UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Atlantic Coast Pipeline, LLC	Docket Nos.	CP15-554-000
Dominion Transmission, Inc.		CP15-554-001
		CP15-555-000

SIERRA CLUB'S SUPPLEMENTAL REQUEST FOR REHEARING AND STAY

Sierra Club submits the attached request for rehearing and motion for stay as a supplement to the request separately filed on behalf of Sierra Club *et al*. by Appalachian Mountain Advocates and the Southern Environmental Law Center.[1] Pursuant to 18 C.F.R. § 386.713, Sierra Club contends that for the reasons stated in that filing, and for the additional reasons stated below, the Commission's October 13, 2017 "Order Issuing Certificates" in the above-captioned dockets, 161 FERC ¶ 61,042 ("Order") should be withdrawn. In addition, the Commission must promptly stay that order, and must not issue notices to proceed or take other action that will authorize the start of construction, pending both a decision on the merits on rehearing requests and completion of judicial review thereof. As we explain below, FERC's practice of issuing "tolling orders" on requests for rehearing, while allowing construction to proceed, further violates Sierra Club's right to due process and improperly deprives courts of jurisdiction to review FERC decisions.

I. Statement of Issues

A. The Order Violates The Due Process Rights of Sierra Club and Its Members

FERC should rescind the Order because the Order deprives Sierra Club and its members

[1] "Request For Rehearing And Rescission Of Certificates And Motion For Stay Of Shenandoah Valley Network, Highlanders For Responsible Development, Virginia Wilderness Committee, Shenandoah Valley Battlefields Foundation, Natural Resources Defense Council, Cowpasture River Preservation Association, Friends Of Buckingham, Chesapeake Bay Foundation, Dominion Pipeline Monitoring Coalition, Sound Rivers, Winyah Rivers Foundation, Appalachian Voices, Center For Biological Diversity, Chesapeake Climate Action Network, Friends Of Nelson, Sierra Club, Wild Virginia, Bold Alliance, Dawn Averitt, Richard Averitt, Rockfish Valley Investments, Llc, Roberta Koontz, And Robert Koontz," filed Nov. 13, 2017, hereinafter "Appalmad Request."

of protected interests without the due process guaranteed by the Fifth Amendment. "Due process generally requires a meaningful opportunity to be heard before one is deprived of life, liberty, or property." *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (quotation omitted) (citing *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006), *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)). A meaningful opportunity to be heard requires opportunity to examine, analyze, explain, and rebut evidence relied upon by the Commission. *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 300-302 (1937). Here, the Order relies on extensive evidence and reasoning that was not presented in the applications, draft EIS, or other document provided for public comment, and which Sierra Club has not had a meaningful opportunity to dispute. *See, e.g.*, Appalmad Request at 45-49, 58-61(summarizing omissions in draft EIS). The Order's conclusion that the public was not entitled to a formal opportunity to contest this information prior to project approval, whether through a renewed or supplemental draft EIS, Order PP 200-202, or through a formal evidentiary hearing, Order PP 22-23, was unlawful. By authorizing construction and the exercise of eminent domain prior to resolution of Sierra Club's challenges to Commission's underlying evidence and logic, the Order violates the Due Process Clause.

1. Sierra Club and Its Members Have Interests Protected By The Due Process Clause

The scope of Due Process Clause protection is determined by a "familiar two-part inquiry": whether action will implicate a "protected interest," and, if so, whether the government provided the process that was due. *UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trustees of Univ. of D.C.*, 56 F.3d 1469, 1471 (D.C. Cir. 1995) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, (1982)). Here, Sierra Club and its members easily satisfy the first

part of this inquiry. Sierra Club and its members have numerous protected interests that will be irreparably harmed by construction of the pipelines.[2]

Multiple Sierra Club members own property that will be crossed by the Atlantic Coast Pipeline route. *See, e.g.*, Declaration of Libra Max, Declaration of Robert Koontz, Declaration of Roberta Koontz.[3] Much of this property is presently forested, and plays a role in broader interior forest ecosystems or in the aesthetic landscape. Roberta Koontz Decl. ¶ 10 (explaining, *inter alia*, that this property is subject to a conservation easement serving the public purpose of preserving the landscape); *see also* FEIS at 4-401 to 4-402.These members, and Sierra Club as a whole, have particular interests in the present, forested character of these properties. *Id.*, *see also, e.g.*, Sierra Club, Forest Protection and Restoration Policy.[4] Sierra Club members also own property adjacent to waterways that will be crossed or otherwise impacted by pipeline construction. Max Decl. ¶ 4, *see also, e.g.*, Sierra Club, Water Policy.[5]

