UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC Docket No. CP15-138-000

REQUEST FOR REHEARING AND MOTION FOR STAY OF ALLEGHENY DEFENSE PROJECT, CLEAN AIR COUNCIL, CONCERNED CITIZENS OF LEBANON COUNTY, HEARTWOOD, LANCASTER AGAINST PIPELINES, LEBANON PIPELINE AWARENESS, AND SIERRA CLUB

Pursuant to section 19(a) of the Natural Gas Act ("NGA"), 15 U.S.C. §717r(a) and Rule 713 of the Federal Regulatory Energy Commission's ("FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Allegheny Defense Project, Clean Air Council, Concerned Citizens of Lebanon County, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, and Sierra Club (collectively, "Intervenors") hereby request rehearing of FERC's "Order Issuing Certificate," issued February 3, 2017, in the above-captioned proceeding ("Certificate Order"). *See Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017). FERC granted the Intervenors' respective motions to intervene in this proceeding. *See id*. at P 13. Thus, the Intervenors are "parties" to this proceeding, 18 C.F.R. § 385.214(c), and have standing to file this request for rehearing. *See* 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

We request that the Certificate Order and deficient final environmental impact statement ("FEIS") be withdrawn and the environmental analysis and public convenience and necessity analysis be redone in a manner that complies with FERC's obligations pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq*. All communications regarding this request should be addressed to and served upon:

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I. STATEMENT OF ISSUES

Pursuant to Section 713(c) of FERC's Rules of Practice and Procedure, Intervenors provide a statement of issues and alleged errors in the Certificate Order:

1. Transco improperly segmented its expansion projects and evaded a complete, rigorous environmental studies under the NEPA. "Under applicable NEPA regulations, FERC is required to include 'connected actions,' 'cumulative actions,' and 'similar actions' in a project EA. 'Connected actions' include actions that are 'interdependent parts of a larger action and dependent on the larger action for their justification.'" *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014) (citing 40 C.F.R. § 1508.25(a)) (holding that since there was a "clear physical, functional, and temporal nexus between the projects," they should have been considered together under NEPA).

2. FERC violated NEPA by failing to ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); *see also* 18 C.F.R. § 380.11(a) (environmental considerations must be addressed "at appropriate major decision points"). "In proceedings involving a party or parties and not set for trial-type hearing, major decision points are the approval or denial of proposals by the Commission or its designees." 18 C.F.R. § 380.11(a)(1). By rushing to issue the Certificate Order before Transco submitted information critical to FERC's decision and by ignoring comments on the FEIS, FERC failed to ensure that it has adequately "considered environmental concerns in its decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see also California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

3. FERC violated NEPA by failing to properly evaluate the purpose and need for the Atlantic Sunrise Project during its NEPA review. 40 C.F.R. § 1502.13. In particular, with regard to this critically important portion of its review, FERC failed to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

4. FERC violated NEPA by failing to rigorously explore and objectively evaluate all reasonable alternatives, including reasonable alternatives not within its jurisdiction. 40 C.F.R. § 1502.14; *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1184 (10th Cir. 2013); *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F.Supp.2d 656, 670 (W.D. Wis., 2013); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1154 (W.D. Wash., 2002). Instead, FERC defined a narrow

range of alternatives that it determined it could "legitimately consider." FEIS, Vol. III, PM-93. This improperly restricted FERC's alternatives analysis to those "alternative means by which a particular applicant can reach his goals." *Simmons*, 120 F.3d at 669 (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986); *see also Nat'l Parks & Cons. Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009).

5. FERC violated NEPA by failing to take a hard look at the direct and indirect effects of the Atlantic Sunrise Project on water resources, including high-quality and exceptional value streams and wetlands. *See* 40 C.F.R. § 1508.8; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). FERC failed to support with substantial evidence its conclusion that proposed mitigation measures would protect water resources during construction of the Atlantic Sunrise Project. *See New York v. U.S. Nuclear Reg. Comm'n*, 589 F.3d 551, 555 (2d Cir. 2009). Insufficient mitigation measures, even when longstanding in their use, are still insufficient. *See Summit Petroleum Corp. v. U.S. E.P.A.*, 690 F.3d 733, 746 (6th Cir. 2012).

6. FERC violated NEPA by failing to take a hard look at the indirect effects of additional shale gas development that would be induced by the Atlantic Sunrise Project. *See* 40 C.F.R. § 1508.8(b). The Atlantic Sunrise Project and upstream shale gas development are "two links of a single chain." *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir 1989). Shale gas development is also reasonably foreseeable and "a person of ordinary prudence would take it into account" before making a decision. *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). FERC is aware of the nature of the effects of shale gas development and cannot simply ignore those effects. *See Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003); *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897, 902 (7th Cir. 2010). FERC is required to engage in "[r]easonable forecasting" because "speculation is . . . implicit in NEPA." *Delaware Riverkeeper*, 753 F.3d at 1310; *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067, 1079 (9th Cir. 2011). FERC's failure to make any attempt to assess the indirect effects of shale gas development "require[s] the public, rather than the agency" to ascertain the effects of the Project. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592, 605 (9th Cir. 2010). "Such a requirement would thwart one of the 'twin aims' of NEPA – to 'ensure[ ] that the *agency* will inform the *public* that it has indeed considered environmental concerns in its decision making process.'" *Id*. (*quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)) (emphasis added by Ninth Circuit).

7. FERC violated NEPA by failing to take a hard look at the cumulative impacts of the Atlantic Sunrise Project. *See* 40 C.F.R. § 1508.7; *Delaware Riverkeeper*, 753 F.3d at 1319-20. This violation stemmed from FERC ignoring thousands of existing and reasonably foreseeable shale gas developments. FERC also refused to investigate that fact that even "minor" or "temporary" Project impacts on natural resources can be cumulatively significant when combined with the other, related developments. *See* 40 C.F.R. §§ 1508.7, 1508.27(b)(7); Council on Environmental Quality ("CEQ"), Considering Cumulative Effects Under the National Environmental Policy Act (1997) (hereinafter "1997 Guidance"); *Klamath-Siskiyou*, 387 F.3d at 993-97. Likewise, FERC's

selection of a "region of influence" for forested lands and air quality was unreasonably restrictive and appears to have been based on the Endangered Species Act's more restrictive definition of "cumulative effects." *See Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1055 (9th Cir. 2013). FERC must consider the "inter-regional" cumulative effects that the Atlantic Sunrise Project will have, including past, present, and reasonably foreseeable shale gas extraction in the Marcellus and Utica Shale formations. *See Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988).

8. FERC's application of the Certificate Policy Statement was arbitrary because it was based on a deficient FEIS. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), order clarified, 90 FERC ¶ 61,128, order further clarified, 92 FERC ¶ 61,094 (2000); *South Coast Air Quality Management District v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010).

9. FERC's failure to adequately and independently evaluate the public need for the Atlantic Sunrise Project renders arbitrary its determination under Section 7 of the Natural Gas Act, that the project is "required by the present or future public convenience and necessity." *See* 15 U.S.C. § 717f(e).

II. BACKGROUND

Transco wants to overhaul its massive pipeline system. The Project is a massive link in a chain of related projects aimed at achieving this overhaul. The Project itself is designed to reconfigure Transco's mainline, which has historically shipped gas from the Gulf Coast to the Northeast, so that it can function bi-directionally and transport Marcellus and Utica shale gas from northern Pennsylvania to the Southeast and Gulf Coast regions. To get the shale gas to its mainline, Transco claims it must construct nearly 200 miles of large diameter pipeline and loops. Thus, the Project's express purpose is to provide gas companies operating in northern Pennsylvania new or dramatically increased access to export facilities at Cove Point, Maryland, and along the Gulf Coast, as well as domestic markets.

Instead of performing the detailed analysis required for such a major action, FERC published significantly flawed draft and final environmental impact statements that omitted substantial information related to the Project's environmental impacts. These flaws were pointed out not only by Intervenors and other commenters, but also by co-regulators, including the U.S.

Environmental Protection Agency, the U.S. Department of the Interior, and the Pennsylvania Department of Environmental Protection. Instead of taking the necessary time to fully cure the deficiencies in its environmental review documents, FERC instead rushed to issue the Certificate Order in response to Transco's desired construction schedule. When it became clear on January 26, 2017, that FERC would lose its quorum upon Commissioner Bay's resignation on February 3, 2017, FERC unlawfully issued the Certificate Order even through there were nearly two months remaining in the 90-day federal authorization window and that Transco had yet to make prerequisite information submittals.[1]

III. ARGUMENT FOR REHEARING

A. FERC improperly segmented Atlantic Sunrise from other closely related and interdependent projects.

Transco improperly segmented its expansion projects and evaded a complete, rigorous environmental studies under the NEPA. For example, along with the Project, Transco announced the Rock Springs Expansion project, which is a proposed 11.17 mile expansion from Lancaster County to the Wildcat Point facility, about five miles from Rising Sun, Maryland. *See* Rock Springs Expansion Project, Williams Transco Pipeline Expansion Projects, http://rocksprings.wpengine.com/. Transco also proposes to submit a 7(c) application in March 2017 for its Northeast Supply Enhancement Project, which is an expansion project that will run from York County, Pennsylvania (where Atlantic Sunrise ends) to the Rockaway Transfer Point, which is an existing interconnection between the Lower New York Bay Lateral and the Rockaway Delivery Lateral in New York State waters. *See* Letter from Transcontinental Gas Pipe Line Company, LLC to Kimberly Bose, Secretary, FERC (May 9, 2016). Atlantic

[1] FERC also issued orders approving the Rover Pipeline Project, Orion Project, and Northern Access 2016 Project. *See Rover Pipeline LLC*, 158 FERC ¶ 61,109 (Feb. 2, 2017); *Tennessee Gas Pipeline Co., L.L.C.*, 158 FERC ¶ 61,110 (Feb. 2, 2017); *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (Feb. 3, 2017).

