UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of

ATLANTIC COAST PIPELINE, LLC	**Docket Nos. CP15-554-000**
DOMINION TRANSMISSION, INC.	**CP15-554-001**
	CP15-554-002
	CP15-555-000
	CP15-555-001

FILED NOVEMBER 13, 2017

REQUEST FOR REHEARING AND RESCISSION OF CERTIFICATES AND MOTION FOR STAY OF

SHENANDOAH VALLEY NETWORK,
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT,
VIRGINIA WILDERNESS COMMITTEE,
SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION,
NATURAL RESOURCES DEFENSE COUNCIL,
COWPASTURE RIVER PRESERVATION ASSOCIATION,
FRIENDS OF BUCKINGHAM,
CHESAPEAKE BAY FOUNDATION,
DOMINION PIPELINE MONITORING COALITION,
SOUND RIVERS,
WINYAH RIVERS FOUNDATION,
APPALACHIAN VOICES,
CENTER FOR BIOLOGICAL DIVERSITY,
CHESAPEAKE CLIMATE ACTION NETWORK,
FRIENDS OF NELSON,
SIERRA CLUB,
WILD VIRGINIA,
WEST VIRGINIA RIVERS COALITION,
RICHARD AVERITT, LOUIS RAVINA,WILLIAM MCCLAIN,
DAWN AVERITT, JUDY ALLEN, WADE AND ELIZABETH NEELY,
WILLIAM LIMPERT, JACKIE TAN, ELFRIEDA MCDANIEL
BOLD ALLIANCE,
NELSON HILLTOP LLC,
ROCKFISH VALLEY FOUNDATION, AND
ROCKFISH VALLEY INVESTMENTS

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 ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Southern Environmental Law Center, on behalf of Shenandoah Valley Network, Highlanders for Responsible Development, Virginia Wilderness Committee, Shenandoah Valley Battlefields Foundation, Natural Resources Defense Council, Cowpasture River Preservation Association, Friends of Buckingham, Chesapeake Bay Foundation, Dominion Pipeline Monitoring Coalition, Sound Rivers, and Winyah Rivers Foundation; Appalachian Mountain Advocates, on behalf of Appalachian Voices, Center for Biological Diversity, Chesapeake Climate Action Network, Friends of Nelson, Sierra Club, Wild Virginia, and West Virginia Rivers Coalition; and Johns Marrs Ellis & Hodge, LLP, on behalf of Richard Averitt, Louis Ravina, William McClain, Dawn Averitt, Judy Allen, Wade and Elizabeth Neely, William Limpert, Jackie Tan, Elfrieda McDaniel, Bold Alliance, Nelson Hilltop LLC, Rockfish Valley Foundation, and Rockfish Valley Investments (collectively, "Intervenors") hereby request rehearing of the Commission's "Order Issuing Certificates," issued October 13, 2017, in the above-captioned proceeding ("Certificate Order").[1]

[1] *See* Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042 (Oct. 13, 2017).

The Commission granted the Intervenors' respective motions to intervene in this proceeding.[2] Thus, the Intervenors are "parties" to this proceeding, 18 C.F.R. § 385.214(c), and have standing to file this request for rehearing.[3]

We request that the Certificate Order and deficient final environmental impact statement ("final EIS") be withdrawn and the environmental analysis and public convenience and necessity analysis be redone in a manner that complies with the Commission'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.

STATEMENT OF RELEVANT FACTS

On October 31, 2014, Atlantic and Dominion requested, and was subsequently granted, pre-filing review of the proposed project. [4] On February 27, 2015, the Commission published a Notice of Intent to prepare an Environmental Impact Statement, requested comments on environmental issues, and announced ten public scoping meetings.[5] On April 28, 2015, Appalachian Mountain Advocates and the Southern Environmental Law Center submitted scoping comments on the

[2] *See id.* ¶ 19.

[3] *See* 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

[4] Atlantic Coast Pipeline, Request to Initiate the Pre-Filing Process (Oct. 31, 2014) (eLibrary No. 20141031-5347).

[5] Notice of Intent to Prepare an Environmental Impact Statement for the Planned Supply Header Project and Atlantic Coast Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings (Feb. 27, 2015) (eLibrary No. 20150227-3043).

project on behalf of a coalition of conservation organizations.[6] The Chesapeake Bay Foundation filed scoping comments on April 27, 2015 and June 2, 2016.[7] On October 23, 2015, the Southern Environmental Law Center, Appalachian Mountain Advocates, and the Chesapeake Bay Foundation respectively filed motions to intervene and protests of the proposed project.[8] On April 6, 2017, the Bold Alliance filed a motion for late intervention.[9] On September 25, 2017, Bold filed a letter in both the MVP and ACP docket, outlining the constitutional and statutory violations that would result from a grant of a certificate.[10]

On September 18, 2015, Atlantic and Dominion filed applications with the Commission for certificates of public convenience and necessity,[11] and the

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[6] Comments on FERC's Notice to Prepare an EIS for the Planned Supply Header Project and the Atlantic Coast Pipeline Project, FERC Docket Nos. PF15-5-000 & PF15-6-000 (Apr. 28, 2015) (eLibrary No. 20150428-5504).

[7] Scoping Comments: Notice of Intent to Prepare Environmental Impact Statement for the Planned Atlantic Coast Pipeline Project, PF15-6-000 (Apr. 27, 2015) (eLibrary No. 20150427-5338); CP15-554-000 (eLibrary No. 20160603-5078).

[8] Motion to Intervene and Protest of Appalachian Mountain Advocates et al. in FERC Docket No. CP15-554 (Oct. 23, 2015) (eLibrary No. 20151023-5252); Motion to Intervene and Protest of Shenandoah Valley Network et al. in FERC Docket No. CP-15-554 (Oct. 23, 2015) (eLibrary No. 20151023-5321); Motion to Intervene of Chesapeake Bay Foundation in FERC Docket No. CP15-554 (Oct. 23, 2015) (eLibrary No.20151023-5202). Appalachian Mountain Advocates' Motion to Intervene and Protest included a request for an evidentiary hearing to resolve disputed issues of material fact regarding the need for the projects.

[9] eLibrary No. 20170406-5700.

[10] On September 5, 2017, the Bold Alliance and the Bold Educational Fund filed a lawsuit in federal district court against the Commission, ACP and MVP challenging the constitutionality of the Commission's certificate process and authorization of use of eminent domain by private natural gas pipeline companies - both as a general matter and specific to the MVP and ACP Projects. Although Bold contends that the federal district court has jurisdiction to entertain all of its claims, as a precaution, it seeks rehearing at the Commission to avoid waiver of its right to challenge the certificate under Section 717f(h) if the federal court declines to hear its case as well as to preserve those issues that are outside the scope of the federal district court case.

[11] Atlantic Coast Pipeline, Abbreviated Application for a Certificate of Public Convenience and Necessity and Blanket Certificates (Sept. 18, 2015) (eLibrary No. 20150918-5212).

Commission issued a notice of application on October 2, 2015.[12] On March 11, 2016, Atlantic submitted an application amendment proposing a new route through the mountains of West Virginia and Virginia.[13] As authorized by Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, intervenor Conservation Groups submitted comments and an answer opposing Atlantic's efforts to expedite approval for the project.[14] On May 3, 2016, the Commission issued another Notice of Intent to prepare an Environmental Impact Statement due to the proposed route changes.[15]

On December 30, 2016, the Commission issued the Draft Environmental Impact Statement for the project.[16] The Southern Environmental Law Center and Appalachian Mountain Advocates submitted comments on the draft EIS on April 6, 2017 on behalf of their respective clients,[17] as did the Chesapeake Bay

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[12] Notice of Application (Oct. 2, 2015) (eLibrary No. 20151002-3032).

[13] Atlantic Coast Pipeline, Amendment to Application for a Certificate of Public Convenience and Necessity and Blanket Certificates (Mar. 11, 2016) (eLibrary No. 20160314-5035).

[14] Comments and Answer Opposing Atlantic Coast Pipeline, LLC's Request to Expedite Processing of its Application by Conservation Groups (Apr. 12, 2016) (eLibrary No. 20160412-5333).

[15] Supplemental Notice of Intent to Prepare an Environmental Impact Statement and Proposed Land and Resource Plan Amendments for the Proposed Atlantic Coast Pipeline, Request for Comments on Environmental Issues Related to New Route and Facility Modifications, and Notice of Public Scoping Meetings (May 3, 2016) (eLibrary No. 20160503-3002).

[16] Draft Environmental Impact Statement for the Atlantic Coast Pipeline Project and Supply Header Project under CP15-554 et al. (Dec. 30, 2016) (eLibrary No. 20161230-4000) [hereinafter Draft EIS].

[17] Comments of Shenandoah Valley et al. on the Draft Environmental Impact Statement for the Proposed Atlantic Coast Pipeline and Supply Header Project (Apr. 6, 2017) [hereinafter Comments of Shenandoah Valley Network] (eLibrary No. 20170406-5347); Comments of Appalachian Mountain Advocates et al. on the Draft Environmental Impact Statement for the Proposed Atlantic Coast Pipeline and Supply Header Project (Apr. 6, 2017) (eLibrary No. 20170406-5619) [hereinafter Comments of Appalachian Mountain Advocates]; Comments of

Foundation. These comments highlighted significant deficiencies of the draft EIS and urged the Commission to file a revised or supplemental draft EIS for public comment. The Commission did not grant this request and issued a final EIS on July 21, 2017.[18] On June 21, 2017, the Shenandoah Valley Network et al. filed a motion for an evidentiary hearing to resolve the issue whether there is actual market demand for the proposed project.[19] The Order granting the certificate of public convenience and necessity was subsequently issued on October 13, 2017.[20] In that Order, the Commission denied the motion for an evidentiary hearing.[21]

Intervenors hereby incorporate by reference all scoping and draft EIS comments mentioned above.

STATEMENT OF ISSUES

1. The Commission issued a certificate of public convenience and necessity that is not based on substantial evidence in violation of the Natural Gas Act and that is arbitrary and capricious in violation of the Administrative Procedure Act. Specifically, the Commission failed to evaluate significant evidence in the record, including but not limited to, demand projections and comparisons of demand with existing pipeline capacity, demonstrating that Atlantic's precedent agreements do not reflect genuine market demand. The Commission's decision to rely solely on Atlantic's precedent agreements as evidence of public benefit runs counter to its 1999 Certificate Policy Statement. *See, e.g.*, *Certification of New Interstate*

Chesapeake Bay Foundation on Draft Environmental Impact Statement for the Atlantic Coast Pipeline, LLC, Dominion Transmission, Inc. (CP15-554-000 and CP-15-555-000) (Apr. 6, 2017) (eLibrary No. 20170406-5601) [hereinafter CBF Comments].

[18] Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project under CP-15-554 et al. (July 21, 2017) (eLibrary No. 20170721-4000).

[19] Motion for an Evidentiary Hearing by Shenandoah Valley Network et al. (June 21, 2017) (eLibrary No. 20170621-5160).

[20] Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042 (Oct. 13, 2017).

[21] *Id.* at 161 FERC ¶ 61,042 at P 22-23.

Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999); 15 U.S.C. § 717r(b); 5 U.S.C. § 706(2)(A).

2. As authorized by 18 C.F.R. § 385.713(c)(3), the Commission should also consider new evidence submitted with this Petition relevant to its determination about whether Atlantic's precedent agreements reflect genuine market demand. This evidence includes, but is not limited to, testimony and filings of Dominion Energy Virginia the Virginia State Corporation Commission and testimony and filings of Duke Energy Progress and Duke Energy Carolinas to the North Carolina Utilities Commission. This new evidence confirms the evidence in the record that Atlantic's precedent agreements do not reflect genuine market demand. *See, e.g.*, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999); 15 U.S.C. § 717r(b); 5 U.S.C. § 706(2)(A).

3. The Commission approved a return on equity for the Atlantic Coast Pipeline that is not based on substantial evidence in violation of the Natural Gas Act and that is arbitrary and capricious in violation of the Administrative Procedure Act. Specifically, the Commission does not rely on substantial evidence in the record to justify its decision to allow Atlantic to recover a 14% rate of return on equity, instead relying on the rate of return for other pipeline project without assessing the risks faced by the developers of this specific project. *See* 15 U.S.C. § 717r(b); 5 U.S.C. § 706(2)(A); *Sierra Club v. FERC*, 867 F.3d 1357, 1378 (D.C. Cir. 2017).

4. The Commission erred in denying Intervenors' request for an evidentiary hearing to resolve serious and disputed factual issues concerning the market demand for the Atlantic Coast Pipeline. Intervenors made allegations of fact, submitted expert analysis and other evidence to support their allegations, and demonstrated that their allegations were in dispute. Moreover, the Commission's Order confirms that these allegations have not been, and cannot be, resolved on the basis of the written record. *See* 15 U.S.C. § 717f(c)(1)(B); 18 C.F.R. § 385.502; *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992).

5. The Commission issued a Certificate Order based on a final Environmental Impact Statement that failed to rigorously explore and objectively evaluate all reasonable alternatives to the proposed Atlantic Coast Pipeline, including the "no action" alternative, in violation of the National Environmental Policy Act and the Administrative Procedures Act. The Commission undertook a cursory analysis of the existing Transco pipeline and other existing pipeline infrastructure that Intervenors' asserted was adequate to meet the demand for natural gas in Virginia

and North Carolina, rejected the no-action alternative based on Atlantic's claims of public benefit, and rejected a single corridor alternative for the Atlantic Coast and Mountain Valley pipelines without assessing the need for either project. By relying entirely on the goals of the applicants to establish the purpose of the projects, the Commission failed to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project" and unreasonably skewed its alternatives analysis. *See, e.g.*, 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.14; *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178 (10th Cir. 2013); *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664 (7th Cir. 1997); Certificate Order, Dissent at 2 – 3.

6. The Commission violated NEPA by failing to include sufficient information in its draft EIS to permit meaningful public review and comment. 40 C.F.R. § 1502.9(a). The DEIS was so lacking in information and analysis that the public could not properly assess the project's impacts or critique the Commission's assessment thereof. The Commission's deficient DEIS and its refusal to provide a revised or supplemental EIS for public review and comment thus violates NEPA's public participation requirements. *Burkey v. Ellis*, 483 F. Supp. 897, 915 (N.D. Ala. 1979); *Habitat Educ. Ctr. v. U.S. Forest Serv*., 680 F. Supp. 2d 996, 1005 (E.D. Wis. 2010) (emphasis added), *aff'd sub nom. Habitat Educ. Ctr., Inc. v. U.S. Forest Serv*., 673 F.3d 518 (7th Cir. 2012).

7. The Commission issued a Certificate Order based on a final EIS that failed to take a "hard look" at the direct, indirect, and cumulative impacts of construction and operation of the Atlantic Coast pipeline and was not based on adequate information. Specifically, the Commission issued an incomplete draft EIS that precluded meaningful public participation; improperly segmented review of the project from proposed expansion to South Carolina; and failed to adequately examine the project's impacts to water resources, climate, intact forests and migratory birds, environmental justice communities; air and water quality from NOx emissions, and protected species. The Commission also failed to adequately examine the project's impacts on historic and cultural resources in violation of NEPA and the National Historic Preservation Act. *See, e.g.*, 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1502.9, 1502.16; 54 USC § 300101; 36 C.F.R. § 800.3(f)(1); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Sierra Club v.* FERC, 867 F.3d 1357 (D.C. Cir. 2017); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014); N.*C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596 (4th Cir. 2012); *Blue Mountains Biodiversity Project v. Blackwood*, 161

F.3d 1208 (9th Cir. 1998); *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174 (4th Cir. 2005).

8. The Commission violates the NGA by granting certificates that are conditional on applicants obtaining future permits from state or local agencies. *See* 15 U.S.C. §717f(e). Legislative history and case law indicate that the NGA empowers the Commission only to impose "conditions" on pipeline activity in the sense of "limitations," not to make certificates "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence. *See N. Nat. Gas Co., Div. of InterNorth, Inc. v. F.E.R.C.*, 827 F.2d 779, 782 (D.C. Cir. 1987); *Panhandle E. Pipe Line Co. v. F.E.R.C.*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389, 392 (1959).

9. The Commission violates the Fifth Amendment by granting certificates that are conditional on applicants obtaining future permits from state or local agencies. As soon as the Commission issues a certificate, even a "conditional" one, the certificated pipeline entity can arguably start acquiring property by condemnation. 15 U.S.C. §717f(h). But if the entity still has additional permits to obtain, there is a chance it will fail to obtain those permits. If that happens, the entity will never be allowed to begin operations—and it will have taken private property for no reason (i.e., without a public necessity) in violation of the Fifth Amendment.

10. By allowing conditional-certificate holders to exercise eminent domain before they have obtained all necessary approvals, he Commission interprets the NGA in a manner that violates the Constitution. The Commission could obviate this problem by imposing conditions prohibiting applicants from exercising eminent domain until after they obtained all necessary approvals, *see Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011), and, under the doctrine of constitutional avoidance, FERC *should* do so. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

11. The Commission exceeds its statutory authority by granting blanket certificates. The grant of blanket authority covers projects that the Commission presently knows, to a virtual certainty, will *not* be where ACP's application describes the pipeline as being. And, in connection with any of these activities, the certificate holder has effectively unrestricted authority to exercise eminent-domain power to force sales of private property, including of properties outside the areas described in ACP's application. 15 U.S.C. §717f(h). This is incompatible with the statutory requirements imposed by Sections 7(c) and 7(e) of the NGA. The Commission's authority does not extend to blanket approvals of unknown future

extensions, expansions, rearrangements, or replacements, at least where such actions are not limited to the pipeline footprint actually proposed by an applicant and considered and approved by the Commission. *See Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008).

12. The Commission practice of granting "blanket" certificates—at least those that authorize construction outside evaluated and approved project footprints—violates The Commission's statutory mandate to consider the economic and environmental impacts of proposed pipeline projects. *See* 15 U.S.C. §717f(a).

13. Granting blanket certificates violates the NGA's notice-and-hearing requirements. 15 U.S.C. §717f(c)(1)(B). This is especially true for "future facility construction" contemplated but not specified by a certificate application.

14. Permitting private entities to exercise eminent domain for previously unconsidered project expansions or "rearrangements," as blanket certificates do, violates due-process requirements under the Fifth Amendment. *See Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 328 (3d Cir. 2014) (Jordan, J., dissenting).

15. Granting blanket certificates that allow applicants to condemn property not specifically described in their existing applications violates constitutional separation of powers principles and the private nondelegation doctrine. *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017); *Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008).

16. The Commission violates the just-compensation clause of the Fifth Amendment by granting certificates (and therefore condemnation power) to entities that have not shown they have sufficient financial resources to guarantee payment of just compensation. *Sweet v. Rechel*, 159 U.S. 380, 400-02 (1895); *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cty.*, 706 F.2d 1312, 1320-21 (4th Cir. 1983).