In additional, the National Environmental Policy Act and Natural Gas Act create an expectation of protection for Sierra Club's interest in environmental protection of land along the pipeline route. Statutes and other non-constitutional law can give rise to expectations and interests protected by the Due Process Clause. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The Due Process Clause protects "property interests … well beyond actual ownership of real estate, chattels, or money," and against "deprivations of liberty beyond the sort of formal constraints imposed by the criminal process." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571–72 (1972). Here, Sierra Club members—both those who own property along the pipeline route and those who do not but whose recreation and other activities will be impacted by the pipeline—have

[2] Operation of the pipelines, although less imminent, will impose additional harms.
[3] These declarations are attached to Sierra Club's parallel request for rehearing.
[4] Available at https://www.sierraclub.org/sites/www.sierraclub.org/files/Forest%20Protection%20and%20Restoration%20Policy.pd f and attached as Exhibit 1.
[5] Available at https://www.sierraclub.org/policy/water-policy and attached as Exhibit 2

particularized interests in the integrity of specific forest and other ecosystems along the pipeline route, the scenic character of specific places, ridges, and other features, and in the integrity of specific streams, waterways, and other aquatic habitat. Gore Decl. ¶ 8-13, Jarrell Decl. ¶ 6, Johnson Decl. ¶¶ 20-22, Declaration of Naomi Cohen ¶¶ 4-12.[6] The Natural Gas Act provides Sierra Club, as an intervenor in this docket, with rights to protect these interests, including the right to participate in a hearing on the application, 15 U.S.C. § 717f(c)(1)(B), and the right to seek rehearing and judicial review, § 717r(a)-(b). Similarly, the National Environmental Policy Act creates the expectation that Sierra Club will have a formal opportunity to comment on the evidence and reasoning underlying FERC's assessment of environmental impacts: that evidence must be presented in a draft EIS "to the fullest extent possible" to enable public comment thereon. 40 C.F.R. § 1502.9. The Natural Gas Act then imposes on FERC a substantive obligation to consider environmental impacts—including any showing by Sierra Club and others that impacts will be greater than FERC or project applicants initially contended—in weighing whether a proposed pipeline is in the public interest. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). These rights further demonstrate that Sierra Club has a protected interest. *See Logan*, 455 U.S. at 431, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11–12 (1978).

2. Due Process Requires A Meaningful Hearing *Before* These Interests Are Impacted

Because Sierra Club and its members have interests within the scope of the Fifth Amendment's protection, FERC must provide an "opportunity to be heard at a meaningful time and in a meaningful manner" before impairing these interests. *Mathews*, 424 U.S. at 333. Because, as explained in Sierra Club's concurrently-filed parallel request for rehearing and

[6] Attached to Sierra Club's parallel filing.

motion for stay, pipeline construction and associated activities such as tree cutting along the right-of-way will irreparably injure these interests, the "meaningful time" must be before such injury occurs. *Id.* at 331; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (post-deprivation hearing will only satisfy due process in "extraordinary situations"). And Sierra Club cannot be heard in a meaningful manner where FERC "use[s] evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 289 n.4 (1974). FERC must "disclos[e]" the evidence it relies upon "to the parties and afford[] them a suitable opportunity to contradict it or parry its effect." *Union Elec. Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989) (quotation omitted).

Here, FERC failed to meet these constitutional minima, because the final order relies on extensive evidence that was not available during public comment opportunities. FERC only invited comments on two occasions: a comment period after notice of the initial application was published, and an opportunity to comment on the draft EIS. Both comment periods had deadlines, such that comments received outside these periods subject to lesser status and protection. However, the final order relies on large amounts of evidence that was not available during either comment opportunity, Appalmad Request at 45-49, 58-61, either citing this evidence directly,[7] or indirectly, in that the final EIS relied on previously unavailable evidence in concluding that numerous environmental impacts would be insignificant, a finding relied on in the Order's overall decision to approve the projects.[8] Sierra Club therefore did not have a meaningful opportunity to "parry [the] effect" of this post-DEIS evidence. *Union Elec. Co.*, 890 F.2d at 1202.