Sunrise appears to be part of this series of projects to expand Transco's system. *See* 149 FERC ¶ 61,258, No. CP13-551-000 (Dec. 18, 2014).

Additional related and interdependent projects, including the Southeast Market Pipelines Project (which includes Transco's Hillabee Expansion) and Magnolia Extension project, were highlighted in Intervenors' request for a revised or supplemental EIS. *See* Intervenors' Comments Requesting Revised or Supplemental DEIS at 4-6. These related and interdependent projects should not be viewed as individual projects under NEPA. "Under applicable NEPA regulations, FERC is required to include 'connected actions,' 'cumulative actions,' and 'similar actions' in a project EA. 'Connected actions' include actions that are 'interdependent parts of a larger action and dependent on the larger action for their justification.'" *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014) (citing 40 C.F.R. § 1508.25(a)) (holding that since there was a "clear physical, functional, and temporal nexus between the projects," they should have been considered together under NEPA). There is a "clear physical, functional, and temporal nexus" between these projects. For example, the three Transco projects on the East Coast connect to each other physically, either directly or through nearby existing pipelines. Functionally, the projects work to bring gas from the Marcellus Shale gas development throughout the East Coast and beyond. Moreover, the three new East Coast projects are scheduled to begin construction from 2017 to 2019, with the goal of completion in order to meet the "increasing demand for natural gas in the northeastern United States for the 2019/2020 winter heating season." Northeast Supply Enhancement, Williams, http://co.williams.com/expansionprojects/northeast-supply-enhancement/. FERC must consider these connected and cumulative actions projects and disclose their environmental impacts together in its environmental review of Atlantic Sunrise.

B. FERC failed to ensure that substantial environmental information was available before authorizing the Atlantic Sunrise Project.

FERC failed to ensure that its decision to approve the Atlantic Sunrise Project was based on complete and accurate information about the environmental consequences of the project. Agencies must ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). FERC's NEPA regulations require that environmental considerations be addressed "at appropriate major decision points." 18 C.F.R. § 380.11(a). "In proceedings involving a party or parties and not set for trial-type hearing, major decision points are the approval or denial of proposals by the Commission or its designees." *Id*. § 380.11(a)(1).

FERC issued the Certificate Order even though Transco has not submitted substantial, specifically-requested information related to environmental consequences of the project. *See* Certificate Order, Environmental Conditions 13-42, 44-45, 47-50, 52. The lack of information on has been a persistent problem throughout this proceeding. *See* Intervenors' DEIS Comments at 5-8 (Accession No. 20160627-5296); EPA's DEIS Comments at 2 (Accession No. 20160706-0052); Intervenors' Comments Requesting a Revised or Supplemental DEIS at 3-9 (Accession No. 20161011-5075); *and* Intervenors' FEIS Comments at 10-16. Instead of requiring Transco to submit the missing information and allowing the public an opportunity to review that information, FERC rushed to issue the Certificate Order before it lost its quorum on February 3, 2017.[2] FERC's decision to prioritize industry timelines over the public interest underscores the arbitrary and capricious nature of its decisionmaking.

By rushing to issue the Certificate Order, FERC failed to ensure that it "has indeed considered environmental concerns in its decisionmaking process." *Robertson v. Methow Valley*

[2] The email confirming FERC's issuance of the Certificate Order was received at 4:46 p.m. (Eastern) on February 3, 2017, just fourteen minutes before the end of FERC's business day.

Citizens Council, 490 U.S. 332, 349 (1989); *see also California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). As explained in comments on the FEIS, despite the six months that elapsed between the end of the DEIS comment period and the publication of the FEIS, there was still a substantial amount of information missing in the FEIS. *See* Intervenors' FEIS Comments at 10-16. Much of this information is still missing. *See* Certificate Order, Environmental Conditions 13-42, 44-45, 47-50, 52.

This missing information concerns significant environmental matters. For example, FERC identified three active underground fires in coal mines within three miles of the Project. *See* Certificate Order at P 84. One of the mine fires "is about 0.4 mile west of the project in Northumberland County, Pennsylvania." *Id*. As a result of this obvious threat to the environment and human health and safety, FERC is requiring Transco to submit an "Abandoned Mine Investigation and Mitigation Plan" that identifies the depth and extent of coal seams that could pose a risk to project facilities, and mitigation measures that would be implemented to protect the integrity of the pipeline from underground mine fires during the life of the project. *Id*. The specifics of that plan are critical to the assessment of potential environmental impacts that is mandated by the NEPA review process. FERC, however, only required Transco to submit the Abandoned Mine Investigation and Mitigation Plan when it submits its implementation plan, *i.e.*, after issuance of the Certificate Order, thereby circumventing the NEPA process. *See id.*, EC 21 and EC 23.

FERC therefore failed to ensure that "environmental information [was] available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). By issuing the Certificate Order without the Abandoned Mine Investigation and Mitigation Plan, FERC acted at a "major decision point" without fully considering significant environmental and human health and safety concerns. 18 C.F.R. § 380.11(a)(1). The same

rationale applies to the other missing information, including missing information that FERC has identified. *See* Certificate Order, Environmental Conditions 13-42, 44-45, 47-50, 52. FERC's failure to ensure that this information was submitted and publicly available during the NEPA review process renders FERC's Certificate Order invalid. FERC should rescind the Certificate Order and prepare a supplemental FEIS after Transco has submitted all of the missing information that FERC identified.

C. FERC failed to specify the purpose and need and evaluate a reasonable range of alternatives.

FERC failed to properly identify, disclose, and evaluate the purpose and need for the Atlantic Sunrise Project in the FEIS. NEPA regulations require FERC to "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. FERC must "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

Instead of specifying the need for the Atlantic Sunrise Project or exercising any degree of skepticism with regard to Transco's statements, FERC flatly stated that "it will not determine whether the need for the Project exists" as part of the NEPA process. FEIS at 1-2. Instead, FERC said "[t]he determination of whether there is a 'need' for the proposed facilities . . . will be made in the subsequent Commission Order granting or denying Transco's request for certificate authorization[.]" FEIS, Vol. III, PM-93. This violates the plain language of 40 C.F.R. § 1502.13. The fact that FERC considers need as part of its certification review under the Natural Gas Act does not relieve the agency of its obligation to specify the need for the Project during the NEPA process when the public has the opportunity to comment and potentially influence FERC's

decision. The failure to specify and assess the need for the Atlantic Sunrise Project during the NEPA process renders the FEIS invalid. FERC should rescind the Certificate Order and prepare a supplemental FEIS that fully vets the purpose and need for the Project.

CEQ's regulations also require agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives," including "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(a); (c). FERC, however, stated in the response to comment on the FEIS that it defined a range of alternatives that it could "legitimately consider." FEIS, Vol. III, PM-93. This improper approach appears designed to narrow the range of reasonable alternatives, particularly by excluding alternative that include elements that are not within FERC's jurisdiction. For example, FERC acknowledges that it:

> received numerous comments suggesting that electricity generated from renewable energy sources could eliminate the need for the Project and that the use of these energy sources as well as gains realized from increased energy efficiency and conservation should be considered as alternatives to the Project.

FEIS at 3-2. FERC continues, however, that:

> The generation of electricity from renewable energy sources is a reasonable alternative *for a review of power generating facilities*. The siting, construction, and operation of power generating facilities are *regulated by state agencies*. Authorization related to how customers in Transco's service area will meet demands for electricity are not part of the application before the Commission and their consideration is outside the scope of this EIS. Therefore, because the *purpose of the Project is to transport natural gas*, and the generation of electricity from renewable energy sources or the gains realized from increased energy efficiency and conservation are *not transportation alternatives*, they are not considered or evaluated further in this analysis.

See FEIS at 3-2 (emphasis added). In other words, in addition to uncritically adopting Transco's stated purpose, FERC used the fact that other agencies and states would have jurisdiction over power generating facilities to impermissibly narrow the range of reasonable alternatives, in direct contravention of 40 C.F.R. § 1502.14(c).

It is well-established that Section 1502.14(c) is "intended to prompt agencies to consider otherwise appropriate alternatives that the agency lacks jurisdiction to authorize." *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1184 (10th Cir. 2013). The fact that an alternative is not within the agency's jurisdiction "should not prevent [an] agenc[y] from proposing it or attempting to persuade the appropriate agencies or units of government to get involved in the project[.]" *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F.Supp.2d 656, 670 (W.D. Wis., 2013). "An agency's refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA's intent to provide options for both agencies and Congress." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1154 (W.D. Wash., 2002); *see also Gottlieb*, 944 F.Supp.2d at 670 ("agencies cannot simply assume that incorporating some form of [non-jurisdictional action] into the project to avoid or minimize adverse social and economic harm is out of the question").

Instead of considering all reasonable alternatives, FERC insisted that renewable energy and conservation alternatives are somehow "outside the scope of this EIS." FEIS at 3-2. That is simply wrong under the authoritative CEQ regulation and case law. Moreover, FERC's position is also inconsistent with its own prior practice of including such alternatives in environmental reviews.