17. The Commission violates the NGA by failing to make findings about applicants' ability to pay just compensation. 15 U.S.C. §717f(e) provides that an applicant can obtain a certificate only "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter." One of the "acts" contemplated by "this chapter"

of the NGA is eminent domain, *see* 15 U.S.C. §717f(h), and the only way "properly to do" eminent domain is to pay just compensation. Thus, FERC's failure to make a finding that an applicant "is able and willing properly to" pay just compensation in a given certificate is fatal. *See Steere Tank Lines, Inc. v. I.C.C.*, 714 F.2d 1300, 1314 (5th Cir. 1983).

18. The Commission violates the Constitution by failing to use its conditioning power to prevent applicants from "quick-taking" property, i.e., taking property before just compensation has been fully and finally determined in a judicial proceeding. *Cf. Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

19. The Commission violates constitutional separation-of-powers doctrine by failing to use its conditioning power to prevent applicants from "quick-taking" property, i.e., taking property before just compensation has been fully and finally determined in a judicial proceeding. When judges allow quick-taking, they are effectively granting eminent-domain power, which is something only the legislative branch has the constitutional authority to do. *See Berman v. Parker*, 348 U.S. 26, 32 (1954). The Commission could prevent that state of affairs with its conditioning power.

20. By failing to use its conditioning power to preclude applicants from quick-taking property, the Commission facilitates due-process problems. When a pipeline company avails itself of the quick-take procedure in district court, the landowner has no opportunity to conduct discovery, obtain its own appraisal of just compensation, or avail itself of any of the other procedural protections inherent in traditional judicial proceedings. This violates the due-process guarantee of the Fifth Amendment. The Commission could prevent that state of affairs with its conditioning power.

21. By failing to preclude applicants from quick-taking property, the Commission violates the just-compensation clause of the Fifth Amendment. With the quick-take procedure, a pipeline company is able to take property based on only its own, self-serving appraisal of what just compensation will ultimately be. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823-27 (4th Cir. 2004). This poses constitutionally unacceptable risk that the landowner will not ultimately receive just compensation if it proves to be more than the pipeline company estimated. FERC could obviate that risk by prohibiting applicants from using "quick take."

22. The Commission's refusal to consider challenges to the constitutionality of the Natural Gas Act and the exercise of eminent domain thereunder violates landowners' Fifth Amendment due-process rights. Although the appellate court that reviews a Commission order can consider such challenges, the damage is already done by the time it gets to, as certificated pipeline companies have often long since taken property and commenced construction, irreversibly altering the landowners' property.

23. The Commission denied landowners constitutional due process by refusing them access to key documents. In granting ACP's conditional certificate, the Commission relied on ACP's Precedent Agreements and Exhibit G flow diagrams to find project need. Despite landowners' repeated demands for disclosure, the Commission denied them access to this evidence, thus preventing them from meaningfully responding to or rebutting the Commission's conclusions in the Certificate Order. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Minisink Residents for Envtl. Pres. v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Myersville Citizens for Rural Cmty. v. FERC*, 783 F.3d 1301 1328 (D.C. Cir. 2014). The Commission cannot cure its violation of the intervenors' due-process rights by disclosing the documents after this rehearing request is filed, as by that time, the deadline for rehearing will have passed and landowners' arguments based on the previously undisclosed information will be untimely under §717f(a) of the NGA.

ARGUMENT

I. THE COMMISSION'S CERTIFICATE ORDER APPROVING THE ATLANTIC COAST PIPELINE VIOLATES THE NATURAL GAS ACT.

A. Under the Natural Gas Act and Commission policy, the Commission must consider relevant evidence bearing on the market demand for the Atlantic Coast Pipeline.

Under the Natural Gas Act, the Commission must consider relevant evidence in the record bearing on the market demand for the Atlantic Coast Pipeline. Section 7(c) of the Natural Gas Act ("the Act" or "NGA") requires a proponent of an interstate natural gas pipeline to obtain a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission ("the

Commission").[22] The Commission shall only issue a certificate "upon a finding that . . . the proposed service and construction is or will be *required by the present or future public convenience and necessity*."[23] Underlying the Commission's 1999 policy statement implementing the Act is the agency's recognition that precedent agreements are not sufficient evidence of the need for a proposed pipeline.[24] The policy identifies the types of evidence the Commission can consider in addition to precedent agreements to show market demand for a project.[25]

Until 1999, Commission policy required applicants to show market support for a project through contractual commitments for at least 25 percent of the proposed pipeline's capacity.[26] But in 1999, the Commission revised its policy, acknowledging that the percentage-of-capacity test was inadequate because, in part, "[t]he amount of capacity under contract . . . is not a sufficient indicator by itself of the need for a project."[27] The Commission further observed that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional questions when the contracts are held by pipeline

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[22] 15 U.S.C. § 717f(c)(1)(A).

[23] *Minisink Residents for Envt'l Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (quoting 15 U.S.C. § 717f(e)) (internal quotation marks and ellipses omitted; emphasis added).

[24] *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, ¶ 61,744 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000) ("The amount of capacity under contract is not a sufficient indicator by itself of the need for a project. . . .").

[25] *See id.* ¶ 61,747.

[26] *See id.* ¶ 61,743.

[27] *Id.* ¶ 61,744.

affiliates."[28] In other words, concerns that capacity contracts in and of themselves are insufficient to demonstrate need are exacerbated when those contracts exist between affiliated entities.

The 1999 policy statement sought to remedy problems caused by the Commission's long-standing sole reliance on precedent agreements. To that end, it established a list of means by which the Commission could assess market benefit, one of the indicators of public benefit for a proposed project.[29] Those means included, but were not limited to "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[30] As the Commission properly recognized, precedent agreements are not a reliable proxy for market need—particularly when those agreements are among affiliates.

Despite the fact that a central, stated purpose of the new policy was to reduce the Commission's sole reliance on precedent agreements, the agency adheres to that outdated approach for the Atlantic Coast Pipeline.[31] To justify its approach, the agency relies on language in the 1999 policy statement that "precedent agreements always will be important evidence of demand for a project" and that

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[28] *Id.*

[29] *See id.* ¶ 61,747.

[30] *Id.*

[31] *See* 161 FERC ¶ 61,042 at P 63.

they would "constitute significant evidence of a project."[32] But this language must be read in context of a stated purpose of the new policy: to put an end to the Commission's *sole* reliance on precedent agreements.[33] The Commission cannot cherry-pick language from the policy statement to support an approach that it expressly abolished in the 1999 policy statement.

More egregiously, the Commission contends in its order that "it is current Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers."[34] That statement is wrong. The section of the policy statement to which the Commission cites for that contention is not discussing *current* policy as of 2017.[35] To the contrary, it cites to the portion of the policy discussing the *previous* Commission policy—the very policy that the 1999 policy statement was written to amend.[36]

The Commission is therefore relying on an erroneous interpretation of its own policy statement to support its sole reliance on precedent agreements. At bottom, the question whether precedent agreements in any particular instance actually indicate market demand—which they must if market demand is going to demonstrate public benefit—is a question of fact that must be justified by the

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[32] *Id.* at P 54.

[33] *See* Certificate Policy Statement, 88 FERC at ¶ 61,744.

[34] 161 FERC ¶ 61,042 at P 54.

[35] *See* Certificate Policy Statement, 88 FERC at ¶ 61,744 (discussing the Commission's pre-1999 policy).

[36] *See id.*

evidence in the record.[37] The Commission must make its determination of public benefit for a proposed pipeline in a manner that is not "arbitrary or capricious" and its factual findings must be based on "substantial evidence."[38] To meet this standard, the Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[39]

For the Atlantic Coast Pipeline, the critical flaw in the Commission's decision is that it made its finding of public benefit solely on a determination that market demand exists for the project based on Atlantic's precedent agreements—without substantial evidence supporting its determination that these contracts are an adequate proxy for market demand. This was erroneous and in contravention of the Commission's own policy. This error is fatal to the certificate: Without a demonstration of market need, the Commission has no basis for a finding of public benefit and therefore no basis on which to conclude that the public benefits of the Atlantic Coast Pipeline outweigh its adverse effects.

The record is replete with evidence that the precedent agreements Atlantic submitted in support of its claim of need for the pipeline do not reflect genuine market demand. First, the Commission did not meaningfully consider expert analysis in the record demonstrating that precedent agreements between a pipeline

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[37] 15 U.S.C. § 717f(b).

[38] *Id.* § 717r(b); 5 U.S.C. § 706(2).

[39] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

developer and an affiliated utility shipper can incentivize projects with weak market support that would otherwise not move forward.[40] Second, the Commission turned a blind eye to evidence in the record that the 1999 policy statement contemplates as relevant to the question of need, including: (i) demand projections, including electricity load forecasts from PJM Interconnection, showing that the need for new gas-fired power generation is not growing and expert analysis showing that renewable energy alternatives are rapidly increasing market share;[41] (ii) expert analysis demonstrating that the pipeline would likely cost, rather than save, consumers money;[42] (iii) expert analysis comparing current pipeline capacity with the highest likely future demand for natural gas in Virginia, North Carolina, and South Carolina.[43] Finally, new evidence submitted with this application for rehearing further undermines the Commission's finding that the pipeline is required by the public convenience and necessity.

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[40] *See, e.g.*, Comments of Shenandoah Valley Network at 17 – 24 (summarizing and attaching expert analysis); Comments of Appalachian Mountain Advocates at 15 – 23 (summarizing and attaching expert analysis).

[41] *See* Comments of Shenandoah Valley Network at 24 – 35 (summarizing and attaching expert analysis); Comments of Appalachian Mountain Advocates at 23-32 (summarizing and attaching expert analysis).

[42] *See* Elizabeth Stanton et al., Synapse Energy Economics, Inc., Atlantic Coast Pipeline Benefits Review: Chmura and ICF Economic Benefits Reports (2015), included as an attachment to Notice of Filing Documents in Support of Protest by Shenandoah Valley Network et al. (Dec. 20, 2016), FERC eLibrary No. 20161220-5146.

[43] *See* Rachel Wilson et al., Synapse Energy Economics, Inc., Are the Atlantic Coast and Mountain Valley Pipelines Necessary? An Examination of the Need for Additional Pipeline Capacity into Virginia and the Carolinas (2016), included as an attachment Comments of Shenandoah Valley Network at 34 – 35 and Comments of Appalachian Mountain Advocates at 34 – 35.

In light of these facts, the Commission's refusal to "look behind" precedent agreements to ensure that they reflect genuine market demand for the Atlantic Coast Pipeline has resulted in a decision that is neither the product of reasoned decision-making nor supported by "substantial evidence" in violation of the Natural Gas Act and the Administrative Procedures Act.

B. The Commission ignored substantial evidence in the record demonstrating that Atlantic's precedent agreements do not reflect genuine market demand.

Intervenors and others submitted expert analysis questioning the usefulness of Atlantic's precedent agreements as indicators of market demand because they are agreements between affiliated companies.[44] The Commission dismissed any concern about affiliated contracts, stating that its "primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper."[45] But it never addressed Intervenor's key contention: the risk that agreements between affiliates, as opposed to agreements between independent market actors, are not a suitable proxy for market demand.

Here, both Atlantic and the affiliated shippers are owned by parent companies—Dominion Energy, Duke Energy, or Southern Company—whose shareholders would profit handsomely from the pipeline, while the cost of the

[44] *See, e.g.*, Comments of Shenandoah Valley Network at 17 – 24 (summarizing and attaching expert analysis); Comments of Appalachian Mountain Advocates at 15 – 23 (summarizing and attaching expert analysis).

[45] 161 FERC ¶ 61,042 at P 60.

pipeline would be borne by the affiliates' captive ratepayers.[46] This ownership and financial structure is a powerful incentive driving execution of the precedent agreements, especially in light of the guaranteed return embodied in the recourse rate that the Commission approved for the project in the Certificate Order.[47]

The Commission states that the state public utility commissions in Virginia and North Carolina have the authority to approve or deny recovery of the costs of the precedent agreements from utility ratepayers at a later time.[48] But it fails to acknowledge another powerful incentive driving execution of the precedent agreements: the utility shippers expect that their captive ratepayers will pay for the cost of the precedent agreements regardless of whether the capacity is ever used. A Dominion Energy Virginia representative confirmed this expectation during the company's annual fuel factor proceeding before the State Corporation Commission in June 2017.[49]

Furthermore, the Commission never addresses or even acknowledges that Atlantic's precedent agreements were at least three years old at the time it approved the Atlantic Coast Pipeline and that the market demand for gas in

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[46] *See* Comments of Shenandoah Valley Network at 17 – 20; Comments of Appalachian Mountain Advocates at 16 – 19.

[47] *See id.*

[48] 161 FERC ¶ 61,042 at P 60.

[49] *See* Hr'g Test. of Glenn Kelly, *Application of Va. Elec. & Power Co. to revise is fuel factor pursuant to Code Section 56-249.6 of the Code of Virginia*, Case No. PUR-2017-00058, Hr'g Tr. at 45-49 (June 14, 2017), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/3f%25%2401!.pdf.

Virginia and North Carolina has changed.[50] Again citing and attaching expert analysis, Intervenors demonstrated that the market for natural gas transmission, particularly for delivery to gas-fired power stations, had changed significantly between 2014 and 2017.[51] By ignoring changes to the market entirely, the Commission again arbitrarily disregarded substantial evidence in the record that rebuts Atlantic's claim that the pipeline is needed.

The Commission's Order ignores the incentive structure created by the corporate relationships behind Atlantic's precedent agreements and the changes that have occurred in the natural gas market in Virginia and North Carolina since 2014. Therefore, the Commission has ignored evidence that the precedent agreements are not, in fact, an adequate proxy for market demand in this case. As the Commission itself recognized in the Certificate Policy Statement, "[u]sing contracts as the primary indicator of market support for the proposed pipeline project [ ] raises additional issues when the contracts are held by pipeline affiliates."[52] Here, without confronting those "additional issues," which are discussed in detail in the record, the Commission cannot conclude that its

[50] *See* Comments of Shenandoah Valley Network at 20 – 22; Comments of Appalachian Mountain Advocates at 19 – 21.

[51] *See id.* (demonstrating that market demand for the Atlantic Coast Pipeline had changed since 2014 because electricity demand did not increase, EIA forecasted that demand for natural gas for power generation would remain below 2015 levels until 2034, and the market share of solar and wind experienced rapid growth, particularly in North Carolina).

[52] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744.

fundamental assumption about the Atlantic Coast Pipeline—that precedent agreements equal market demand—is, in fact, true.

The second problem that the Commission does not address is that the demand for electricity—and consequently, the need for natural gas to fuel power plants—has leveled off in Virginia and North Carolina since 2014. But these facts are highly relevant to the Commission's decision because the lion's share of the purported need for the Atlantic Coast Pipeline to supply gas-fired power plants owned by Dominion Energy and Duke Energy.[53] Intervenors asserted, again based on expert analysis, that electricity load in the territories of Dominion Energy Virginia, Duke Energy Progress, and Duke Energy Carolinas would not experience the rate of growth predicted in 2014.[54] For Dominion Energy Virginia, Intervenors introduced expert analysis explaining that the load forecasts from the PJM Interconnection sharply contradict the utility's own forecasts, resulting in a substantial divergence in the projections equal to approximately two power plants by 2027.[55] Moreover, Intervenors offered evidence from the Energy Information Administration that the demand for natural gas to fuel power plants in the

[53] Atlantic Coast Pipeline, LLC, Abbreviated Application for a Certificate of Public Convenience and Necessity and Blanket Certificates at 6 – 8 (Sept. 18, 2015), FERC eLibrary No. 20150918-5212.

[54] *See* Comments of Shenandoah Valley Network at 24 – 32 (summarizing and attaching expert analysis); Comments of Appalachian Mountain Advocates at 23 – 32 (summarizing and attaching expert analysis).

[55] *See* Comments of Shenandoah Valley Network at 24 – 27; Comments of Appalachian Mountain Advocates at 32 – 35.

Southeast would remain below 2015 levels until 2034.[56] The Commission ignored the uncontested evidence introduced by Intervenors and instead accepted Atlantic's precedent agreements, failing to meaningfully address the evidence that those agreements were not, in fact, representative of genuine market conditions.

The Commission also never addresses how the rapid incremental growth of renewable energy in Virginia and, especially, in North Carolina will affect the need for this project. For example, Intervenors offered expert analysis demonstrating that, in North Carolina, distributed solar generation increased by 83% to 2400 MW from 2015 to 2016 and that continued growth is likely because the cost of solar systems continues to drop 14%-15% per year.[57] The Commission only examined whether renewable energy could serve as a complete alternative to the Atlantic Coast Pipeline.[58] But it never address Intervenors' assertion that the rapidly growing market share for solar and other renewables must be quantified and addressed because it bears directly on whether Dominion and Duke utilities genuinely need the Atlantic Coast Pipeline to run new gas-fired power generation as Atlantic claims.[59] This is especially true where other evidence, like the load

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[56] *See* Comments of Shenandoah Valley Network at 32 – 35; Comments of Appalachian Mountain Advocates at 32 – 35.

[57] *See* Matt Cox, The Greenlink Group, Clean Energy Has Arrived: Tapping Regional Resources to Avoid Locking in Higher Cost Natural Gas Alternatives in the Southeast (April 2017), included as an attachment to Comments of Shenandoah Valley Network & Comments of Appalachian Mountain Advocates.

[58] *See* 161 FERC ¶ 61,042 at P 57.

[59] *See* Comments of Shenandoah Valley Network at 37; Comments of Appalachian Mountain Advocates at 37 – 41.

forecasts discussed above, demonstrate serious questions about the market support for the project.

Third, the Commission does not address the comparison between demand for natural gas and the capacity of existing infrastructure set forth in the analysis from Synapse Energy Economics. Synapse modeled the highest likely demand for natural gas in Virginia, North Carolina, and South Carolina for the period 2015 to 2030 and then compared that demand projection with the capacity of existing pipeline infrastructure serving that region.[60] This analysis showed that even under a "high demand" scenario, the capacity of existing infrastructure would be adequate.[61] The Commission does acknowledge the Synapse analysis, but brushes it aside by concluding that "long-term demand projections, such as those presented in the Synapse Study" are uncertain.[62] The Commission's dismissal of the Synapse Study ignores a critical feature of the study: the use of a range of demand projections to address the very uncertainty identified by the Commission.

Relatedly, the Commission brushes aside Intervenors' assertion that the existing Transco pipeline already serves Dominion Energy Virginia's existing Brunswick and Greensville power plants, the utility's only power plants that will

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[60] *See* Elizabeth Stanton, Are the Mountain Valley and Atlantic Coast Pipelines Necessary? at 1 – 4.