Although Sierra Club contests the adequacy of this evidence now, the present opportunity to seek rehearing is insufficient to meet the requirements of due process here, because (absent a

[7] *E.g.*, Order PP 206, 210, 242, 243.
[8] *E.g.*, Order PP 199, 228, 249.

stay) irreparable injury is likely to occur prior to resolution of any request for rehearing. Due process requires a meaningful hearing before the order is "final" or "becomes effective." *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1327 (D.C. Cir. 2015). Here, the Order has already taken effect. The project applicants have already initiated eminent domain condemnation proceedings, and the Order contemplates that construction activities, which would irreparably injure Sierra Club and its members, will begin soon. Thus, in vital practical terms, the Order is already final and effective. Similarly, if FERC issues "notices to proceed" or similar orders authorizing construction (and, thus, irreparable injury), these orders will effectively be final orders for purposes of the Natural Gas Act, 15 U.S.C. § 717r. On the other hand, FERC's recent practice has been to consistently issue "tolling orders" rather than to decide requests for rehearing within the 30 day period contemplated by the Natural Gas Act, instead taking many months to resolve requests for rehearing filed by Sierra Club, rendering it likely that injury will occur prior to resolution of the requests for rehearing here.[9] This case is therefore unlike *Myersville*, because nothing in that opinion discussed the possibility of irreparable injury occurring prior to resolution of the requests for rehearing. *Id.*, *accord Minisink Residents for Envtl. Pres. & Safety v. F.E.R.C.*, 762 F.3d 97, 115 (D.C. Cir. 2014). Other cases holding that the opportunity to seek rehearing satisfied due process concerned remediable injuries. *Blumenthal*, 613 F.3d at 1146 (executive compensation), *Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988) (monetary payments presumptively not irreparable).

FERC's practice of extending the time to respond to rehearing requests aggravates this constitutional injury. Not only does FERC authorize deprivation of Sierra Club's protected interests prior to a meaningful hearing before FERC, but if FERC delays in acting on Sierra

[9] As we explain *infra*, issuing a tolling order while allowing construction to proceed constitutes unreasonable delay. *Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C.Cir. 1984).

Club's rehearing request by issuing a "tolling order" rather than a decision on the merits 30 days after the rehearing request is filed (as FERC has often done in other recent dockets), this limits Sierra Club's ability to seek effective hearing from the courts as well. 15 U.S.C. § 717r(b). Courts have recognized that FERC actions that keep a claim "tied up" a claim in administrative review "may present due process concerns." *See Kokajko*, 837 F.2d at 526 (explaining that such concerns could arise when there was a risk of "irreparable injury" or harm to "human health and welfare."). "The Due Process Clauses protect civil litigants who seek recourse in the courts." *Logan*, 455 U.S. at 429. To be clear, the potential for judicial relief—even if immediately available—would not be a substitute for a meaningful pre-deprivation hearing before FERC. *Craft*, 436 U.S. at 20. However, in the event that FERC delays Sierra Club's ability to seek judicial relief while allowing the project to proceed (for example, by issuing notices to proceed, letter orders, or taking other action that allows for on-the-ground activity while responding to rehearing requests with a tolling order), this presents a separate and compounding constitutional violation. *Logan*, 455 U.S. at 429.

Finally, we note that providing a meaningful pre-deprivation opportunity to rebut evidence relied on by FERC would not impose an unreasonable burden on FERC. FERC issued the draft EIS prematurely, before the project applicants had supplied much of the information essential to the analysis of environmental impacts. Waiting for the applicants to finalize (or reasonably complete) their proposal before requiring Sierra Club and the public to comment thereon would have imposed no additional burden on FERC.