In the FEIS for the Constitution Pipeline, for example, FERC analyzed multiple alternatives that did not involve the transport of natural gas. This included energy conservation and energy efficiency alternatives as well as renewable energy alternatives. *See* Constitution Pipeline FEIS at 3-4 – 3-13 (Docket No. CP13-499-000, Accession No. 20141024-4001). FERC has not explained why such alternatives were within the scope of the Constitution Pipeline FEIS but outside the scope of the Atlantic Sunrise Pipeline FEIS. The failure to consider any renewable energy and energy conservation/efficiency alternatives in the Atlantic Sunrise Pipeline

FEIS was arbitrary and capricious. FERC should prepare a supplemental FEIS that analyzes both the need for the Project and alternatives to determine whether some of all of the purported need for the Project can be met without building new fossil fuel infrastructure. 40 C.F.R. § 1502.9(c)(1).

Finally, it is becoming readily apparent that a major driver of Atlantic Sunrise may be the exportation of northern Pennsylvania shale gas to foreign countries. FERC acknowledges that "the international marketplace represents a potential destination" for gas made available to export terminals through Atlantic Sunrise. FEIS at 1-10. FERC further acknowledges that Cabot Oil & Gas ("Cabot"), the largest shipper on the Project with approximately half of the subscribed capacity, "has publicly announced that it has contracted to sell gas supply to a party that is also a shipper (Sumitomo) in the Cove Point [Export] Terminal." *Id*. FERC, however, appears to take Transco at its word when the company claims that it "anticipates that the vast majority of natural gas transported through the firm capacity under the Project would be consumed domestically in markets along the East Coast[.]" *Id*. The fact that the largest subscriber on Atlantic Sunrise has announced an agreement with a shipper at the nearest export terminal at Cove Point casts doubt on these claims. FERC cites no additional evidence for its statements others than Transco's unsupported claims.

In addition, the reversal of the Transco longhaul pipeline to the Southeast would allow northern Pennsylvania shale gas to reach Gulf Coast export terminals. For example, Kinder Morgan's Elba Island export terminal was approved and is currently under construction. *See* Elba Island LNG Update: Non-FTA Exports Approved, Marcellus Drilling News, Dec. 2016, *available at* http://marcellusdrilling.com/2016/12/elba-island-lng-update-non-fta-exports-approved-dump-truck-city/. Kinder Morgan also "owns and operates the 200-mile Elba Express pipeline, which connects the LNG facility to the Transco [pipeline]." *Id*. Transco's parent

company, Williams, "has been on a mission to send Marcellus gas south – including to Georgia[.]" *Id*. "Marcellus Shale gas will, via the Transco [pipeline], be at least some of, *if not the primary*, source for gas exported from the Elba Island facility." *Id*. (emphasis added).

In January 2017, Cabot said that the "anticipated pricing" for gas transported on facilities made available by Atlantic Sunrise will be based on two market areas: the D.C. market area (where Cove Point is located) and the Gulf Coast market area (where multiple export facilities are located). *See* Cabot, Investor Presentation at 20, Jan. 2017 (Ex. 1). Thus, Cabot anticipates selling its gas based on prices for exporting. As explained above, Cabot has subscribed to approximately half of the capacity on Atlantic Sunrise. Therefore, FERC's assumption that the "vast majority of natural gas transported through the firm capacity under the Project would be consumed domestically" is not supported by the available evidence and is not rational. FEIS at 1-10.

Intervenors raised these issues regarding Cabot in comments on the FEIS. *See* FEIS Comments at 8-10. Nevertheless, FERC issued the Certificate Order without addressing any of these concerns. FERC's refusal to seriously assess whether gas transported by the Atlantic Sunrise pipeline is intended primarily for export is a critical issue going to the heart of the purpose and need for the Project and the alternatives analysis. This is especially important in proceedings such as this where Transco could seize people's land through eminent domain so the gas industry can profit by selling gas to foreign countries. Had Transco announced that Atlantic Sunrise was intended to export northern Pennsylvania shale gas through terminals at Cove Point and along the Gulf Coast, the Project likely would have received greater scrutiny from the public and elected officials. FERC's failure to make any investigation into the true public need for the project renders its EIS deficient and seriously undermines its conclusion pursuant to Section 7 of

the Natural Gas Act that the Atlantic Sunrise Project is "required by the present or future public convenience and necessity."

D. FERC violated NEPA by failing to take a hard look at the direct and indirect effects of the Atlantic Sunrise Project on waterbodies and wetlands.

FERC failed to take a "hard look" at the direct and indirect effects of the Atlantic Sunrise Project on waterbodies and wetlands. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Direct effects "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b).

FERC acknowledges that it received a number of comments regarding potential effects on waterbodies and exceptional value wetlands as a result of construction and operation of the Atlantic Sunrise Project. *See* Certificate Order at PP 86, 89; *see also* Intervenors' DEIS Comments at 9-14. Nonetheless, FERC asserts that implementation of mitigation measures will result in no long-term adverse impacts on surface water resources and will reduce impacts on exceptional value wetlands to less than significant levels. *See* Certificate Order at PP 87, 91. Past experience demonstrates, however, that inclusion of such measures is insufficient to prevent significant adverse impacts to water resources.

FERC must support with substantial evidence its conclusion that proposed mitigation measures would protect water resources during construction and operation of the Atlantic Sunrise Project. *See New York v. U.S. Nuclear Reg. Comm'n*, 589 F.3d 551, 555 (2d Cir. 2009). Insufficient mitigation measures, even if longstanding in their use, are still insufficient. *See Summit Petroleum Corp. v. U.S. E.P.A.*, 690 F.3d 733, 746 (6th Cir. 2012). "[T]o ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed." CEQ, Forty Most Asked Questions

Concerning CEQ's National Environmental Policy Act Regulations, 19b (1981), *available at* https://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf. Both the EIS and Record of Decision should indicate "the likelihood that such measures will be adopted or enforced by the responsible agencies." *Id*. "If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement." *Id*. FERC has failed to satisfy these requirements.

FERC has a history of nonenforcement of mitigation measures in Pennsylvania. For example, in December 2014, the Pennsylvania Department of Environmental Protection ("DEP") announced that it had reached an $800,000 settlement agreement with Tennessee Gas Pipeline Company, LLC for "multiple violations of the [Pennsylvania] Clean Streams Law during the construction of [the 300 Line Project] in 2011 and 2012 through four counties in northeast and north-central Pennsylvania." *See* Allegheny Defense Project's April 29, 2015 Comments, Attachment 1 (Accession No. 20150429-5518). According to DEP's press release:

> During 73 inspections of the "300 Line Project," inspectors with the Potter, Susquehanna, Wayne and Pike County Conservation Districts discovered violations including the discharge of sediment pollution into the waters of the commonwealth, some of which are protected as "High Quality" or "Exceptional Value Waters," and failure to implement required construction best management practices to protect water quality.

Id.

FERC has acknowledged that in constructing the 300 Line Project, Tennessee Gas Pipeline Company "violated state clean water laws even through [its] EA had previously determined that the company's environmental construction plan and assurances made in the application would protect the environment during and following construction." *Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,156, P 74 (2016). FERC insisted, however, that "the fact that issues arose during construction of [the 300 Line Project] is not indicative of a generic

weakness in our general mitigation requirements." *Id*. at P 78. FERC offered no reasoning or evidence to support that conclusion. Moreover, FERC did not address the issue of likelihood of enforcement of its mitigation measures, whether the applicant is Tennessee Gas or Transco.

At no point in the construction of the 300 Line Project did FERC issue a stop work order. *See* Docket No. CP09-444-000. If county conservation districts are issuing notices of violation for impacts to high-quality and exceptional value waterways, it should be apparent that either the approved mitigation measures are insufficient or that FERC is not adequately enforcing mitigation measures (or both). This history of nonenforcement underscores the need for FERC to fully detail proposed mitigation measures and assess the likelihood of success of those measures – and how they will be enforced in a manner that is substantially improved from what occurred during construction of the 300 Line Project. FERC has failed to do so. FERC should rescind the Certificate Order and prepare a revised EIS.

E. FERC violated NEPA by failing to consider the indirect effects of induced gas production.

FERC violated NEPA by failing to take a hard look at the indirect effects of the Atlantic Sunrise Project, including induced gas drilling in the Marcellus and Utica shale formations in northern Pennsylvania. FERC claims that:

> [T]he environmental effects resulting from natural gas production are generally neither sufficiently causally related to specific natural gas infrastructure projects nor are the potential impacts from gas production reasonably foreseeable such that the Commission could undertake a meaningful analysis that would aid our determination.

Certificate Order at P 130 (citing *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. Coalition for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion)). Contrary to FERC's assertions, the indirect effects of shale gas

development in the Marcellus and Utica shale formations are sufficiently causally related to the Atlantic Sunrise Project and reasonably foreseeable, such that FERC should have taken those impacts into consideration in the FEIS. FERC's failure to do so renders the FEIS invalid.

1. There is a sufficient causal relationship between the Atlantic Sunrise Project and induced shale gas extraction in the Marcellus and Utica shale formations.

FERC claims that "the environmental effects resulting from natural gas production" are not "sufficiently causally related to specific natural gas infrastructure projects" such as the Atlantic Sunrise Project. Certificate Order at P 130. Although FERC admits "that natural gas . . . transportation facilities are . . . required to bring domestic natural gas to market[,]" FERC nonetheless insists that this "does not mean, however, that [its] approval of this particular pipeline project will cause or induce the effect of additional or further shale gas production." *Id*. at P 133. FERC relies, in large part, on the Second Circuit's unpublished summary order in *Coalition for Responsible Growth*. *See id*. at PP 130, 134. Under the Local Rules of Civil Procedure from the Second Circuit, such an order has no precedential effect. 2nd Cir. L.R. 32.1.1. Unsurprisingly, for a summary order, that decision offered no independent analysis but merely accepted FERC's rationale on the specific case at issue. *See* 485 Fed. Appx. 472, 2012 WL 1596341 (2d Cir. 2012); *see also 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).

