreseeable, Algonquin would not be constructing the project. Allegheny contends that the March 3 Order misinterpreted NEPA case law when it found that natural

¹⁶⁹ 605 F. Supp. 1425, 1428.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

gas production activities were not reasonably foreseeable because Commission staff could only speculate on the exact location, scale, scope, and timing of production. Allegheny and Mr. Harchkam assert that speculation is implicit in NEPA. In support, Allegheny cites *Northern Plains*¹⁷² to argue that there is no need for Commission staff to know the exact location of production activities.

125. *Northern Plains* addresses the issue of whether the Surface Transportation Board should have considered the cumulative impacts of coal bed methane well development as part of its NEPA analysis of a proposed 89-mile-long rail line intended to serve specific new coal mines in three Montana counties. *Northern Plains* is distinguishable because, as part of an earlier, programmatic EIS, the BLM had already analyzed reasonably foreseeable coal bed methane well development, which provided the Surface Transportation Board with information about the timing, scope, and location of future coal bed methane well development. Here, the Commission has no similar information in the present case about the timing, location, and scope of future shale (or conventional) well development that might be associated with the proposed AIM Project. As the Commission stated in the March 3 Order, *Northern Plains* establishes that while agencies must engage in reasonable forecasting in considering cumulative impacts, NEPA does not require an agency to “engage in speculative analysis.”¹⁷³

126. Further, *Northern Plains* concerned the foreseeability of impacts from coal bed methane extracted from specific new coal mines in three Montana counties, which the proposed rail line intended to service. Here, Allegheny asks us to consider the impacts from all potential gas production activities in a multistate region, which may or may not produce gas to be transported using the capacity created by the AIM Project. As stated in *Northern Plains*, agencies are not required “to do the impractical, if not enough information is available to permit meaningful consideration.”¹⁷⁴ A broad analysis, based on generalized assumptions rather than reasonably specific information of this type, will not meaningfully assist the Commission in its decision making, e.g., evaluating potential alternatives.

¹⁷² 668 F.3d 1067 (9th Cir. 2013).

¹⁷³ *Id.* at 1078.

¹⁷⁴ *Id.* (citing *Env'tl. Protection Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)).

4. Cumulative Effects

127. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions”¹⁷⁵ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

128. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”¹⁷⁶ CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”¹⁷⁷ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”¹⁷⁸ An agency’s analysis should be proportional to the magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.

a. Cumulative Effects of Induced Production

129. As we have explained, consistent with CEQ guidance, in order to determine the scope of a cumulative impacts analysis for each project, Commission staff establishes a geographic scope within which various resources may be affected by both a proposed project and other past, present, and reasonably foreseeable future actions.¹⁷⁹ While the scope of our cumulative impacts analysis will vary from case to case, depending on the

¹⁷⁵ 40 C.F.R. § 1508.7 (2015).

¹⁷⁶ *Kleppe*, 427 U.S. 390 at 413.

¹⁷⁷ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (January 1997) (1997 CEQ Guidance), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf.

¹⁷⁸ *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

¹⁷⁹ See, e.g., *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

facts presented, we have concluded that, where the Commission lacks meaningful information regarding potential future natural gas production within a geographic scope, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.¹⁸⁰

130. Here, Commission staff established a geographic scope for the inclusion of other projects or activities based on the resources affected. To the extent production occurs outside of the AIM Project's geographic scope for cumulative impacts, the final EIS and the March 3 Order concluded that the potential environmental effects associated with shale production were not sufficiently reasonably foreseeable to warrant a detailed analysis for cumulative impacts.¹⁸¹

131. Allegheny, Coalition, and Mr. Harckham contend that the Commission unjustifiably restricts the cumulative impacts analysis. Citing various Commission natural gas proceedings, Allegheny states that such restriction is routine for the Commission and demonstrates that the Commission ignores the majority of the AIM Project impacts.¹⁸²

132. Allegheny asserts that the Commission misread the 1997 CEQ Guidance to limit the scope of the cumulative impact analysis to an arbitrarily narrow geographic scope.¹⁸³ Allegheny notes that the 1997 CEQ Guidance contrasts between a project-specific analysis, for which it is often appropriate to analyze effects within the immediate area of the proposed action, and an analysis of the proposed action's contribution to cumulative effects, for which "the geographic boundaries of the analysis almost always should be expanded."¹⁸⁴ Similarly, Coalition and Mr. Harckham assert that the EPA stated geographic proximity is not the standard for NEPA's requirement to consider impacts that have a reasonably close relationship to the federal action.

¹⁸⁰ *Id.* P 120.

¹⁸¹ March 3 Order, 150 FERC ¶ 61,163, at PP 116, 123. We note that production would occur well over 10 miles from the AIM Project construction area, outside of the sub-watersheds crossed by the AIM Project facilities, and outside of the Air Quality Control Regions for the AIM Project compressor stations. *See* final EIS at 4-290.

¹⁸² Allegheny April 1, 2015 Rehearing Request at 15-16.

¹⁸³ *Id.* at 15.

¹⁸⁴ *Id.* (citing 1997 CEQ Guidance at 12).

133. To bolster their argument that the Commission should have considered as cumulative effects the impacts of Marcellus and Utica shale production activities, rehearing applicants cite various cases. Allegheny and Coalition cite *LaFlamme v. FERC* (*LaFlamme*) to argue that the Commission cannot consider the cumulative impacts of the AIM Project in isolation.¹⁸⁵ Allegheny cites *Natural Resources Defense Council, Inc. v. Hodel* (*Hodel*)¹⁸⁶ to argue that the Commission must consider ‘inter-regional’ impacts of Marcellus and Utica shale development activities. Allegheny also cites *Northern Plains* to argue that projects need not be finalized before they are reasonably foreseeable and that even if the Commission does not know the extent of natural gas production activities, the Commission is aware of its nature and cannot arbitrarily narrow its cumulative impacts analysis. In addition to case law, Allegheny references various recent research that identifies the “substantial impact” that shale gas drilling will have throughout the Marcellus and Utica shale formations, obligating the Commission under NEPA to take a hard look at these impacts on a broader scale.¹⁸⁷

134. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.¹⁸⁸ The agency should then establish the geographic scope for analysis.¹⁸⁹ Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project’s direct and indirect impacts.¹⁹⁰ Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.¹⁹¹ As noted above, CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.¹⁹²

¹⁸⁵ *LaFlamme v. FERC*, 852 F.2d 389 (9th Cir. 1988).

¹⁸⁶ *Nat. Res. Def. Council, Inc. v. Hodel* 865 F.2d 288 (D.C. Cir. 1998) (*Hodel*).

¹⁸⁷ Allegheny April 1, 2015 Rehearing Request at 24-26.

¹⁸⁸ 1997 CEQ Guidance at 11.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005) (2005 CEQ Guidance), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-

135. The cumulative effects analysis in the EA took precisely the approach the CEQ guidance advises.¹⁹³ Because impacts on geology and soils, land use, residential areas, visual resources, cultural resources, and traffic by the AIM Project will be highly localized, the final EIS evaluated other projects within 0.25 mile of the construction work areas.¹⁹⁴ Similarly, impacts on waterbody and wetland crossings as well as on groundwater, vegetation, and wildlife by the AIM Project will occur in close proximity to the project. Therefore, the final EIS evaluated other projects within the sub-watersheds crossed by the AIM Project.¹⁹⁵ Likewise, long-term noise impacts from the AIM Project compressor stations will only occur within one mile of each station. Thus, the final EIS evaluated other projects that will result in long-term impacts on noise affecting the same noise-sensitive areas as the AIM Project compressor stations.¹⁹⁶

136. With respect to operational air quality impacts, the final EIS acknowledged that the AIM Project compressor stations will result in long-term impacts on air quality in various Air Quality Control Regions. Therefore, the final EIS also considered other projects with the potential to result in long-term impacts on air quality (e.g. natural gas compressor stations or industrial facilities) within the Air Quality Control Regions that will also be impacted by an AIM Project compressor station.¹⁹⁷

137. For these reasons, we find that the final EIS identified the appropriate geographic scope for considering cumulative effects, and properly excluded from its cumulative impacts analysis the impacts from shale gas drilling in the Marcellus and Utica shale

[PastActsCumulEffects.pdf](#). The 2005 CEQ Guidance notes that agencies have substantial discretion in determining the appropriate level of their cumulative impact assessments and that agencies should relate the scope of their analyses to the magnitude of the environmental impacts of the proposed action. Further, the Supreme Court held that determination of the extent and effect of cumulative impacts, “and particularly identification of the geographic area within which they occur, is a task assigned to the special competency of the agenc[y],” and is overturned only if arbitrary and capricious. *See Kleppe*, 427 U.S. 390, 414-15 (1976).

¹⁹³ We note that the 1997 CEQ Guidance at 15 states that the “applicable geographic scope needs to be defined case-by-case.”

¹⁹⁴ *See* final EIS at 4-293.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

formations. Such impacts will occur far outside the AIM Project's geographic scope.¹⁹⁸ Further, given the large geographic scope of the Marcellus and Utica shale, the magnitude of the impacts of gas drilling in the Marcellus and Utica shale formations bears no relationship to the limited magnitude of Algonquin's instant proposal, which involves temporary construction impacts on 575.6 acres and permanent impacts to 42.4 acres of land within a mixed use area of mostly forest and open land.

138. In our view, Allegheny's arguments regarding the geographic scope of our cumulative impacts analysis are based on its erroneous claim that the Commission must conduct a regional programmatic NEPA review of natural gas development and production in the Marcellus and Utica shale formations, an area that covers potentially thousands of square miles. We decline to do so. As the Commission explained in other proceedings,¹⁹⁹ there is no Commission program or policy to promote additional natural gas development and production in shale formations.

139. We also disagree with Allegheny's argument that the Commission's use of a project geographic scope is inconsistent with CEQ regulations. Our cumulative impacts analyses consider the additive impact of a proposed action's direct and indirect effects with other past, present, or reasonably foreseeable actions that have impacts occurring in the same region, and within the same time span, as the impacts of the proposed action.²⁰⁰ We believe this is consistent with the CEQ's Guidance.

140. Allegheny's and Coalition's reliance on *LaFlamme* is misplaced, as that case in fact supports the Commission's use of a geographic scope and an analysis of cumulative impacts limited to those impacts occurring in the area of the project at issue. In *LaFlamme*, the court found that in preparing an EA for the Sayles Flat Project, a hydroelectric project on the American River in California, the Commission failed to consider the cumulative impacts of other projects on the American River because it had relied on a previous EIS for another project on the river, which had limited its review to assessing the impact of that project's diversion dams and other proposed facilities in that project's area. Thus, the court criticized the Commission's use of the "narrow analysis" of

¹⁹⁸ See *id.* at 4-290.

¹⁹⁹ See, e.g., *Columbia Gas Transmission, LLC*, 153 FERC ¶ 61,064 at P 44; *Dominion Transmission, Inc.*, 152 FERC ¶ 61,138, at P 32 (2015).

²⁰⁰ See final EIS at 4-282 to 4-304.

another project's EIS as a substitute for the analysis required for the Sayles project.²⁰¹ The court in *LaFlamme* did not fault the Commission for limiting its cumulative impacts analysis for the Sayles Flat Project to the cumulative effects of dams and facilities in the area of the project. If anything, *LaFlamme* supports identifying a geographic scope appropriately connected to the location of the project under review.

141. Similarly, Allegheny's reliance on *Hodel* is unavailing. In *Hodel* the court considered the U.S. Department of the Interior's (Interior) EIS composed in conjunction with its plan to award five-year leases for hydrocarbon exploration and production on multiple offshore blocks. The court found that the EIS focused primarily on assessing impacts associated with the region proximate to each lease block, and thereby failed to capture potential inter-regional cumulative impacts on migratory species if exploration and production were to take place simultaneously on several lease blocks within the species' migratory range. *Hodel* considered a plan for resource-development leasing over a vast geographic area (including the North Atlantic, North Aleutian Basin, Straits of Florida, Eastern Gulf of Mexico, and waters off California, Oregon, and Washington). In contrast, the 'plan' before us involves construction of approximately 37 miles of pipeline and related facilities in New York, Connecticut, and Massachusetts, and the addition of a compression at six existing compressor stations. Because we find the proposal will have no reasonably foreseeable impacts on shale development, we find no reason to adopt a geographic scope for reviewing cumulative impacts that would include, as Allegheny urges, all the "the Marcellus and Utica shale gas extraction."²⁰²

142. Interior's leasing of large tracts in federal waters in *Hodel* is also dissimilar from the Commission's case-by-case review of individual and independent infrastructure projects. Whereas mineral leases, especially those that cover extensive and contiguous areas, establish the location and time frame for future development, the Commission does not permit, and indeed has no jurisdiction over, activities upstream of the point of interconnection with an interstate pipeline, e.g., leasing, exploration, production, processing, and gathering. To the extent the court in *Hodel* was persuaded by an earlier Supreme Court statement that under NEPA ". . . proposals for . . . related actions that will have cumulative or synergistic environmental impact upon a region *concurrently pending before an agency* must be considered together,"²⁰³ production and gathering activities in

²⁰¹ *LaFlamme*, 852 F.2d 389 at 399, 401-02 ("At no point did the [[Upper Mountain Project] EIS analyze the effects other projects, pending or otherwise, might have on this section of the American River Basin.")

²⁰² Allegheny April 1, 2015 Rehearing Request at 24.

²⁰³ *Hodel*, 865 F.2d at 297 (citing *Kleppe*, 427 U.S. at 410) (emphasis added).

the Marcellus and Utica shale areas are not related actions concurrently pending before the Commission. Thus, there is no way to relate any specific production and gathering activities to this project.

b. Other Cumulative Effects

143. Rehearing applicants claim that the final EIS did not adequately analyze the cumulative effects of the AIM Project when added to the Atlantic Bridge Project; the Access Northeast Project; the Champlain Hudson Power Express Project – a proposed 330-mile 1,000 MW subterranean transmission line from Quebec, Canada, to Astoria, New York; and the West Point Transmission Project – a 1,000-megawatt underwater power cable proposed by West Point Partners to bring untapped power from northern and western New York State to the New York City area. Further, Mr. Harckham states that the final EIS inappropriately found that the cumulative effects of the AIM Project when added to the Atlantic Bridge Project would be mitigated based on conditions imposed by state permitting authorities.