[61] *See id.*

[62] 161 FERC ¶ 61,042 at P 56.

be connected directly to the Atlantic Coast Pipeline.[63] The Commission's claim that a redundant connection to the Atlantic Coast Pipeline will increase reliability is unsupported in the record. It does not identify any evidence in the record showing that supply disruption is a problem for any of the utility's 14 power plants that rely on the Transco pipeline system.[64]

Finally, the Commission never addresses expert analysis demonstrating that Atlantic's claims that utility customers in Virginia and North Carolina will save money on their power bills are based on flawed assumptions. Intervenors, again based on expert analysis, showed that Atlantic's claims of savings based on a commodity price differential between Transco Zone 5 and the Dominion South Point hub were not likely to persist as the Dominion South Point hub is connected to the rest of the market.[65] As a result, the economic development that Atlantic claims will accompany the pipeline is also not likely to materialize.[66] The Commission has an obligation to "consider all factors bearing on the public interest," and it cited Atlantic's claims of economic development as a reason for rejecting the no-action alternative in the final EIS.[67] Whether Atlantic's claims of

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[63] 161 FERC ¶ 61,042 at P 61; *see, e.g.*, Shenandoah Valley Network Motion for Evidentiary Hearing at 23.

[64] 161 FERC ¶ 61,042 at P 61.

[65] *See* Elizabeth Stanton et al., Atlantic Coast Pipeline Benefits Review: Chmura and ICF Economic Benefits Reports.

[66] *See id.*

[67] *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d , 1412, 1421 (10th Cir. 1992) (citing Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959); Transcontinental Gas Pipe Line Corp., 365 U.S. at 19); Final EIS at 3-3.

economic development have merit is evidence that is relevant to the question of whether its precedent agreements reflect genuine market demand justifying a certificate of public convenience and necessity.

C. Recent proceedings before the Virginia State Corporation Commission further undermine the alleged market demand for the Atlantic Coast Pipeline.

Evidence proffered during a recent hearing before the Virginia State Corporation Commission ("SCC") raises significant questions about the market support for the Atlantic Coast Pipeline and further undermines the Commission's finding that the Atlantic Coast Pipeline is a public necessity. Dominion Energy Virginia, a regulated utility in Virginia and North Carolina, has entered into long-term precedent agreements for 20% of the capacity of the Atlantic Coast Pipeline through a wholly owned subsidiary, Virginia Power Services Energy Corp.[68]

First, during the evidentiary hearing, Dominion Energy Virginia's witness stated that the utility considers the Atlantic Coast Pipeline a "portfolio" asset that would serve existing power plants, not fuel new power plants as Atlantic claimed in its application to the Commission. In its application, Atlantic told the Commission that the proposed pipeline was necessary to satisfy a growing demand for natural gas to generate electricity in Virginia and North Carolina.[69] According to the application, "[d]emand for gas-fired electric power generation grew by 67 percent in Virginia and by 417 percent in North Carolina from 2009 to 2014. To

[68] *See* Atlantic Coast Pipeline Application at 5 – 6, 12.

[69] *See id.* at 5-6.

help meet this demand, Atlantic is applying for a Certificate of Public Convenience and Necessity to construct, install, own, operate and maintain the ACP . . . ."[70]

However, Dominion Energy Virginia told a different story to the SCC in September during the integrated resource plan hearing on its 2017 integrated resource plan. There, the utility said it considers the Atlantic Coast Pipeline to be a "portfolio" asset that would serve its existing generation facilities.[71] But those facilities are already served by long-term capacity contracts on existing pipelines, and the utility admitted in a discovery response that it has not done an analysis "for purposes of this or any prior Plan" of whether it can meet its generation obligations without using natural gas from the Atlantic Coast Pipeline.[72] Furthermore, under the business as usual scenario in the utility's integrated resource plan, does not predict the need for a new combined cycle gas turbine for at least 15 years.[73]

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[70] Atlantic Coast Pipeline Application at 5-6 (citations omitted).

[71] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Hr'g Tr. at 383-84 (Sept. 26, 2017), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/3hv%2401!.PDF, excerpts of the Hearing Transcript for this proceeding are included as **Attachment 1**.

[72] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Hr'g Tr. at 79-80 (Sept. 25, 2017), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/3hv%4001!.pdf.

[73] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Va. Elec. & Power Co.'s Report of its Integrated Res. Plan at 13 (May 1, 2013), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/3%23tx01!.PDF, included as **Attachment 2**.

Second, from the perspective of Dominion Energy Virginia, the primary function of the Atlantic Coast Pipeline is as a supply pipeline that delivers gas to Transco Zone 5 on the existing Transco pipeline system. The utility's representative, Glenn Kelly, testified that only two of Dominion Virginia Power's generating stations, the Brunswick Power Plant and the Greensville Power Plant, will have a direct connection to the Atlantic Coast Pipeline.[74] All of the utility's other facilities will receive gas from the Atlantic Coast Pipeline via the existing Transco system.[75] "Because [the Atlantic Coast Pipeline] can feed Transco, it can feed almost all of the assets that are gas-related in the Company's fleet."[76]

The existing Transco system has capacity to serve Dominion Energy Virginia's power plants. All of the utility's power plants are already served by long term capacity contracts on the Transco system. Moreover, at least two other projects that the Commission approved in 2017, the Atlantic Sunrise Pipeline and the Mountain Valley Pipeline, approved the same day as the Atlantic Coast Pipeline, would connect to and supply the existing Transco system. These projects, 1.7 bcf/day and 2.0 bcf/day respectively, are primarily subscribed to by producers and marketers looking for end use customers.

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[74] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Hr'g Tr. at 383-84 (Sept. 26, 2017), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/3hv%2401!.pdf.

[75] *See id.*

[76] *Id.* at 384.

Third, contrary to Atlantic's claims of utility customer savings of $377 million per year, the Atlantic Coast Pipeline will cost Dominion Energy Virginia's ratepayers about $2 billion over the next twenty years.[77] Atlantic has told the Commission repeatedly, most recently on September 7, 2017, that the Atlantic Coast Pipeline will produce utility customer savings in Virginia and North Carolina.[78] However, the testimony of industry expert, Gregory M. Lander, using the utility's commodity price forecast data used to prepare the IRP, demonstrated the flaws of the assumptions underlying claim of customer savings.

In response to a data request, the utility provided its own data on the expected natural gas commodity prices at Dominion South Point and Transco Zone 5.[79] Using this pricing data and the published transportation costs of the Atlantic Coast Pipeline and Transco Pipeline with appropriate adjustments, Mr. Lander testified that the ACP would have a net cost to ratepayers is $1.6 and $2.3 billion over the 20-year period of the Company's precedent agreements on the Atlantic Coast Pipeline.[80]

Finally, even though Dominion Energy Virginia's integrated resource plan does not predict the need for a new gas-fired combined cycle plant, the plan is also

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[77] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Direct Testimony & Exhibits of Gregory M. Lander at 14 – 19 (Aug. 11, 2017), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/3gy601!.PDF, included as **Attachment 3**.

[78] *See* Letter from Diane Leopold, Dominion Energy et al., to Neil Chatterjee, FERC Chairman, at 2 (Sept. 7, 2017), FERC eLibrary No. 20170907-5144.

[79] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Direct Testimony & Exhibits of Gregory M. Lander at 13.

[80] *See id.* at 14-19.

based on an electricity load forecast that SCC Commissioner Dimitri challenged as high and the utility's own expert witness identified as high. Questioning the utility's counsel, Commissioner Dimitri observed that the utility's load forecast "appear[ed] to be always high year after year" and asked "what is the Company going to do about refining it or redefining it to recognize that you shouldn't put too high a confidence level in that projection?"[81] And Dominion Energy Virginia's expert witness Eric Fox observed that load forecasts were coming down across the industry because demand for electricity no longer tracked growth in GDP in lock step as a result of new utility energy efficiency programs and new industry standards.[82] Given that Dominion Energy Virginia has overstated the demand for electricity in its service territory in its 2017 integrated resource plan, the need for a new combined cycle generation in Virginia will not arise by 2032 or well beyond that time, if at all.

Dominion Energy Virginia's integrated resource plan proceeding provides highly relevant evidence regarding the true market demand for the Atlantic Coast Pipeline in Virginia. Tellingly, this evidence is largely made up of admissions from the very utility that, through its subsidiary, is a foundational shipper on the

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[81] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Hr'g Tr. at 584 (Sept. 27, 2017), http://www.scc.virginia.gov/docketsearch/DOCS/3hvn01!.PDF.

[82] *See In re: Va. Elec. & Power Co.'s Integrated Res. Plan filing*, Case No. PUR-2017-00051, Hr'g Tr.at 486-87 (Sept. 26, 2017), http://www.scc.virginia.gov/docketsearch/DOCS/3hvk 01!.PDF.

Atlantic Coast Pipeline. The Commission cannot ignore this new evidence of market demand without violating the Natural Gas Act.

D. As in Virginia, recent developments undermine the already shaky grounds for Atlantic's claim that new transmission capacity is needed to supply natural gas to North Carolina.

Recent trends in North Carolina's electric sector cast further doubt on the already dubious purported need for the Atlantic Coast Pipeline. As discussed above, Atlantic relies on precedent agreements with affiliated utilities to prop up its claim that the pipeline is needed to meet demand for natural gas—primarily to fuel natural gas-fired power plants. These affiliate agreements have never reflected a real market need, however, and recent trends in the electric sector further undermine the already shaky assertion that sufficient demand exists to justify certification of the Pipeline.

Since Intervenors filed their motion for an evidentiary hearing on June 21, additional facts have emerged that further undercut the supposed need for the pipeline and require rehearing on the question of need.

First, in their 2017 Integrated Resource Plans filed with the North Carolina Utilities Commission, Duke Energy's electric utilities have sharply reduced their load forecasts, which will mean reduced demand for natural gas to fuel power plants. These dramatic reductions in forecasted energy and peak demand would prompt a reassessment of need for new fuel transmission capacity by any rational actor in a free market, and should similarly prompt this Commission to re-examine the need for the Pipeline.

In addition, Duke Energy's electric utilities and gas utility, Piedmont Natural Gas, amended their precedent agreements with Atlantic, which had provided a right of termination in the event that the Certificate was not issued by June 30, 2017. The amended agreements extended the trigger date for the right of termination; however, Duke and Piedmont informed the NCUC that they would not file these amended agreements with the Commission. This development undercuts the evidentiary value of the precedent agreements in the record as the basis for a finding of need.

1. **Duke Energy's own recent load forecasts—which have historically been inflated—show a decline in the projected growth of electricity demand.**

Duke Energy's electric utilities in the Carolinas, Duke Energy Progress ("DEP") and Duke Energy Carolinas ("DEC"), have recently slashed their forecasts of peak demand and energy growth. The utilities' updated Integrated Resource Plans ("IRPs"), filed with the North Carolina Utilities Commission on September 1, 2017, featured drastically lower load forecasts compared to previous IRPs.

In its revised load forecasts, after accounting for projected energy efficiency, DEP anticipates average annual increases of only .6% from 2018 until 2032, with much of the increase projected to occur in later years. Between 2018 and 2022, DEP forecasts only a one percent increase in overall energy demand. In contrast, in 2016, DEP forecast a 2.6% increase in overall energy demand for that

same five-year period. DEP also dramatically reduced its 2017 revised forecasts for winter and summer peak demand. Projected annual growth in winter peak demand is now at .7%--down from 1.1% in 2016. For summer peak demand, projected annual growth is .7%, whereas it was 1.3% the year before.[83]

DEC also projects lower, though somewhat less reduced, load and energy growth over the next 15 years. The 2016 IRP projected average annual growth in summer peak demand of 1.2% and in winter peak demand of 1.3%, after EE programs. In its updated September 2017 filing, DEC revised down these forecasts to 0.4% average annual growth in summer peak demand and 0.9% in winter peak demand.[84] Table 1, below, taken from a recent Duke Energy presentation, presents a comparison of the 2016 and 2017 load forecasts.[85]

Table 1: Comparison of 2016 and 2017 DEC and DEP Load Forecasts

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[83] Duke Energy Progress, Integrated Resource Plan (Annual Report), p. 18, NCUC Docket E-100, Sub 147 (Sept. 1, 2016), http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=5de73974-cacf-4484-814d-48364446728a, hereinafter 2016 DEP IRP, included as **Attachment 4**.

Duke Energy Progress, Integrated Resource Plan (Update Report), p. 48, NCUC Docket E-100, Sub 147 (Sept. 1, 2017), http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=040feb17-3f8b-4b6b-b620-b1cac673e7e1, hereinafter 2017 DEP IRP, included as **Attachment 5**.

[84] Duke Energy Carolinas, Integrated Resource Plan (Annual Report), p. 17, NCUC Docket E-100, Sub 147 (Sept. 1, 2016), http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=0707e812-b29f-4d0e-8974-d215cb3a6e87, hereinafter 2016 DEC IRP, included as **Attachment 6**.

Duke Energy Carolinas, Integrated Resource Plan (Update Report), p. 12, NCUC Docket E-100, Sub 147 (Sept. 1, 2017), http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=05fb2b10-a879-4a9e-a881-f9cbb60a69a5, hereinafter 2017 DEC IRP, included as **Attachment 7**

[85] Duke Energy Carolinas and Duke Energy Progress, 2017 Integrated Resources Plans, 2017 Stakeholder Meeting at 16, included as **Attachment 8**.

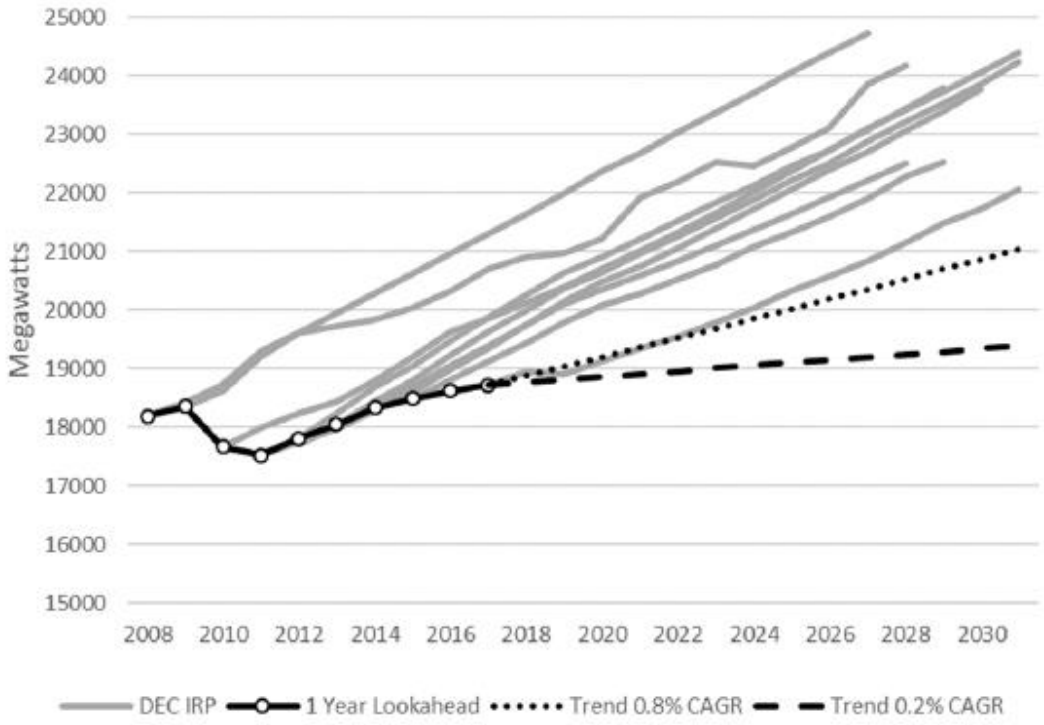
DEC	2017 Forecast (2018 – 2032)			2016 Forecast (2017 – 2031)		
	Summer Peak Demand	Winter Peak Demand	Energy	Summer Peak Demand	Winter Peak Demand	Energy
Excludes Impact of new EE programs	0.7%	1.0%	0.7%	1.3%	1.4%	1.1%
Includes Impact of new EE programs	0.4%	0.9%	0.4%	1.2%	1.3%	1.0%

DEP	2017 Forecast (2018 – 2032)			2016 Forecast (2017 – 2031)		
	Summer Peak Demand	Winter Peak Demand	Energy	Summer Peak Demand	Winter Peak Demand	Energy
Excludes Impact of new EE programs	0.9%	0.8%	0.8%	1.3%	1.4%	1.1%
Includes impact of new EE programs	0.7%	0.7%	0.6%	1.1%	1.3%	0.9%

Duke Energy's drastically reduced 2017 load forecasts are especially startling in light of the company's history of inflated projections for demand for electricity. Historically, both DEC and DEP have overestimated their peak load and energy forecasts, skewing high their assessment of future capacity and fuel needs. In testimony filed recently with the NCUC, an energy economics expert testified that a review of past DEC IRPs reveals that the Company "consistently forecasts greater annual peak load growth than ultimately materializes" and that its forecasting errors "grow[] larger the farther in the future DEC forecasts," as shown in the following line graph.[86]

[86] *See Application of Duke Energy Carolinas, LLC for a Certificate of Public Convenience and Necessity to Construct a 402 MW Natural Gas-Fired Combustion Turbine Generating Facility in Lincoln County*, NCUC Docket No. E-7, Sub 1134, Tr. Vol. 3, Testimony of Thomas Vitolo at 73, excerpt included as **Attachment 9**.

Figure 1: DEC Peak Load Forecasts and Trends



Source: DEC IRPs 2008–2016.

In fact, "each IRP forecast since 2002 has consistently overestimated the load that would manifest seven years from publication."[87] Given this trend, the utilities' downward revisions in load growth over the next 15 years are especially significant.

In addition, Duke Energy's forecasts recognize that per-customer electricity usage is generally flat, and accordingly, DEC and DEP base their growth projections on anticipated population increases: "[t]he outlook for usage per customer is slightly negative to flat through much of the forecast horizon, so most

[87] *Id.* at 91.

of the growth is primarily due to customer increases."[88] In recent testimony to the NCUC, DEC's Director of Load Forecast & Fundamentals explained that "[a] great deal of this change [in the 2017 load forecasts] is due to expected increases in energy efficiency."[89]

Compounding the uncertainty regarding load growth is the fact that much of DEC's assumed future need for natural gas-fired generating capacity could be obviated or delayed by energy efficiency and demand-side management. In a recent NCUC proceeding on a CPCN for a new gas plant, the lead economist with the Public Staff, North Carolina's consumer advocate agency, testified that "[t]he possibility of additional DSM and EE development is another example of the uncertainty that gives rise to the Public Staff's concerns in this proceeding" that the need for DEC's proposed gas plant may not materialize.[90] The downward adjustments in load forecasts result in lower capacity needs compared to the 2016 IRP.[91] Reduced load forecasts also mean lower energy needs, and a correspondingly reduced need for natural gas to fuel electric generating plants.