An examination of the case law reveals why FERC acted arbitrarily when it failed to consider Marcellus and Utica shale gas extraction activities as an indirect effect of the Atlantic Sunrise Project. FERC relies on both *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) and *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) in its decision, *see* Certificate Order at P 127, but neither case supports for FERC's position that the Atlantic Sunrise Project and shale gas development are not "sufficiently

causally related." *Metropolitan Edison* was the first case in which the U.S. Supreme Court used the term "reasonably close causal relationship" in the context of NEPA. 460 U.S. 766 (1983). In that case, citizens argued that the Nuclear Regulatory Commission had impermissibly permitted renewed operation at the Three Mile Island Nuclear facility because the agency failed to consider the psychological impact of its action. The Court, however, said that "NEPA addresses *environmental* effects of federal actions," *id*. at 778 (emphasis added), and that the psychological effect from the risk of a nuclear accident "is not an effect on the physical environment." *Id*. at 775. In other words, the Court concluded that threat of psychological harm is outside the zone of interests that NEPA was intended to address. Unlike the psychological harm resulting from the risk of a nuclear accident in *Metropolitan Edison*, the impacts related to reasonably foreseeable Marcellus and Utica shale gas drilling involve harms to the environment.

The Court relied on *Metropolitan Edison* in its decision in *Public Citizen*. *See* 541 U.S. 752, 767. *Public Citizen* involved a challenge to rules promulgated by the Federal Motor Carrier and Safety Administration ("FMCSA"). The plaintiffs claimed that FMCSA failed to consider the increased emissions that would result from the lifting of a presidential moratorium on the cross-border operation of Mexican motor carriers. The Court, however, noted that FMCSA had no discretion to deny registration of motor carriers that met the requirements of 49 U.S.C. § 13902(a)(1), none of which addressed environmental impacts. *Id*. at 779 (agency "ha[d] no ability to prevent a certain effect due to its limited statutory authority"). *See Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 401 F.Supp.2d 1298, 1324-25 (S.D. Fla. 2005). In other words, since Congress mandated that FMCSA register motor carriers that satisfied the requirements of 49 U.S.C. § 13902(a)(1), there was no "reasonably close causal relationship" between FMCSA's actions and increased emissions. *Id*. at 768 (because agency "ha[d] no ability categorically to prevent the cross-border operations of Mexican motor carriers, the

environmental impact of the cross-border operations would have [had] no effect on [agency's] decisionmaking – [and agency] simply lack[ed] the power to act on whatever information might be contained in the EIS"). Here, unlike the agency involved in *Public Citizen*, FERC has discretion and can act on the information regarding these impacts. FERC can attach conditions to a certificate, or deny an application if is not required by the public convenience and necessity, which includes environmental considerations. *See* 15 U.S.C. § 717f(e). Because FERC has statutory authority to deny the certificates or set conditions on them, it is a legally relevant cause of the downstream impacts. *Ctr. for Biological Diversity*, 538 F.3d at 1213 (distinguishing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004)). When an agency has authority to prevent the relevant effects, as FERC does here, "*Public Citizen*'s limitation on NEPA does not apply." *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 n. 20 (9th Cir. 2007).

The Ninth Circuit has said that an agency must consider something as an indirect effect if the agency action and the effect are "two links of a single chain." *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989). The Atlantic Sunrise Project and gas extraction in the Marcellus and Utica shale formations are two such links of a single chain. FERC admits as much in the Certificate Order, acknowledging that "[t]he 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." Certificate Order at P 133. Moreover, FERC recently stated that "the availability of pipeline and storage capacity *determines which supply basins are used and the amount of gas that can be transported from producers to consumers.*" FERC, Energy Primer, p. 6 (Nov. 2015) (emphasis added), *available at* https://www.ferc.gov/market-oversight/guide/energy-primer.pdf. Similarly, a recent report by Morningstar stated:

> As long as producers are financing this pipeline build-out and paying for the firm service, *it is likely that pipeline expansions out of the Marcellus will be met with increased production.* Producers are paying for the firm services with incremental revenue from new production.

Morningstar, Marcellus Takeaway Capacity and Utilization Outlook, at 2 (Oct. 1, 2015) (emphasis added), *available at* http://www.morningstarcommodity.com/Research/MarcellusTakeawayUpdatetm_.pdf.

A recent EIS prepared by the Surface Transportation Board ("Board") demonstrates why FERC's logic is incompatible with NEPA. In April 2015, the Board published a DEIS for the Tongue River Railroad Company's ("TRRC") proposal to build a railroad to transport coal to market. *See* Board, Tongue River Railroad DEIS, *available at* https://www.stb.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/e7de39d1f6fd4a9a85257e2a0049104d?OpenDocument. According to the Board, the proposed railroad would "transport low-sulfur, subbituminous coal from proposed mine sites yet to be developed in Rosebud and Powder River Counties, Montana." FEIS Comments, Ex. 2 at C.1-2. The Board continued that, "[b]ecause the Tongue River region contains additional quantities of coal, future rail traffic could also include shipments of coal from other mines whose development could be induced by the availability of a nearby rail line." *Id*. As a result, the Board prepared an analysis of various coal production scenarios in southeastern Montana should the Board approve the railroad. The Board's analysis included consideration of domestic and export markets, coal production costs, transportation routes, and emissions forecasts. The results of the analysis revealed that approval of the railroad was likely to induce the development of at least two additional coal mines in southeastern Montana. *Id*. at C.3-1.

The Board's decision to consider induced coal production in its review of TRRC's proposed railroad is important because, just as FERC has no jurisdiction over gas production, the

Board has no jurisdiction over coal production. Nevertheless, the Board did not completely ignore its obligation under NEPA to consider indirect effects. Rather, it prepared a review of likely coal production scenarios that could occur should it approve TRRC's project.

Here, four of the shippers financing the Atlantic Sunrise Project are gas exploration and production companies.[3] *See* Certificate Order at P 11. These four companies represent over 87% of the Project's subscribed capacity. *Id*. FERC states that "producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for selling gas to end-use consumers and have made a business decision to subscribe to the capacity on the basis of that assessment." *Id*. at P 29. In order to sell that gas, it must first be produced, which requires drilling new wells – and therefore impacting more and more land, water, and air on a routine basis. According to FERC, at the median 30-day initial gas production rate, "about 340 gas wells would be required to provide the 1.7 MMDth of gas required for the Atlantic Sunrise Project." FEIS at 4-283. Due to well production declines over time, however, "the actual number of wells necessary to supply the Atlantic Sunrise Project over many years would be much higher." *Id*. Intervenors highlighted where such production is likely to occur in previous comments. *See* Intervenors' DEIS Comments at 25-27; Intervenors' Comments on Need for Revised or Supplemental DEIS at 12-14. FERC ignored these comments.

FERC relies on the Ninth Circuit's decision in *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998), to support its non-compliance with NEPA. *See* Certificate Order at P 130. In that case, the court considered whether the FAA's proposed rerouting of certain flight paths would have "growth-inducing" impacts. 161 F.3d 569, 580. The court likened the case to a previous decision involving similar facts where it emphasized that a plan to reroute flight paths

[3] The four exploration and production companies are Cabot Oil & Gas Corporation, Chief Oil & Gas LLC, Inflection Energy LLC, and Seneca Resources Corporation (a subsidiary of National Fuel Gas Corporation). *See* Certificate Order at P 11.

was focused on "existing air traffic." *Morongo Band*, 161 F.3d 569, at 580 (citing *Seattle Community Council Fed'n v. FAA*, 961 F.2d 829, 835 (9th Cir. 1992)). In other words, the rerouting of flight paths at the airport did not "induce" growth but simply rearranged "existing air traffic." Thus, the "increased" air traffic was not considered to be a growth-inducing effect. *Id*. Here, as explained above, the Atlantic Sunrise and associated projects are not simply a "rearranging" of existing gas production, but a direct stepping stone to further gas development.

FERC also relies on two recent D.C. Circuit decisions in support of its refusal to consider shale gas development as an indirect effect. *See* FEIS at 4-281, n. 41 (citing *Sierra Club and Galveston Baykeeper v. FERC*, No. 14-1275, slip op., at 16 (D.C. Cir. June 28, 2016); *Sierra Club v. FERC*, No. 14-1249, slip op., at 13-14 (D.C. Cir. June 28, 2016)). These cases are inapposite. *Sierra Club and Galveston Baykeeper* involved a unique statutory scheme governing the review and approval of liquefied natural gas export terminals. The Department of Energy ("DOE") has statutory authority over the export of natural gas. 42 U.S.C. § 7151(b). DOE delegated authority to FERC to approve or deny the construction and operation of particular export facilities, but the court found that export decisions remained "squarely and exclusively within the [DOE's] wheelhouse." *See Sierra Club and Galveston Baykeeper*, No. 14-1275, slip op., at 14 (D.C. Cir. June 28, 2016). "[O]bjections concerning the environmental consequences stemming from the actual export of natural gas…, including increased emissions and induced production, [were] raised in [a] parallel challenge to the [DOE's] order authorizing" exports, and the court concluded that "any such challenges to the environmental analysis of the export activities themselves must be raised in a petition for review from [DOE's] decision to authorize exports." *Id.* Here, on the other hand, it is FERC's decision alone whether to approve construction and operation of the Atlantic Sunrise Project for its intended purpose of increasing capacity to transport additional volumes of shale gas. The NGA does not place any portion of

that decision in the "wheelhouse" of any other agency. Because FERC possesses the power to act on whatever information might be contained in this EIS, it must consider these impacts. *Ctr. for Biological Diversity*, 538 F.3d at 1216-17. Moreover, no other agency is in a position to conduct NEPA review of the environmental consequences of these effects. If FERC is relieved of its obligation to evaluate upstream impacts, those impacts will remain unevaluated.