144. We disagree and affirm the final EIS’s cumulative effects analysis. The final EIS considered the cumulative effects of the Atlantic Bridge Project using the preliminary details available at the time, provided by Algonquin.²⁰⁴ The final EIS found that if the Atlantic Bridge Project moved forward based on the preliminary details, it would impact resources in many of the same areas as the AIM Project and the levels of impact would be similar to those of the AIM Project. The final EIS explained, however, that these impacts would not occur at the same time. The AIM Project would be constructed in 2015 and 2016, and the areas disturbed by the AIM Project would be restored before construction would start on the Atlantic Bridge Project, which at its earliest would be in 2017. As stated above, however, since the issuance of the final EIS, Algonquin has reduced the size, and thus minimized the impacts, of the Atlantic Bridge Project. Therefore, the final EIS’s cumulative effects analysis of the Atlantic Bridge Project is cautiously inclusive as many impacts would no longer occur.

145. The final EIS also properly considered the cumulative impacts of the Access Northeast Project. As required by CEQ regulations,²⁰⁵ the final EIS explained that project details regarding the Access Northeast Project were unknown. The only information

²⁰⁴ See final EIS at 5-18.

²⁰⁵ 40 C.F.R. § 1502.22 (2015) (“When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.”).

available on the Access Northeast Project was the preliminary information on Spectra's website, which merely indicated that the project would be located in the New England region.²⁰⁶ Without more detail on project facilities or locations, Commission staff could not determine whether the Access Northeast Project would result in cumulative impacts within the same project area or geographic scope as the AIM Project.²⁰⁷ In any event, Algonquin's pre-filing request for the Access Northeast Project indicates that the construction of the AIM Project and the Access Northeast Project will not overlap in time. Algonquin intends to begin constructing the Access Northeast Project in March 2018²⁰⁸ whereas it plans to complete construction of the AIM Project in 2016. Should Algonquin file an application for the Access Northeast Project, Commission staff will then evaluate the cumulative impacts of the project when added to the existing environment, including impacts from the AIM Project.

146. We also find that the final EIS adequately analyzed the added effects of the Champlain Hudson Power Express Project. The final EIS identified potential overlap in construction timing of the Champlain Hudson Power Express Project and the AIM Project, which could result in increased traffic and noise impacts. The final EIS also noted that there would be no cumulative impact on the Hudson River, as Algonquin would utilize the HDD method for crossing the Hudson River to avoid in-water work.²⁰⁹ Further, the Champlain Hudson Power Express and AIM Projects have been designed to utilize existing rights-of-way to the extent practical in the area near the Hudson River to avoid additional impacts. The final EIS acknowledged that while cumulative impacts would result, the AIM Project impacts would be temporary.

147. Lastly, the final EIS adequately analyzed the cumulative effects of the AIM Project when added to the West Point Transmission Project. The final EIS stated that West Point Partners modified the alignment of the transmission line to closely parallel the AIM Project to reduce impacts on residential areas and shorten construction timing.²¹⁰ The final EIS also evaluated the safety concerns of electrical arcing between the West Point

²⁰⁶ See final EIS at 4-290.

²⁰⁷ See *id.* at 4-283 (defining the geographic region considered for each resource where cumulative impacts could occur).

²⁰⁸ Algonquin's November 3, 2015 Request for Approval to Use the Pre-Filing Process for the Access Northeast Project at Attachment 5, page 12.

²⁰⁹ See final EIS at 4-150.

²¹⁰ See *id.* at 4-152.

Transmission Project and the AIM Project, concluding that safety issues would not occur.²¹¹ The cumulative impacts assessed, however, will likely not transpire. The West Point Transmission Project application with the New York Public Service Commission has been suspended until West Point Partners files an application amendment that identifies alternative sites for the southern converter station. Therefore, it is speculative to assume when or if the West Point Transmission Project will proceed.

5. Water Quality and Wetlands

a. Stormwater Runoff

148. Riverkeeper argues that the final EIS failed to meaningfully evaluate the impacts from increased stormwater runoff likely to be caused by the AIM Project, particularly within the watersheds that supply water to New York City, i.e. Croton, Catskill, and Delaware supply systems. Riverkeeper recommends that the final EIS contain a detailed stormwater pollution prevention plan (stormwater plan).

149. We disagree. The EIS evaluates all potential project impacts on resources, including from runoff associated with the project during storm events and trench and hydrostatic test dewatering. The EIS also identifies measures to reduce runoff-related impacts.²¹² Several measures are in our *Upland Erosion Control, Revegetation, and Maintenance Plan (Plan)* and *Wetland and Waterbody Construction and Mitigation Procedures (Procedures)*, which Algonquin incorporated into its Erosion and Sediment Control Plan, including temporary and permanent erosion and sediment control measures along the right-of-way and project work areas, and the inspection and maintenance of the erosion control measures daily, weekly, and within 24 hours of each 0.5 inch rainfall event.²¹³ Based on these and other measures identified within Algonquin's Erosion and Sediment Control Plan, Commission staff determined that the impacts associated with runoff (regardless of source) could be adequately mitigated.

150. Furthermore, impacts will be reduced by implementing additional site-specific measures stipulated in state water quality permits and stormwater plans developed in consultation with the applicable state agencies. As discussed in the final EIS,²¹⁴

²¹¹ See *id.* at 4-276.

²¹² See final EIS at 4-22 to 4-25.

²¹³ See FERC, *Upland Erosion Control, Revegetation, and Maintenance Plan*, at 6 (2013), <http://www.ferc.gov/industries/gas/enviro/guidelines/upland-pocket-guide.pdf>.

²¹⁴ See final EIS at 1-9, 4-40.

Algonquin filed a stormwater plan with the New York State Department of Environmental Conservation (New York DEC) in December 2014 and has been working with the New York City Department of Environmental Protection (NYCDEP) to ensure that the stormwater plan addresses NYCDEP's requirements for constructing within a New York City watershed. The New York DEC filed comments stating that with implementation of Algonquin's protection measures, the construction and operation of the AIM Project will not significantly impact surface water resources, including the Croton, Catskill, and Delaware water supply systems, or groundwater resources, that supply New York City.²¹⁵ On October 22, 2015, Algonquin filed a supplement to its implementation plan identifying that it had received all of its stormwater plan approvals. Thus, we find that the final EIS adequately assessed stormwater effects, and that requiring Algonquin to file a stormwater plan would be unnecessary and duplicative.

b. West Roxbury Lateral Water Crossings

151. West Roxbury Intervenors state that the Commission erroneously accepted Algonquin's statement that it will be a "faithful steward of the environment" and that the West Roxbury Lateral will not impact water bodies, wetland, or watershed protection areas in Massachusetts.²¹⁶ To counter Algonquin's statement, West Roxbury Intervenors state, without more, that the West Roxbury Lateral will cross Mother Brook Reservation and the Charles River Basin.

152. A pipeline crossing a water body does not mean that water bodies, wetlands, or watershed protection areas will be adversely affected. In this case, the final EIS states that the West Roxbury Lateral will not affect any watershed protection areas or wetlands in Massachusetts.²¹⁷ While the lateral will cross water bodies, adverse impacts to these areas will be minimized and mitigated to the extent practicable through avoidance and minimization measures.

153. For example, Algonquin must comply with all appropriate federal permits and authorizations, including the Clean Water Act, which protects water resources.²¹⁸ Environmental Condition 9 requires Algonquin to file with the Commission documentation

²¹⁵ See *id.* at ES-4; New York State Department of Environmental Conservation May 15, 2015 Response to Comments at 17.

²¹⁶ West Roxbury Intervenors April 2, 2015 Rehearing Request at 21.

²¹⁷ See final EIS at 4-29, 4-59.

²¹⁸ March 3 Order, 150 FERC ¶ 61,163, at P 73.

showing that Algonquin has received all applicable authorizations required under federal law, or evidence of waiver thereof. Accordingly, the Commission will not authorize Algonquin to start construction until and unless Algonquin has received the applicable authorizations to protect water resources. Algonquin will also implement its Erosion and Sediment Control Plan that includes certain wetland protection and restoration measures. Further, Algonquin must comply with Environmental Conditions 16, 17, 18, and 19 of the March 3 Order that apply to horizontal directional drill (HDD) crossings, vernal pools, and wetlands.

154. To ensure Algonquin complies with these measures and conditions, Algonquin will participate in a third-party monitoring program. This program includes an on-site compliance monitor that, at the Commission's direction, inspects Algonquin's construction activities daily and ensures compliance with Algonquin's plans and the March 3 Order certificate conditions. If Algonquin fails to comply, it is subject to the potential assessment of general and civil penalties.²¹⁹

c. Supplemental EIS for Condition 16

155. The Commission received several comments on the draft EIS regarding what would happen in the event that the HDD method is unsuccessful for crossing the Hudson River in New York or Still River in Connecticut. In response to these comments, Commission staff proposed an environmental recommendation that would require Algonquin to file with the Commission's Secretary a site-specific plan for an alternative crossing method in the event that the HDD method is unsuccessful. The March 3 Order adopted this recommendation as Environmental Condition 16.²²⁰

156. Riverkeeper, Coalition, and Town of Cortlandt argue that an alternate crossing method would result in "substantial changes in the proposed action" or "significant new circumstances or information" requiring a supplemental environmental review under NEPA.²²¹ Because Environmental Condition 16 does not require supplemental

²¹⁹ See 15 U.S.C. §§ 717t; 717t-1 (2012).

²²⁰ See March 3 Order, 150 FERC ¶ 61,163, at Environmental Condition 16. Environmental Condition 16 also requires Algonquin to file its alternative crossing method plan with its application to the Corps for a Clean Water Act section 404 permit and to other applicable agencies for a permit to construct.

²²¹ Riverkeeper April 2, 2015 Rehearing Request at 24-25 (citing 40 C.F.R. § 1502.9(c)(1); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989)).

environmental review for an alternative crossing plan, they argue that the Commission violated NEPA.

157. The HDD method has not proven unsuccessful, and Algonquin has not proposed an alternative crossing method. Because there is no alternative crossing plan before the Commission, the Commission cannot determine whether the alternative crossing plan would substantially change the proposed action, or involve new significant circumstances or information. The claim that the Commission must mandate supplemental environmental review is therefore not ripe. In the event that Algonquin files an alternative crossing plan for either the Hudson or Still Rivers, staff will at that time evaluate whether it needs to conduct a supplemental EIS to comply with NEPA.

6. Blue Mountain Reservation

158. The AIM Project will replace pipeline segments (Mile Post (MP) 6.7 to 8.1 and MP 8.4 to 8.5) that pass through the Blue Mountain Reservation, a 1,538 acre county-owned park and biodiversity hub located in Westchester County, New York. Algonquin will install the new pipeline in the same trench of the existing pipeline to be removed using additional temporary work space that extends beyond its existing 75-foot maintenance easement.

159. Mr. Harckham and Coalition argue that the final EIS failed to adequately evaluate the impacts that will occur in the Blue Mountain Reservation. Coalition states that Westchester County's easement proceedings²²² and a court's eminent domain proceedings will be hindered because the final EIS did not adequately consider wetlands, biodiversity, endangered species, historical and tribal resources, and recreation within the Blue Mountain Reservation. Therefore, Coalition asserts that the Commission cannot confer eminent domain powers until it completes a full environmental review. In addition, Coalition argues that the Commission does not support its conclusion that the AIM Project will not substantially alter local wildlife populations in Reynolds Hills, a neighborhood abutting the Blue Mountain Reservation.

160. Coalition cites the report prepared by Eric Kiviat, Ph.D. (Kiviat Report), which, as discussed in the March 3 Order, describes the existing habitat and potential plants and animals of conservation concern within the Blue Mountain Reservation and the Reynolds Hills residential area.²²³ Coalition argues that because the Kiviat Report identifies

²²² Coalition specifically references the requirement in New York State for counties to seek approval from the New York State Legislator to alienate parkland, which we discussed above in paragraph 31.

²²³ See March 3 Order, 150 FERC ¶ 61,163, at P 138.

discrepancies regarding impacts to special status species, the Commission should conduct additional studies.

161. Mr. Harckham adds that the final EIS should have provided an adequate inventory of the flora and fauna or wetlands. Mr. Harckham also argues that the final EIS failed to evaluate whether the AIM Project requires the additional temporary workspace that extends beyond Algonquin's existing 75-foot right-of-way.

162. As an initial matter, we note that the Commission itself does not confer eminent domain powers. Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, under NGA section 7(h), a certificate holder is authorized by Congress to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.²²⁴

163. In any event, the final EIS and the March 3 Order adequately evaluated impacts that will occur within the Blue Mountain Reservation.²²⁵ The final EIS explained that overall impacts would be minimized because the pipeline would be installed within the existing pipeline trench. Construction noise, dust, tree clearing, and traffic would temporarily impact the Blue Mountain Reservation during project construction. Visual impacts for recreational and aesthetic users, however, would be largely screened by the surrounding woodlands. Algonquin would inform the public before commencing construction activities. Although long-term impacts associated with tree clearing would occur, they would not be permanent.

164. The final EIS identified the existing wetlands in the drainage area of Dickey Brook near Reynolds Hills and within the Blue Mountain Reservation, disclosed the potential impacts on wetlands, and analyzed mitigation measures identified during project review.²²⁶ The final EIS explained that Algonquin would mitigate unavoidable construction-related impacts on wetlands associated with the AIM Project by implementing the wetland protection and restoration measures contained in its Erosion and Sediment Control Plan.

165. The final EIS also adequately evaluated impacts on wildlife in Blue Mountain Reservation and Reynolds Hills. The final EIS listed common wildlife species associated

²²⁴ 15 U.S.C. § 717f(h) (2012).

²²⁵ See final EIS at 4-160 to 4-161.