B. Conclusion to Supplemental Request for Rehearing

The Order at issue here permits irreparable injury to the interests of Sierra Club members and the organization itself. Due process requires that Sierra Club have an opportunity to rebut the evidence FERC relied upon in adopting this order, and that opportunity must arise before the

deprivation occurs. Here, the final EIS and Order rely on extensive information that was not available during public comment on the application or the draft EIS. Accordingly, the Order's conclusion that neither a full evidentiary hearing nor a second or supplemental draft EIS were required was unlawful, arbitrary, and a violation of the constitutional rights of Sierra Club and its members. FERC must rescind the Order and provide Sierra Club with a meaningful pre-deprivation hearing.

II. Supplemental Motion for Stay

FERC should immediately stay the Order for the reasons stated in the concurrently filed joint request for rehearing and motion for stay (see *supra* note 1). Each of the factors FERC traditionally considers in evaluating a stay supports issuance of a stay here. *Id.* In addition, a stay is necessary in order to protect the Congressionally-mandated jurisdiction of the appellate courts to review FERC action, 15 U.S.C. § 717r(b), as well as Sierra Club's constitutional right of access to the courts.[10]

If FERC allows construction to proceed, and Sierra Club to be irreparably injured, prior to resolution of Sierra Club's requests for rehearing, FERC's "fail[ure] to resolve [the] dispute[]" will defeat, in important part, "the statutory obligation of a Court of Appeals to review [FERC's decision] on the merits." *Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C.Cir. 1984). But FERC is prohibited from "thwart[ing] [the courts'] jurisdiction by withholding a reviewable decision." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). "[A]gencies cannot insulate their decisions from Congressionally mandated

[10] *See Patchak v. Jewell*, 828 F.3d 995, 1004 (D.C. Cir. 2016*), cert. granted sub nom. Patchak v. Zinke*, 137 S. Ct. 2091 (2017) ("The right of access to courts is, without question, 'an aspect of the First Amendment right to petition the government.'") (quoting *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 896–97 (1984)).

judicial review simply by failing to take 'final action.'" *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001).

These judicial admonitions are especially pertinent because in multiple cases, Sierra Club and other environmental groups have succeeded in showing that FERC improperly approved pipelines, only to see these decisions rendered after pipeline construction has been largely completed. *See, e.g.*, *Sierra Club*, 867 F.3d 1357, *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014). In these cases, FERC's decision to allow construction to proceed while delaying resolution of requests for rehearing largely impeded the ability of the courts to exercise jurisdiction over FERC's authorization of construction of the pipelines at issue, violating Congressional intent and the repeated instruction of the circuit courts. *Sierra Club*, 867 F.3d at 1364-65 (FERC took six months act on rehearing request), *Delaware Riverkeeper Network*,735 F.3d at 1312 (FERC took seven months to act on rehearing request) Accordingly, FERC must stay the Order, and refrain from issuing notices to proceed, until Sierra Club's request for rehearing is resolved. If FERC ultimately denies rehearing, FERC should extend the stay pending completion of judicial review.

III. Conclusion

For the reasons stated in Sierra Club's parallel filing, ("Appalmad Request"), and above, Sierra Club requests rehearing of the Order, and Sierra Club separately requests that the Order be immediately stayed.

Sincerely,

Nathan Matthews
Staff Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5695
Nathan.Matthews@sierraclub.org

CERTIFICATE OF SERVICE

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

Dated at Oakland, CA this 13th day of November, 2017.

Nathan Matthews
Staff Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5695 (tel)
(415) 977-5793 (fax)
Email: nathan.matthews@sierraclub.org

Forest Protection and Restoration Policy

The Sierra Club supports halting the destruction of forest ecosystems throughout the United States. We oppose all logging activities -- whether on federal, state, provincial, or private lands -- that are environmentally unsustainable, or that jeopardize fully functioning forest ecosystems. We support the immediate halt of: all logging in remaining old-growth or roadless areas, ecologically destructive clearcutting, and conversions to non-native species.

The Club supports restoring naturally self-sustaining networks of wild forests for every forest ecosystem. Where forests have been damaged or fragmented, we call for the restoration of the ecosystem with native plants and animals, and establishment of biological corridors to link isolated stands.

The Club supports dramatically reducing the consumption of virgin wood products through recycling, reuse, and the use of environmentally acceptable alternative materials. Phasing out logging on ecologically sensitive lands, regardless of ownership, is a high priority.