The court rested on similar reasoning to support its decision in *Sierra Club*. *See Sierra Club v. FERC*, No. 14-1249, slip op., at 13-14 (June 28, 2016). Adopting FERC's reading of these cases would eviscerate NEPA's requirement agencies evaluate a project's indirect effects, s*ee* 40 C.F.R. § 1508.8(b). Finally, FERC argues that other factors "such as domestic natural gas prices and production costs drive new drilling." Order at P 136. The fact that other factors may influence drilling does not mean that additional pipeline capacity does not drive additional shale gas development. *See* Energy Information Administration, Spread between Henry Hub, Marcellus natural gas prices narrows as pipeline capacity grows (Jan. 27, 2016), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=24712 (shale gas production contingent on price, available infrastructure).

Thus, the Atlantic Sunrise Project and gas drilling in the Marcellus and Utica shale formations are "two links of a single chain." *Sylvester*, 884 F.2d 394, 400 (9th Cir. 1989). Even though 87% of the capacity of Atlantic Sunrise has been subscribed by gas producers, FERC completely ignored indirect effects of induced gas drilling. Because this failure renders FERC's NEPA analysis deficient, FERC should rescind its Certificate Order and prepare a revised EIS.

2. Induced gas drilling in the Marcellus and Utica shale formations is reasonably foreseeable.

FERC further violated NEPA by refusing to consider the reasonably foreseeable indirect effects of induced shale gas drilling as reasonably foreseeable. An indirect 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." *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). "[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, [an] agency may not simply ignore the effect." *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d at 549 (emphasis in original); *see also Habitat Educ. Center v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010). Reasonable forecasting and speculation is "implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Delaware Riverkeeper*, 753 F.3d at 1310 (quoting *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); *see also Northern Plains Resource Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011).

Here, a person of ordinary prudence would take Marcellus and Utica shale gas drilling into account before reaching a decision about whether to approve the Atlantic Sunrise Project. Moreover, FERC is well aware of the nature of the effects of shale gas development and may not simply ignore the effect because it does not know the precise location and timing of future development. Yet, that is precisely what FERC did in the FEIS and Certificate Order.

According to FERC, "even if a causal relationship between our action here and additional production were presumed, the scope of the impacts from any such induced production in this case is not reasonably foreseeable." Certificate Order at P 137. Even if FERC knows "the identity of a producer of gas to be shipped on a pipeline, and the general area where that producer's existing wells are located," FERC claims that "does not alter the fact that the number and location of any additional wells cannot be identified in this proceeding." *Id*. As noted above, however, such reasonable forecasting is implicit in NEPA. *Delaware Riverkeeper*, 753 F.3d at

1310; *Northern Plains*, 668 F.3d at 1078-79 (9th Cir. 2011). And FERC can certainly predict the nature of such effects even if it cannot precisely anticipate their magnitude.[4]

FERC's failure to assess these impacts "require[s] the public, rather than the agency" to ascertain the effects of the Project. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of the Interior*, 608 F.3d 592, 605 (9th Cir. 2010). This "thwart[s] one of the 'twin aims' of NEPA – to 'ensure[ ] that the *agency* will inform the *public* that it has indeed considered environmental concerns in its decision making process.'" *Id*. (*quoting Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)) (emphasis added by Ninth Circuit). Compliance with NEPA "is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1161 (9th Cir. 1997) (*quoting City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975). *See also Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) ("The procedures prescribed both in NEPA and the implementing regulations are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act….'[g]rudging, pro forma compliance will not do.'") (citations omitted)).

Finally, FERC should consider former Commissioner Norman Bay's recent statements on the need for FERC to consider the environmental impacts of shale gas development. Commissioner Bay noted that "[d]espite the growing importance of Marcellus and Utica gas production . . . the Commission has never conducted a comprehensive study of the environmental consequences of increased production from that region." *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 at 4-5 (Feb. 3, 2017) (Bay, Commissioner, Separate

[4] Moreover, FERC is aware of the capacity of the pipeline and should be able to make an informed prediction about the number of wells that would produce that amount of gas.

Statement). Commissioner Bay continued that "in light of the heightened public interest and in the interests of good government, I believe the Commission should analyze the environmental impacts of increased regional gas production from the Marcellus and Utica." *Id*. at 5. Commissioner Bay also stated that "the Commission should also be open to analyzing the downstream impacts of the use of natural gas and to performing a life-cycle greenhouse gas emissions study[.]" *Id*. Such information "may be of use to the Commission, the public, and industry in examining the broader issues raised in certification proceedings." *Id*.

Intervenors respectfully request that FERC heed the advice of its most recent Chairman. There is a clear causal relationship between the Atlantic Sunrise Project and shale gas development and that development is reasonably foreseeable. The FEIS failed to consider gas drilling in the Marcellus and Utica shale formations as an indirect effect of the Project and, therefore, violates 40 C.F.R. § 1508.8(b). FERC should withdraw the Certificate Order and prepare a revised EIS that provides an analysis of "the environmental impacts of increased regional gas production from the Marcellus and Utica." *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 at 5 (Feb. 3, 2017) (Bay, Commissioner, Separate Statement).

F. FERC violated NEPA by failing to take a hard look at the cumulative impacts of the Atlantic Sunrise Project and other past, present, and reasonably foreseeable future actions, including shale gas development.

FERC violated NEPA by failing to take a hard look at the cumulative impacts of the Atlantic Sunrise Project in conjunction with other past, present, and reasonably foreseeable future actions, including shale gas development in the Marcellus and Utica shale formations. A cumulative impact is the:

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

40 C.F.R. § 1508.7 (emphasis added). "Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). Cumulative impact analyses that contain "cursory statements" and "conclusory terms" are insufficient. *See Delaware Riverkeeper*, 753 F.3d at 1319-20; *see also Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988) (although "FEIS contains sections headed 'Cumulative Impacts,' in truth, nothing in the FEIS provides the requisite analysis," which, at best, contained only "conclusory remarks").

Commenters explained at length in their comments on the DEIS that FERC's cumulative impacts analysis was substantially flawed. *See* DEIS Comments at 41-69. In response, FERC claimed that its cumulative impacts analysis is "consistent with the methodology set forth in relevant guidance (CEQ, 1997b, 2005; EPA, 1999)." FEIS at 4-274. FERC's analysis, however, is anything but consistent with the guidance that FERC cites. In the Certificate Order, FERC addressed cumulative impacts in just two paragraphs about climate change and safety. *See* Certificate Order at PP 147-48. Nowhere in its decision did FERC address cumulative impacts on water resources, vegetation and wildlife, fisheries, land use, or air quality. FERC did not take a "hard look" at the cumulative impacts of the Atlantic Sunrise Project.

Moreover, FERC's cumulative impacts analysis is flawed because it imprperly limited the analysis area. FERC states that "[f]or the most part, the area of potential cumulative impact is limited to the area directly affected by the Project and areas surrounding the Project." FEIS at 4-274. Based on this limited analysis area, FERC concluded that, "as a whole, minimal cumulative effects are anticipated when the impacts of the [Atlantic Sunrise] Project are added to the identified ongoing actions *in the immediate area*." *Id*. at 4-320 (emphasis added). Such a limited

cumulative impacts analysis is inconsistent with both the Council on Environmental Quality's ("CEQ") and Environmental Protection Agency's ("EPA") guidance on cumulative impacts.

The CEQ guidance recommends significantly expanding the cumulative impacts analysis area beyond the "immediate area of the proposed action" that is often used for the "project-specific analysis" related to direct and indirect effects:

> For a project-specific analysis, it is often sufficient to analyze effects within the immediate area of the proposed action. When analyzing the contribution of this proposed action to cumulative effects, however, the geographic boundaries of the analysis *almost always should be expanded*. These expanded boundaries can be thought of as differences in hierarchy or scale. Project-specific analyses are usually conducted on the scale of counties, forest management units, or installation boundaries, *whereas cumulative effects analysis should be conducted on the scale of human communities, landscapes, watersheds, or airsheds*.

CEQ, Considering Cumulative Effects under the National Environmental Policy Act, p. 12 (1997) (emphasis added). *See Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979) (CEQ entitled to substantial deference in interpreting NEPA). CEQ further says that it may be necessary to look at cumulative effects at the "ecosystem" level for vegetative resources and resident wildlife, the "total range of affected population units" for migratory wildlife, an entire "state" or "region" for land use, and the "global atmosphere" for air quality. *Id*. at 15. FERC's selected regions of influence for forested lands, forested and scrub-shrub wetlands, and air quality are not consistent with the requirements of NEPA.

EPA's guidance states that "[s]patial and temporal boundaries should not be overly restrictive in cumulative impact analysis." EPA, Consideration of Cumulative Impacts in EPA Review of NEPA Documents, p. 8 (1999). EPA specifically cautions agencies to not "limit the scope of their analyses to those areas over which they have direct authority or to the boundary of the relevant management area or project area." *Id*. Rather, agencies "should delineate appropriate geographic areas including *natural ecological boundaries*" such as ecoregions or watersheds. *Id*.