²²⁶ See *id.* at 4-61 to 4-74.

with the vegetative cover types found within the project area,²²⁷ described migratory bird priority species and associated habitats,²²⁸ and discussed common vegetative species associated with identified cover types.²²⁹ The March 3 Order stated that Algonquin consulted with the appropriate jurisdictional agencies to identify special status species that may occur within the project area, including the New York DEC's New York Natural Heritage Program and the U.S. Fish and Wildlife Service (FWS). The March 3 Order also stated that qualified wetland scientists already conducted full wetland delineations for the project area in accordance with the Corps' wetland delineation manuals.²³⁰

166. A site-specific inventory of the flora and fauna within the Blue Mountain Reservation in addition to the final EIS's analysis is unwarranted. Such inventory would not produce new information that would necessitate a change in our analysis and conclusions. Nor do Dr. Kiviat's observations necessitate additional surveys within the Blue Mountain Reservation.²³¹ Dr. Kiviat's observations are merely conflicting views. The Supreme Court has noted that "[w]hen specialists express conflicting views an agency must have discretion to rely on the reasonable opinions of its own qualified experts"²³²

167. We also find that the final EIS adequately evaluated the need for Algonquin's additional temporary workspace in the Blue Mountain Reservation. The final EIS explained that for replacement segments of the AIM Project, Algonquin would need a 100-foot-wide construction right-of-way to safely pass equipment and materials needed to

²²⁷ See *id.* at Appendix N.

²²⁸ See *id.* at Appendix O.

²²⁹ See *id.* at section 4-75 to 4-86.

²³⁰ See March 3 Order, 150 FERC ¶ 61,163, at PP 140-42.

²³¹ See March 3 Order, 150 FERC ¶ 61,163, at P 139.

²³² *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). See also *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993) ("We defer to agency expertise on questions of methodology unless the agency has completely failed to address some factor"); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) ("although [the petitioner] has demonstrated that some scientists dispute the Service's analyses and conclusions, such a showing is not a sufficient basis for us to conclude that the Service's action was arbitrary and capricious. If it were, agencies could only act upon achieving a degree of certainty that is ultimately illusory").

remove the existing pipeline and install the new large-diameter pipeline.²³³ The final EIS explained that while the construction right-of-way would generally be reduced in wetlands to 75 feet, certain wetland locations would require additional workspace. Algonquin identified six wetland locations within Blue Mountain Reservation where additional workspace would be needed to store spoil from saturated subsoil and accommodate heavy equipment that would be used to install large diameter pipe.²³⁴ We agree with Commission staff's determination that Algonquin sufficiently justified the use of additional workspace in those wetland areas.

7. Traffic, Noise, and Visual Impacts

168. West Roxbury Intervenors argue that the Commission inadequately considered traffic, noise, and visual impacts. Without explanation, West Roxbury Intervenors quote sentences from the final EIS that discussed project impacts to land use and safety.

169. We deny rehearing on these issues. The final EIS addressed traffic impacts in sections 4.9.5 and 4.9.6 and Appendix G, Traffic Management Plans, finding that the impacts on traffic during construction along the West Roxbury Lateral would result in localized, unavoidable significant adverse impacts at one intersection.²³⁵ With the implementation of Algonquin's *Updated Traffic Management Assessment and Plans for the West Roxbury Lateral*, however, impacts resulting from in-street construction would be minimized to the extent possible and impacts at all other locations along the West Roxbury Lateral would be reduced to less than significant levels.

170. The final EIS addressed noise impacts, including construction traffic noise, in section 4.11.2 of the final EIS.²³⁶ As West Roxbury Intervenors acknowledge, the final EIS also disclosed that the West Roxbury Meter Station could result in some visual impacts,²³⁷ which the March 3 Order required Algonquin to mitigate.²³⁸

²³³ See final EIS at 2-11.

²³⁴ See at table 4.4.4-1.

²³⁵ See *id.* at 4-185 to 4-193, Appendix G.

²³⁶ See *id.* at 4-245 to 4-263.

²³⁷ See *id.* at 4-173 to 4-175.

²³⁸ See March 3 Order, 150 FERC ¶ 61,163, at Environmental Condition 24.

8. Property Values and Homeowners Insurance

171. Coalition contends that the Commission inadequately supported its conclusion that the AIM Project will not diminish property values or increase the cost of homeowners' insurance. In support, Coalition cites *Constitution Pipeline Co., LLC (Constitution)*²³⁹ where the Commission required Constitution to monitor project impacts on property insurance rates.

172. We affirm the final EIS's assessment of impacts on property values and homeowner insurance. Commission staff found that property values will not be devalued by a pipeline easement as the majority of the project's pipeline segments will replace existing pipeline in the same location, and will not require a new pipeline easement.²⁴⁰ While the West Roxbury Lateral will require new permanent pipeline easements, the new pipeline will predominantly be located on public property or within streets that have an existing distribution pipeline, and thus, will not require a new pipeline easement on private properties. For any new easements, Algonquin will compensate the landowners for the temporary loss of land use and any damages. In addition, affected landowners who believe that their property values have been negatively impacted can appeal to local tax agencies for reappraisal and potential tax reductions.

173. The final EIS also concluded that it is unlikely that homeowners' insurance rates would be affected by the AIM Project because insurance advisors, consulted on other natural gas pipeline projects reviewed by the Commission, indicated that pipeline infrastructure does not affect homeowner insurance rates.²⁴¹ Commission staff appropriately did not recommend that Algonquin monitor homeowner insurance complaints as it did in *Constitution*. In *Constitution* the applicant proposed an entirely greenfield pipeline affecting new landowners, and thus, staff was uncertain on how the project would affect homeowner insurance. In contrast, the majority of the AIM Project is replacement pipeline, and thus landowners' homeowners insurance would have already been affected. While the West Roxbury Lateral is a new pipeline, adjacent landowners' homeowners insurance would also likely not change because the pipeline would primarily be located on public land or within streets, not on private property subject to homeowners insurance, and their property already abuts an existing distribution pipeline.

²³⁹ *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014).

²⁴⁰ See final EIS at 4-193 to 4-194.

²⁴¹ See *id.* at 4-194.

174. Therefore, we find that the final EIS fully considered the impacts that the AIM Project will have on property values and homeowners insurance.

9. Environmental Justice

175. Coalition argues that the final EIS failed to adequately consider whether the AIM Project would cause disparate health impacts to two environmental justice communities – City of Peekskill, New York, and Town of West Roxbury, Massachusetts. Specifically, Coalition appears to contend that our environmental justice analysis did not account for existing air quality, noise, and traffic impacts affecting the environmental justice communities. Coalition adds that the Commission did not provide meaningful opportunities for these communities to participate in this proceeding.

176. The final EIS's consideration of environmental justice matters is consistent with NEPA and CEQ regulations. The final EIS evaluated the impacts on environmental justice communities of Peekskill and West Roxbury by analyzing the existing environment and the cumulative impacts of the AIM Project when added to other reasonably foreseeable actions in the geographic scope of the project.²⁴² Based on the information gathered, the final EIS concluded that the AIM Project would not result in any disproportionately high or adverse environmental and human health impacts on minority or low-income communities, or Indian tribes. The EPA's comments on the draft EIS affirm this finding.²⁴³ Moreover, as we stated in prior cases, the siting of linear facilities between two fixed end points is generally based on environmental and engineering factors with no regard to demographics.²⁴⁴

177. With respect to public participation, ample opportunity was provided for meaningful community involvement. All public documents, notices, and meetings were readily available to the public during our review of the AIM Project. Coalition argues that the Commission should have issued notices in Spanish during the scoping and commenting process. Notwithstanding that Coalition does not explain how it was harmed by this, it

²⁴² See final EIS at 4-200.

²⁴³ In the comments it filed on the draft EIS, EPA states, "The [draft EIS] does a good job of identifying [] impacts and construction mitigation measures to address impacts to Environmental Justice populations along the route. In general, we agree with the conclusion provided in the [draft EIS] that the impacts to low income and minority populations along the route will not be disproportionate." EPA September 29, 2014 Comments on Draft EIS at 7.

²⁴⁴ See, e.g., *Trunkline Gas Co.*, 94 FERC ¶ 61,381, at P 11 (2001).

was unclear what language other than English was dominant given that the AIM Project crosses multiple ethnicities and socioeconomic backgrounds. Further, Algonquin translated several fact sheets on its website into Spanish, simplified Chinese, and Traditional Chinese.

10. Air Quality

178. Several rehearing applicants raise various arguments challenging the final EIS's analysis of air emissions and impacts generally, greenhouse gas emissions, and radon.

a. Air Emissions and Impacts

179. Mr. Harckham argues that the Commission failed to present a baseline analysis of existing emissions and public health, and should have performed a health impact assessment for project emissions. Mr. Harckham asserts that the final EIS used conventional dispersion modeling and published emission factors that do not adequately account for sensitive populations, peak impacts, site-specific conditions, and the characteristic of Marcellus shale gas that will be transported.

180. Coalition argues that the final EIS's conclusion that the AIM Project will not adversely affect air quality is unsupported because the Southeast Compressor Station air permit allows Algonquin to emit from the compressor station more than it actually emitted in 2013. In addition, Coalition argues that the final EIS did not evaluate ozone impacts from constructing the West Roxbury Lateral.

181. We disagree. The final EIS identified the existing baseline conditions, including: ambient air quality monitoring data over a three-year period, the attainment status of all project areas for each pollutant (with emphasis on areas currently not in compliance with the National Ambient Air Quality Standards (NAAQS)), and the existing emissions from each compressor station.²⁴⁵ The final EIS also presented the results of air quality modeling performed for each compressor station. This modeling was based on site-specific terrain and meteorological data for the Stony Point and Southeast Compressor Stations and worst case inputs for all other compressor stations. Further, Commission staff included both short-term (peak) and long-term (average) impacts, and compared the results with the NAAQS.

182. As stated in the March 3 Order, a health impact assessment would be redundant. The EPA developed each NAAQS to protect human health, including that of sensitive populations (e.g., asthmatics, those with cardiovascular disease, children, the elderly, etc.)

²⁴⁵ See final EIS at 4-217 to 4-234.

to account for the latest research on health impacts. EPA has also established multiple standards for different pollutants to address both long-term chronic exposure and short-term exposures (e.g., 1-hour or 24-hour) and standards for hazardous air pollutant (HAP) emissions for specific source categories under the Clean Air Act. The final EIS explained that the AIM Project will result in continued compliance with the NAAQS.²⁴⁶ We find no basis to duplicate work already performed under EPA rulemakings that were subject to public comment.

183. Moreover, Algonquin also conducted a screening analysis per the guidance in New York DEC's Policy DAR-1. This analysis showed that the model-predicted output concentrations from the two compressor stations located in New York (i.e., Southeast Compressor and Stony Point Compressor Stations) are below New York's health effect-based annual and short-term (1 hour) guideline concentrations that were established to protect public health.

184. Coalition's conclusion that the Southeast Compressor Station will emit more pollutants is erroneous. The final EIS compared the maximum potential emissions of the existing compressor stations with the maximum potential emissions from these stations after modifications, and concluded that emissions would decrease for several pollutants at the Southeast and Stony Point Compressor Stations. In comparison, Coalition likens past actual emissions with the maximum potential future emissions, even though they are not directly comparable. The presented project emissions represent continuous operation (8,760 hours per year) of the emission sources at their full capacity.²⁴⁷ Past actual emissions are based on the actual load conditions and operating hours, which may be notably lower than those used to estimate the potential to emit. The existing and modified facilities are permitted to operate at full capacity and 8,760 hours per year at any point in time. Therefore, we affirm the comparison that the final EIS performed. Further, the final EIS's air quality modeling results demonstrated that operating the project facilities (at their full capacity and 8,760 hours per year) would not violate the NAAQS.²⁴⁸

185. Coalition's argument regarding ozone impacts is similarly lacking. The final EIS identified that the West Roxbury Lateral will be located within an ozone nonattainment area.²⁴⁹ Further, the final EIS discussed stationary equipment operating emissions and

²⁴⁶ See *id.* at 4-200.

²⁴⁷ See *id.* at tables 4.11.1-7 to 4.11.1-11.

²⁴⁸ See *id.* at table 4.11.1-14.

²⁴⁹ See *id.* at table 4.11.1-3.

construction emissions associated with construction equipment operation, fugitive emissions, and worker commuting for ozone precursor pollutants.²⁵⁰ Commission staff aggregated these emissions across all project components for the entire project and for each non-attainment or maintenance area to compare with the General Conformity thresholds.²⁵¹ Table 4.11.1-5 of the final EIS showed that the construction and operating emissions for all project components would not exceed the General Conformity thresholds. The final EIS also explained that operating emissions which are subject to major or minor New Source Review, are already deemed to conform through the state permitting process. Therefore, the final EIS appropriately concluded that air quality impacts, including ozone impacts, from construction would be temporary, localized, and insignificant.²⁵²

b. Greenhouse Gas Emissions

186. Coalition, Mr. Harckham, and West Roxbury Intervenors argue that the Commission did not examine methane emissions from blowdown events or fugitive sources released when operating the AIM Project's pipeline segments. Coalition and West Roxbury Intervenors state that the final EIS should have evaluated methane emissions using the Boston Methane Emissions Study described above.²⁵³ West Roxbury Intervenors also state that the Commission should have addressed methane's carcinogenic effects along the existing distribution pipelines in Boston. To mitigate methane emissions, Coalition states that the Commission should have required Algonquin to monitor any emissions and to comply with any EPA guidelines or requirements concerning methane leaks that are issued during the AIM Project's life.

²⁵⁰ See *id.* at tables 4.11.1-5, 4.11.1-6.

²⁵¹ General Conformity thresholds are found in section 93.1531(b)(1) of the Environmental Protection Agency's (EPA) regulations. 40 C.F.R. § 93.153(b)(1) (2015). They are minimum thresholds for various criteria pollutants in nonattainment areas for which a General Conformity Determination must be performed. General Conformity Determinations stem from section 176(c) of the Clean Air Act, which requires a federal agency to demonstrate that a proposed action conforms to the applicable State Implementation Plan, a state's plan to attain the NAAQS for nonattainment pollutants. 42 U.S.C. § 7506(c) (2012).