Adopted by the Board of Directors, November 20-21, 1993; ratified in the Club election May 9, 1994; amended by the Board of Directors, February 23-24, 2002

Water Policy

Water is basic to all life. Water and quality and water quantity are integral to issues such as energy, land use, and maintenance of a healthy environment for plants, wildlife and humanity. Proper management of water is essential so that present and future generations may survive and flourish. To promote proper management for a healthful and aesthetically pleasing natural environment, the Sierra Club adopts the following Water Policy:

Instream Flows

Minimum instream flows for the benefit of recreation, water quality, fish and wildlife, and scenic values should protected by law. A moratorium on additional withdrawals and diversions must be immediately imposed where ecosystems are presently in jeopardy. Comprehensive programs to ensure protection of instream flows should be enacted in states and provinces where they do not now exist, and should be implemented in all states and provinces. Specially managed buffer zones should be maintained on sides of steams through farmlands, logging areas, or other areas under development to help protect instream flows.

Wild and Scenic Rivers

Effective wild, scenic, and recreational river protection programs should be enacted in every state and province. Federal, state or provincial, and local programs should be fully implemented to preserve unique areas.

Wetlands

Natural wetlands should be managed for their environmental values. All federal and state or provincial programs should be implemented to ensure that wetlands are protected. State, provincial, and local governments should adopt protective laws and effective implementation programs.

Floodplains

In flood protection, emphasis should be placed not on structural controls, but on floodplain management, including floodproofing and relocation of existing structures as appropriate, and zoning for compatible uses to control future development. To maximize environmental benefits, floodplains should be utilized for wetlands, agriculture, parks, greenbelts, groundwater recharge, buffer zones for protection of instream uses, and other uses compatible with the flood hazard. Structural devices should not be used where they would encourage development in floodplains. Coastal floodplains must also be protected.

Priorities

In each state and province, priorities for different water uses should be written into law, to protect basic human and environmental requirements. The priority rankings may vary regionally.

Water Inventory

Thorough water inventories, including historic water yields and uses, should be conducted of all water resources of environmental importance, with priority where substantial demands are anticipated.

Coordinated Ground and Surface Water Management

Federal, state and provincial laws should take into account the physical interrelationship of ground and surface water. Rights in both sources of supply should be integrated, and their management should be coordinated. The available water in a basin should be managed on a sustained-yield basis. Where groundwater is relatively isolated from the surface water and receives insignificant recharge, the government should determine and optimum useful life of the aquifer and control withdrawals accordingly. Controls should be established in water-short areas to ensure equitable distribution. Projects and proposals should be stopped if they would significantly damage aquifers or other natural features such as springs or caves.

Conservation

Programs should be pursued to improve the water retention capacity of the land, reduce water consumption, and promote water recycling. Allocations, building codes, metering, and pricing should aim to encourage conservation. All water users, including beneficiaries of federal water projects, should pay the full cost of water deliveries. States should have comprehensive water conservation plans as a condition to any funding by the federal government.

In areas where loss is significant, irrigation ditches should be lined.

Interbasin Diversion

There should be a moratorium on major new interbasin diversions of water until the ground and surface water interrelationships and ecological, social, economic, and land-use implications of such diversions are fully understood and appropriate protection has been established by law.

Federal Agencies

Federal agencies with water management responsibilities should be directed to shift from the design and construction of major structural water development projects to such activities as operation and maintenance of those projects already in existence; flood emergency planning; dissemination of information and provision of support needed for land-use regulation of floodplains; floodplain maintenance; regulation of dredge and fill of the nation's rivers and harbors and contiguous wetlands; public education; and improving the efficiency of water use in water-short regions. All federal agencies with water management roles should comply with the Water Resources Council's principles and standards.

Water Quality

An adequate water quality data base must be developed and existing quality higher than federal standards must be preserved. The Clean Water Act should be aggressively enforced by all agencies with water management responsibilities and should not be weakened. Point-source pollution should be eliminated, best management practices for air and water-borne pollutants should be developed, and adequate funding should be provided to implement control of non-point sources. Soil conservation measures and site development ordinances that protect water quality should be encouraged. Groundwater, oceans, and coastal waters must also be protected. No water projects that violate federal, state or provincial water quality laws should be built.