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[88] 2016 DEC IRP, Appendix C at 92-93

[89] *See Application of Duke Energy Carolinas, LLC for a Certificate of Public Convenience and Necessity to Construct a 402 MW Natural Gas-Fired Combustion Turbine Generating Facility in Lincoln County,* , NCUC Docket No. E-7, Sub 1134, Tr. Vol. 4, Testimony of Philip Stillman at 169, included as **Attachment 10**.

[90] *See Application of Duke Energy Carolinas, LLC for a Certificate of Public Convenience and Necessity to Construct a 402 MW Natural Gas-Fired Combustion Turbine Generating Facility in Lincoln County,* , NCUC Docket No. E-7, Sub 1134, Tr. Vol. 3, Testimony of John Hinton, at 161, included as **Attachment 11**.

[91] C*ompare* 2016 DEC IRP at 40 (Table 8-C, Load, Capacity and Reserves Table – Winter) *with* 2017 DEC IRP at 46 (Table 6-A, Load, Capacity and Reserves Table – Winter).

2. The Duke Energy and Piedmont Natural Gas precedent agreements are outdated and not reliable evidence of need before this Commission.

In June of this year, DEC, DEP, and Piedmont Natural Gas filed requests with the NCUC to amend their precedent agreements with their affiliate, ACP. In these pleadings, DEC, DEP, and Piedmont informed the NCUC the precedent agreements previously approved by the NCUC included a "right of termination" in the event this Commission had not issued a CPCN for the pipeline on or before June 30, 2017.[92]

In response to a challenge to those amended precedent agreements by the Sierra Club, DEC, DEP, and Piedmont declared that they had no plans to file the amended precedent agreements with this Commission.[93] By doing so, they were able to evade the scrutiny of the agreements by the NCUC and the public that is dictated by the regulatory conditions of the merger between Duke Energy and Piedmont Natural Gas. Those regulatory conditions, intended to protect ratepayers from self-dealing by affiliates, would have obligated Duke Energy and Piedmont to allow for more public scrutiny of these precedent agreements:

- Regulatory Condition 3.1(c) requires the utilities to file advance notice and a copy of "an amendment to an existing Affiliate Contract with the

[92] Duke Energy Carolinas, LLC's and Duke Energy Progress, Inc.'s Request for Expedited Acceptance of Affiliated Agreement Amendment, NCUC Docket Nos. E-2, Sub 1052 and E-7, Sub 1062 (June 21, 2017), http://starw1.ncuc.net/ncuc/ViewFile.aspx?Id=8867b3aa-cb93-4fcd-9b47-402c6d23cc45, included as **Attachment 12**.

[93] Duke Energy Carolinas, LLC's and Duke Energy Progress Inc's Response to Sierra Club Petition and Motion, NCUC Docket Nos. E-2, Sub 1052 and E-7, Sub 1062 (July 28, 2017), included as **Attachment 13**.

Commission at least 30 days prior to a filing with the FERC." If an objection is filed, the proposed filing shall not be executed and filed with the Commission until the Commission issues an order resolving the objection. 3.1(c) (ii).

- The provisions of Regulatory Condition 13.2 apply to an advance notice filed pursuant to Regulatory Condition 3.1. These provisions—setting forth the procedures to be followed in connection with advance notices—clearly contemplate the potential for interested parties to object to the activity to be undertaken, and underscore the importance of notice to those parties and of a free exchange of information regarding the activity to be undertaken.

Because Atlantic relies on the precedent agreements in the record of this proceeding to show market need, this development undermines the value of those agreements to support a finding of need in North Carolina.

E. The Commission's unreasonably high return on equity undermines the precedent agreements' ability to support a finding of public convenience and necessity.

The Commission lacked substantial evidence to support the high return on equity (ROE) of 14 percent that its Certificate Order permits Atlantic to recover. Atlantic's ROE has a substantial impact on the recourse rates that the Commission allows it to charge and, consequently, the affiliated owner/shippers' incentive to build a new pipeline instead of utilizing existing infrastructure. Given the potential for unreasonably high rates of return to skew incentives towards building new, unnecessary pipelines, the Commission should have given closer scrutiny to Atlantic's requested ROE. Instead, the Commission's dismissal of that danger in its Certificate Order relies entirely on its past precedent and conclusory statements, without meaningfully assessing the appropriate ROE for this particular project.

The Commission's high ROE for greenfield pipelines incentivizes overbuilding by offering returns in excess of what can be achieved through other market investments. As Intervenors and others have explained, the ROE that the Commission provides for new pipeline construction is much higher than the returns available in comparable industries or elsewhere in the marketplace. For instance, the average return on equity granted by state public utility commissions to investor-owned electric utilities was 9.92 percent, while the projected rate of return for investors in U.S. stocks over the next five years is only around 4 to 7 percent.[94] "The high returns on equity that pipelines are authorized to earn by [the Commission] and the fact that, in practice, pipelines tend to earn even higher returns, mean that the pipeline business is an attractive place to invest capital. And because . . . there is no planning process for natural gas pipeline infrastructure, there is a high likelihood that more capital will be attracted into pipeline construction than is actually needed."[95] The Commission failed to account for

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[94] *See* C. Kunkel & T. Sanzillo, Inst. for Energy Econ. & Fin. Analysis, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia* (2016) at 8, attached to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates; *see also* S. Isser, Natural Gas Pipeline Certification and Ratemaking 24 (2016), attached to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates at 23 ("Traditionally, FERC has repeatedly granted a 14 percent rate of return on equity for 'greenfield' pipelines whose equity investors not only face development risk, but also significant financial risk, while granting lower rates of return for pipelines with less risk. . . . The 14% ROE standard can be traced back to the 1997 decision in Alliance Pipeline. In 1997, Moody's Aaa bonds yielded 7.26% and Baa bonds yielded 7.86%, in 2015 their respective rates were 3.89% and 5.00%. The decline in corporate bond rates suggests that 14% is too high a return even for highly leveraged greenfield projects, much less conservatively financed projects backed by regulated affiliated customers with captive ratepayers." (internal citations omitted) (the "Isser Report")).

[95] *Id.* at 9.

those market-skewing incentives when it approved Atlantic's requested ROE of 14 percent.

Furthermore, the Commission lacked substantial evidence for its approval of the high ROE. The North Carolina Utilities Commission (NCUC) filed a protest to Atlantic's 14 percent return on equity, explaining that although "in the past the Commission has merely accepted recourse rates based on cases citing previous cases, application of that policy would appear to conflict with the unambiguous statutory requirement that a filing entity demonstrate that its filing, including the recourse rates, comports with the public convenience and necessity."[96] Indeed, the past precedent that the Commission relies on to justify the 14 percent ROE does not itself include substantial evidence on which it could base a finding that the 14 percent ROE is reasonable.[97]

The Commission's only justification for its excessive ROE is this same past precedent and unsupported statements regarding "the risk Atlantic faces as a new market entrant, constructing a new greenfield pipeline system."[98] The Commission does not provide any market information to establish what Atlantic's true risk is, nor does it assess how Atlantic's risk may be lower than that found in previous

[96] NCUC, Comments in Support of Project and Protest of Proposed Recourse Rates of the North Carolina Utilities Commission, Docket No. CP15-554 (Accession No. 20151023-5301) ("NCUC Protest") at 5–6; *See also* Request for Rehearing of the North Carolina Utilities Commission and the New York State Public Service Commission, Docket No. CP15-138 (Accession No. 20170306-5163) at 16–21.

[97] NCUC Protest at 5–6, n.16.

[98] Certificate Order ¶102.

proceedings given the current low cost of capital.[99] Further, there is reason to doubt that Atlantic will face high risk as a new market entrant. Because the project is structured almost exclusively through affiliate agreements, it is unlikely Atlantic will shoulder the same risk it would if it were forced to compete for actual market demand. Though such an analysis may be difficult and time-consuming as the Commission claims,[100] that does not relieve the Commission of its statutory and constitutional duty to find that a proposed project, including that project's ROE, is *required* by the public convenience and necessity.[101]

The Commission's failure is not remedied by its claim that Atlantic's rates may potentially be reassessed in the future,[102] because once an unnecessary pipeline is approved and constructed based on the incentives provided by the unjustified ROE, the harm to Intervenors' interests will have largely already occurred. Regardless of any potential future adjustments, the Commission's approval of the 14 percent ROE in the absence of substantial evidence provides a perverse incentive to build an unnecessary greenfield pipeline and undermines its finding that the Project is required by the public convenience and necessity.[103]

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[99] *See* Isser Report at 23 (describing current low cost of capital compared to when FERC first approved 14 percent ROE).

[100] Certificate Order ¶101.

[101] *See* Request for Rehearing of the North Carolina Utilities Commission and the New York State Public Service Commission, Docket No. CP15-138 (Accession No. 20170306-5163) at 16–18.

[102] Certificate Order ¶102.

[103] *See Sierra Club v. FERC*, 867 F.3d 1357, 1378 (D.C. Cir. 2017) ("We confess to being skeptical that a bare citation to precedent, derived from another case and another pipeline, qualifies as the requisite 'substantial evidence.' *See NCUC*, 42 F.3d at 664 (citing *Maine Pub.*

F. The Commission erred in denying Intervenors' request for an evidentiary hearing to resolve serious and disputed factual issues concerning the market demand for the Atlantic Coast Pipeline.

Fundamentally, no matter how the Commission attempts to justify its reliance on affiliate precedent agreements, nothing relieves the agency of its obligation to assess the weight of that evidence and to ensure that its findings are supported by substantial evidence. It is not the case that every precedent agreement submitted by every pipeline developer to the Commission constitutes an equally valid representation of market demand. Even if some precedent statements may be sufficiently demonstrative of demand, others—namely, those between affiliates—may be at best weak indicators of demand and at worst, no indicator of demand at all. If the Commission is going to rely on market need to demonstrate public benefit, it is incumbent on the agency to evaluate the validity of any purported indicator of market demand—especially affiliate precedent agreements. This includes considering other evidence in the record that calls into question the relationship between the precedent agreements and market need. The agency cannot turn a blind eye to the validity of the evidence presented simply because they come in the form of precedent agreements.

Intervenors asked the Commission to hold an evidentiary hearing to resolve serious disputed factual issues about the market demand for the Atlantic Coast Pipeline described in this petition and, again, supported their request with expert

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Serv. Co. v. FERC, 964 F.2d 5, 9 (D.C. Cir. 1992), for the proposition that 'FERC's use of a particular percentage in a ratemaking calculation was not adequately justified by citation of a prior use of the same percentage without further reasoning or explanation')").

analysis.[104] The Commission denied the request, claiming that the written record was sufficient to resolve all of the factual issues raised by Intervenors.[105] But, as the Commission readily admits in its order granting Atlantic a certificate of public convenience and necessity, it relied solely on Atlantic's precedent agreements to demonstrate public benefit and did not look behind those agreements to determine whether they are a valid proxy for market demand. It did not resolve the disputed factual issues raised by Intervenors and, in many cases, failed to even address them.

The Commission's cursory dismissal of all evidence offered by Intervenors underscores the need for a formal, trial-like evidentiary hearing concerning the market demand for the Atlantic Coast Pipeline. The Commission must weigh the complex technical evidence offered by Intervenors in a trial-like proceeding where the Commission and opponents can cross-examine Atlantic's witnesses. Furthermore, an evidentiary hearing would have brought to light the new evidence Intervenors have included with this petition. These issues go to the heart of the Commission's evaluation of the pipeline, they are not resolved in the final order, and unless they are resolved, the Commission has not determined that the project is "required by the . . . pubic convenience and necessity" in compliance with its

[104] *See* Shenandoah Valley Network Motion for Evidentiary Hearing at 1 – 36 (summarizing and attaching expert evidence).

[105] 161 FERC ¶ 61,042 at P 23.

lawful obligations. The order is therefore a violation of the Natural Gas Act and arbitrary and capricious under the Administrative Procedure Act.

II. THE COMMISSION'S ENVIRONMENTAL IMPACT STATEMENT VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.

A. Statutory and Regulatory Requirements of NEPA

The National Environmental Policy Act (NEPA) requires that federal agencies prepare a "detailed" environmental impact statement (EIS) for every "major federal action significantly affecting the quality of the human environment."[106] The EIS is an information dissemination tool, allowing federal agencies and the public to understand the environmental impacts before they are commenced and, critically, before resources are irretrievably committed.[107]

The EIS must include the full consideration of environmental consequences that may result from a proposed project, the alternative means that may be used to minimize those impacts, and the cumulative impact of the project with other foreseeable actions.[108] This process has been described by the courts as one

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[106] 42 U.S.C. § 4332(C); *see, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

[107] *See, e.g., Ariz. Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1116 (D. Ariz. 1998) (quoting *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)) (The NEPA requirement to issue an EIS serves two purposes: to "ensure[] that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences" and "to provide[] the public with information on the environmental impact of a proposed action and encourage[] public participation in the development of that information.").

[108] 40 C.F.R. § 1500.1; *see also Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 990 (E.D. Cal. 2005) (These "mandatory" regulations "require that an agency give environmental information to the public and then provide an opportunity for informed comments to the agency.").

designed to bring "clarity and transparency" to federal decisions affecting the environment.[109]

Only if an EIS is "based on adequately compiled information, analyzed in a reasonable fashion . . . can the public be appropriately informed and have any confidence that the decisionmakers have in fact considered the relevant factors and not merely swept difficult problems under the rug."[110] Further, sufficient information must be provided in a timely manner to ensure that the public can meaningfully participate in the decisionmaking process.[111]

To start, an EIS must provide a full and fair discussion and analysis of significant environmental information and impacts to foster informed decision-making and public participation.[112] This analysis is required to ensure important environmental consequences will not be "overlooked or underestimated."[113] A cursory reference to the impacts of an activity does "not satisfy the necessary 'hard look' at the project's environmental impact that is required by NEPA."[114]

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[109] *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (citing *Dep't of Transp. V. Pub. Citizen*, 541 U.S. 752, 756-57 (2004)).

[110] *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973).

[111] *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) ("Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA.").

[112] 40 C.F.R. § 1502.1.

[113] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[114] *Sierra Club v. Austin*, 82 F. App'x 570, 572 (9th Cir. 2003).

The adequacy and accuracy of this impacts analysis will guide the sufficiency of the following alternatives, mitigation, and cumulative impacts analyses.[115]

The alternatives analysis is the heart of the EIS.[116] This section mandates that the agency "rigorously explore and objectively evaluate all reasonable alternatives" in order to ensure the issues and choices are sufficiently defined and the agency and public have a clear basis for decisionmaking.[117] The scope of "reasonable alternatives" should be guided by the underlying purpose and needs of the project; however, it should not be constrained by "those alternative means by which a particular applicant can reach *his* goals."[118] Agencies must conduct a searching, independent review of the underlying purpose and need of a proposed project when considering alternatives and must demonstrate a degree of skepticism in evaluating the applicant's project statements.[119] With respect to the alternatives an agency must consider in determining the scope of an EIS, Council on Environmental Quality (CEQ) regulations require evaluation of a "no action"

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[115] *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 200 (4th Cir. 2005).

[116] 40 C.F.R. § 1502.14.

[117] *Id.* § 1502.14.

[118] *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (emphasis added) (finding alternatives analysis inadequate where Corps failed to substantially consider use of existing facility because the applicant did not own or have access to the land); *see also Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (finding underlying purpose and need to be supplying water to locality, *not* building, or finding, a single reservoir to supply that water).

[119] *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 423 (4th Cir. 2012); *Van Abbema*, 807 F.2d at 643 (vacating grant of permit and finding that when information is specifically and credibly challenged as inaccurate, the Corps has an independent duty to investigate the specific factual challenges made by plaintiffs).

alternative representative of the status quo, other reasonable courses of action, and mitigation measures not in the proposed action.[120]

In order to ensure agencies take a "hard look" at the environmental impact of their actions, CEQ regulations require a discussion of mitigation measures throughout the EIS.[121] A sufficient mitigation analysis requires a detailed discussion of mitigation measures and a full consideration of each measure's effectiveness in minimizing the specifically identified project impacts. Courts have found a discussion of general best management practices to be inadequate where those BMPs were not evaluated in light of the unique concerns raised by the proposed project.[122] While courts do not require agencies to develop specific implementation and planning criteria for each measure, a mere listing of mitigation measures without supporting analytical data has consistently been found to be inadequate in meeting an agency's NEPA duties.[123]

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[120] 40 C.F.R. § 1508.25(b).

[121] *See* 40 C.F.R. §§ 1502.14(f) (agency must discuss mitigation measures in discussing alternatives to proposed action), 1502.16(h) (agency must discuss mitigation in assessing consequences of the proposed action), 1508.25(b) (agency must discuss mitigation in defining scope of the EIS), 1505.2(c) (agency must discuss mitigation in explaining its ultimate decision); *Robertson*, 490 U.S. at 351–52 (recognizing that an agency must discuss mitigation when defining the scope of the EIS, discussing possible alternatives and impacts, and in explaining its final decision).

[122] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (mitigation measures inadequate where BMPs designed to reduce erosion from logging on *unburned* areas but project proposed logging in severely burned areas).

[123] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (Service's EIS inadequate where mitigation analysis lacked details of the proposed mitigation measures and consideration of each measure's level of effectiveness); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (finding EIS inadequate where BLM, due to uncertainty, failed to consider whether any of the listed mitigation measures would be effective in avoiding impact).

NEPA regulations also require agencies to discuss the cumulative impacts of proposed management activities. Cumulative impacts analysis must consider together the impacts of the project and all other past, present, and reasonably foreseeable actions planned by other federal and state agencies and activities on private land.[124] "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[125] Future impacts must be considered in the context of the current condition of the affected environment. Cumulative impacts analysis cannot be deferred to future studies at the project level.[126] NEPA "cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until after the first step has already been taken."[127] The analysis of cumulative impacts should "equip a decisionmaker to make an informed decision about alternative courses of action" and should be "useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts."[128] Agencies must analyze the "synergistic effects from implementation of the Plan as a whole."[129]

The foregoing NEPA analysis is required to ensure agency decisionmakers consider accurate, high quality information about environmental impacts and to

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[124] 40 C.F.R. § 1508.7.

[125] *Id.*

[126] *Kern v. Or. Nat. Res. Def. Council*, 284 F.3d 1062, 1075 (9th Cir. 2002) (citations omitted).

[127] *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998).

[128] *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 298-99 (D.C. Cir. 1988).

[129] *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994).

make this information available to the public and encourage involvement in decisionmaking.[130] "[P]ublic scrutiny" is "essential to implementing NEPA," and a detailed EIS "serves as a springboard for public comment . . . ."[131] An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[132] An uninformed, arbitrary and capricious decision to move forward with a proposed project is not consistent with the strict procedural duties mandated by NEPA.

As discussed in detail below, the Certificate Order and the EIS on which it rests do not meet the requirements established by NEPA and its implementing regulations.