²⁵² See final EIS at 4-236.

²⁵³ See *supra* P 38.

187. Coalition also contests the final EIS's use of a global warming potential (GWP)²⁵⁴ of 25 for methane over a 100-year period to analyze greenhouse gas (GHG) emissions associated with the AIM Project. Coalition argues that the GWP of 25 is "outdated" and that the final EIS should have based the methane carbon dioxide equivalent (CO₂-eq) emissions on GWPs published by the Intergovernmental Panel on Climate Change (IPCC) in its Fifth Assessment Report.²⁵⁵ IPCC Fifth Assessment Report estimates the value for methane to be 34 over a 100-year period, and 86 over a 20-year period.²⁵⁶

188. Coalition adds that the final EIS failed to evaluate the environmental impact of GHG emissions released from upstream natural gas production as required by CEQ's 2014 Draft Greenhouse Gas Guidance (2014 Draft GHG Guidance). Coalition argues that greenhouse gases are reasonably foreseeable because the AIM Project will provide a market for gas, and without a market, the gas would otherwise remain in the ground.

189. The final EIS identified the GHG emissions (including methane) from fugitive sources and blowdown events for the compressor stations, meter stations, and pipeline components.²⁵⁷ Using the information available, the final EIS compared the incremental GHG emissions from the proposed AIM Project facilities to the GHG emissions in the New England region to conclude that emissions were only 0.18 percent of the region. Notwithstanding that the Boston Methane Emissions Study was not yet available when the final EIS was issued, the final EIS's review of emissions in the New England region

²⁵⁴ The global warming potential is a ratio relative to carbon dioxide that is based on the properties of greenhouse gases' ability to absorb solar radiation as well as the residence time within the atmosphere.

²⁵⁵ Coalition April 2, 2015 Rehearing Request at 41.

²⁵⁶ IPCC, *Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013), <http://www.ipcc.ch/report/ar5/wg1/>.

²⁵⁷ See final EIS at tables 4.11.1-7 to 4.11.1-11, 4.11.1-13. The final EIS also stated that methane, the primary component of a blowdown or fugitive emission, is not considered toxic and is not listed under any regulation or database as carcinogenic. See EPA, Integrated Risk Information System, A-Z List of Substances, <http://cfpub.epa.gov/ncea/iris/index.cfm?fuseaction=iris.showSubstanceList>; Centers for Disease Control and Prevention, Carcinogen List, <http://www.cdc.gov/niosh/topics/cancer/npotocca.html>; American Cancer Society, Known and Probable Human Carcinogens, <http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens>.

included GHG emissions in Boston. Even so, the Boston Methane Emissions Study is inapposite as it studied leakage from existing distribution pipelines and, as noted below in our safety discussion, is unrelated to transmission pipelines.

190. It would be inappropriate for us to require Algonquin to monitor and record methane emissions to comply with EPA's future regulations. The EPA, not the Commission, is responsible for identifying applicable facilities and enforcing any existing or future air quality regulations.

191. We also find that the final EIS's use of 25 GWP appropriate. The final EIS explained that we selected a methane GWP of 25 over a 100-year period over other published GWPs for other timeframes because the EPA uses a GWP of 25 for reporting GHG emissions and air permitting requirements. By using the same GWP, Commission staff can compare the project emissions with EPA's regulatory requirements.²⁵⁸

192. Coalition's reliance on the 2014 Draft GHG Guidance is also misplaced. Putting aside that the guidance is a draft, and therefore not final, we note that the 2014 Draft GHG Guidance states that agencies should take into account upstream emissions if they have a "reasonably close causal relationship."²⁵⁹ As we explain above, impacts from future natural gas production are neither causally related to the AIM Project nor reasonably foreseeable. In any event, Commission staff recognized the 2014 Draft GHG Guidance in the final EIS and built the concepts of that guidance into its final EIS to the extent practicable.²⁶⁰ Commission staff presented the GHG emissions associated with the AIM Project, the potential impacts of GHG emissions, and the mitigation proposed by Algonquin to minimize GHG emissions associated with the AIM Project.²⁶¹

²⁵⁸ See final EIS at 4-221 n. 9. See also final EIS at Volume II, at CO32-3 (explaining that EPA's final rulemaking adopted the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment Report values over the IPCC's Fifth Assessment values).

²⁵⁹ CEQ, *Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts*, at n.4 (December 2014), https://www.whitehouse.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance_sea_rchable.pdf (CEQ 2014 Draft GHG Guidance).

²⁶⁰ *Id.* at 4 ("Agencies should apply this guidance to the NEPA review of new proposed agency actions moving forward and, to the extent practicable, to build its concept into on-going reviews.")

²⁶¹ See final EIS at 4-303.

c. Radon

193. Coalition challenges the Commission's finding that the risk of radon exposure is insignificant. Coalition argues that radon from transported Marcellus shale gas will be higher than both the average indoor and outdoor radon levels. Coalition relies on a Pennsylvania Department of Environmental Protection (Pennsylvania DEP) report, published the week before the final EIS's issuance, finding that the median radon value at the well was 43.6 picocuries per liter (pCi/L), and the maximum value was 148 pCi/L.

194. As an initial matter, as we state above, we do not know whether the transported natural gas will originate in the Marcellus shale or elsewhere. Even so, we affirm the final EIS's finding that the risk of exposure to radon is not significant.²⁶²

195. Coalition mischaracterizes the Pennsylvania DEP report to conclude that there are higher levels of radon in the home. Rather than presenting values taken from a natural gas transmission pipeline, Coalition cites measurements taken at the wellhead – i.e., gas that is not processed, not in transport, and not subject to influx rate or air exchange. In contrast, the final EIS incorporated reviews of six studies on natural gas radon levels, including one study that took samples from a natural gas transmission pipeline (i.e., downstream from the wells and post processing).

196. Further, the Pennsylvania DEP report calculates indoor concentrations that are similar to those identified in the final EIS. The Pennsylvania DEP report estimated indoor radon levels to equal a median of 0.04 pCi/L and a maximum of 0.13 pCi/L. Similarly, the final EIS estimates in-home concentrations estimated at 0.0042 to 0.0109 pCi/L. Both the Pennsylvania DEP report and final EIS demonstrate that indoor concentrations of radon transported in natural gas is less than average indoor and outdoor concentrations, which are 1.3 pCi/L and 0.4 pCi/L, respectively.²⁶³

11. Safety

a. Indian Point Energy Center

197. Indian Point Energy Center (Indian Point) is a nuclear powered generating facility owned and operated by Entergy Nuclear Operations, Inc. (Entergy) in the Village of Buchanan, New York. Approximately 2,159 feet of the AIM Project, part of the Stony Point to Yorktown Take-Up and Relay segment, will run through Indian Point's property.

²⁶² See *id.* at 4-245.

²⁶³ See *id.* at 4-244.

The segment will be located 0.5 miles south of Algonquin's existing right-of-way, over 1,600 feet from the power plant structures, and 2,370 feet from the facility's protected security barrier around the main facility sites.

198. U.S. Nuclear Regulatory Commission (NRC) regulations require that nuclear power plant structures, systems, and components important to safety be appropriately protected against dynamic effects resulting from equipment failures and other events and conditions that may occur outside a nuclear power plant, such as the effects of explosions of natural gas carried near the nuclear facility.²⁶⁴ Entergy provided to the NRC an evaluation on the safety of the pipeline segment near Indian Point in compliance with NRC regulations,²⁶⁵ and concluded that the AIM Project, as proposed and incorporating certain safety mitigation measures, would not pose increased risks to Indian Point or reduce the margin of safety.²⁶⁶ The NRC reviewed Entergy's safety analysis and performed its own independent confirmatory analysis. Similarly, the NRC concluded that the AIM Project would not adversely impact the safe operation of Indian Point.²⁶⁷ Based on Entergy's and NRC's analyses, the March 3 Order, and the final EIS, found that the AIM Project will not result in increased safety impacts at Indian Point.²⁶⁸

199. Coalition and Mr. Harckham contend that the Commission did not adequately support its conclusion that installing a pipeline segment near Indian Point will not increase safety impacts. Coalition and Mr. Harckham state that the Commission failed to consider expert testimony filed by Mr. Kuprewicz and Paul Blanch on Entergy's and the NRC's analyses. Mr. Kuprewicz and Mr. Blanch's comments challenge Entergy's assumptions and NRC's methodology to evaluate project safety. Coalition also notes that during a hearing held by the U.S. House of Representative's Appropriations Committee on March 24, 2015, representatives questioned NRC Commissioners about their safety review of the AIM Project. Coalition argues that based on the challenges and congressional attention, the Commission should not have relied on NRC's report. Coalition compares the Commission's safety analysis to that in *Washington Gas Light Co. v. FERC*

²⁶⁴ Entergy April 8, 2014 Motion to Intervene at 3.

²⁶⁵ 10 C.F.R. § 50.59 (2015).

²⁶⁶ Entergy September 29, 2015 Comments on the draft EIS at 8.

²⁶⁷ FERC December 3, 2014 Meeting Summary dated October 17, 2014, between FERC and NRC.

²⁶⁸ See March 3 Order, 150 FERC ¶ 61,163, at P 107; final EIS at 4-276 to 4-278.

(*Washington Gas Light*).²⁶⁹ Coalition also cites *Bangor Hydro-Electric Co. v. FERC (Bangor)*²⁷⁰ to argue that the Commission cannot rely on NRC's findings to satisfy the Commission's review.

200. Further, Mr. Harckham contends that the final EIS does not discuss the impact that constructing the pipeline segment may have on the Indian Point Radiological Evacuation Plan or evaluate any alternatives that might promote public safety.

201. We disagree and affirm the final's EIS finding that the AIM Project can safely operate near Indian Point. As an initial matter, we maintain that the NRC is the expert authority and enforcing agency for evaluating and ensuring the safe operation of nuclear facilities, including risks associated with external factors. The experts referenced by intervenors, Mr. Blanch and Mr. Kuprewicz, filed similar petitions with the NRC noting the same concerns raised here to which the NRC prepared extensive formal responses. The NRC continues to conclude that a potential rupture of the proposed pipeline poses no threat to the safe operation of the plant or safe shutdown of the plant and that the analysis it performed was reasonable and acceptable. We find no basis to duplicate or contradict work performed by an agency with special expertise regarding nuclear power plant facilities.

202. Coalition misconstrues the case *Bangor* as requiring otherwise. At issue in *Bangor* was the Secretary of the Interior's (Secretary) fishway prescription at a hydroelectric project. The court did not impose any obligation on the Commission to independently review the Secretary's prescription. In fact, the *Bangor* court stated that it is the court's role, not the Commission's, to review Interior's fishway prescriptions at Commission licensed hydropower projects: "a reviewing court must determine whether Interior's prescription is 'consistent with law' or 'reasonably related to [its] goal.'"²⁷¹

²⁶⁹ *Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008).

²⁷⁰ *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996) (*Bangor*).

²⁷¹ *Id.* at 663 (citing *Escondido Mutual Water Co. v. La Jolla et al.*, 466 U.S. 765, 778 (1984)).

203. In any event, the Commission is entitled to rely on an agency's expertise.²⁷² The Commission's capability to assess different types of environmental impacts, while extensive, is not infinite. Accordingly, we routinely rely on the expertise of other agencies to evaluate the environmental or safety impacts of proposed projects, provided we are satisfied as to their competence and the validity of their basic data and analysis. Here, the Commission appropriately relied on the NRC.

204. Further, the safety review in *Washington Gas Light* is inapposite to Commission staff's review here. In *Washington Gas Light*, the Commission dismissed Washington Gas Light's (WGL) safety concern that authorizing the Cove Point Expansion Project would cause WGL's system to leak, finding that there would be no leakage because WGL could repair its system before the expansion project's proposed in-service date. In support, the Commission noted that WGL had fixed leaks on a portion of its system by replacing damaged couplings and reducing operating pressure. The D.C. Circuit, however, found that the fact that WGL fixed a portion of its system does not suggest that WGL could fix its entire system before expansion began. Thus, the D.C. Circuit held that the Commission's finding was not supported by substantial evidence

205. Here, the Commission based its conclusion that the AIM Project can safely operate near Indian Point on substantial evidence.²⁷³ Entergy and NRC performed safety evaluations and concluded that the AIM Project poses no increased risks to Indian Point. NRC's analysis assumed catastrophic pipeline failure, not taking account additional pipeline design measures that Entergy identified and Algonquin committed to use. The NRC's review covered everything inside the outermost fenced area of the facility, including the area with the spent fuel rods. Moreover, we received no comments regarding NRC's report from the U.S. Department of Transportation, which was a cooperating agency to the EIS and has regulatory oversight of pipeline safety once natural gas pipeline facilities are constructed and operating.

206. We also reject Mr. Harckham's assertion that the final EIS should have discussed the impact that constructing the pipeline segment may have on the Indian Point Radiological Evacuation Plan or evaluate any alternatives that might promote public safety. As discussed in the March 3 Order, Mr. Bernard Vaughey raised that issue after Commission staff issued the final EIS. Even so, the March 3 Order explained that

²⁷² See e.g., *EMR Network v. Fed. Comm'n Comm'n*, 391 F.3d 269, 273 (D.C. Cir. 2004) (holding that the FCC did not improperly delegate its duties under NEPA by crediting outside expert standard-setting organizations and other government agencies with a specific expertise).