(emphasis added). Therefore, FERC's assertion that, "for the most part, the area of potential cumulative impact is limited to the area directly affected by the Project and areas surrounding the Project," is plainly inconsistent with NEPA's requirement to analyze cumulative impacts. As a result, the cumulative impacts analysis is fatally flawed and cannot support FERC's conclusion that there will be "minimal cumulative effects" associated with construction and operation of the Atlantic Sunrise Project.

There are also unexplained inconsistencies between the DEIS and FEIS in FERC's evaluation of natural gas development. In the DEIS, FERC stated that its cumulative impacts analysis included "natural gas well permitting and development projects . . . within 10 miles of the Atlantic Sunrise Project." DEIS at 4-259. In the FEIS, however, FERC removed this language and instead pointed the reader to Appendix Q, where other "major actions" were listed in a 35-page table. While at first glance it seems that FERC used the same 10-mile region of influence for natural gas development projects, FERC added a footnote pointing the reader to Appendix I for further information about these projects. Appendix I indicates that FERC only considered natural gas wells and facilities within 0.25 mile of the Atlantic Sunrise Project, a significant reduction from the (already truncated) 10-mile region of influence in the DEIS. As a result, FERC only included 47 "oil/gas wells" in its cumulative impacts analysis. *See* FEIS, App. I.

This does not constitute a "hard look" at the cumulative environmental impacts of past, present, and reasonably foreseeable natural gas development. The counties[5] in which the CPL North, the northern portion of the CPL South, and the Unity and Chapman Loops would be

[5] The CPL North would be located in Susquehanna, Wyoming, Luzerne, and Columbia Counties. The northern portion of the CPL South would be located in Columbia County. The Unity Loop would be located in Lycoming County. The Chapman Loop would be located in Clinton County. *See* FEIS at 2-6.

located have experienced extensive natural gas development activities over the past decade. Since 2007, gas companies have drilled at least 2,637 unconventional shale gas wells in Susquehanna, Wyoming, Luzerne, Columbia, Lycoming, and Clinton counties. *See* Intervenors' FEIS Comments, Ex. 5. Despite the fact that these counties and the proposed project facilities within them are located within the Susquehanna River watershed, there is no analysis of the cumulative impacts of natural gas development at a watershed, or even subwatershed, level (beyond FERC's arbitrary 0.25-mile region of influence).

FERC claimed elsewhere in the FEIS that it took a broader view of natural gas development in Susquehanna County. *See* FEIS at 4-277. The FEIS contains a map allegedly showing "natural gas development near the Atlantic Sunrise Project in Susquehanna County." *Id*. While this map shows some aspects of Williams' midstream facilities, the map does not identify any gas wells. This is a major oversight considering that at least 1,338 shale gas wells have been drilled in Susquehanna County since 2007. *See* Intervenors' FEIS Comments, Ex. 5; DEIS Comments at 45, Figure 1 (map showing the large number of shale gas wells drilled in Susquehanna County). Nor does the map identify all of the access roads that have been constructed to access these wells.

The construction of new roads and over 1,300 well sites in the same watershed as the Project is highly likely to cumulatively impact the water resources of the watershed. Nevertheless, FERC stated that "impacts from shale gas development outside of the geographic scope of cumulative impacts assessed for the Project [i.e., 0.25-mile], including those related to water quality and tree clearing, are not within the purview of the analysis for the Project." FEIS, Vol. III, CO-82. Thus, FERC failed to take a hard look at the cumulative impacts of the Project and past, present, and reasonably foreseeable shale gas development on the impacted watershed.

FERC also substantially understated the cumulative impacts of the Atlantic Sunrise Project and gas development on wildlife and interior forests. For example, FERC identified "157 migratory bird species [that] are regular breeders in project counties" in Pennsylvania. FEIS at 4-96. According to Transco, the pipeline would cross 44 interior forests along CPL North and South and one interior forest associated with Chapman Loop, affecting over 262 acres of interior forest habitat during construction. *Id*. at 4-83. Of this acreage, over 118 acres of interior forest would be permanently eliminated and converted to forest edge habitat as part of the pipeline right-of-way. *Id*.

Despite these impacts, neither Transco nor FERC have obtained a Migratory Bird Treaty Act ("MBTA") permit from the U.S. Fish & Wildlife Service ("USFWS"). The MBTA prohibits persons, entities or, in some cases, agencies, from pursuing, hunting, taking, capturing, or killing "any migratory bird, . . . nest, or egg of any such bird" without a permit or other exemption. *See* 16 U.S.C. § 703(a). FERC's authorization of Atlantic Sunrise would allow Transco to clear hundreds of acres of interior forests. FERC acknowledged that "[h]abitat removal and/or modification of existing habitats during construction and the long-term or permanent conversion of habitats associated with tree clearing and the maintenance of rights-of-way" will impact migratory birds. FEIS at 4-98. Nevertheless, FERC issued a certificate before either FERC or Transco obtained the proper MBTA permit from the USFWS. Unless Transco acquires a MBTA permit, it would be arbitrary and capricious for FERC to issue a notice to proceed upon a finding Transco acquired all necessary permits.

FERC acknowledged that "Marcellus shale development would also contribute to the cumulative vegetation and wildlife impacts," *see* FEIS at 4-300, but the subsequent analysis falls well short of NEPA's hard look requirement. For example, while FERC estimated that 3,060 acres of land (much of it probably forested) could be cleared in a year as shale gas wells are

constructed to supply Atlantic Sunrise, there is no analysis of past and present cumulative impacts of shale gas development. As stated above, FERC only included 47 oil/gas wells within 0.25-mile of the Project area. *See* FEIS, App. I. This ignores thousands of existing shale gas wells that have been drilled in northern Pennsylvania since 2007. *See* Intervenors' FEIS Comments, Ex. 5. Without a proper baseline of how shale gas development has already impacted interior forest habitat in this region, FERC cannot properly gauge the severity of impacts to these forests and the wildlife that depends on them, such as migratory birds.

FERC also relied on outdated and incomplete data to mischaracterize the current condition of interior forests. For example, FERC cites to a 2013 Forest Service inventory of Pennsylvania's forests to claim that forest losses in the Southern Tier of Pennsylvania "have been offset by gains resulting from agriculture declines in the Northern Tier counties (U.S. Forest Service, 2013)." FEIS at 4-85. While this report was published in 2013, the data range used in the report was from 2004-2009. *See* Intervenors' FEIS Comments, Ex. 6. This is significant because the report did not include the impacts of shale gas development between 2009 and the present, a time period in which thousands of new wells have been drilled in Pennsylvania's Northern Tier. The 2013 Forest Service report, in fact, acknowledged the growing threat that gas development posed to interior forests:

> Forest fragmentation and increased urbanization can create conduits for the introduction and spread of invasive species. Pennsylvania contains abundant roads and other fragmenting features. The exception occurs in the north-central reaches of the State where large blocks of public forests are common. Marcellus shale gas development is contributing to forest fragmentation and could potentially threaten interior forest of this region[.]

FEIS Comments, Ex. 6 at 12. The report, however, contained no analysis of the impacts of shale gas development on these interior forests in northern Pennsylvania. Thus, it was improper for FERC to rely on this report to claim that forest losses in Pennsylvania's Southern Tier "have

been offset by gains resulting from agriculture declines in the Northern Tier counties" because the report on which that claim is based is outdated and contradicted by more recent evidence. Whatever forest gains have resulted from agriculture declines in the Northern Tier counties are themselves being offset by forest clearing for road construction and development of well pads, wastewater pits, pipelines, gathering lines, compressor stations, and other infrastructure associated with gas development. The FEIS, however, contained no analysis of these impacts on interior forests or wildlife, including migratory birds. Therefore, FERC failed to take a hard look at the cumulative impacts of the Project and past, present, and reasonably foreseeable gas development on these resources.

FERC also failed to adequately consider cumulative impacts on land use, recreation, special interest areas, and visual resources. The FEIS addressed cumulative impacts on these resources in just four paragraphs. *See* FEIS at 4-303 – 4-304. While FERC purports to include the "ongoing Marcellus shale development in Susquehanna County," FEIS at 4-304, it did not address that ongoing development in any meaningful way. Nor did FERC include other counties in the Project area where shale gas development is occurring.

As Intervenors explained in their comments on the DEIS, Seneca has specifically identified the areas where it plans to drill wells if the Atlantic Sunrise Project comes online. *See* DEIS Comments at 25-26, 32, 61, 64-65. Seneca's leases are directly connected to Transco's Leidy Line (which would be expanded with the Chapman and Unity Loops). *See* FEIS Comments, Ex. 4 at p. 16. Because Seneca's lease areas are more than 0.25 mile from the Project area, they were not included in the cumulative impacts analysis. This was arbitrary and capricious.