B. The Commission's Failure to Meaningfully Evaluate the Need for the Project in the EIS Renders Its Alternatives Analysis Deficient.

The Council on Environmental Quality's ("CEQ") regulations for implementing NEPA require that an EIS "specify the underlying purpose and need

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[130] *See* 40 C.F.R. §§ 1500.1(b), 1500.2(b),(d); *see also Nat'l Audubon Soc'y*, 422 F.3d at 194 (agencies are required to disclose and address different scientific views, not sweep them under the rug); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443, 446-48 (4th Cir. 1996); *Kettle Range Conservation Grp. v. U.S. Forest Serv.*, 148 F.Supp.2d 1107, 1127 (E.D. Wash. 2001) (agencies' plans to complete surveys "sometime in the future" are insufficient to demonstrate that the agency has taken a "hard look" at impacts).

[131] 40 C.F.R. § 1500.1(b); *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990).

[132] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

to which the agency is responding in proposing the alternatives including the proposed action."[133] The CEQ regulations also require the Commission to consider and evaluate the "no action" alternative.[134] The alternatives analysis "is the heart of the environmental impact statement."[135]

A properly drafted purpose and need statement is critical to "inform the agency's review of alternatives to the proposed action and guide its final selection."[136] A purpose and need statement "will fail if it unreasonably narrows the agency's consideration of alternatives so that the out-come is preordained."[137] Where, as here, a federal agency is reviewing an applicant-sponsored project, it "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.'"[138] An agency must "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project."[139]

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[133] 40 C.F.R. § 1502.13; *see also* FERC NEPA regulations at 18 C.F.R. Part 380.

[134] 40 C.F.R. § 1502.14(d).

[135] 40 C.F.R. § 1502.14.

[136] *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016).

[137] *Id*. (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013)); *see also Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[138] *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664, 669 (7th Cir. 1997) (*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).

[139] *Simmons*, 120 F.3d at 669 (7th Cir. 1997) (*quoting Citizens Against Burlington*, 938 F.2d at 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

Moreover, inflated or inaccurate market information skews agency decisions about a project and misleads the public in its evaluation of project impacts.[140] In *Hughes River Watershed Conservancy v. Glickman*, the Fourth Circuit rejected an EIS for a proposed reservoir finding that an inflated estimate of the project's recreation benefits skewed analysis of environmental impacts.[141] The Court held that the inflated economic information "impaired the first function of an EIS—ensuring that the NRCS and the Corps take a hard look at the Project's adverse environmental impacts" and "impaired the second function of the EIS—ensuring that members of the public have accurate information to enable them to evaluate the Project."[142] Thus, inaccurate market information can render the EIS defective when it is a barrier to "a well-informed and reasoned decision."[143]

Relying on this well-established law, Intervenors raised multiple factual issues challenging and rebutting the economic assumptions presented in the draft EIS for the Atlantic Coast Pipeline, supporting their comments with expert reports and other technical information.[144] Then, on June 21, 2017, a month before the release

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[140] *See N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012); *Hughes Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996); *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005).

[141] *See Hughes River Watershed Conservancy*, 81 F.3d at 447.

[142] *Id.* at 447-48.

[143] *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d at 812. *See also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1157 (W.D. Wash. 2002) ("An EIS that relies on misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing an accurate assessment upon which to evaluate the proposed project."), *overruled on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008).

[144] *See* Comments of Shenandoah Valley Network at 14 – 41; Comments of Appalachian Mountain Advocates at 15 – 41.

of the final EIS, Intervenors filed a motion requesting that the Commission hold an evidentiary hearing to resolve disputed factual issues concerning the market demand for the Atlantic Coast Pipeline.[145] As they did with their comments on the draft EIS, Intervenors supported their allegations with expert reports and other technical information.[146] However, the final EIS does not address these issues, instead reciting Atlantic's claims that the project is needed.[147] The final EIS violates NEPA when it accepts Atlantic's claims without considering or even acknowledging significant contrary evidence.[148]

Far from harmless, this flaw undermines the alternatives analysis in the final EIS. The final EIS provides inadequate consideration of important alternatives, including the "no action" alternative and the use of available capacity in existing pipeline infrastructure.[149] Intervenors criticized the alternatives analysis in the draft EIS for the Atlantic Coast Pipeline writing that the "Commission focuses too narrowly on Atlantic's goal of moving gas from the Dominion South Hub on the schedule Atlantic is pushing for, rather than making the determination that the

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[145] *See* Shenandoah Valley Network Motion for Evidentiary Hearing.

[146] *See id.* at 6 – 34.

[147] *See* final EIS at 1-3, 3-3.

[148] 40 C.F.R. § 1502.9 ("The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."); *see Hughes River Watershed Conservancy*, 81 F.3d at 447–48.

[149] *See* Comments of Shenandoah Valley Network at 37–41; Comments of Appalachian Mountain Advocates at 41 – 45.

public interest requires: Can the existing pipeline network meet demand for natural gas in Virginia and North Carolina?"[150]

One need not look farther than the final EIS's discussion of the "no action" alternative to grasp how thoroughly Atlantic's claims of necessity influenced the Commission's alternatives analysis. There, the agency lists a cascade of harms that will result if the Atlantic Coast Pipeline is not built: (1) "[p]rolonging existing supply constraints" which could result in "winter premium pricing," "price volatility," and lack of an economical gas supply for power plants; (2) "higher gas and electricity rates," (3) "energy shortages during times of winter peak demand," and (4) reduced "economic benefits," including jobs and tax revenue.[151] The Commission brushes aside the "no-action" alternative because it focused solely on achieving Atlantic's proposed goal—moving gas from Dominion South Point to Virginia and North Carolina—on Atlantic's time frame.[152]

The Commission dismisses existing infrastructure system alternatives without the necessary "hard look" required by NEPA. The final EIS does not address the issues raised in comments on the draft EIS concerning existing infrastructure, including the expert report from Synapse Energy Economics discussed elsewhere in this petition.[153] Even if Atlantic is right that there is a growing demand for

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[150] Comments of Shenandoah Valley Network at 40.

[151] Final EIS at 3-3.

[152] *See id.*

[153] *See* Comments of Shenandoah Valley Network at 34 – 35, 39 – 40; Comments of Shenandoah Valley Network at 34 – 35, 42 – 43.

natural gas in Virginia and North Carolina—and we do not accept that it is—the Synapse analysis demonstrates that existing pipelines can deliver enough gas to meet that demand. The use of existing infrastructure is an alternative that would avoid entirely or dramatically reduce on-the-ground environmental impacts to national forest lands and private property and eliminate new infrastructure costs for utility ratepayers in Virginia and North Carolina.[154]

Most importantly, the Commission has also not considered the issues raised by Intervenors regarding the existing Transco pipeline system.[155] The final EIS fails to mention the slated reversal of the Transco Mainstem, the largest North-South pipeline on the East Coast, or that the Commission approved the project that would complete the reversal earlier this year.[156] Moreover, the final EIS does not address the fact that the subscribers to the approved reversal, which would move 1.7 bcf/day of Marcellus gas into the Southeast, are gas producers and marketers looking for customers.[157] In other words, this approved project will make more Marcellus gas available in Virginia and North Carolina than the Atlantic Coast Pipeline, and that gas does not have an identified end user. The Commission also just approved the Mountain Valley Pipeline, another producer-push pipeline that would put 2.0 bcf/day into the Transco system, confirming the capacity of that existing system to deliver adequate gas supplies to Virginia and North Carolina.

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[154] *See id.*

[155] *See id.*

[156] *See id.*

[157] *See id.*

As the final EIS acknowledges, the Transco system can move 11 bcf/day, an enormous capacity that dwarfs the capacity of the Atlantic Coast Pipeline and warrants careful consideration as an alternative.[158] The Commission fails to meet its NEPA obligations to consider reasonable alternatives when the final EIS for the Atlantic Coast Pipeline does not address the historic shift in the direction of gas flow on the largest East Coast pipeline system running from the Marcellus through Virginia and North Carolina.

The final EIS's primary point with regard to the Transco system is that it does not connect to the Dominion South Point hub in northwestern West Virginia.[159] But the Commission not attempted to determine if existing pipeline infrastructure not operated by Transco, like the Columbia pipeline system, other interstate pipeline systems, or intrastate systems, could connect the Transco system to this hub. The final EIS claims, without meaningful analysis or support, that 300 miles of new pipeline would be necessary to make this connection.[160] And even if gas is supplied on Transco from the Leidy hub in northeastern Pennsylvania, the primary objective of the Atlantic Coast Pipeline would be achieved: Marcellus gas would reach end users in Virginia and North Carolina and it would do so without 600 miles of a new, greenfield pipeline across West Virginia, Virginia, and North Carolina.

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[158] *See* final EIS at 3-4 to 3-5.

[159] *See id.*

[160] *See id.*

The final EIS also claims that new pipelines are necessary to connect the Transco system to Atlantic's delivery points.[161] But the Transco system already connects to several of Atlantic's proposed delivery points in southeastern Virginia via an existing lateral known as the Southside Expansion Project. It also connects, via other existing pipelines, to every existing gas-fired power plant operated by Dominion Energy Virginia in Virginia. The final EIS does not consider those connections or whether other existing laterals could connect Transco to Atlantic's proposed delivery points in North Carolina.

The existing Columbia pipeline network is another important system alternative that the final EIS summarily dismisses.[162] Moreover, the final EIS does not respond to Intervenors' comment that it must examine the pipeline system as a whole and that its compartmentalized analysis ignores opportunities to take advantage of available capacity on more than one system to increase incremental delivery in Virginia and North Carolina.[163] And it does not address partial alternatives using existing infrastructure that may adequately meet the alleged demand for natural gas.[164] The final EIS says that the Commission "does not direct the development of the gas industry's infrastructure regionally or on a project-by-

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[161] *See id.*

[162] *See id.* at 3-5.

[163] *See* Comments of Shenandoah Valley Network at 39-40.

[164] *See Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975) ("the EIS must nevertheless consider such alternatives to the proposed action as may *partially* or completely meet the proposal's goal and it must evaluate their comparative merits") (emphasis added).

project basis."[165] But NEPA requires that federal agencies "shall . . . [i]nclude reasonable alternatives not within the jurisdiction of the lead agency."[166] Even if we accept the Commission's statement of its authority under the Natural Gas Act—which we do not—the Commission cannot ignore a reasonable alternative on these grounds for purposes of their NEPA analysis. [167]

Relatedly, the final EIS does not adequately address co-location of the Atlantic Coast Pipeline in the Mountain Valley Pipeline corridor. The Commission gave cursory attention to such alternatives in the final EIS and dismissed them based on its conclusions that the "co-location" options did not provide feasible means by which both applicants could transport their entire desired volumes of gas.[168] But the Commission was unable to meaningfully assess the single corridor alternative because it did not understand the need for either project and whether genuine market demand would justify transportation of the combined volume of gas. For example, the Commission does not know whether smaller-scale adjustments would allow a pipeline using the Mountain Valley corridor to meet the actual market demand for both projects.

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[165] Final EIS, App. Z at Z-694.

[166] 40 C.F.R. § 1502.14.

[167] For the same reason, FERC should have assessed whether non-pipeline alternatives, such as energy efficiency or renewable energy sources—which are readily available, dropping in cost, and easily integrated into the grid—could meet any demonstrated demand for additional power generation. *See, e.g.,* Comments of Appalachian Mountain Advocates at 37–41.

[168] Final EIS at 3-6 to 3-9.

The Commission's failure to more fully assess the feasibility of a "single corridor" alternative for the Mountain Valley and Atlantic Coast projects led Commissioner LeFleur to dissent from the Commission's Certificate Order.[169] After describing the "single corridor" alternatives,[170] Commissioner LaFleur concluded that "these alternatives demonstrate that the regional needs that these pipelines address may be met through alternative approaches that have significantly fewer environmental impacts."[171]

As with the draft EIS, inaccurate and incomplete economic assumptions skew the alternative analysis in the final EIS. These documents focus myopically on Atlantic's goal of moving gas from the Dominion South Hub to the Southeast and accept the premise that economic harm will result if this pipeline is not built. That narrow view, skewed as it is by the blind acceptance of Atlantic's claims of public necessity, violates NEPA.

C. The Commission's Draft EIS Failed to Provide Adequate Information to Permit Meaningful Public Involvement.

As discussed at length in comments on the draft EIS, the Commission's draft EIS for the Atlantic Coast Pipeline was missing so much relevant environmental information that it precluded meaningful public participation in the

[169] Certificate Order, 161 FERC ¶ 61,042, Dissent at 2–3.

[170] The EIS for the ACP evaluated an alternative where the capacity for both pipelines would be met in a single corridor primarily along the ACP alignment. *Id.* at 3.

[171] *Id.*

NEPA process.[172] The Commission's failure to include adequate information necessary for the public to reasonably assess and comment on the full scope of the project's impacts undermines one of the statute's primary goals.[173]

NEPA's EIS requirement "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[174] Information must be provided in a timely manner to ensure that the public can meaningfully participate in the decisionmaking process.[175] An agency must "not act on incomplete information, only to regret its decision after it is too late to correct."[176]

When an agency publishes a draft EIS, it "must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act."[177] "If a draft statement is so inadequate as to preclude meaningful analysis, the agency *shall* prepare and circulate a revised draft of the

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[172] Comments of Shenandoah Valley Network at 5-13; 45-48; Comments of Appalachian Mountain Advocates, 3-12; 49-53.

[173] These failures are in addition to the failure to establish need for the project in the EIS, but rather to only make the need determination in the Certificate Order. The procedures of the Natural Gas Act cannot replace the full and fair public participation in the decisionmaking process that NEPA mandates and the Commission's lack of a well-considered need statement in the EIS hindered the public's ability to meaningfully comment on the need for the project, as well as alternatives that could satisfy that purported need, as part of the NEPA process.

[174] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[175] *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) ("Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA.").

[176] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

[177] 40 C.F.R. § 1502.9(a).

appropriate portion."[178] "The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action."[179] An EIS that fails to provide the public a meaningful opportunity to review and understand the agency's proposal, methodology, and analysis of potential environmental impacts violates NEPA.[180]

Courts have explained that, when performing an EIS, an agency "should take to the public the full facts in its draft EIS and not change them after the comment period unless, of course, the project itself is changed."[181] NEPA "expressly places the burden of compiling information on the agency" so that the public and other governmental bodies can evaluate and critique the agency's action.[182] "The now traditional avenue of independent comment on decision-making by public interest organizations would be narrowed if interested parties did not have presented in the EIS the analysis and data supporting an agency's decision."[183] Such information must be included in the draft EIS, as opposed to supplied in the final EIS following public comments because "the purpose of the

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[178] *Id*. (emphasis added).

[179] *Id*.

[180] *See e.g.*, *California ex rel. Lockyer v. U.S. Forest Serv.*, 465 F. Supp. 2d 942, 948-50 (N.D. Cal. 2006); *see also Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F.Supp.2d 1248, 1261 (D. Idaho 2001) ("NEPA requires full disclosure of all relevant information before there is meaningful public debate and oversight.").

[181] *Burkey v. Ellis*, 483 F. Supp. 897, 915 (N.D. Ala. 1979).

[182] *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1073 (1st Cir. 1980).

[183] *Id.*

final EIS is to respond to comments rather than to complete the environmental analysis (which should have been completed before the draft was released)."[184]

Intervenors acknowledge that, as the Commission notes in its Certificate Order, one "purpose of a draft EIS is to elicit suggestions for change."[185] However, the deficiencies in the draft EIS are not in any way limited to new information that arose after the publishing of the draft EIS as a result of changes to the Project. Rather, the draft EIS simply failed to include substantial amounts of information necessary to assess the impacts of the project as proposed in the draft EIS and, to a large degree, as approved by the Commission. All of this information *could have been* included in a draft EIS for the Project as proposed had the Commission and the applicant simply taken the time to gather it and conduct the proper analysis. Instead, the Commission chose to rush through the NEPA process in an apparent effort to meet the applicant's self-imposed deadlines for service, resulting in a draft EIS that did not contain adequate information for the public to reasonably assess and comment on the impacts of the project.

The draft EIS lacked sufficient information about the Atlantic Coast Pipeline and its potential environmental impacts on a wide variety of resources. The draft

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[184] *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 680 F. Supp. 2d 996, 1005 (E.D. Wis. 2010), *aff'd sub nom. Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518 (7th Cir. 2012).

[185] Certificate Order ¶ 201 (*citing City of Grapevine v. DOT*, 17 F.3d 1502, 1507 (D.C. Cir. 1994)). Intervenors do not, however, agree with the Commission that the final EIS did not present "significant new circumstances or information relevant to environmental concerns." As discussed below, much if the information that was not included in the draft EIS but later supplied was critical to understanding the Project's environmental impacts, even if the information presented in the final EIS was not adequate to satisfy NEPA's "hard look" requirement.

EIS recommended that some of this missing information be supplied by the applicants either by the end of the draft EIS comment period or before construction begins.[186] In their comments on the draft EIS, Intervenors documented over 200 instances of missing or incomplete information.[187] Much of that information was essential to understanding the impacts of the proposed pipeline. For example, the draft EIS failed to include sufficient information to analyze: the public need for the project; the feasibility and comparative impacts of alternatives to the Project, including the "no action" alternative, and their ability to meet any demonstrated need for the Project; impacts associated with construction on steep and highly-erodible slopes; impacts to protected species; and impacts associated with construction through sensitive karst topography.[188] The information described above should have been included in the draft EIS; without this information, the Commission was not able to perform a fully informed evaluation of potential impacts and routing decisions. the Commission's failure to require such voluminous and significant information to be included and evaluated in the draft EIS for public review and comment clearly demonstrates that the

[186] *See* Table of Missing and Incomplete Information in Draft EIS, Attachment 1 to Appalachian Mountain Advocates et al. draft EIS Comments; *See also* Certificate Order Appendix C ¶¶14–66 (requiring additional information to be submitted prior to commencing construction). In apparent recognition of the inadequacy of the information considered in the draft EIS, the Commission invited Atlantic to submit additional information after the release of the draft EIS. As of March 24, 2017, the company had filed more than 8,000 pages of new information during this time. Table of Information Filed by Atlantic Coast Pipeline, LLC since Release of Draft EIS, Attachment 4 to Appalachian Mountain Advocates et al. draft EIS Comments.

[187] *Id.*

[188] *See* Appalachian Mountain Advocates et al. draft EIS Comments at 7–10.

agency did not "make every effort to disclose and discuss at appropriate points *in the draft statement* all major points of view on the environmental impacts of the alternatives including the proposed action."[189] By publishing the draft EIS without this information, the Commission failed to "guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[190]

Furthermore, the lack of relevant information prevented the Commission from assessing how the Project's impacts can be mitigated. "[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences."[191] The understanding that the EIS will discuss the extent to which adverse effects can be avoided is implicit in NEPA's demand that the agencies identify and evaluate those adverse effects.[192] The absence of a "reasonably complete" discussion of mitigation measures undermines NEPA and the ability of the agency and the public to evaluate environmental impacts.[193] While there is not a substantive requirement that a complete mitigation plan be adopted, there is "a requirement that mitigation be discussed in sufficient detail to

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[189] 40 C.F.R. § 1502.9(a) (emphasis added).