²⁷³ See final EIS at 4-276 to 4-278.

emergency vehicle access will be maintained as Algonquin will keep steel plates on site during construction at all open-cut road crossings. Thus, the March 3 Order concluded that project construction will not impact the emergency response and evacuation plans associated with the Indian Point Emergency Planning Zone.²⁷⁴

b. West Roxbury Lateral and West Roxbury Meter Station

207. The West Roxbury Lateral and West Roxbury Meter Station will be adjacent to the West Roxbury Crushed Stone Quarry (West Roxbury Quarry). We received many comments concerning the impact that blasting from the active quarry will have on the pipeline and meter station. After careful environmental review, the final EIS concluded that the blasting will not damage either the pipeline or meter station.²⁷⁵ The final EIS based its finding on a report conducted by the third party consultant, GZA GeoEnvironmental, Inc., (GZA Report) and Algonquin's proposed mitigation measures to protect the pipeline from blasting impacts. The GZA Report concluded that the proposed West Roxbury Lateral pipeline will be subject to vibrations well within pipeline design parameters and that the vibrations from blasting at the quarry will not be disruptive or damaging to the meter station. Several rehearing applicants argue that our conclusion is unsupported by substantial evidence.

208. Boston Delegation and West Roxbury Intervenors argue that the Commission's reliance on the GZA Report is arbitrary and capricious. Boston Delegation asserts that the Commission misinterpreted the GZA Report as concluding that the quarry will not damage the meter station or the lateral, when in fact, the GZA Report stated that such damage is "not anticipated."²⁷⁶ In addition, Boston Delegation and West Roxbury Intervenors state that the GZA Report does not provide any facts or opinions regarding the effect that blasting at the quarry has had on the condition of the existing water lines and gas line. Instead, Boston Delegation states that the GZA Report conceded that the "age, condition, depth, and material of the existing utilities are not known."²⁷⁷ Boston Delegation adds that the GZA Report failed to analyze the cumulative effect of blasting operations on the pipeline or meter station over multiple years.

²⁷⁴ See March 3 Order, 150 FERC ¶ 61,163 at PP 146-147.

²⁷⁵ See final EIS at 4-5 to 4-6.

²⁷⁶ Boston Delegation April 2, 2015 Rehearing Request at 14.

²⁷⁷ *Id.* at 16.

209. Further, Boston Delegation and Town of Dedham note that the majority of the West Roxbury Lateral is located within a High Consequence Area (HCA).²⁷⁸ Town of Dedham states that the Commission inadequately considered the use of more rigorous safety measures in the high consequence areas to minimize risks of an incident, and urges the Commission to require post-construction assessment and monitoring of pipeline operation. West Roxbury Intervenors and Town of Dedham add that the final EIS failed to address the likelihood and consequences of an incident.

210. West Roxbury Intervenors also argue that the final EIS ignored Massachusetts Energy Facility Siting Board's comments regarding safety, including that the proposed operating pressure of the pipeline is too high, that shut-off times are too long, that a ten-mile separation between shut-off valves is too great, that pipeline weld inspections are too infrequent, that operating a pipeline under a street with heavy truck traffic is unsafe, and that surrounding residences would be affected in the event of an incident. West Roxbury Intervenors state that the Commission's dismissal of the Siting Board's concerns ignores the provisions of section 192.317 of the U.S. Department of Transportation's regulations.²⁷⁹

211. In addition, West Roxbury Intervenors allege that the Commission dismissed the legal effect of the new Massachusetts law that prohibits any blasting or use of explosive materials within 500 feet of a natural gas pipeline or meter station, and that the Commission failed to address terrorism.

212. The Commission considers pipeline safety as an important and serious matter. Here, Commission staff vigilantly assessed the impacts that the West Roxbury Lateral and West Roxbury Meter Station will have on public safety. The final EIS and the March 3 Order appropriately concluded that the fact that the existing non-jurisdictional gas distribution pipeline has not been damaged corroborates that blasting at the active quarry will not damage the West Roxbury Lateral. The existing distribution pipeline owner is required to comply with the U.S. Department of Transportation's safety regulations for pipeline inspections. Thus, any damage to the existing pipeline would be found through routine inspections. We have no evidence to suggest, nor have the parties demonstrated, that this pipeline is damaged.

²⁷⁸ An HCA is a location that is defined in the pipeline safety regulations as an area where pipeline releases would have greater consequences to the health, safety or environment. *See* 49 C.F.R. § 192.903 (2015).

²⁷⁹ West Roxbury Intervenors April 2, 2015 Rehearing Request at 14.

213. More important, the GZA Report concluded that vibrations from quarry blasting under the most conservative assumptions are one-tenth of what the proposed pipeline could safely sustain (regardless of the condition of the existing pipeline)²⁸⁰ and presented research of blast induced vibration on pipelines.²⁸¹ We also note that it is not unusual to site a transmission pipeline near a quarry.²⁸² Therefore, we affirm our finding that quarry blasting would not damage the West Roxbury Lateral or the West Roxbury Meter Station.

214. As the March 3 Order and the final EIS explained, any Commission-regulated pipeline must meet the current pipeline safety standards as set forth in U.S. Department of Transportation regulations.²⁸³ High pressure natural gas pipelines routinely operate in densely populated areas. West Roxbury Intervenors submit no evidence to support their broad claim that the West Roxbury Lateral's proposed operating pressure of 750 pounds per square inch gauge is too high for a populated area. The U.S. Department of Transportation will require the AIM Project to comply with the applicable safety standards, including more stringent pipeline design and inspection measures required in more densely populated areas (e.g., HCAs), such as a shorter separation between shut-off valves (i.e., 4 miles in class 3 areas and 2.5 miles in class 4 areas) and increased pipeline burial depths under roads and railroads. Further, the U.S. Department of Transportation's regulations require post-construction testing of the pipeline and ongoing operational inspections, including the requirements for weld testing. Thus, U.S. Department of Transportation's regulations already impose post-construction assessment and operational monitoring measures. Accordingly, rehearing applicants' concerns with respect to these types of the safety measures are more appropriately directed to the U.S. Department of Transportation.

215. The final EIS also discussed *transmission* pipeline accident data nationwide and in each state the project will operate within. The data demonstrated the very low likelihood

²⁸⁰ Algonquin's March 31, 2014 Analysis of West Roxbury Crushed Stone Operations on Construction and Operation of the West Roxbury Lateral at Attachment A, p. 4.

²⁸¹ *Id.* p. 12.

²⁸² See, e.g., *Alliance Pipeline L.P.*, 84 FERC, ¶ 61,239, at 62,217 (1998) (stating pipeline construction right-of-way will be located 1,000 feet from an active sandstone quarry); *Maritimes and Northeast Pipeline, L.L.C. et al.*, 80 FERC ¶ 61,136, at 61,480 (1997) (stating pipeline will cross one planned quarry).

²⁸³ See final EIS at 4-264.

of an incident.²⁸⁴ The final EIS further explained that, unlike the AIM Project's replacement and new pipelines, older pipelines have a higher frequency of incident because they lack external protective coating and a cathodic protection system, their location may be less well known and less well marked than newer lines, and they are more easily crushed or broken by mechanical equipment or earth movement. Similarly, the final EIS distinguished transmission pipelines from *distribution* pipelines, noting that distribution pipelines represent the majority of pipeline fatalities, are more susceptible to damage because they have smaller diameters, may be plastic, and often have unclear location markings.

216. The final EIS discussed the impact of the project on public safety using the U.S. Department of Transportation's methodology to identify the potential impact radius of an incident. While we recognize that the potential impact radius extends beyond the landowners or abutters affected by project construction, the final EIS identified this distance and the likelihood for an incident to occur. Weighing both consequence and likelihood of an explosion, the final EIS concluded that the West Roxbury Lateral represents a slight increase in risk to the nearby public.²⁸⁵

217. The March 3 Order also did not dismiss the legal effect that the new Massachusetts law would have on the West Roxbury Quarry, which prohibits blasting within 500 feet of a natural gas pipeline. As West Roxbury Intervenors acknowledge, the March 3 Order explained that because there is already an existing natural gas distribution pipeline located between the quarry and the proposed route, the new Massachusetts law would apply to the quarry even without the construction of the West Roxbury Lateral.²⁸⁶

218. In addition, the final EIS adequately addressed terrorism concerns in section 4.12.4.²⁸⁷ The final EIS concluded that the likelihood of terrorism is unpredictable and the continuing need to construct facilities to support future natural gas pipeline infrastructure is not diminished from the threat of any such future acts. The final EIS also discussed Algonquin's collaboration with the U.S. Department of Homeland Security's Transportation Security Administration - Pipeline Security Division.

²⁸⁴ See *id.* at 4-272 to 4-281.

²⁸⁵ See *id.* at 4-281.

²⁸⁶ March 3 Order, 150 FERC ¶ 61,163 at P 66.

²⁸⁷ See final EIS at 4-281- to 4-282.

12. Delegated Review

219. Coalition maintains that the final EIS violates NEPA because the final EIS prematurely assumed that Algonquin will comply with not yet issued state air and water quality permits when it concluded that most of the AIM Project's adverse air quality and wetland impacts would be reduced to less-than-significant levels.²⁸⁸ Coalition argues the Commission's assumption was an unlawful delegation of NEPA responsibilities to state agencies. In support, Coalition cites *State of Idaho By and Through Idaho Public Utilities Commission v. Interstate Commerce Commission (Idaho Public)*.²⁸⁹

220. Coalition's argument is supported by neither law nor fact. In *Idaho Public*, the court found that the Interstate Commerce Commission violated NEPA when it declined to prepare an EIS for a project proposal, opting to require the regulated party to consult with other federal and state agencies. Here, Commission staff prepared an EIS, which evaluated air quality and wetland impacts, among other things.

221. Coalition appears to argue that the Commission delegated to New York DEC its NEPA review of air emissions from the new meter station and upgrades to existing meter stations in New York. Coalition is mistaken. The draft and final EIS identified the proposed capacity rating of the new heaters for the meter stations and the associated operating emissions of the new and modified meter stations.²⁹⁰ While the draft EIS did request that Algonquin provide an update on air permitting requirements associated with the new and existing meter stations, Algonquin's update did not affect the operation or our environmental review of the meter stations.

222. As for wetlands, the final EIS identified the existing wetlands in the project area, disclosed the potential project impacts on wetlands, analyzed the mitigation measures identified during project review, and responded to public comments on the draft EIS regarding wetland impacts.²⁹¹ The final EIS based its conclusions regarding wetland

²⁸⁸ In its rehearing request, Coalition states the final EIS's conclusion is a finding of no significant impact. We assume Coalition refers to our conclusion that the project would result in adverse environmental impacts, but that most impacts would be reduced to less-than-significant levels.

²⁸⁹ *State of Idaho By and Through Idaho Pub. Utils. Comm'n v. Interstate Commerce Comm'n*, 35 F.3d 585 (D.C. Cir. 1994).

²⁹⁰ See draft and final EIS at tables 4.11.1-12, 4.11.1-13.

²⁹¹ See final EIS at 4-61 to 4-74 and at Volume II, "Response to Comments on the Draft Environmental Impact Statement."

impacts on Algonquin's proposed avoidance and mitigation measures, including those measures in its Erosion and Sediment Control Plan. The final EIS did acknowledge that state agencies may require additional mitigation measures; however, the final EIS did so to explain that such additional permitting measures would further offset any adverse impacts on wetlands, above-and-beyond what was already proposed and analyzed in the final EIS.²⁹²

13. Alternatives

223. Section 102(C)(iii) of NEPA requires an agency to discuss alternatives to the proposed action in an environmental document.²⁹³ All reasonable alternatives must be evaluated, including alternatives not within the lead agency's jurisdiction and no-action alternatives.²⁹⁴ An agency's environmental document must also include a brief statement of the purpose and need of the proposed action.²⁹⁵ Agencies use the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives.²⁹⁶ In determining which alternatives to consider, agencies must adopt a rule of reason.²⁹⁷ Only feasible alternatives need to be considered.²⁹⁸ Alternatives

²⁹² See *id.* at 4-65.

²⁹³ 42 U.S.C. § 4332(C)(iii) (2012). Section 102(E) of NEPA also requires agencies "to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(E).

²⁹⁴ See 40 C.F.R. § 1502.14 (2015).

²⁹⁵ See 40 C.F.R. § 1502.13 (2015).

²⁹⁶ See *Col. Env'tl. Coal. v. Dombek*, 185 F.3d 1162, 1175 (10th Cir. 1999).

²⁹⁷ See *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972).

²⁹⁸ CEQ, *Guidance Regarding NEPA Regulations*, at 9 (1983), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-GuidanceRegulations.pdf. See also CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* at 4 (1981), <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act> ("Reasonable alternatives include those that are *practical* or *feasible* from the technical and economic standpoint and using common sense.").

that are remote, conjectural, or do not meet the purpose or need of the proposed action may be eliminated so long as the agency briefly discusses the reasons for the elimination.²⁹⁹

224. NEPA only requires that appropriate alternatives be considered.³⁰⁰ NEPA does not mandate any particular alternative.³⁰¹ Nor does NEPA require an agency to select the environmentally preferred alternative, or to weigh environmental considerations more heavily than other factors. The Supreme Court stated in *Robertson v. Methow Valley Citizens Council*:

If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by [NEPA] from deciding that other values outweigh the environmental costs.³⁰²

225. Below, we discuss the rehearing applicants' challenges to the final EIS's alternatives analysis for the AIM Project as a whole and to the West Roxbury Lateral and West Roxbury Meter Station.

a. Alternatives to the AIM Project as a Whole

226. Mr. Harckham asserts that the final EIS did not support the rejection of renewable energy alternatives, pointing out that the final EIS dismissed renewable energy alternatives based on power generation even though the AIM Project will not supply electric generators. Mr. Harckham also contends that the final EIS did not thoroughly examine certain alternatives, including energy conservation, Kinder Morgan's Northeast Energy Direct Project,³⁰³ gas exchanges among transmission providers, LNG storage, or LNG import facilities. Mr. Harckham argues that the Commission narrowly defined the project's purpose to reject these alternatives. In addition, Town of Dedham argues that the

²⁹⁹ See 40 C.F.R. § 1502.14(a) (2015).

³⁰⁰ 42 U.S.C. § 4332(2)(E) (2012).

³⁰¹ See *Limerick Ecology Action, Inc. v. Nuclear Regulatory Comm'n*, 869 F.2d 719, 730 n. 9 (3d Cir. 1989) (stating NEPA imposes procedural requirements, not substantive outcomes).

³⁰² 490 U.S. 332, 350 (1989).