Finally, FERC failed to adequately consider the Project's downstream impacts on greenhouse gas ("GHG") emissions and climate change. According to FERC, "[a]ssuming that

all of the natural gas being transported is used for combustion, downstream end-use would result in about 32.9 million metric tons of CO_2 per year." FEIS at 4-318. FERC neither provides a satisfactory explanation for how it arrived at this number nor adequately analyzes the climate change impact of emitting millions of metric tons of carbon dioxide. Instead, FERC maintains that "increased production and distribution of natural gas would likely displace *some* use of higher carbon emitting fuels" such as fuel oil and coal, which "would result in a *potential* reduction in regional GHG emissions." *Id*. (emphasis added). FERC makes no attempt to quantify the potential emission offset. Nor does the agency offer legal authority suggesting that NEPA allows an agency to avoid an in-depth analysis of a reasonably foreseeable effect because it may be partially offset to an unknown degree. *See also* 40 C.F.R. § 1508.27(b)(1) (NEPA requires the agency to take a hard look at all environmental impacts, including beneficial impacts). Moreover, FERC fails to assess whether the gas carried on the Atlantic Sunrise would offset new renewable energy production, thus skewing its analysis in favor of the project. The possibility that *some* emissions *may* be offset to some degree does not excuse FERC's failure to thoroughly analyze downstream greenhouse gas emissions and climate change impacts. FERC's conclusory assertion that "neither construction nor operation of the Project would significantly contribute to GHG cumulative effects or climate change" is unsupported and must be remedied in a revised or supplemental EIS.

FERC's cumulative impact analysis is fatally flawed in its geographic scope and for all but ignoring the substantial impacts of Marcellus and Utica shale gas development and climate change. FERC should withdraw the Certificate Order and prepare a revised EIS that complies with NEPA.

G. FERC improperly relied on the deficient FEIS to conclude that construction of the Atlantic Sunrise Project will "avoid unnecessary disruptions of the environment."

FERC violated its Certificate Policy Statement by relying on the deficient FEIS to conclude that construction of the Atlantic Sunrise Project will "avoid unnecessary disruptions of the environment." *See* Certificate Order at PP 20, 33. In implementing the Certificate Policy Statement, FERC balances public benefits against adverse consequences, including consideration of the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions to the environment, and the unneeded exercise of eminent domain. *See id*. at P 20 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), order clarified, 90 FERC ¶ 61,128, order further clarified, 92 FERC ¶ 61,094 (2000)).

FERC's factual determinations under the NGA may be upheld if they are supported by "substantial evidence," which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *South Coast Air Quality Management District v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010) (quoting *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)). As explained above, FERC ignored the indirect and cumulative effects of shale gas development despite the fact that thousands of shale gas wells have been drilled in the area where the Atlantic Sunrise Project is located. Thus, there is insufficient evidence for a reasonable mind to conclude that FERC's authorization of the Atlantic Sunrise Project avoids unnecessary impacts on the environment.

H. FERC failed to adequately and independently evaluate public need.

FERC failed to adequately and independently evaluate the public need for the Atlantic Sunrise Project. This renders arbitrary its decision, under Section 7 of the Natural Gas Act, that the project is "required by the present or future public convenience and necessity." *See* 15 U.S.C.

§ 717f(e). FERC should withdraw the Certificate Order and perform a transparent and independent evaluation of public need for the Atlantic Sunrise Project.

Former Commissioner Bay recently explained that FERC's policy for evaluating need in certificate proceedings is outdated and lacking. According to Mr. Bay, while the policy "lists a litany of factors for the Commission to consider in evaluating need . . . in practice, the Commission has largely relied on the extent to which potential shippers have signed precedent agreements for capacity on the proposed pipeline." *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 at 3 (Feb. 3, 2017) (Bay, Commissioner, Separate Statement). By fixating on precedent agreements, Mr. Bay says FERC:

> [M]ay not take into account a variety of other considerations, including, among others: whether the capacity is needed to ensure deliverability to new or existing natural gas-fired generators, whether there is a significant reliability or resiliency benefit; whether the additional capacity promotes competitive markets; whether the precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize.

Id. Mr. Bay further warns FERC against aiding industry "boom-and-bust cycles" and overbuilding pipelines, which could leave ratepayers subject to increased costs. *Id*.

These concerns are relevant here. While FERC says it "considers all evidence submitted reflecting on the need for the project," the fact is that FERC "found that long-term commitments serve as 'significant evidence of demand for the project.'" Certificate Order at P 28 (citation omitted). FERC then points to nine project shippers that have "executed binding precedent agreements for firm service using 100 percent of the design capacity of the proposed project" as the overarching demonstration of need for the Project. *Id*.

The only destinations identified for gas to be transported on Atlantic Sunrise facilities are the "Mid-Atlantic and southeastern markets." *Id*. at P 29. The reversal of the Transco longhaul pipeline to the southeast will allow northern Pennsylvania shale gas to reach Gulf Coast export

terminals. For example, Kinder Morgan's Elba Island export terminal was approved and is currently under construction. *See* Elba Island LNG Update: Non-FTA Exports Approved, Marcellus Drilling News, Dec. 2016, *available at* http://marcellusdrilling.com/2016/12/elba-island-lng-update-non-fta-exports-approved-dump-truck-city/. Kinder Morgan also "owns and operates the 200-mile Elba Express pipeline, which connects the LNG facility to the Transco [pipeline]." *Id*. Transco's parent company, Williams, "has been on a mission to send Marcellus gas south – including to Georgia[.]" *Id*. "Marcellus Shale gas will, via the Transco [pipeline], be at least some of, *if not the primary*, source for gas exported from the Elba Island facility." *Id*. (emphasis added).

In January 2017, Cabot said that the "anticipated pricing" for gas transported on facilities made available by Atlantic Sunrise will be based on two market areas: the D.C. market area (where Cove Point is located) and the Gulf Coast market area (where multiple export facilities are located). *See* Intervenors' FEIS Comments, Ex. 1. In other words, Cabot is anticipating to sell its gas based on prices for exporting. As explained above, Cabot has subscribed to approximately half of the capacity on Atlantic Sunrise. Therefore, FERC's assumption in the FEIS that the "*vast majority* of natural gas transported through the firm capacity under the Project would be *consumed domestically* in markets along the East Coast" does not appear to be accurate. *See* FEIS at 1-10.

FERC's refusal to seriously question whether gas transported by the Atlantic Sunrise pipeline is intended primarily for export is a significant issue going to the heart of the public need for the Project. Had Transco announced that Atlantic Sunrise was intended to export northern Pennsylvania shale gas through terminals at Cove Point and along the Gulf Coast, the Project likely would have received greater scrutiny from the public and elected officials. The fact that 87% of the Project's capacity is subscribed to by four gas production companies that, upon

completion of the Project, will have direct access to export facilities, raises serious concerns that the main driver behind the Project is to provide these companies with access to higher priced markets overseas. Thus, it was improper for FERC to place significant weight on the precedent agreements as evidence of a public need for the Atlantic Sunrise Project.

IV. FERC'S ISSUANCE OF AN ORDER GRANTING REHEARING FOR FURTHER CONSIDERATION WILL BE DEEMED A DENIAL OF INTERVENORS' REQUEST FOR REHEARING

Under the NGA, unless FERC "acts upon" a request for rehearing "within thirty days after it is filed," the request for rehearing "may be deemed to have been denied." 15 U.S.C. § 717r(a). Congress expressly defined the "acts" that FERC may take upon a request for rehearing – FERC "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." *Id*. If FERC does not take one of these enumerated actions upon a request for rehearing within 30 days, an aggrieved party may file a petition for review in the appropriate Court of Appeals. *See* 15 U.S.C. § 717r(b).

Instead of "act[ing] upon" a request for rehearing as Congress intended, FERC often issues an "order granting rehearing for further consideration," commonly referred to as a tolling order. Although tolling orders purportedly "grant" rehearing, no such rehearing is actually granted. Rather, tolling orders simply "afford [FERC] additional time" to consider requests for rehearing beyond the statute's 30-day time period. *See e.g.*, *National Fuel Gas Supply Corp.*, Order Granting Rehearing For Further Consideration (Docket No. CP14-70-000, Accession No. 20150416-3002). FERC's use of tolling orders in NGA certificate proceedings has allowed project proponents to engage in extensive construction activities (and in some cases place facilities into service) before FERC addresses the issues raised in timely filed rehearing requests, thus effectively depriving parties of judicial review. *See* Ex. 2.

The issuance of a tolling order in response to Intervenors' request for rehearing in this proceeding will be considered a denial of rehearing. Intervenors' members will suffer irreparable harm from implementation of the Atlantic Sunrise Project. Intervenors must have an opportunity for judicial review of FERC's Certificate Order in a timely manner, as Congress intended. Therefore, if FERC issues a tolling order in response to Intervenors' request for rehearing, it will be deemed a denial of rehearing and intervenors will seek immediate review of the Certificate Order in the Court of Appeals.

V. Motion for Stay of Certificate and Construction Pending Decision on the Merits

The standard that the Commission uses for granting a stay is whether "justice so requires." 5 U.S.C. § 705. Here, the interests of justice require that the Certificate and any potential construction be stayed pending the Commission's decision on this request for rehearing.

In addressing a motion for stay, the Commission considers "(1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether the stay is in the public interest." 98 FERC ¶ 61,086. Furthermore, "[t]he key element in the inquiry is irreparable injury to the moving party." *Id*. Courts also take into account the availability of a legal remedy for the harm caused, as well as the likelihood of success on the merits.

Here, justice requires the granting of Intervenors' request for a stay. Absent such a stay, Intervenors will be left without an adequate remedy at law to address the irreparable harms inflicted by the construction. In addition, the public will permanently lose important environmental resources. If Intervenors prevail on rehearing, or prevail on judicial review, they will have already suffered irreversible harms relating to construction if such activities are

permitted to proceed. Thus, absent a stay by the Commission, meaningful judicial review could be hindered if not foreclosed.