[190] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[191] *Id.* at 351 & n.15 (quoting 40 C.F.R. § 1508.20 (1987) (defining "mitigation")).

[192] *Id.* at 351-52 (citations omitted).

[193] *Id*. at 352 ("More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.").

ensure that environmental consequences have been fairly evaluated[.]"[194] Due to the substantial lack of information in the draft EIS, the public and other reviewing agencies were left to speculate about potential mitigation such that the Commission failed to meet its statutory obligation to ensure informed public engagement.

The EPA raised similar concerns about post-draft EIS and post-comment information in a letter to the Commission concerning the Mountain Valley Pipeline draft EIS. EPA described the Commission's draft EIS for that project as a "rolling document providing just a snapshot in time" that creates "considerable challenge for stakeholders and members of the public to follow the documentation provided, or know which material is most current" and precludes "an opportunity to fully comment on this material." [195] EPA urged the Commission to clarify its process and to consider preparing a revised or supplemental draft EIS.

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[194] *Id.*; *see also Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 431-32 (4th Cir. 2012) (citing and discussing *Robertson*, 490 U.S. 332) ("[D]iscussions of specific, detailed mitigation measures that are responsive to specified effects" are indicative of fair evaluation of environmental consequences).

[195] Letter from Jeffrey D. Lapp, Assoc. Dir., EPA Region III, to Nathaniel J. Davis, Deputy Sec'y, FERC (Dec. 20, 2016), Attachment 5 to Appalachian Mountain Advocates et al. draft EIS Comments. *See also* Department of Interior, *Comments on the Federal Energy Regulatory Commission (FERC) Draft Environmental Impact Statement (DEIS) for the Proposed Mountain Valley Project (MVP) by the Mountain Valley Pipeline Company, LLC and proposed Equitrans Expansion Project by the Equitrans LP* (Dec. 22, 2016) (Accession No. 20161223-5049) at 1 ("This late provision of critical information in effect significantly shortened the comment period and made commenting on this project a significant challenge. Information submissions to the FERC docket without additional public notification require an exceptional level of diligence to ensure that all materials are found and included in one's analysis."); *id.* at 2–3 ("This late provision of critical information in effect significantly shortened the comment period and made commenting on this project a significant challenge. Information submissions to the FERC docket without additional public notification require an exceptional level of diligence to ensure that all materials are found and included in one's analysis."); *id.* ("The DEIS should include all updates

Likewise, the Commission here erred by not waiting until it had gathered the information described above (and the other missing information identified elsewhere in Intervenor's draft EIS comments and in the numerous other similar comments submitted to the Commission) and then issuing a revised draft EIS with a new public comment period, as Intervenors requested. The fact that some (but by no means all) of the missing information was included in the final EIS does not remedy the infirmity of the Commission's NEPA process. In the absence of a complete draft EIS in the first instance, only the issuance of a revised draft EIS that thoroughly analyzed the missing information could have satisfied NEPA's public comment requirements, which "[encourage] public participation in the development of information *during the decision making process*."[196] Simply adding this missing information to the final EIS is insufficient, as it does not allow the same degree of meaningful public participation.[197] The Commission thus failed to fulfill its NEPA duty by issuing a draft EIS that was woefully incomplete and

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from the applicant that are necessary for a meaningful analysis prior to opening up the comment period. The approach of this project has not allowed for adequate public input as it circumvents the timeframes to review information provided and makes it extremely challenging to understand what is proposed, what the potential impacts are, and how the various alternatives compare against each other. . . .This lack of information also precludes a meaningful analysis of cumulative impacts."); EPA, *Comments on the Constitution Pipeline DEIS* at 3 (Apr. 9, 2014) (Docket No. CP13-499-000, Accession No. 20140409-5120) (The DEIS's lack of information "negates the ability of agency specialists and the public to review the analysis and comment on it.").

[196] *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (emphasis added).

[197] *Id*. (*citing California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982)) ("It is only at the stage when the draft EIS is circulated that the public and outside agencies have the opportunity to evaluate and comment on the proposal…No such right exists upon issuance of a final EIS."); 40 C.F.R. § 1500.1(b).

by not issuing a revised, complete draft EIS in response to the numerous comments highlighting the draft EIS's informational deficiencies.

D. In Light of Atlantic's Recent Revelation That It Plans To Extend the Pipeline Into South Carolina, the Certificate Order Violates NEPA's Prohibition on Segmentation and Failure to Evaluate Indirect Impacts.

Atlantic has requested, and this Commission has approved, a certificate to build a pipeline to serve Virginia and North Carolina. In applying to build the Pipeline and in its other filings and public statements, Atlantic has repeatedly asserted that the need driving the project is to meet demand in Virginia and North Carolina. However, contrary to these representations, recent news reports reveal that Atlantic plans to extend the Pipeline into South Carolina, directly contradicting information supplied to this Commission about the Pipeline's terminus. This startling new evidence requires new analysis under NEPA's requirement to evaluate indirect effects, as well as its prohibition on unlawful segmentation of projects to evade environmental review—and at a minimum, requires that the Commission grant rehearing of the Certificate Order to hear this new evidence.

The revelation about planned extension of the Pipeline was not announced to this Commission or to the public, but instead, was captured on an audio recording by a conference participant and leaked to the media. In that audio recording, Dan Weekley, Vice President of Southern operations for Dominion

Energy, gave the following remarks to attendees at the September 21, 2017 S.C. Clean Energy Summit in Columbia, South Carolina:

> I'll just say that one of the projects that we have in an adjoining state, we have a very large natural gas project that we're bringing out of the West Virginia area . . . bringing it down 600 miles down to Lumberton, North Carolina. It's exclusively for power generation load. That line, 600 miles, it's about a 5-and-half-billion dollar project for us. Even though it dead ends at Lumberton – of course, 12 miles to the border – *everybody knows it's not going to end in Lumberton*. The data point for you to think about is even when you get to Lumberton that line is still 36 inches in diameter, and we'll have to maintain 900 pounds of pressure at that point for our customers, which is a huge volume of gas. We could deliver into South Carolina whichever ever [sic] way the pipeline turns – because it will turn – that's one of the decisions we're going to have to make somewhere down the road. We could bring in almost a billion cubic feet a day into South Carolina by just adding horsepower, upstream.[198]

Although Mr. Weekley did not mention the "project" by name, it is clear from his description that he was referring to the Atlantic Coast Pipeline.

Dominion's expressed intention to extend the Pipeline beyond the terminus point articulated in the Commission's NEPA analysis requires rehearing. Any plan to extend the Pipeline into South Carolina would differ significantly from the project the Commission evaluated in the final EIS supporting its Certificate Order: The Commission's description of Atlantic's application in the final EIS states, in pertinent part: "On September 18, 2015, Atlantic Coast Pipeline, LLC filed . . . an application[] with the FERC . . . to construct, operate, abandon, and maintain

[198] APNewsBreak: Disputed East Coast pipeline likely to expand, available at https://apnews.com/d9e1216747d642abb025dedb0043462f. Mr. Weekley's remarks were transcribed from the audio recording embedded in the article on the Associated Press website (emphasis added).

natural gas pipeline facilities in *Pennsylvania, West Virginia, Virginia, and North Carolina*."[199] The Commission goes on to describe the proposal as follows:

> ACP would involve the construction and operation of 333.4 miles of 42-inch-diameter mainline pipeline (AP-1); 186.3 miles of 36-inch-diameter mainline pipeline (AP-2); 83.4 miles of 20 inch diameter lateral pipeline (AP-3); 0.4 mile of 16-inch-diameter lateral pipeline (AP-4); 1.0 mile of 16-inch diameter lateral pipeline (AP-5); three new compressor stations; and valves, pig launchers and receivers, and meter and regulating (M&R) stations in *West Virginia, Virginia, and North Carolina*. ACP would be capable of delivering up to 1.5 billion cubic feet per day (Bcf/d) of natural gas to customers in *Virginia and North Carolina*.[200]

Similarly, no mention of South Carolina appears in the final EIS' statement of the project purpose and need—a critical underpinning of the entire NEPA analysis—which reads, in relevant part:

> As stated by Atlantic, ACP would serve the growing energy needs of multiple public utilities and local distribution companies in *Virginia and North Carolina*. . . Atlantic states that access to additional low-cost natural gas supplies from ACP would increase the reliability and security of natural gas supplies in *Virginia and North Carolina*.[201]

There is no mention anywhere in these descriptions of South Carolina. Clearly, the Commission was not asked to consider—and hence did not consider—the environmental impacts, convenience, and necessity of a pipeline extending into South Carolina.

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[199] Final EIS at ES-1 (emphasis added).

[200] *Id.* (emphasis added; footnotes omitted).

[201] *Id.* at 1-3 (emphasis added).

When conducting a NEPA review, the Commission must consider not just the direct effects of the project under consideration, but also the indirect effects.[202] "Indirect effects" are those that "are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable."[203] In turn, effects are "reasonably foreseeable" if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision."[204]

A NEPA analysis must also take into account the "cumulative impacts" associated with a project, which are "the incremental impact[s] of the action when added to other past, present, and *reasonably foreseeable future actions*."[205] Mr. Weekley's assertion that "everybody knows" about the planned expansion beyond North Carolina's southern border renders the extension of the Pipeline a "reasonably foreseeable" future action that the Commission cannot ignore. Accordingly, a supplemental draft EIS must be prepared that takes into account the indirect effects and cumulative impacts of the expansion.

In addition, NEPA prohibits "segmentation" of a project, that is, breaking a project into smaller component parts to evade scrutiny of the project's impacts. NEPA regulations mandate that the environmental effects of projects "related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement" together, and that the evaluation must be

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[202] *See* 40 C.F.R. § 1502.16(b).

[203] *Id.* § 1508.8(b).

[204] *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citation omitted).

[205] *See WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7) (emphasis added).

completed "before actions are taken."[206] An EIS must discuss any "connected" actions, *i.e.*, actions that cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a larger action and depend on the larger action for their justification.[207] "[A]n agency must discuss '[c]onnected actions' – that is, 'closely related' actions – 'in the same impact statement.'"[208] "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."[209]

Here, the Pipeline as described in Atlantic's application and the planned expansion into South Carolina are "related to each other closely enough to be, in effect, a single course of action." The planned South Carolina expansion cannot proceed unless the officially disclosed West Virginia-Virginia-North Carolina segment of the Project is implemented and is an interdependent part of that action which depends on the larger action's completion for its justification. Accordingly, both the officially disclosed Project and the planned South Carolina expansion must be "evaluated in a single impact statement." In the face of the new evidence about Atlantic's plans, for the Commission to now accept piecemeal evaluation of the Pipeline would constitute unlawful segmentation under NEPA. Accordingly,

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[206] 40 C.F.R. §§ 1500.1(b), 1502.4(a).

[207] *Id.* § 1508.25(a)(1).

[208] *Nevada v. Dep't of Energy*, 457 F.3d 78, 91 n 8 (D.C. Cir. 2006).

[209] *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

the Commission should hold a hearing to assess the applicant's intention with regard to possible extension of the Pipeline, and should issue a supplemental draft EIS addressing any new information on that subject that may emerge.

E. The Commission's inadequate analysis of impacts to water resources violates NEPA.

The Commission granted the certificate of public convenience and necessity without adequately compiling and assessing the most critical information to an assessment of impacts to waterbodies and wetlands. Intervenors submitted detailed comments regarding these deficiencies in the draft EIS. Given that construction and operation of the proposed pipeline will likely significantly impact those resources, the insufficient analysis must be addressed in a revised draft EIS for public comment.

Along the entire route, the pipeline will threaten water quality, largely by increasing sedimentation resulting from land-clearing, erosion, soil compaction, and blasting and trenching in streams and wetlands. As acknowledged in the final EIS and discussed at length in comments on the draft EIS, sedimentation can cause "permanent alterations in invertebrate community structures, including diversity, density, biomass, growth, rates or reproduction, and mortality."[210] In West Virginia and Virginia, these threats will be exacerbated by construction across steep slopes and through fragile karst terrain. Construction would impact hundreds of acres of wetlands along the route, most of which are forested wetlands that may

[210] Final EIS at 4-228 to 4-229.

never recover. The final EIS significantly understates the permanent impacts to wetlands and relied on inadequate information to assess impacts.

Construction and operation of the pipeline will cause extensive and long-lasting impacts to water quality, yet the Commission's final EIS fails to analyze the true extent of these impacts. The final EIS assumes that hundreds of acres of impacted forested wetlands will recover without any support, fails to request site-specific information essential to understanding water quality impacts, and fails to conduct any cumulative impacts analysis. Therefore, the Commission's final EIS violates NEPA's "hard look requirement."

1. The final EIS failed to adequately assess impacts to water from construction across steep slopes.

As discussed at length in Intervenors' comments on the draft EIS and draft Forest Service ROD, a primary threat to water resources along the proposed route is an increase in sediment due to erosion and potential landslides caused by construction across steep slopes.[211] Concerns about excessive sedimentation and turbidity are particularly worrisome in areas of Virginia and West Virginia characterized by steep slopes or prone to landslides. Construction of the pipeline in these areas risks serious harm to adjacent streams and wetlands. Increased erosion and landslide incidence will lead to elevated sedimentation levels, which

[211] Comments of Shenandoah Valley Network at 42-60; 80-81; 186; 202-05; 210-14; 394-410; Comments of Appalachian Mountain Advocates at .45-63; 83-84; 189; 205-08; 213-17; 397-413.

will likely have long-term adverse effects on pristine headwaters, wetlands, and habitat for sensitive species like brook trout.

The Commission, citing Atlantic's *Soil Erosion and Sedimentation Model Report* on sedimentation on the George Washington and Monongahela National Forests, concludes that sedimentation during the first year of construction could be "approximately 200 to 800 percent above baseline erosion rates."[212] And these models significantly underestimate the increase in sedimentation from forest clearing because erosion and sediment control measures are typically well less than 100 percent effective.[213] Any failure to adequately assess and mitigate impacts from construction in steep, landslide-prone terrain has direct implications on impacts to waterbodies adjacent to those upland areas.

These concerns were not sufficiently addressed in the final EIS because the Commission's assessment of impacts from construction in steep terrain was based on inadequate information.

a. Failure to Obtain and Assess information Deemed Essential by the USFS

The Forest Service has, over the past two years, repeatedly requested from Atlantic site-specific designs of stabilization measure in high-hazard portions of the proposed route on or in close proximity to the national forests.[214] The fact that

[212] Final EIS at 4-240; 5-20.

[213] Comments of Shenandoah Valley Network at 317, 402; Comments of Appalachian Mountain Advocates at 291-92; 322-23.

[214] Letter from Clyde Thompson, Forest Supervisor, U.S. Forest Serv., to Nicholas Tackett, FERC (Nov. 18, 2016); included as an attachment to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates; Letter from Clyde Thompson, Forest

the Forest Service has since arbitrarily abandoned its initial approach by issuing a draft ROD despite Atlantic's failures to provide this information does not change the fact that this site-specific information is critical to assessing the impacts and mitigation measures for construction on steep slopes.

Citing the "very challenging terrain" of the central Appalachians, the Forest Service expressed concern about how Atlantic would handle and mitigate impacts arising from steep slopes, the presence of headwater streams, geologic formations with high slippage (landslide) potential, highly erodible soils, and the presence of high-value natural resources downslope of high-hazard areas.[215] Noting that similar hazards on smaller pipelines had led to erosion and sediment incidents and resulting damage to aquatic resources, the Forest Service expressed the inevitable concern that the Atlantic Coast Pipeline could present a high risk of failure leading to damage to water resources on the national forests.[216]

When Atlantic failed to comply with that request, the Forest Service notified the Commission that the "lack of essential information hinders the Forest Service's ability to provide a definitive completion date for the decision."[217] Because the Forest Service lacked critical information that it had repeatedly

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Supervisor, U.S. Forest Serv., to Kimberly D. Bose, Secretary, FERC (Oct. 24, 2016), [hereinafter Forest Service High-Hazard Stabilization Measures Request], included as an attachment to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates; *see* Draft EIS Comments at 42–56; *see* Shenandoah Valley Network Forest Service Objection at 14-15; 51-52.

[215] Forest Service High-Hazard Stabilization Measures Request.

[216] *Id.*

[217] Letter from Clyde Thompson to Nicholas Tackett; *see* Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates.

requested, it was unable to conduct a thorough assessment of impacts as required by NEPA, as the missing information "precluded meaningful analysis" of potential impacts to water resources on the forests.[218] Atlantic's failure to produce the requested information thus also thwarted the public's opportunity to meaningfully comment on the draft EIS.

As of the publication of the final EIS and the issuance of the Certificate, Atlantic was still "coordinating" with the Forest Service on as-yet unfinished "site-specific designs for steep slope areas to further mitigate risks."[219] The final EIS reflects that Atlantic has submitted site-specific designs for only two sites: one ridge on Cloverlick Mountain in the Monongahela National Forest, and one steep slope in the George Washington National Forest.[220] As for the other eight sites for which site-specific designs were requested, the final EIS states that, if the project is authorized, the Forest Service would require approval of the two submitted designs as well as the other eight before construction "at those locations" could begin.[221]

This lesser requirement is in stark contrast to the Forest Service's initial request, which stated that the ten high-hazard sites "are merely representative sites that have been selected to demonstrate whether stability can be maintained for the

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[218] *See* 40 C.F.R. § 1509(a).

[219] Final EIS at 2-46.

[220] *Id.* at 4-40.

[221] *Id.* at 4-40 to 4-41.

purpose of making a *preliminary determination* of Forest Plan consistency."[222] In fact, the Forest Service request went on to clarify that "[s]hould the ACP Project be permitted, *multiple additional* high hazard areas will need to be addressed on a site-specific basis."[223]

Additionally, the *Construction, Operations, and Maintenance Plan* (*COM Plan*), which purports to set out the mitigation necessary to minimize the likely severe impacts of constructing across steep, difficult terrain on the national forests, was not final as of the publication of the final EIS.[224] Many of the Plan's most critical mitigation measures are unknown or unassessed. Regarding effects of erosion and sedimentation on water quality and aquatic species, the final EIS explicitly admits that the existing discussion is "general" and has "no supporting documentation," that there is "no correlation" between information and analyses presented in two appendices on the topic, that "water resource impacts from sedimentation are largely uncertain."[225] For these reasons, the final EIS concludes that the *COM Plan* is in draft form so it is "unclear if erosion control and

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[222] Forest Service High-Hazard Stabilization Measures Request.