³⁰³ Commission staff is considering the Northeast Energy Direct Project in Docket No. CP16-21-000.

Commission should have evaluated the Atlantic Bridge and Access Northeast Projects as system alternatives.³⁰⁴

227. We disagree. Commission staff did not narrowly define the purpose and need for the project so as to preclude consideration of other alternatives. While an agency may not narrowly define the proposed action's purpose and need, the alternative discussion need not be exhaustive.³⁰⁵ When the purpose of the project is to accomplish one thing, "it makes no sense to consider the alternative ways to which another thing might be achieved."³⁰⁶

228. Here, the final EIS stated that the project purposes are to deliver up to 342,000 Dth per day of natural gas transportation to the Connecticut, Rhode Island, and Massachusetts markets; to eliminate capacity constraints on existing pipeline systems in New York State and southern New England; and to provide access to growing gas supply areas in the Northeast region to increase competition and reduce volatility in natural gas pricing in southern New England. The final EIS set forth the criteria that staff employed to evaluate potential alternatives to the proposed project: whether the alternatives were technically and economically feasible, whether the alternatives offered significant environmental advantage over the proposed project or segments of it, and whether the alternatives met project objectives. The final EIS identified and evaluated alternatives to the project, including the no-action alternative, energy alternatives, system alternatives, and alternative sites and pipeline routes.³⁰⁷

229. The final EIS rejected renewable energy alternatives³⁰⁸ based on their inability to meet the project purposes and objectives. As stated in the final EIS, renewable energy is not completely interchangeable with natural gas and could not provide additional natural gas supplies for direct residential and commercial uses, including heating and cooking,

³⁰⁴ It is unclear whether Town of Dedham argues that the Commission should have considered the Atlantic Bridge Project and the Access Northeast Project as alternatives or that the Commission improperly segmented them from staff's environmental review of the AIM Project. To the extent that Town of Dedham is arguing segmentation, we address improper segmentation above in paragraphs 46-86.

³⁰⁵ See *State of N.C. v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976).

³⁰⁶ *City of Angoon et al. v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986).

³⁰⁷ See final EIS at 3-12.

³⁰⁸ See *id.* at 3-4 to 3-9.

without extensive conversion of existing systems to electric-based systems. In addition, the final EIS considered Kinder Morgan's Northeast Energy Direct Project as a system alternative but found that project's scope would need to be significantly increased to reach the delivery points of the AIM Project Shippers, which would not provide a significant environmental advantage over the AIM Project.³⁰⁹

230. The final EIS did not consider LNG storage, import facilities, or gas exchanges as system alternatives to the AIM Project because they were not reasonable alternatives. In order to access supplies at LNG import and storage facilities, Project Shippers would have to transport the regasified LNG by pipeline. Algonquin's system has capacity restraints in this region, and as a result, additional facilities would still be necessary to transport gas to and from LNG import and storage alternatives. Similarly, gas exchanges among transmission providers would require the AIM Project to deliver the gas to the Project Shippers' city gates. Other than Algonquin's system, no other pipeline system serves the Project Shippers' delivery points.

231. The final EIS also appropriately did not evaluate Algonquin's Atlantic Bridge and Access Northeast Projects as system alternatives. In order to accommodate the additional capacity and deliveries for the AIM Project, the Atlantic Bridge and Access Northeast Projects would need to include the AIM Project facilities. Therefore, those projects would not provide significant environmental advantage over the AIM Project and are not reasonable alternatives.

b. Alternatives to West Roxbury Lateral and West Roxbury Meter Station

232. The final EIS evaluated three alternatives to the West Roxbury Lateral, including the West Roxbury Lateral Alternative Route and the West Roxbury Lateral South End Alternative; both of which would not run adjacent to the West Roxbury Crushed Stony Quarry. In addition, the final EIS evaluated one alternative to the West Roxbury Meter Station, which would be located on residential land that would not abut the quarry.³¹⁰

233. Boston Delegation and Town of Dedham challenge the final EIS's alternatives analysis for the West Roxbury Lateral and West Roxbury Meter Station, arguing that it was arbitrary and capricious and unsupported by substantial evidence. They assert that the Commission must choose a different pipeline lateral route and meter station site because of the proximity of the project facilities to the West Roxbury Crushed Stone Quarry.

³⁰⁹ See *id.* at 3-12.

³¹⁰ See final EIS at 3-25 to 3-29, 3-34 to 3-35, 3-55.

234. Town of Dedham argues that the final EIS failed to evaluate alternatives to the West Roxbury Lateral located outside of West Roxbury. Town of Dedham states that because Algonquin's system can connect with Boston Gas Company's (Boston Gas) system elsewhere, Commission should have evaluated other lateral route alternatives to the West Roxbury Lateral in the Greater Boston Area. Instead, Town of Dedham alleges, Commission staff limited the alternatives reviewed based on the contractual obligation between Boston Gas and Algonquin, rather than NEPA requirements.

235. In addition, Town of Dedham and Boston Delegation argue that the final EIS arbitrarily rejected the alternatives to the West Roxbury Lateral and West Roxbury Meter Station. Town of Dedham argues it was inappropriate to dismiss the West Roxbury Lateral South End Alternative based on a Massachusetts Department of Transportation (MassDOT) policy. Because Commission approval preempts both state and municipal regulations, Town of Dedham argues that Commission staff cannot find that overriding a municipality's preferences on where to locate a pipeline is more feasible than setting aside a state agency policy.

236. Boston Delegation argues that Commission staff arbitrarily relied on the GZA Report to reject the West Roxbury Lateral Alternative Route and the alternative meter station site. Boston Delegation also challenges the final EIS's finding that the alternative meter site is technically infeasible and not environmentally preferable because its location would require Algonquin to purchase and demolish an existing residence and the site has potential traffic impacts. Boston Delegation argues that Algonquin can afford to purchase the house and that traffic impacts should not be a factor because the proposed West Roxbury Lateral route will also impact traffic.

237. We disagree and affirm the final EIS's alternatives analysis. Town of Dedham requests that we evaluate other alternative sites to interconnect Algonquin's and Boston Gas's systems in the Greater Boston Area, but does not identify any locations where the systems could be interconnected. As the D.C. Circuit stated in *Minisink*, "[the Commission's obligation to consider alternatives in Section 7 proceedings is not boundless . . . [the Commission] need not 'undertake exhausting inquiries, probing for every possible alternative, if no viable alternatives have been suggested by the parties, or suggest themselves to the agency.'"³¹¹

238. The final EIS found that neither the West Roxbury Lateral Alternative Route nor the West Roxbury Lateral South End Alternative were preferable or had an environmental

³¹¹ *Minisink Residents for Environmental Preservation & Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014) (citing *Citizens for Allegan Cnty.*, 414 F.2d 1125, 1133 (D.C. Cir. 1969)).

advantage over the proposed West Roxbury Lateral route.³¹² The final EIS found that the West Roxbury Lateral Alternative Route would cross through the backyards of houses (requiring long-term easements on homeowners' property), impact residential streets, and disrupt the surrounding neighborhoods, including requiring the complete closure of streets within these areas. In comparison, although the proposed route would pass near more residences, the final EIS explained that the proposed route would primarily be constructed along and within more roadways and in parking lots of commercial and industrial properties (not requiring homeowner easements). Although some impacts would be lessened by use of the West Roxbury Lateral Alternative Route, there is not a significant environmental advantage to recommending it over the proposed route.

239. Similarly, the West Roxbury Lateral South End Alternative would not provide a significant environmental advantage over the proposed route. The West Roxbury Lateral South End Alternative would run adjacently parallel to Interstate 95. Such location would result in limited construction workspace, would require the temporary removal of existing sound abatement walls along the highway and cause highway traffic noise impacts until the wall could be replaced, would require the permanent removal of trees that protect residences from highway traffic noise, and would result in additional traffic impacts on a local shopping area.

240. Moreover, the location of the West Roxbury Lateral South End Alternative would conflict with MassDOT's "Policy on the Accommodation of Utilities Longitudinally, Along Controlled-Access Highways." This MassDOT policy precludes placing utility infrastructure parallel to the interstate highway system absent extenuating circumstances. Commission staff considered requesting a waiver of MassDOT policy to reduce local impacts in West Roxbury; however, Commission staff ultimately concluded that the AIM Project, including the West Roxbury Lateral, as proposed with Algonquin's mitigation measures, would not result in significant impacts, and therefore, requesting a waiver was unwarranted. Hence, we find no basis to preempt a state's policy to satisfy a municipality's preference.

241. The final EIS also found that the alternative to the West Roxbury Meter Station would not be preferable to or provide a significant environmental advantage over Algonquin's proposed meter station site.³¹³ The final EIS evaluated the alternative meter site and found that the alternative site would require the purchase and demolition of an existing residence, which is not currently for sale, to provide sufficient workspace for the meter station. Because the availability of that site is unknown, coupled with the

³¹² See final EIS at 3-25 to 3-29.

³¹³ See *id.* at 3-55.

Commission's policy to encourage applicants to negotiate for the use of a right-of-way or workspace over the use of eminent domain, the final EIS concluded that the alternative meter site was less feasible than the proposed site. Further, construction at the alternative site would cause greater traffic impacts than the proposed site because the alternative site had limited space available for construction.

242. Commission staff also found no basis for selecting an alternative route or site to alleviate concerns about locating the project facilities near an active quarry, which the GZA Report demonstrates are unwarranted. As noted above in our safety discussion, Commission staff appropriately relied on the GZA Report to support its conclusion that the West Roxbury Lateral and the West Roxbury Meter Station could safely operate near the quarry.

243. Accordingly, we find that the final EIS's alternatives analysis fulfilled NEPA requirements, and deny rehearing on these matters.

G. Conformity with the Natural Gas Act

244. Mr. Harckham contends that the March 3 Order erred in its determination of whether the AIM Project should be authorized under the Natural Gas Act, as implemented through the Certificate Policy Statement, because the order failed to appropriately balance public benefits against potential adverse environmental impacts. Mr. Harckham repeats his contentions that the March 3 Order failed to adequately consider the AIM Project's impacts on water quality, forest habitats, species, and air quality; the indirect and cumulative impacts of upstream production; and the AIM Project's contribution to climate change. Similarly, Boston Delegation and West Roxbury Intervenors argue that the Commission violated the Certificate Policy Statement by concluding that Algonquin minimized adverse safety impacts on landowners and surrounding communities.

245. We disagree and affirm our finding in the March 3 Order that authorizing the AIM Project is in the public convenience and necessity. Under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of: (1) the applicant's existing customers; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the construction (i.e., eminent domain impacts). The Certificate Policy Statement's balancing of adverse impacts and public benefits is not an environmental analysis process, but rather an economic test that we undertake before our environmental analysis.³¹⁴

³¹⁴ See *National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012).

246. The March 3 Order concluded that the AIM Project will have no adverse economic impacts on either Algonquin's existing customers or on other existing pipelines or their captive customers.³¹⁵ Further, the Commission found that the AIM Project will minimize the impacts to affected landowners as the majority of all construction activities and project facilities will be located on Algonquin's existing right-of-way and fenced facilities.³¹⁶ The March 3 Order also noted that Algonquin executed binding precedent agreements with its Project Shippers for firm service utilizing all of the project's design capacity.³¹⁷ Based on the strong showing of public benefits (i.e., the creation of capacity to meet the firm contractual commitment of the project shipper) and the minimal impacts the project may have on the economic interests of adjacent landowners, the Commission found and continues to find that, the AIM Project is required by the public convenience and necessity pursuant to the criteria set forth in the Certificate Policy Statement, subject to the order's environmental discussion and conditions.³¹⁸

247. The March 3 Order then turned to analyze the project's environmental impacts to complete the NGA analysis and comply with NEPA. The Commission fully addressed the environmental and safety issues raised by the rehearing applicants in the final EIS, the March 3 Order, and this order. As discussed above, the Commission need not analyze the impacts of upstream production for the purposes of our environmental analysis for this project, and the Commission substantially supported its final EIS's conclusion that, although the project would result in adverse environmental impacts, most impacts would be reduced to less-than-significant levels.

248. Thus, we affirm the March 3 Order's application of the Certificate Policy Statement.

H. Items Raised for the First Time on Rehearing

249. Rehearing applicants raise three arguments for the first time on rehearing: (i) that the Commission violated the NGA by segmenting the AIM Project and the Atlantic Bridge Project, (ii) that the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan (Plan)* and *Wetland and Waterbody Construction and Mitigation Procedures (Procedures)* inadequately mitigate project impacts, and (iii) that the Final Survey Results should have been made publicly available.

³¹⁵ March 3 Order, 150 FERC ¶ 61,163 at P 20.

³¹⁶ *Id.* P 21.

³¹⁷ *Id.* P 23.

³¹⁸ *Id.* P 26.

250. As a rule, we reject novel arguments raised on rehearing, unless we find that the argument could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances.³¹⁹ We do so because our regulations preclude other parties from responding to a request for rehearing³²⁰ and “such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.”³²¹

251. Rehearing applicants do not explain why they or any of their joining members could not have raised these new arguments earlier, and we find no reason that these arguments could not have been raised before we issued our March 3 Order. Therefore, we will not entertain these new arguments. In any event, as discussed below, we would nevertheless deny rehearing of the new arguments.

1. Economic Segmentation

252. Several rehearing applicants argue that the Commission violated section 7 of the NGA and the Certificate Policy Statement by excluding the Atlantic Bridge Project from the Commission’s analysis of the AIM Project. Coalition argues that such exclusion ignores that developing both projects may be more costly, less efficient, or duplicative, and therefore inconsistent with the public convenience and necessity. West Roxbury Intervenors state that without evaluating the project on national scale, the Commission cannot find that the AIM Project is required by the public convenience and necessity. In support, Coalition and West Roxbury Intervenors cite *City of Pittsburgh v. FPC (City of Pittsburgh)*.³²²

253. The rehearing applicants are mistaken. There is no inconsistency between the Commission’s actions in this proceeding and *City of Pittsburgh*. At issue in *City of*

³¹⁹ Rule 713(c)(3) of our Rules of Practice and Procedure states that any request for rehearing must “[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.” 18 C.F.R. § 385.713(c)(3) (2015).