Forests and Ranges

Activities in forest and range watersheds must be managed to ensure that erosion does not exceed the normal geologic rate and that water quality and quantity are maintained.

Attempts to alter water yield should not damage other natural resource values.

Energy New energy developments should not be allowed if fish and wildlife habitat, water quality, instream stock watering, scenic and recreational values, or existing agricultural operations would be significantly damaged. Aquifers must be protected from depletion or degradation. Development of alternative energy systems requiring minimal water supply should be encouraged.

Urban Water Systems

Water resource public works funding priorities should be shifted to those projects and programs that would conserve existing water supplies. These would include municipal pipeline maintenance and leak repair, installation of redundancy and bypass capacity in conveyance systems, reuse and reclamation of storm water and sewage effluent, and other structural and nonstructural conservation measures for urban water systems.

Adopted by the Board of Directors, November 10-11, 1979; amended July 8, 1995

Guidelines for Evaluating Proposed Federal Water Project Transfers

Legislative and administrative proposals to transfer federal water and power facilities and related assets to non-federal entities should be considered carefully. On the one hand, they could have detrimental impacts on the environment and other interests; on the other, they can provide opportunities to mitigate past environmental damage and otherwise enhance the environment. Therefore, transfers should be authorized and approved only under conditions that enhance the environment and provide continuing protection of other public interests, as follows:

1. Fair Price - The federal taxpayer is entitled to a fair price for any facilities or assets transferred, one that should be set in light of the market value of the facilities. At a minimum, no federal water or power facility should be transferred for a price less than the present value of all associated outstanding repayment obligations, irrespective of adjustments or of the allocation of facility or asset costs among different uses. In addition, the value of any land or other non-water or non-power assets transferred, as well as the present value of any other anticipated receipts to the U.S. Treasury, should either be added to the minimum price or, preferably, reflected in environmental improvements, including ecologically beneficial land given by the transferee, determined as a result of sections 4 and 5, below.

2. Federal Control - Some federal water and power facilities play a critical role in watershed and river management for multiple purposes or in the interstate or international allocation of resources. Control of these facilities should be retained by the federal government.

3. Compliance with Environmental Laws - All transfers should comply with the National Environmental Policy Act, Endangered Species Act, and other federal environmental laws. All transferred facilities should operate in full compliance with such laws.

4. Facility-Specific Transfer Plans - Transfers should be carried out only pursuant to facility-specific plans developed by the applicable federal agencies with the input of all stakeholders. The plans should contain minimum terms and conditions that will require transferees to:

a. protect existing water resource values that could be affected by the transfers;

b. mitigate environment impacts to fish and wildlife, and otherwise enhance the environment;

c. promote the protection and restoration of threatened and endangered species, through measures that may include development and implementation of a habitat conservation plan;

d. use any power generation or transmission facilities in a manner consistent with national energy policy, especially to support non-hydroelectric renewable resources; and

e. avoid adverse impacts on the federal government's ability to fulfill its treaty and trust responsibilities to Indian tribes.

5. Competitive Bidding - Once the above minimum terms and conditions are established, the choice of a transferee and the final transfer price should be made on the basis of bids obtained competitively, in which both price and non-price terms are evaluated.

6. FERC License - Facility-specific transfer plans that include hydroelectric facilities must be incorporated into a special, one-time, temporary Federal Energy Regulatory Commission (FERC) license, which should be enforceable as if it were a conventional FERC license. Upon expiration of the special license, a transferee must obtain and operate facilities pursuant to a FERC license issued under the Federal Power Act and other laws applicable to non-federal hydropower facilities, without waiver.

7. Public Oversight - There should be full disclosure of and access to all information material to a full and fair evaluation of any transfer proposal. Appropriate mechanisms for ongoing public oversight of any transferred facilities must be provided so as to assure compliance with the terms and conditions of the transfer.

8. Impact on the Federal Budget - For federal budgetary purposes, net transfer proceeds should reflect both the total receipts from the transfer as well as the total expected revenues foregone by the U.S. Treasury, using the same time periods and discount rates for each revenue stream.

Approved by Wild Planet Strategy Team, Sept. 7, 2004