[223] *Id.*

[224] *See* Shenandoah Valley Network et al., Notice of Objection and Statement of Issues on Forest Service Draft Record of Decision for the Atlantic Coast Pipeline Special Use Permit/Land and Resource Management Plan Amendments 18-21 (Sept. 5, 2017), https://cara.ecosystem-management.org/Public/DownloadCommentFile?dmdId=FSPLT3_4092306 [hereinafter Shenandoah Valley Network Forest Service Objection to Draft ROD] (listing all instances in which the final EIS acknowledged that the *COM Plan* was still in draft form as of issuance of the final EIS).

[225] Final EIS at 4-129.

rehabilitation would meet Forest Plan standards."[226] Similarly, the final EIS stated that "effects on wetland resources on NFS lands are unknown" pending incorporation of necessary mitigation measures into the COM Plan.[227] Such admittedly deficient analysis plainly cannot pass muster under NEPA. An agency finding that impacts are "largely uncertain" lacks the tools necessary to engage in the kind of reasoned, informed decision-making NEPA requires.[228] And the public lacks the tools to inform meaningful comment.

The inadequate information that has prevented the Forest Service from conducting a full assessment of impacts to water from construction in steep, landslide-prone terrain on the George Washington and Monongahela National Forests cannot meet the requirements of NEPA and cannot provide an adequate basis for agency decision-making or meaningful public comment.

Further, while the Forest Service took the lead role in consistently highlighting many of these concerns—until it changed course in the draft ROD[229]— any of the concerns the Forest Service has expressed apply to the entire length of the pipeline. In fact, while the information on which the Forest Service relied was inadequate, that agency had slightly more information on which to rely than the Commission, since the Forest Service also reviewed Atlantic's *Construction, Operations, and Maintenance Plan* (*COM Plan*). The *COM Plan*

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[226] *Id.*

[227] *Id.* at 4-140.

[228] *Id.* at 4-129.

[229] *See* Shenandoah Valley Network Forest Service Objection to Draft ROD.

does not apply to the route off federal lands. For this reason, the deficiencies identified by the Forest Service with respect to impacts to water quality from erosion and sedimentation resulting from construction on steep slopes are even more worrisome on non-federal lands.

b. Other Deficiencies in Steep Slope Impacts Analysis

In addition to deficiencies identified by the Forest Service, the final EIS contains other examples of inadequate information relating to water impacts from steep slope construction. For instance, concerns regarding landslides along the entire route have been inadequately addressed. As of the publication of the final EIS, the Commission acknowledged that "locations along the pipeline route identified as high and medium threat level hazards are undergoing further analysis as part of a Phase 2 program that includes detailed mapping and potentially subsurface exploration . . . . Atlantic has not yet completed the Phase 2 analysis at all evaluation sites."[230]

Further, the final EIS acknowledges that Atlantic is still "developing a Best in Class Steep Slope Management Program (BIC Team) to incorporate the results" of a Geohazard Analysis Program that had identified over 100 possible slope instability hazard locations along the mainline.[231] As of the publication of the final EIS, the BIC Team had "consider[ed], but ha[d not yet] adopted, specific screening criteria for slopes that would be identified for site-specific requirements

[230] Final EIS at 4-28.

[231] *Id.* at 4-28; 5-4.

for construction and restoration.[232] In other words, not only had the Commission not obtained the kind of site-specific information on high-hazard slope locations that the Forest Service had repeatedly requested and called "essential" and "necessary,"[233] but it had not even determined what the criteria for *selecting* those sites would be. High-hazard sites should have been identified and assessed for impacts and potential mitigation in the draft EIS to allow the public to comment meaningfully and for the agency to make an informed decision. Instead, as of the publication of the final EIS, and presumably as of the issuance of the Certificate, this critical information was missing or incomplete.

Moreover, even the standard best in class mitigation designs were incomplete as of the issuance of the final EIS. The final EIS states that "[t]he BIC Team *would develop* standard mitigation designs" for categories of steep slopes, drawing on industry-specific guidance.[234] The Commission's reliance on unproven or undisclosed best management practices to minimize any impacts to aquatic resources from pipeline construction renders the EIS insufficient. Further, even if Atlantic had completed its best in class designs by the time the final EIS was issued, the Commission's reliance on those designs would still fall short of NEPA requirements. An EIS must contain a "reasonably complete discussion of possible

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[232] *Id.* at 4-29; 4-61.

[233] Letter from James A. Thompson, Ph.D., Professor of Pedology and Land Use, W. Va. Univ., to Clyde Thompson, Forest Supervisor, U.S. Forest Serv. (Feb. 22, 2017), included as an attachment to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates; Letter from Clyde Thompson to Nicholas Tackett.

[234] Final EIS at 4-29.

mitigation measures," and such a discussion cannot rely on an applicant's general assurance of the implementation of "best management practices" or, in this case, "best in class" methods.[235]

Despite the lack of adequate information for the Commission or the Forest Service to determine impacts to water resources from construction across steep slopes, the Commission nevertheless acknowledged in the final EIS and the Certificate that "[l]ong-term impacts related to slope instability adjacent to streams have the potential to adversely impact water quality and stream channel geometry; in addition to downstream aquatic biota."[236] But this determination was not based on the agencies' consideration of accurate, high-quality information about environmental impacts. As of the final EIS, "[w]hile Atlantic . . . ha[s] implemented programs and several mitigation measures to minimize the potential for slope instabilities and landslides, the development of other slope instability/landslide risk reduction measures have not been completed or have not been adopted."[237] With so much fundamental information regarding the impacts of construction on steep slopes and landslide-prone areas missing, there is no basis for the Commission's findings about the effects on water resources. This is in clear violation of NEPA.

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[235] See, e.g., *Wilderness Soc'y v. Bosworth*, 118 F.Supp.2d 1082, 1107 (D. Mont. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)) (holding that summarily relying on BMPs to mitigate a high risk of landslides, when those measures have not been specifically assessed for effectiveness against landslides, inadequate under NEPA).

[236] 161 FERC ¶ 61,042 at P 222; Final EIS at 4-129; 4-244.

[237] Final EIS at ES-12; 4-47; 4-231; 4-244; 4-610; 5-21.

Given the critical importance of the missing information regarding impacts on water from construction on steep slopes and in landslide-prone areas, it is essential that the Commission issue a revised draft EIS for public comment. That revised draft EIS must be based on sufficient information from the applicant to allow the Commission and the Forest Service to make a meaningful assessment of impacts to water quality from erosion and sedimentation caused by construction across steep slopes.

2. The Commission fails to adequately assess impacts to groundwater from construction through fragile karst terrain.

As the final EIS recognizes, these impacts are not limited to surface waters. Clearing, grading, trenching, and soil stockpiling activities can alter surface drainage and groundwater recharge patterns, thus causing fluctuations in groundwater levels or increased turbidity.[238] The proposed ACP would cross 71.3 miles of karst terrain in West Virginia and Virginia.[239] The Commission acknowledged in the final EIS that "[k]arst development greatly increases the susceptibility of underlying aquifers to contamination sources (e.g., stormwater runoff, chemical spills, or other contaminants) originating at the ground surface . . . . as such, karst areas are susceptible to a greater range of environmental impact."[240] And in the Certificate, the Commission recognizes that "[b]ecause karst features provide a direct connection to groundwater, there is a potential for

[238] Final EIS at 4-94.

[239] *Id.* at 5-2.

[240] *Id.* at 4-95.

pipeline construction to increase turbidity in groundwater, due to runoff of sediment into karst features[,] or to contaminate groundwater resources by inadvertent spills of fuel or oil from construction equipment."[241]

Yet the final EIS concludes that "[w]hile small, localized, and temporary impacts on karst features, water flow, and water quality could occur, the impacts would be adequately minimized and mitigated through Atlantic's . . . plans and our recommendations"[242] and that "construction and operation of ACP . . . would not result in a significant impact on aquifers or other groundwater resources."[243]

This conclusion is not supported by a meaningful assessment of potential impacts to water quality from construction through fragile karst terrain. To minimize these impacts, the Commission states that Atlantic will rely primarily on its *Karst Mitigation Plan*, as well as measures included in the Commission's generic *Upland Erosion Control, Revegetation, and Maintenance Plan* (FERC Plan) that applies to all projects. These plans are inadequate, however, because they do not address the primary underlying problem: that how and where groundwater moves through karst terrain is largely unknown without proper analysis. Because water moves through karst terrain underground, it is difficult to map—unlike surface water. As a result, mapping of particular karst features (i.e., caves or sinkholes) within a particular area offers only a fragmented—and

[241] 161 FERC ¶ 61,042 at P 214.

[242] Final EIS at ES-5; 5-4.

[243] *Id.* at ES-8.

incomplete—picture of the actual movement of water through the terrain.[244] Mapping karst features alone, rather than karst systems, is insufficient to determine how water flows through terrain and where that water, and any sediments or other pollutions in it, will end up.[245]

Dye tracing is a crucial tool to facilitate the understanding of how water moves underground. To date, there has been no comprehensive dye tracing done of the karst terrain through which the pipeline would pass. While state agencies, including the Virginia Department of Conservation Resources and Department of Environmental Quality, have recommended or required dye tracing,[246] the Commission did not require a comprehensive dye tracing study to "map" the route through karst terrain.[247] In the absence of comprehensive dye tracing, the Commission has little basis on which to claim that impacts will be not be significant.[248] As the final EIS notes, an analysis could be done that would

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[244] Chris Groves, Ph.D., *Karst Landscapes and Aquifers of the Central Appalachian Mountains and Implications for the Proposed Atlantic Coast Pipeline* 9 (2017) [hereinafter Groves Report], included as an attachment to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates; Dr. Chris Groves, *Crawford Hydrology Laboratory, Comments on Karst-Related Environmental Issues in the Atlantic Coast Pipeline (ACP) Response (5/31/17) and Second Response (6/23/17) and (6/27/17) to the Virginia Department of Environmental Quality Request for Information for Developing and Evaluating Additional Conditions for Section 401 Water Quality Certification for Interstate Natural Gas Infrastructure Project* (2017) [hereinafter Groves Virginia 401 Comments].

[245] *See* Groves Report; Groves Virginia 401 Comments.

[246] *See, e.g.*, Va. Dep't of Envtl. Quality, *Draft 401 Water Quality Certification Issued to Atlantic Coast Pipeline, LLC, Certification No. 17-002* (July 3, 2017), http://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/ACPfinaldraft401cert.pdf [hereinafter DEQ Draft 401 Certification].

[247] Groves Virginia 401 Comments at 5.

[248] *Id.*

"extrapolate groundwater flow through a mature karst system."[249] But as of the final EIS, "the results of this analysis have not been completed" or provided for the Commission's review.[250]

The proper remedy for this lack of information would have been for the Commission to issue a supplemental draft EIS once the analysis had been completed. Instead, the Commission merely "recommend[ed] that Atlantic provide the results of this analysis with its Implementation Plan."[251] This requirement, like the requirement to produce site-specific designs for steep slopes, is too little, too late. An accurate map of the karst terrain through which the pipeline would pass is essential to an accurate assessment of likely impacts to groundwater. It is also critical to a meaningful mitigation analysis. The Commission's failure to require dye tracing prevented the agency from identifying the full scope of impacts to groundwater from construction of the pipeline through karst terrain. This failure constitutes a violation of NEPA, as it cannot serve as the basis for informed decision-making.

3. The final EIS did not sufficiently assess impacts to hundreds of acres of forested wetlands

The final EIS severely distorts impacts to wetlands. It states that "nearly all of the permanent forested wetland impacts would be considered conversions," that wetlands "would be allowed to return to preconstruction conditions," and

[249] Final EIS at 4-11; 5-2.

[250] *Id.* at 4-11 to 4-12; 5-2 to 5-3.

[251] *Id.* at 5-3.

determined that the ACP "would not significantly impact wetlands.[252] There is no evidence that supports these conclusions by the Commission. Construction of the ACP will affect at least 798 acres of wetlands, and 75% of these impacts will be to forested wetlands,[253] which take a *century or more* to recover—if they do at all.[254] Furthermore, the Commission did not have sufficient information to adequately assess impacts of construction to wetlands.

Initially, forested wetlands will be cleared of trees within a 75-foot construction right-of-way above the pipeline.[255] After construction is finished, Atlantic will continue to prevent any regrowth of trees within a 30-foot area of the entire length of the pipeline,[256] permanently degrading the functions performed by a forested wetland, fragmenting and disrupting the breeding territories of existing populations such as the Cerulean Warbler, and paving the way for the intrusion of invasive species.[257] Yet, the final EIS labels the *deforestation* of forested wetlands as mere "conversions."[258] In reality, hundreds of acres of forested wetlands will be permanently lost.

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[252] Final EIS at ES-10, 4-140.

[253] *Id.* at ES-10.

[254] *Id.* at ES-10; 4-137 (emphasis added).

[255] *Id.* at 4-135-36, Table 4.3.3-2; Supplemental Information, at 14.

[256] Atlantic Coast Pipeline, 401 Water Quality Permit Application, Appendix J, at 29.

[257] CEA Report, at 13–14. Avian species that will be affected include the Scarlet Tanager, the Wood Thrush, and the Worm Eating Thrush. These species are "very sensitive to nest predation and to parasitic nesters." *Id.*

[258] Final EIS at 4-140; ES-10.

Forested wetlands perform ecological and hydrological functions distinct from other wetlands. They are "unusually efficient" at removing harmful pollutants from upland areas, providing essential downstream water quality protection.[259] Forested wetlands, in particular, store storm and floodwaters well, thereby safeguarding areas prone to future extreme storm events.[260] Forested wetlands also provide unique habitats, distinct from those provided from other wetlands.[261] Finally, forested wetlands "are a major source of groundwater recharge."[262] The final EIS itself states that several thousand feet of the pipeline will cross through cypress gum wetlands, which "provide an abundance of aquatic and wildlife habitat and enhance groundwater and surface water quality for receiving systems."[263] The removal of all trees within a forested wetland would destroy the vital ecological functions of the wetland, and cannot be considered a mere "conversion." The Commission's lack of attention to forested wetland impacts meant that the Commission took no effort to identify the environmental

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[259] CEA Report at 4.

[260] "Wetland use" under 15A N.C. Admin. Code 2B. 0231(a)(1); *see also* Pamela C. Dodds, *Assessment of the Adverse Hydrogeological Impacts Resulting from Construction of the Proposed Atlantic Coast Pipeline in West Virginia, Virginia, and North Carolina* Section 1.3 (2017) [hereinafter Dodds Study], included as Attachment 53 to Comments of Shenandoah Valley Network ("[D]eforestation removes the protective tree canopy, causing increased stormwater discharge and decreased groundwater recharge."), included as Attachment 53 to Comments of Shenandoah Valley Network; *see also* CEA Report, at 4 ("They are often critical flood water storage and groundwater recharge areas.").

[261] USFS Wetlands Report at 32–35; *see also* CEA Report at 4.

[262] CEA Report at 11.

[263] Final EIS at 4-133.

impacts of deforesting such wetlands. As a result, the Commission failed to take a "hard look" at impacts, as required by NEPA.

In addition to the widespread loss of forested wetlands within the pipeline's right-of-way, there will be long-lasting, potentially permanent impacts to forested wetlands outside of the right-of-way—a total 45-foot area along the entire length of the pipeline.[264] As stated in the final EIS, "[i]mpacts on forested wetlands would be much longer, and may include changes in the density, type, and biodiversity of vegetation. […] Impacts on habitat may occur due to fragmentation, loss of riparian vegetation, and microclimate changes associated with gaps in forest canopy."[265] Yet, these impacts have not been adequately analyzed by the final EIS. The final EIS considers impacts to forested wetlands outside of the right-of-way as temporary, claiming that mature trees in forested wetlands would take 30 years or more to recovery.[266] Yet, the final EIS states that a "closed canopy of mature forest" could take a century or more to recover.[267] The final EIS fails to explain why the closed canopy a mature wetland forest would take 70 years less to recover than an analogous canopy on dry land. Nevertheless, it is indisputable that effects to forested wetlands outside of the right-of-way will

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[264] *Id.* at 4-135, Table 4.3.3-2; Supplemental Information, at 14; Atlantic Coast Pipeline, 401 Water Quality Permit Application, Appendix J at 29.

[265] Final EIS at 4-137.

[266] *Id.* at 4-137.

[267] *Id.* at ES-10.

be significant and long-lasting.[268] Because the Commission considers these effects as temporary, however, it failed to take a "hard look" at the actual environmental impacts that would occur to forested wetlands that take decades to recover—if they recover at all. It is not enough to group all forested wetlands together and simply state that impacts "may" occur, as the EIS has done.

Not only will Atlantic destroy hundreds of acres of forested wetlands, it also has provided no assurances that they will ever return to their current state. Although the final EIS states that wetlands will "recover to preconstruction conditions,"[269] Atlantic's current commitments are either inadequate to ensure recovery, or too vague to determine actual impacts of the construction.

First, Atlantic's application is further filled with indeterminate and discretionary measures for its construction procedures regarding wetlands, for instance: "New road construction will avoid wetlands *where feasible*," and "ground disturbance will be avoided *to the extent practicable*."[270] Notably, Atlantic fails to define such terms as "feasible" and "practicable," leaving open the possibility that protective steps might be abandoned due to additional time or cost. In addition, Atlantic has made no promises to restore wetland contour to their

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[268] *Id.* at ES-10; *see also* CEA Report at 13–14 (Significant impacts associated with the clearing of trees in forested wetlands "include species differentiation due to light penetration, habitat intrusion by predator species, habitat loss due to the edge effect, the disruption of reproductive populations and the introduction of invasive species." "Other permanent impacts associated with the edge effect and habitat fragmentation include changes in site hydrology associated with earth compaction during construction, changes in plant diversity and [] the introduction of diseases.").

[269] Final EIS at 4-137.

[270] *Id.* at G-143.

"near-natural morphology," as Atlantic has promised to do for stream channels in National Forest lands,[271] and therefore, the Commission cannot claim that wetlands will simply "recover to preconstruction conditions." The proposed trenching of all impacted wetlands and soil compaction "can cause significant alterations in the water regime of wetlands, [which] can significantly change the viability and functions of the system by redistributing water [or] eliminate the available waters to other areas."[272] Furthermore, wetlands "are extremely sensitive to alterations in water regimes," and even "minor changes" can redistribute the flow of water and harm species survival and diversity.[273] In order for the Commission to have taken a "hard look" at impacts to wetland hydrology, it must have requested clarification on Atlantic's construction and restoration procedures within wetlands.