³²⁰ *Id.* (d).

³²¹ *Texas Eastern Transmission, LP et al.*, 141 FERC ¶ 61,043, at 19 (2012) (citing *Westar Energy, Inc.*, 134 FERC ¶ 61,176 (2011)), *appeal dismissed, NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014).

³²² 237 F.2d 741 (D.C. Cir. 1955).

Pittsburgh was the Commission's order authorizing Texas Eastern Transmission Corporation (Texas Eastern) to abandon service on one of its pipelines and to transfer the load to another pipeline that did not operate at full capacity. Protesters contested the Commission's order, arguing that because the pipeline would be abandoned, the pipeline would not be available for future expansion and, as a result, Texas Eastern would have to install more capacity and increase rates. The *City of Pittsburgh* court set aside the order largely on what it deemed the Commission's failure to consider the impact of future expansion.

254. Here, Algonquin does not propose to abandon existing capacity that would have to be replaced to accommodate future expansion. Instead, the AIM Project and the Atlantic Bridge Project are expansion projects. The AIM Project costs will be recovered through negotiated rates paid by Project Shippers and will not be rolled-into Algonquin's existing shippers' rates. Therefore, existing customers will not subsidize service on the AIM Project. The AIM Project and Atlantic Bridge Project are also not duplicative. The Project Shippers have subscribed to full capacity made available on the AIM Project and the seven project shippers of the Atlantic Bridge Project have subscribed to its additional expansion capacity. The Certificate Policy Statement found that long-term transportation service agreements constitute strong evidence of project need.

255. Regarding West Roxbury Intervenors' request to evaluate the project on a national scale, as we noted above, section 7(e) of the NGA requires the Commission to assess each project individually.³²³ Therefore, the March 3 Order did not violate section 7 or the Certificate Policy Statement by evaluating the economic impacts of the AIM Project on its own.

2. Mitigation Measures

256. Allegheny argues that the Commission has not provided substantial evidence that the Commission's *Plan* and *Procedures* are sufficient to avoid and minimize any potential impacts. In support, Allegheny cites a settlement agreement between the Pennsylvania Department of Environmental Protection and Tennessee Gas Pipeline Company, L.L.C. for multiple violations of state law, including the discharge of sediment pollution, during the construction of the 300 Line Project in 2011 and 2012.

257. We disagree. Before constructing the take-up and relay portions of the project, Algonquin must file a revised project-specific Erosion and Sediment Control Plan, which incorporated the Commission's *Plan* and *Procedures*.³²⁴ The Commission's *Plan* and

³²³ See our discussion in paragraphs 40 of this order.

³²⁴ See March 3 Order, 150 FERC ¶ 61,163, at Environmental Condition 19.

Procedures, both updated in 2013, are based on Commission staff's experience inspecting pipeline construction and include industry best management practices designed to minimize the extent and duration of disturbance on wetlands and waterbodies during the construction of Commission-jurisdictional natural gas projects. During the 2013 update, Commission staff revised the *Plan* and *Procedures* with input from the federal, state, and local agencies; environmental consultants; inspectors and construction contractors; the natural gas industry; and nongovernmental organizations and other interested parties with special expertise on natural gas facility construction projects. The construction and mitigation measures in the *Plan* and *Procedures* are proven to protect wetlands and waterbodies. One isolated project of thousands of projects and 200,000 miles of transmission pipeline under our jurisdiction fails to indicate widespread ineffectiveness of the *Plan* and *Procedures*.

258. In addition, Algonquin will implement an environmental inspection program, which will consist of trained individuals to ensure that Algonquin implements the appropriate mitigation measures and complies with federal, state, and local permit stipulations. Algonquin has also agreed to fund a third-party environmental monitoring program that will include full-time personnel working under our direction.³²⁵ The third-party personnel will monitor project construction and conduct regular field inspections. Given the Commission's extensive experience with the *Plan* and *Procedures*, the consultation conducted to revise the *Plan* and *Procedures*, and the monitoring programs, we find that Commission staff provided substantial evidence indicating that the *Plan* and *Procedures* sufficiently mitigate project impacts.

259. Moreover, the Commission takes matters of non-compliance seriously. We impose penalties for non-compliance on a case-by-case basis, which are tailored to the specific facts presented, e.g., degree of non-compliance and resulting impacts. If Algonquin fails to comply with the conditions of the order, it will be subject to potential general and civil penalties.³²⁶

3. Final Survey Reports

260. Coalition argues that because Algonquin filed its Final Survey Reports for federally-listed species as privileged, Coalition could not meaningfully evaluate the Commission's analysis of endangered species within Blue Mountain Reservation and Reynolds Hills in Westchester County, New York. Persons interested in viewing

³²⁵ See final EIS at 2-40 to 2-41.

³²⁶ See 15 U.S.C. §§ 717t; 717t-1 (2012).

privileged information could have requested them pursuant to section 388.112 of the Commission's regulations.³²⁷

IV. Request for Stay

261. On rehearing, Coalition urges the Commission to stay the certificate or Algonquin's ability to commence tree removal or ground-breaking activity or invoke eminent domain until a resolution has been reached on rehearing and judicial review. The Town of Cortlandt on rehearing also states that the Commission should stay the commencement of the AIM Project, but provides no explanation for its assertion. In its April 17, 2015, Answer, Algonquin filed comments opposing Coalition's and Town of Cortlandt's requests for stay.

262. On June 23, 2015, U.S. Congressman Stephen Lynch, Massachusetts State Senator Michael F. Rush, Massachusetts State Representative Edward F. Coppinger, and Boston City Councilor Matt O'Malley (collectively, Local Officials) requested an emergency stay of construction of the West Roxbury Lateral pending rehearing.³²⁸ On July 7, 2015, Algonquin filed an answer opposing Local Officials' request for stay. On July 9, 2015, Project Shippers Yankee Gas Services, Inc. and NSTAR Gas Company filed an answer supporting Algonquin's July 7 Answer and opposing Local Officials' request for stay.

263. Coalition argues that a stay of the order is necessary to prevent irreparable injury to landowners from Algonquin's acquisition of property rights through eminent domain. Coalition states that eminent domain proceedings will cause landowners and municipal governments to incur legal fees to defend against the taking of property for a project that may be vacated on rehearing or modified by yet-to-be-issued water quality certifications. Coalition adds that if property rights are restored to landowners, it is unlikely that the landowners will recover their attorney fees. Coalition also asserts that a stay of the order is necessary to prevent irreparable injury to the environment from construction activities. Coalition maintains that the construction of the pipeline will cause irreversible environmental impacts, such as the loss of trees, wetland areas, and wildlife habitat.

264. Local Officials argue that a stay of the order is necessary to prevent irreparable injury to landowners from the operation of the West Roxbury Lateral and West Roxbury

³²⁷ 18 C.F.R. § 388.112 (2015).

³²⁸ On April 23, 2015, New York State Assembly Member Sandy Galef filed comments requesting that the Commission stay any construction, or preliminary set-up for construction, before the New York DEC issues its air and water permits.

Meter Station. Local Officials reiterate the concerns regarding the lateral and meter station operating within a populated area and near an active quarry.

265. The Commission's standard for granting a stay is whether justice so requires.³²⁹ The most important element is a showing that the movant will be irreparably injured without a stay. To ensure definiteness and finality in our proceedings, our general policy is to refrain from granting a stay.³³⁰ For the reasons discussed below, we will deny Coalition's request.

266. Coalition has not shown that absent a stay there will be irreparable injury to them as a result of the incurrence of potentially unnecessary costs during eminent domain proceedings. In *Wisconsin Gas Co. v. FERC*,³³¹ the court developed several principles to determine if the requirement of irreparable harm has been met for a judicial stay:

First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." It is also well settled that economic loss does not, in and of itself, constitute irreparable harm Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur.³³²

267. Coalition has not met these principles of showing irreparable harm. We do not vacate the AIM Project here nor has any issued water quality certification modified the pipeline route. Thus, any *unnecessary* legal costs which might be incurred by landowners that may have their land restored are speculative at best. Moreover, regardless of the fact that Algonquin may have commenced eminent domain proceedings, it is still possible for

³²⁹ Administrative Procedure Act, 5 U.S.C. § 705 (2012); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

³³⁰ See, e.g., *Sea Robin Pipeline Co.*, 92 FERC ¶61,217, at 61,710 (2000).

³³¹ 758 F.2d 669 (D.C. Cir. 1985).

³³² *Id.* at 674.

individual landowners to work with Algonquin to accommodate some of their needs. Further, any economic loss, by itself, is not sufficient to constitute irreparable harm.

268. Coalition also has not shown that absent a stay there will be irreparable injury to the environment. The Commission determined in the March 3 Order, after a thorough environmental review, that if the proposed AIM Project facilities are constructed and operated in accordance with the recommended and proposed environmental mitigation measures, it would constitute an environmentally acceptable action.³³³ As detailed above, the Commission also rejects Coalition's rehearing arguments that there will be irreparable injury involving the loss of wetlands and wildlife habitat.

269. Similarly, Local Officials have also not shown that absent a stay there will be irreparable injury to their constituents' safety. The Commission determined in the March 3 Order that blasting at the active quarry will not damage the West Roxbury Lateral or West Roxbury Meter Station,³³⁴ and that natural gas transmission lines continue to be a safe, reliable means of transportation.³³⁵ Further, as detailed above, we reject the rehearing arguments that the project cannot operate safely near the active quarry or in a populated area.

270. Both the Commission and the courts have denied stays in circumstances similar to those presented here. For example, in *Midwestern Gas Transmission Company*, the Commission denied a request for stay that was based on claims that construction and eminent domain proceedings would cause irreparable harm to the environment and local landowners.³³⁶ Similarly, in *Transcontinental Gas Pipe Line Corporation*, the Commission found that allegations of environmental harm and pipeline safety did not support grant of a stay.³³⁷ The courts have also denied requests for judicial stay in similar pipeline construction cases.³³⁸

³³³ March 3 Order, 150 FERC ¶ 61,163, at P 150.

³³⁴ *Id.* PP 61-63.

³³⁵ *Id.* P 105.

³³⁶ 116 FERC ¶ 61,182 (2006).

³³⁷ 98 FERC ¶ 61,086 (2002).

³³⁸ See, e.g., *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, No. 12-1481, Order Denying Motion for Stay (D.C. Cir. Mar. 5, 2013); *In re Minisink Residents for Env'tl. Pres. and Safety*, No. 12-1390, Order Denying Petition for Stay (D.C. Cir. Oct. 11,

271. For these reasons, the Commission finds that Coalition and Local Officials have not demonstrated that they will suffer irreparable harm, and thus, their requests for stay are denied.

The Commission orders:

(A) The requests for rehearing of the March 3 Order are denied, and the requests for stay of the March 3 Order are dismissed, as discussed in the body of this order.

(B) Mr. Huston's Request for Rehearing is dismissed for the reasons given in the body of this order.

(C) Late motions to intervene are denied and the late movants' requests for rehearing are dismissed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

2012); *Defenders of Wildlife v. FERC*, No. 10-1407, Order Denying Motion for Stay (D.C. Cir. Feb. 22, 2011); *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389 Order Denying Motion for Stay (D.C. Cir. Jan. 28, 2011). *See also Feighner v. FERC*, No. 13-1016, Order Denying Motion for Stay (D.C. Cir. Feb. 8, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015, Order Denying Motion for Stay (D.C. Cir. Feb. 6, 2013); *Coal. for Responsible Growth and Res. Conservation v. FERC*, No. 12-566, Order Denying Motion for Stay (2d. Cir. Feb. 28, 2012).

Appendix A
Parties Requesting Rehearing

Parties Joining the City of Boston Delegation Request for Rehearing

- United States Congressman Stephen F. Lynch
- Mayor of The City of Boston Martin J. Walsh
- Boston City Councilor Matt O'Malley
- Boston City Councilor Michelle Wu
- Boston City Councilor Michael Flaherty
- Boston City Councilor Ayanna Pressley
- Boston City Councilor Stephen J. Murphy
- Massachusetts State Representative Edward F. Coppinger
- Massachusetts State Senator Michael Rush

Parties Joining the Coalition Request for Rehearing

- The Community Watersheds Clean Water Coalition
- Jessica Porter
- Sierra Club Lower Hudson Chapter
- Food & Water Watch
- Stop the Algonquin Pipeline Expansion
- Better Future Project
- Capitalism versus the Climate
- Fossil Free Rhode Island
- Phil Barden
- Eunice Carlas
- Paul Dunn
- Margaret Sheehan
- Paul McIrney
- Marla Rivera
- Jan White
- Mary McMahan
- Robert and Audrey Brait
- Dan McCann
- William and Robin Cullinane
- Linder Sweeney

- Walter Partridge³³⁹
- Reynolds Hill, Inc.
- Keep Yorktown Safe New York
- City of Peekskill, New York
- Pramilla Malick
- Rickie Harvey (West Roxbury Saves Energy)

Parties Joining the West Roxbury Intervenors Request for Rehearing

- Matthew Butler
- Charles River Spring Valley Neighborhood Association
- Conservation Law Foundation;
- Rickie Harvey
- West Roxbury Saves Energy
- Virginia Hickey
- Mary McMahan
- Alexandra Shumway³⁴⁰

³³⁹ We note that the March 3 Order granted late motion to intervene of the Direct Abutters and Private Citizens of West Roxbury and Dedham (Direct Abutters). Appendix A of the March 3 Order, however, mistakenly did not include Walter Partridge as member of the Direct Abutters as requested in the Direct Abutter's late motion to intervene.

³⁴⁰ Appendix A of the March 3 Order incorrectly spells Ms. Shumway's last name as "Schumay."

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 13, Candy Woodall, *Constitution Pipeline delayed, but hundreds of trees already cut down*, Pennlive, March 10, 2016.