A. A stay is necessary to avoid irreparable injury

Absent a stay, and if construction of the project is allowed to move forward, this will cause immediate and irreparable injury to Intervenors and their members, including harm to streams, wetland systems, and forests they use, as well as other environmental impacts associated with constructing the pipelines. These environmental harms, and subsequent harms to the recreational and aesthetic interests of Intervenors' members, warrant the requested relief because they are imminent, certain, and irreparable. An injury is "irreparable" if damages are not adequate to compensate the injury. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003); "Environmental injury, 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 Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("[E]nvironmental and aesthetic injuries are irreparable.")

1. The project impacts would cause irreparable injury

As set forth in the FEIS, there would be permanent, irreparable environmental harm from construction in the right-of-way ("ROW"). *See* FEIS at 2-8 (stating that Transco would maintain a 50-foot-wide permanent ROW along non-collocated greenfield segments of CPL North and CPL South). Clearing the ROW would involve removing topsoil, trees, shrubs, brush, roots, and large rocks, and then removing or blasting additional soil and bedrock to create a trench for the pipeline. Following construction, a permanent ROW would be maintained along the length of the Project. This Project would impact over 3,740 acres temporarily during construction as well as over 1,200 acres permanently throughout operation. *Id*. at 2-8. This easily meets the Supreme

Court's standard for irreparable harm. *Amoco Production Co.*, 480 U.S. at 545 (discussing how environmental harms are "permanent or at least of long duration, *i.e*. irreparable.").

The Project will also contribute significantly to air pollution during both construction and operation. *See* FEIS at 4-218 – 4-233. Operation of the compressor stations is also expected to emit additional tons of air pollutants over the life of the Project. *See id*. at 4-221 – 4-223. These cumulative emissions would have a long-term and therefore irreparable impact on air quality.

2. Absent a Stay, Intervenors and Their Members Will Suffer Irreparable Injury.

Intervenors have members who live, work and recreate along the proposed pipeline route. Intervenors members' have also been active in community meetings and protests against the pipeline. Given the nature of this project as set forth in the EIS, Intervenors' injury would be "likely" to occur. *See, e.g., Moussa I. Kourouma d/b/a Quntum Energy,* LLC, 137 FERC ¶ 61,205, 62,142 (Nov. 16, 2011); *see also Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

B. A stay will not substantially harm other parties.

The injury to Intervenors, the public, and the environment outweighs any harm that a stay may cause the applicants or the Commission. If Intervenors' Request is granted, and the Certificate is revoked, applicants obviously could not possibly suffer any harm by a stay pending a final decision in this matter. And to the extent that Intervenors' Request is granted, but construction is merely delayed until applicants comply with all environmental laws and other Commission requirements, any injury from such delay would not be "damages" in a legal sense.

Economic harm is not irreparable and does not provide an adequate basis for denying a stay. *See e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) (potential monetary injury is not irreparable). To the extent that pipeline construction is allowed once compliance with all

environmental laws has been achieved, any delays in pipeline operations would be purely temporary economic harms while the undisputed environmental harms in this case are permanent and irreversible. *See, e.g.*, *OVEC v. U.S. Army Corps of Eng's*, 528 F. Supp. 2d 625, 632 (S.D. W. Va., 2007) ("Money can be earned, lost, and earned again; a valley once filled is gone."); *San Louis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) ("delay in drilling the exploratory wells is not irreparable. . . ."); *Alaska Center for the Env't v. West*, 31 F. Supp. 2d 714, 723 (D. Alaska 1998) (longer permit processing time was "not of consequence sufficient to outweigh irreversible harm to the environment"); *Citizen's Alert Regarding the Env't v. U.S. Dep't of Justice*, 1995 WL 748246, *11 (D.D.C. Apr. 15, 1995) (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.")

In any event, any injury to applicants due to prematurely proceeding with construction would be "self-inflicted" because they assumed the risk that Intervenors' request for rehearing might be granted. Such self-inflicted harm caused by "jump[ing] the gun" or "anticipat[ing] a pro forma result" in permitting applications makes the pipeline companies "largely responsible for their own harm." *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011); *see also Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). Under such circumstances, the pipeline companies' assumption of the risk weighs heavily against any harm they might claim based on the issuance of a stay. *Id.*

Thus, in contrast to the irreparable injury that Intervenors and their members would suffer in the absence of a stay, any potential harm to the applicants from delaying construction to ensure compliance with the law is minimal. Granting a stay that prohibits the construction

activities authorized by the Notices to Proceed[6] would only serve to preserve the *status quo* until the parties have fully resolved their claims.

C. A stay is in the public interest.

Because Intervenors seek to compel compliance with federal laws designed by Congress to protect the environment, and because a stay would prevent permanent environmental damage, the public interest weighs heavily in favor of granting a stay. The public interest is protected by preventing irreparable harm to the environment that will result from the construction activities. *See Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985) ("a preliminary injunction would serve the public by protecting the environment from any threat of permanent damage"). Moreover, the public interest is served by ensuring that federal agencies scrupulously comply with their statutory duties. *See Fund for Animals v. Espy*, 814 F. Supp. at 152 (finding "meticulous compliance with the law by public officials" as relevant to the public interest); *Citizen's Alert,* 1995 WL 748246, *11 (compliance with law "is especially appropriate in light of the strong public policy expressed in the nation's environmental laws" (citation omitted)). The public "has a strong interest in maintaining the balance Congress sought to establish between economic gain and environmental protection." *OVEC*, 528 F. Supp. 2d at 633.

For example, there is a strong public interest in avoiding unnecessary destruction of wetlands. *See, e.g., Utahns For Better Transp. v. U.S. Dept. of Transp.*, 2001 WL 1739458 (10th Cir. Nov. 16, 2001) ("The concern for wetlands expressed by the Clean Water Act and its implementing regulations demonstrates a strong public interest in their preservation and

[6] On February 8, 2017, Transco filed a Request for Partial Notice to Proceed "to fell trees prior to March 31, 2017 within 0.25-mile of a known northern long-eared bat hibernaculum in Northumberland County." *See* Request for Partial Notice to Proceed at 1 (Accession No. 20170209-5131). Transco's requests that the Director of the Office of Energy Projects approve its request no later than March 3, 2016. *Id*. at 4. Intervenors intend to supplement its motion for stay upon further requests for notices to proceed.

maintenance…. [and] the public has an interest in ensuring that all alternatives to the destruction of wetlands have been considered and that unavoidable impacts on such areas are minimized."); *Rapanos v. United States*, 547 U.S. 715, 777 (2006) ("Important public interests are served by the [CWA]… and by the protection of wetlands in particular."); 33 C.F.R. § 320.4(b)(1) ("Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.").

Additionally, the Project will cause or contribute to increased upstream fracking and infrastructure development, including all adverse environmental impacts associated therewith, and result in major adverse downstream environmental impacts from combustion of the natural gas. NEPA requires the Commission to consider those adverse impacts, including the effects of burning gas that will produce tons of greenhouse gas emissions ("GHGs"), NO_x, VOCs, and HAPs. The pollutants emitted from those plants as a result of burning natural gas are known to cause serious adverse health effects. Thus, there is a strong interest in protecting the public from those effects.

The importance of the Commission properly considering the direct and indirect adverse downstream effects of GHGs is supported by the Council on Environmental Quality's ("CEQ") recent "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" ("Guidance").[7] The Guidance provides that federal agencies should consider the extent to which a proposed action would contribute to climate change through GHG emissions and that agencies should quantify both the reasonably foreseeable direct and indirect GHG emissions from the proposed project. Guidance at 9, 11, 16.

Finally, the Guidance confirms that a wide variety of tools exist to quantify GHG

[7] The guidance document is available at: https://goo.gl/8QUK94.

emissions including emissions from fossil fuel combustion: "Quantification tools are widely available, and are already in broad use in the Federal and private sectors, by state and local governments, and globally. . . . These tools can provide estimates of GHG emissions, including emissions from fossil fuel combustion . . . ." *Id.* at 12. As such, quantification of the GHG emissions from the plants and their effects can and should be determined.

Given the high stakes, a stay of the Certificate and construction pending a final decision on the merits is clearly in the public interest. A stay will help ensure that that a full and complete analysis of the impacts, and potential mitigation, occurs before alternatives are foreclosed by the construction. Furthermore, given the level of interest demonstrated by the public in this controversial pipeline project, the public interest lies in maintaining the *status quo* until the pending request is considered fully on the merits. *See San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv*., 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) (large volume of public comments submitted indicates a public interest in maintaining the *status quo* pending proper review).

D. Justice requires that the Certificate and Construction be stayed pending rehearing and judicial review.

Consideration of the elements described above strongly favors the granting of a stay. Furthermore, where, as here, the parties requesting a stay are likely to succeed on the merits, justice requires granting a stay. The Commission has noted in previous orders that the factors it examines when considering whether to grant a stay do not include the likelihood of success on the merits. However, this inquiry is intertwined with the inquiry regarding whether justice requires a stay. If the party requesting a stay is likely to prevail, this tips the balance in favor of granting the stay. It would be unjust to allow the project proponents to move forward with construction activities that would cause irreversible environmental harm even though Intervenors

are likely to succeed on the merits. *See Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) ("If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury.").

V. CONCLUSION

For the reasons stated above, FERC should grant Intervenors' request for rehearing and withdraw its February 3, 2017 Certificate Order and determination that the Atlantic Sunrise Project is an "environmentally acceptable action" that is "required by the present or future public convenience and necessity." FERC should also withdraw the deficient FEIS and prepare a revised EIS that fully considers the direct, indirect, and cumulative impacts of the Atlantic Sunrise Project.

Dated: February 10, 2016 Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on this official list compiled by the Secretary in this proceeding.

Dated: February 10, 2016

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