Constitution Pipeline delayed, but hundreds of trees already cut down



By **Candy Woodall** | cwoodall@pennlive.com

[Email the author](#) | [Follow on Twitter](#)

on March 10, 2016 at 2:42 PM, updated March 10, 2016 at 4:57 PM

The Constitution Pipeline is delayed, and the setback has created a situation in northeastern Pennsylvania that Megan Holleran feared.

Last month, [she and her family lost hundreds of maple trees](#), which were cut down to make room for the 124-mile pipeline.

The pipeline will connect Marcellus Shale gas in Susquehanna County to consumer markets in New York and New England states.

Now that the pipeline is delayed, Holleran is both angry and vindicated.

"It was senseless to cut down the trees in Pennsylvania before they were sure they could move forward. At the same time, it proves we were right," she said.

Holleran asked Williams Partners, the Oklahoma-based pipeline builder, to wait until it received all of its approvals before clearing about 200 trees on her family's 23-acre property in New Milford.

The \$875 million project - a partnership among Williams, Cabot Oil & Gas, Piedmont Natural Gas and WGL Holdings - is still awaiting some environmental permits in New York.

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['We will be here as long as it takes': protesters launch encampment opposing Atlantic Sunrise Pipeline](#)

[Atlantic Sunrise pipeline opponents set to begin encampment in Lancaster County](#)

[Harrisburg revs up for natural gas severance tax fight](#)

['This is our yard': Pipeline opponents build structures to block \\$3B Atlantic Sunrise project](#)

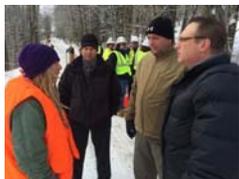
[Third time's the charm for Gov. Tom Wolf's natural gas severance tax?](#)

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"If they cut them down and the project doesn't move forward, we can't get these trees back," **Holleran said last month.**

The pipeline is waiting on permits from the New York Department of Conservation and the Army Corp of Engineers, but it will move forward, **Williams spokesman Chris Stockton said last month.**

"The project is under the jurisdiction of the federal government, and the federal government already approved it," he said.



Pipeline builder can cut down Pa. family's maple trees, federal judge says

Until this week, **Constitution Pipeline** was on target to be in service by the end of this year and had already cut down several miles of trees in Pennsylvania.

But on Thursday the company issued **a statement** saying it has changed its in-service date from the fourth quarter this year to the second half of 2017.

Constitution Pipeline builders haven't been able to start clearing trees in New York because the pipeline hasn't received a necessary water quality permit.

Without the permit, the tree-clearing can't be completed by the March 31 deadline to avoid disrupting birds and bats.

Limited construction is expected to begin this summer, and full construction will begin after Oct. 1 "to minimize and avoid adverse impacts to migratory birds and the Northern Long Eared Bat," **according to a company statement.**



'Piece of paradise' lost to pipeline development

Pipeline construction is estimated to support more than 2,400 jobs and generate \$130 million in labor income for the region, according to the statement. The pipeline's overall economic impact is anticipated to reach more than \$13 million in local tax revenue and \$600,000 in new income in the region.

Once the Constitution Pipeline is in service, it will deliver enough natural gas to serve approximately 3 million U.S. homes, including those in Pennsylvania and New York, according to the statement.

"There are consumers, power plants and utility companies there that are still getting their natural gas from the Gulf of Mexico or Canada," Stockton said last month. "There's gas right in their backyard that they can't tap. The Constitution Pipeline was designed to change that."

Despite pushback in both Pennsylvania and New York, the Federal Energy Regulatory Commission approved the pipeline in December 2014 and denied challenges to the project in January.

Federal agency funded by energy industry has never rejected a pipeline plan



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People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 14, Jon Hurdle,
Maple syrup trees cut to make way for Constitution
Pipeline, State Impact, March 2, 2016.

stateimpact.npr.org

Maple syrup trees cut to make way for the Constitution Pipeline

Jon Hurdle

March 2, 2016 | 11:47 AM

By



Jon Hurdle / StateImpact PA

Megan Holleran stands by a sign on her family's land. The Hollerans lost their court battle to save their maple trees from eminent domain seizure. The trees are being cut to make way for the new Constitution Pipeline.

Megan Holleran lost the latest round of her long-running battle with the natural gas industry on Tuesday when men with chain saws began to fell trees on her family's property to make way for an interstate pipeline.

The felling crew took down about one and a half acres of trees on the 23-acre Susquehanna County lot, and were expected to cut about the same amount again Wednesday in preparation for construction of the 124-mile Constitution Pipeline that would carry natural gas from Pennsylvania's Marcellus Shale into New York State.

When the clearance is complete, it will have stripped about 90 percent of the trees from which Holleran and her family harvest maple syrup in a commercial operation that is now destroyed, she said.

The pipeline's builders, led by the Williams Companies, won court permission about a year ago to take some of the family's land under eminent domain, a legal mechanism that is being pursued by other pipeline companies as they begin a massive build-out of Pennsylvania's natural gas pipeline infrastructure.

Landowners like the Hollerans are rejecting offers of compensation by pipeline builders who in some cases are going to court to seek eminent domain over the land.

Holleran said her family, which has owned the property since the 1950s, has urged Williams to find a different route for the pipeline, perhaps even burying it underground, since it was first proposed about five years ago, but that Williams has insisted on the current route.

Tom Droege, a spokesman for Williams, said the company has made changes to "more than half" of the route, including the Hollerans' property, as a result of feedback from stakeholders.

At the Holleran property, the company moved the route to the western edge in order to "confine impacts," he said. The company also considered a request from the family to move the line to an adjacent property to the west but that would have involved crossing a quarry which would have created "constructability challenges," Droege said.

Holleran accused Williams of abusing eminent domain on the grounds that the gas to be carried by the new pipeline would be exported to Canada and Europe and so could not be for the public benefit.



Jon Hurdle / StateImpact PA

An armed U.S. Marshall on his way to accompany two tree cutters at the Holleran property on Tuesday, March 1 2016. The Williams Company says a federal judge ordered the heavy police presence.

“Eminent domain is supposed to work to benefit the people it’s impacting, and we will not benefit from this pipeline,” Holleran told StateImpact, as chain saws roared and trees fell a few hundred yards away. “The usage of eminent domain in this case to take land from people who didn’t want to give it to them is more of an abuse of the power.”

Droege argued that the Constitution Pipeline, the first to directly link the Marcellus Shale with markets in New York and New England, was determined to be in the public interest by the Federal Energy Regulatory Commission after an extensive regulatory review.

“The project is designed to connect natural gas supplies to communities in the northeastern U.S. so they can enjoy the benefits of this cost-effective resource by next winter,” he said.

At the isolated property in New Milford Township about 30 miles north of Scranton, Holleran and her family were joined by about 20 protestors who were ordered by a federal judge to stay at least 150 feet away from a right-of-way where the felling crew was working. Protestors painted American flags on the trunks of some trees amid handwritten signs such as “No Eminent Domain for Corporate Gain” and “Sap Lines Not Pipelines.”

The tree crew was accompanied by at least three U.S. Marshals who were armed with semi-automatic weapons and pistols, and who wore bulletproof vests.

Holleran, whose aunt and uncle live a few hundred feet from where the trees were cut, said the presence of heavily armed men on her property during the tree cutting was a heavy-handed gesture which undermines Williams's claim that it treats landowners fairly.

"Williams must be a lot more terrified of my words that I have given them reason to be," she said. "It shows just how unreasonable they can be; I don't think that bringing in half a dozen marshals with bullet-proof vests and assault weapons is treating landowners fairly."

Droege, the Williams spokesman, said the decision to have armed marshals at the site was made by a federal judge, and not by the company. "The top priority is ensuring these activities are conducted safely and efficiently," he wrote in an email.



Jon Hurdle / StateImpact Pennsylvania

Fallen trees on the Holleran property after cutting on Tuesday. The trees were cut to make way for the Constitution Pipeline project.

The protesters included Elliott Adams, a forester from Sharon Springs, NY, who lives near the proposed pipeline route in that state, and said he had come to support the Hollerans because he said the eminent domain law has been misused in their case.

"They took land by eminent domain which is meant to be for the public good we know that exportation of gas is not for the public good," Adams said.

He said New York State has not issued all necessary permits for the pipeline, and that he would continue to urge Gov. Andrew Cuomo to withhold final permitting.

On Feb. 10, a tree-cutting crew arrived at the property, accompanied by Pennsylvania state troopers, but left without starting work after the police said they did not have the authority to enforce a felling operation.

The work was then restarted by a federal judge in Scranton who authorized law-enforcement officers to arrest anyone who tried to stop the tree cutting, and said that anyone who did so could be held in contempt of court.

Holleran said the company had made “several” offers of compensation for the value of the wood rather than for the business that she said is being destroyed by the tree removal. But the family is not interested in any compensation because it wants to be able to enjoy its land as it has done for three generations.

“We would reject any offer,” she said. “We have been very clear from the beginning that we don’t want this pipeline on our land. They are destroying my home. You can’t put this in terms of money; there is no compensation for this.”

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 15, FERC Order Granting Rehearing for Further Consideration, Atlantic Sunrise Pipeline, Docket No. CP15-138, March 13, 2017.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP15-138-001

ORDER GRANTING REHEARINGS FOR
FURTHER CONSIDERATION

(March 13, 2017)

Rehearings have been timely requested of the Commission order issued on February 3, 2017, in this proceeding. *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 (2017). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)¹ would be deemed denied. 18 C.F.R. § 385.713 (2016).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Kimberly D. Bose,
Secretary.

¹ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Document Content(s)

CP15-138-001.DOC.....1-1

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 16, Jon Hurdle,
*A company cut trees for a pipeline that hasn't been
approved. The landowners just filed for compensation,*
State Impact, July 12, 2018.



JULY 12, 2018 | 05:17 PM

A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation

Family contends the line will never be built

Jon Hurdle 

A Pennsylvania family that lost more than 500 trees to make way for the stalled Constitution Pipeline project asked a court on Thursday to dissolve an injunction that gave the company access to their property, and to determine compensation that remains unpaid.

The Hollerans of New Milford Township in Susquehanna County

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

**Stripping People's Rights Attachment 17, FERC Order
Granting Rehearing, Sabal Trail, Docket No. CP15-17-
001, March 29, 2016.**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Florida Southeast Connection, LLC
Transcontinental Gas Pipe Line Company, LLC
Sabal Trail Transmission, LLC

Docket Nos. CP14-554-001
CP15-16-001
CP15-17-001

ORDER GRANTING REHEARINGS FOR
FURTHER CONSIDERATION

(March 29, 2016)

Rehearings have been timely requested of the Commission order issued on February 2, 2016, in this proceeding. *Florida Southeast Connection, LLC, Transcontinental Gas Pipe Line Company, LLC, and Sabal Trail Transmission, LLC*, 154 FERC ¶ 61,080 (2016). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)¹ would be deemed denied. 18 C.F.R. § 385.713 (2015).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Document Content(s)

CP14-554-001.DOC.....1-1

People's Dossier: FERC's Abuses of Power and Law
→ **Stripping People's Rights**

Stripping People's Rights Attachment 18, FERC Order Granting Rehearing for Further Consideration, Dominion Transmission, Docket No. CP14-497-001, June 27, 2016.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Dominion Transmission Inc.

Docket No. CP14-497-001

ORDER GRANTING REHEARINGS FOR
FURTHER CONSIDERATION

(June 27, 2016)

Rehearings have been timely requested of the Commission order issued on April 28, 2016, in this proceeding. *Dominion Transmission Inc.*, 155 FERC ¶ 61,106 (2016). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)¹ would be deemed denied. 18 C.F.R. § 385.713 (2015).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Document Content(s)

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Stripping People's Rights Attachment 19, Statement of
FERC Commissioner Richard Glick on PennEast
Pipeline, Docket No. CP15-558-002, May 30, 2018.



STATEMENT

Statement of Commissioner Richard Glick on PennEast Pipeline Co., LLC

Date: May 30, 2018

Docket No.: CP15-558-002

"Today's order affirms the Commission's authority under the Natural Gas Act (NGA) to toll the date for issuing a merits determination on a request for rehearing. As the Commission explains, the rehearing process affords it an opportunity to review the underlying decision and further explain the basis for its actions. This process frequently requires more than the thirty-day period set forth in section 19(a) of the NGA, particularly when parties have submitted requests for rehearing raising significant and complex arguments.¹ It is nonetheless critical that the Commission respond to rehearing requests as quickly as possible, especially where—as here—parties have raised serious questions regarding the Commission's conclusion that a new natural gas pipeline facility is needed and in the public interest.

"Until the Commission issues its ultimate order on rehearing, the NGA precludes parties from challenging the Commission's decision in federal court.² However, the pipeline developer has the right to pursue eminent domain³ and, in many cases, to begin construction on the new pipeline facility while the Commission addresses the rehearing requests. As a result, landowners, communities, and the environment may suffer needless and avoidable harm while the parties await their opportunity to challenge the Commission's certificate decision in court.

"This proceeding, in particular, illustrates the need for prompt action on rehearing requests. As I explained in my dissent from the underlying order, I disagree with the Commission's finding that the PennEast Project is needed and in the public interest. I believe that the Commission's reliance on affiliate precedent agreements is, without more, insufficient to demonstrate that a new natural gas pipeline is needed.⁴ I also have serious concerns regarding the Commission's practice of issuing conditional certificates—which, notwithstanding their name, vest the pipeline developer with full eminent domain authority—in cases where the record does not contain adequate evidence to conclude definitively that the pipeline is in the public interest.⁵

¹ 15 U.S.C. § 717r(a) (2012).

² *Id.* § 717r(b).

³ *Id.* § 717f(h).

⁴ *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at 1-2 (2018) (Glick, Comm'r, dissenting).

⁵ *Id.* at 2-4 (Glick, Comm'r, dissenting).



STATEMENT

In short, when the Commission issues a tolling order, it is critical that the Commission issue a subsequent order addressing the merits of the rehearing request as expeditiously as reasonably possible in order to both protect the public from unnecessary harm and permit the parties to timely seek their day in court.⁶

⁶ This statement is not intended to reflect in any way concerns regarding how timely Commission staff currently processes rehearing orders for Commission consideration.