The final EIS also makes grand, unsubstantiated statements about the wetland vegetation recovery. For instance, it claims that "Atlantic will ensure that all disturbed areas successfully revegetate with wetland herbaceous and/or woody plant species."[274] However, Atlantic's restoration plans do not ensure such promising outcomes. For instance, the final EIS states that, if natural, rather than active revegetation was used, Atlantic considers wetland restoration "successful" if vegetation is "consistent with the early successional wetland plant communities

[271] *Id.* at Appendix G, at G-138.

[272] CEA Report at 12, 15.

[273] CEA Report at 15.

[274] Final EIS at G-146.

in the affected ecoregion."[275] This means that a wetland can be considered "restored" if it looks similar to a wetland that has been newly disturbed in the same region. Additionally, the final EIS states that wetland restoration is considered "successful" if "vegetation is at least 80 percent of either the cover documented for the wetland prior to construction, or [for] adjacent wetland areas that were not disturbed by construction."[276] This restoration measure is not protective enough of forested wetlands, as the remaining 20 percent of vegetative cover that Atlantic is permitted to ignore could be the trees that do not grow back after construction. If Atlantic is allowed to use these criteria, then it could consider a previously-forested wetland that no longer has any trees "successfully restored." The Commission must have requested far more specific restoration criteria in order to truly analyze the short- and long-term impacts to wetland vegetation.

Atlantic's treatment of wetland soil during and after construction is also not adequately protective, as suggested by the final EIS. For instance, Atlantic only plans to segregate the topsoil of wetlands if they are not inundated at the time of construction,[277] even though topsoil contains the "highest concentration of organic matter," the "bulk of necessary nutrients to vegetation," and the "highest concentration of plant roots and seeds."[278] The final EIS itself even states, that "[d]uring construction, failure to segregate topsoil could result in the mixing of

[275] *Id.* at G-146.

[276] *Id.* at G-146.

[277] Supplemental Information at 26.

[278] Final EIS at 4-58.

topsoil with the subsoil, which could result in reduced biological productivity or modification of chemical conditions in wetland soils," and could "affect the reestablishment and natural recruitment of native wetland vegetation."[279] The final EIS cannot conclude that construction of the ACP "would not significantly impact wetlands" if Atlantic does not even plan to segregate topsoil for all wetlands. The massive disruption of wetland soil layers and the compaction caused by heavy construction equipment, coupled with Atlantic's dismal restoration plan, will inhibit regeneration of vegetation and permanently harm the hydrologic patterns of wetlands—yet these impacts are consistently neglected and downplayed by the final EIS.

Finally, prior to the final EIS, Atlantic still had not provided the commission with wetland mitigation plans. The EIS simply recommends that the company file a copy of the plans prior to construction. As a result, the Commission's claim that wetland replacement or compensatory mitigation would "replace lost wetland function" is unsubstantiated.[280]

Such inadequacies were discussed at length in Intervenors' comments on the draft EIS, yet the Commission did not resolve these issues in the final EIS. Accordingly, the Commission's persistent failure to take a "hard look" at the environmental impacts to forested wetlands violates NEPA.

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[279] *Id.* at 4-137.

[280] *Id.* at 4-136.

4. The Commission did not have adequate site-specific information for the final EIS to analyze water quality impacts

The Commission did not have adequate information regarding site-specific construction plans and procedures in order to take a "hard look" at water quality impacts. Such information includes, but is not limited to: site-specific construction plans for each crossing, detailed information on water withdrawals and discharges for both hydrostatic testing and dust control, and data on the depth of pipeline burial at particular crossings.

The final EIS only stated that Atlantic submitted site-specific drawings for *major waterbody* crossings.[281] As demonstrated by the Commission's request for Atlantic to submit updated site-specific crossing plans, information on construction procedures at particular sites is essential to understanding the actual impacts of the pipeline.[282] Such necessary information might include: the location of temporary bridges and bridge type, information on the depth of bridge abutments in stream banks, cofferdam locations, water discharge structure locations and pump locations, and locations of access roads. As discussed above, it is not enough for the Commission to rely on Atlantic's general assurance of the implementation of "best management practices."[283] Therefore, in order to analyze

[281] *Id.* at 4-102.

[282] *Id.* Although the Commission only requires this information for all major waterbodies, Atlantic should do this for all waterbodies and wetlands. There is nothing in the 401 certification regulations that says DEQ only has to consider impacts to large or major waterbodies and wetlands.

the water quality impacts of this enormous project that involves hundreds of crossings, the Commission must have requested site-specific drawings for *each* crossing—not just for the four crossings listed in Appendix J of the EIS.

In addition, Atlantic plans to use over 85 million gallons of water for hydrostatic testing, and over 40 million gallons for dust control for both the ACP and SHP.[284] The impacts of both the withdrawals and discharges of this massive quantity of water have not been adequately addressed by the final EIS. at least 82.9 million gallons of water will be used for hydrostatic testing,[285] which can cause further increased water temperature, reduced dissolved oxygen levels, and entrainment of species.[286] As stated in the final EIS, "[t]he discharge of stormwater, trench water, or hydrostatic test water could increase the potential for sediment-laden water to enter wetlands and cover native soils and vegetation."[287] The final EIS did not contain sufficient site-specific information on the particular locations or rate of discharge for hydrostatic testing wastewater—as exemplified by the North Carolina Department of Environmental Quality's multiple requests that Atlantic submit information on the location and rate of discharge of

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[283] See, e.g., *Wilderness Soc'y v. Bosworth*, 118 F.Supp.2d 1082, 1107 (D. Mont. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)) (holding that summarily relying on BMPs to mitigate a high risk of landslides, when those measures have not been specifically assessed for effectiveness against landslides, inadequate under NEPA).

[284] Final EIS at 4-121, 4-124.

[285] *Id.* at 4-123; Atlantic Coast Pipeline, 401 Water Quality Permit Application, Appendix O.

[286] Final EIS at 4-121.

[287] *Id.* at 4-137.

hydrostatic testing wastewater.[288] It was not enough for the Commission to assume that discharged water would be sent to "well-vegetated upland areas" in a manner that would "prevent scour and erosion."[289] The Commission needed specific data on each discharge—the exact location for the discharge, a determination of which waterbodies or wetlands would be impacted, and the extent of those impacts for that particular discharge. Without this data, however, the Commission simply concluded, "[n]o significant water quality impacts are anticipated as a result of discharge."[290] Furthermore, the Commission did not even know where the 40 million gallons of water required for dust control would be withdrawn or discharged,[291] so there was no way for it to begin to determine the extent of water quality impacts from dust control. Therefore, the Commission lacked essential data to analyzing the water quality impacts caused by water withdrawals and discharge for both hydrostatic testing and dust control.

Finally, the final EIS fails to discuss the depth of pipeline burial. If the ACP is not buried deeply enough, flooding and heavy storm events can re-expose the pipeline, risking damage to the pipeline and requiring remedial actions that would further impact waters.[292] The ACP would cross over 41 miles of land within

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[288] North Carolina's Division of Water Resources has requested additional information on this issue on both September 14 and October 26, 2017.

[289] Final EIS at 4-124.

[290] *Id.* at 4-121.

[291] *Id.* at 4-124.

[292] NYSDEC Notice of Denial of 401 Certification for the Constitution Pipeline 11, April 22, 2016, at 13, http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf; Timothy Morse, *et al*., The Dangers of Flood Scouring on Buried Pipeline River Crossings, Exponent,

Special Flood Hazard Areas, and over 5 miles of land within minimal flood hazard areas.[293] The people of eastern North Carolina are still recovering from the devastating floods caused by Hurricane Matthew in 2016. The severe flooding of last year could easily occur again, yet the Commission has given no attention to the depth of pipeline burial in the final EIS. Accordingly, the Commission has again failed to take a "hard look" at potential environmental impacts caused by construction of the ACP, and is in violation of NEPA.

5. The final EIS did not sufficiently assess connected and cumulative impacts of construction of the ACP to water quality.

The final EIS' cumulative impacts assessment is wholly inadequate and fails to meet the requirements of NEPA. It lists "past, present and reasonably foreseeable future actions within the geographic scope of influence" for the ACP,[294] stating that "some of these other projects *may result* in impacts on surface waters," and that it "assume[s] *some level* of impacts would occur" to wetlands.[295] Yet, the final EIS makes no effort to provide any information on water quality impacts from any of these projects. Instead, it attempts to provide vague assurances that these other projects "would *likely* be required to install and maintain BMPs [best management practices]" for waterbodies, or that it

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available at http://www.exponent.com/~/media/newsletters/oil-gas-2017-v6/the-dangers-of-flood-scouring-on-buried-pipeline-river-crossings.pdf.

[293] Final EIS at 4-105.

[294] *Id.* at Appendix W, Table W-1.

[295] *Id.*at 4-606 to 4-607 (emphasis added).

"*assume[s]* […] mitigation would be required" for wetlands.[296] The final EIS also states that "potential cumulative impacts *could result* if the proposed projects are constructed at the same time,"[297] yet makes no attempt to analyze *which* projects would coincide with the ACP schedule, and therefore would exacerbate ACP's impacts to wetlands and waterbodies.

Numerous related projects listed in the final EIS are in progress, completed, or expected to be completed within the next year.[298] Their locations have already been determined, and many construction decisions have already been made. Completed projects have already executed the bulk of their impacts on waterbodies and wetlands. Yet, the Commission clearly does not intend to, or request Atlantic to, gather data on the specific locations of these projects, or their construction schedules or procedures—so that it may properly analyze the cumulative impacts of these projects with the ACP.

Additionally, it is not clear if these projects occur in the same subwatersheds, or might impact the same streams or wetlands. In fact, the Commission has not even given data on the cumulative impacts of the ACP *alone* on particular streams, wetlands, subwatersheds, and watersheds. The ACP will cross and re-cross several streams and their tributaries, and wetland systems, many times. In order to adequately address cumulative impacts, the Commission must

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[296] *Id.*at 4-606-7 (emphasis added).

[297] *Id.*at 4-606 (emphasis added).

[298] *Id.*at Appendix W, Table W-1.

have included data on how many times each stream, river, wetland, subwatershed, and watershed is crossed by both the ACP and any of the other projects listed in Appendix W. Furthermore, the Commission must have actually analyzed the cumulative impacts of these projects on water quality in order to satisfy NEPA.

These glaring omissions throughout the final EIS' "cumulative impacts assessment" are inexcusable, yet the Commission simply concluded that the cumulative impacts on waterbodies "would be temporary and minor," and that impacts on wetlands "would not be significant." The Commission has made no effort to analyze the cumulative impacts of this enormous project that promises to impact major watersheds along the route, and its final EIA violates the requirements of NEPA.

F. The Commission Failed to Adequately Analyze the Project's Climate Impacts.

The Commission failed to adequately analyze the climate change impacts of the end use of the gas transported by the Project, as required by NEPA. Intervenors addressed this issue in depth in their comments on the draft EIS.[299] NEPA requires agencies to assess not only the direct effects of a proposed action, but also the indirect and cumulative effects. Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[300] "Indirect effects are defined broadly, to 'include growth inducing

[299] *See generally*, Comments of Shenandoah Valley Network at 231 – 257; Comments of Appalachian Mountain Advocates at 246 – 271.

[300] 40 C.F.R. § 1508.8(b).

effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.'"[301] Cumulative impacts are "impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[302]

The Court of Appeals for the D.C. Circuit's recent decision in *Sierra Club v. FERC*[303] recognizes a bar for assessing indirect and cumulative impacts under NEPA that the Commission failed to meet here.[304] In *Sierra Club*, the court agreed with the petitioners that the Commission must meaningfully assess the downstream greenhouse gas ("GHG") emissions and climate impacts of the natural gas pipelines. The court vacated the orders under review and remanded the matter to the Commission for the preparation of an EIS that is consistent with its opinion. Similarly, as in *Sierra Club*, the Commission's environmental review of the ACP failed to disclose the Project's climate impacts.

The *Sierra Club* court explained that "[a]n agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental

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[301] *Nat. Res. Def. Council v. U.S. Army Corps of Eng'rs*, 339 F. Supp. 2d 386, 404 (S.D.N.Y. 2005) (quoting 40 C.F.R. § 1508.8(b)).

[302] 40 C.F.R. § 1508.7.

[303] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017)

[304] *Id.; see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172,1217 (9th Cir. 2008) ("the fact that 'climate change is largely a global phenomenon that includes actions ... outside of [the agency's] control ... does not release the agency from the duty of assessing the effects of its actions on global warming'"); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp.3d 1174 (D. Colo. 2014) (requiring the federal government to analyze the climate change impacts of its decisions under NEPA).

effects, of the project under consideration."[305] Greenhouse gas emissions from end use of natural gas are causally related and reasonably foreseeable indirect effects of permitting a pipeline intended to deliver that natural gas.[306] Burning of the gas transported by a pipeline thus "is not just 'reasonably foreseeable,' it is the project's entire purpose."[307] The court explained that not only could the Commission foresee the likely emissions from combustion of gas carried on the pipeline, it also had authority to mitigate those emissions.[308] Accordingly, the "EIS … needed to include a discussion of the significance of this indirect effect … as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[309] The Court found that the Commission's EIS did not satisfy NEPA because it failed to adequately assess downstream greenhouse-gas effects.

NEPA requires a more searching analysis than merely disclosing the amount of pollution. Rather, the Commission must examine the "ecological[,]… economic, [and] social" impacts of those emissions, including an assessment of their "significance."[310] In the final EIS for the Atlantic Coast Pipeline, the Commission declined to consider downstream GHG emissions as indirect effects of the project,

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[305] *Sierra Club*, 867 F.3d at 1371 (citing § 1502.16(b) (emphasis in original).

[306] *Id.* at 1371–74

[307] *Id.* at 1372.

[308] *Id.* at 1373–74.

[309] *Id.* at 1374.

[310] 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b).

incorrectly maintaining that "downstream combustion of gas is not causally connected" to the Project.[311] Like the EIS that the D.C. Circuit invalidated in *Sierra Club v. FERC* ("Sabal Trail EIS"), the ACP EIS incorrectly maintains with regard to downstream emissions that "NEPA does not … require [the Commission] to engage in speculative analyses or provide information that will not meaningfully inform the decision-making process."[312]

As the D.C. Circuit recognized in *Sierra Club v. FERC*, this analysis is *not* overly speculative and *should* inform the decision-making process.[313] the Commission's position to the contrary renders the ACP EIS insufficient. The ACP EIS also incorrectly maintains that "[e]ven if [FERC] were to find a sufficient connected relationship between the proposed project and ... downstream end-use, it would still be difficult to meaningfully consider these impacts, primarily because emission estimates would be largely influenced by assumptions rather than direct parameters about the project."[314] The Commission's refusal to

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[311] Final EIS at 4-621. *Compare id*. ("the inclusion of ... end-use as an indirect effect" is not warranted) to *Sierra Club*, 867 F.3d at 1372 (burning gas transported by pipeline "is not just 'reasonably foreseeable,' it is the project's entire purpose"); *Compare* Final EIS at 4-616 ("While ACP would deliver natural gas to the Brunswick and Greenville County Power Stations, these facilities are independent of the proposed projects.") to *Sierra Club*, 867 F.3d at 1371–72 ("What are the 'reasonably foreseeable' effects of authorizing a pipeline that will transport natural gas to Florida power plants? First, that gas will be burned in those power plants."). The ACP EIS also states, without explanation or support, that "end-use would occur with or without the projects." Final EIS IS at 4-621.

[312] Final EIS at 4-621; *see* Sabal Trail EIS at 3-297 (identical language).

[313] *Sierra Club*, 867 F.3d at 1374.

[314] Final EIS at 4-621; *see* Sabal Trail EIS at 3-297 (identical language). *See also Sierra Club*, 867 F.3d at 1374.(rejecting identical statement in the Sabal Trail EIS and noting that "some educated assumptions are inevitable in the NEPA process").

acknowledge in the ACP EIS that downstream GHG emissions are a causally connected, reasonably foreseeable consequence of the pipeline undermined the ability of both the public and decision-makers to fully consider and analyze these impacts.[315] As a consequence of this fatal flaw, the Commission also failed to adequately seek public input regarding possible mitigation measures.[316]

Pursuant to *Sierra Club*, the Atlantic Coast Pipeline EIS also "needed to include a discussion of the 'significance' of downstream emissions,[317] as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[318] The EIS fails on both accounts.

With regard to significance, the EIS states both that "we cannot determine whether the projects' contribution to cumulative impacts on climate change would be significant,"[319] and that "we conclude that ACP and SHP would not significantly contribute to GHG cumulative impacts or climate change."[320] Not

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[315] In its Certificate Order, the Commission claims that the "fact that the final EIS stated that the emissions were not "causally connected" to the project is immaterial because the information was presented in both the draft and final EIS." Certificate Order ¶304. The Commission is wrong. The purpose of NEPA is not only to disclose the environmental impacts of a proposed project to the public, but also to ensure that environmental impacts are given proper consideration in the agency's decisionmaking process. If an agency does not believe that particular impacts are required to be considered under NEPA, it is much less likely to give proper weight to those impacts and to meaningfully assess the degree to which other feasible alternatives could reduce those impacts. Such biases are evident in the Commission's decisionmaking process as a result of its failure to give proper weight to downstream GHG emissions.

[316] *See Sierra Club*, 867 F.3d at 1374 ("greenhouse-gas emissions are an indirect effect of authorizing this project, ... which the agency has legal authority to mitigate").

[317] *See* 40 C.F.R. § 1502.16(b)

[318] *Id.*; *see WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7).

[319] Final EIS at 4-620.

[320] *Id*. at 4-622.

only are these conclusions conflicting,[321] they are also unsupported– respectively, on the basis that the Commission "cannot determine the projects' incremental physical impacts on the environment caused by climate change,"[322] and that "emissions have been minimized."[323, 324] The Commission lists the annual GHG emissions for Pennsylvania, West Virginia, North Carolina, and Virginia, but only writes that "[a]lthough the GHG emissions from construction and operation of the projects appear large, the emissions are small in comparison to the GHG emissions for each state," and that the comparison "is not an indicator of significance."[325] These cursory statements do not constitute a meaningful assessment of the significance of this indirect effect, and are not sufficient for informed decision-making or public participation.

As a consequence of the Commission's failure to take a hard look at the downstream GHG emissions, including their significance, the cumulative impacts

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[321] This is not the only inconsistency found in the relevant section of the ACP EIS. *Compare* ACP EIS at 4-618 ("The cumulative impact analysis described below does not focus on a specific cumulative impact area because climate change is a global phenomenon.") to *id*. ("Although climate change is a global concern, for this analysis, we will focus on the potential cumulative impacts of climate change in ACP and SHP project areas."). *See also id*. at 4-620 (referencing physical effects on the environment in the Midwest region).

[322] *Id*. at 4-620. In the invalidated Sabal Trail EIS, FERC similarly maintained that "there is no standard methodology to determine how the proposed SMP Project's incremental contribution to GHGs would translate into physical effects of the global environment." Sabal Trail EIS at 3-297.

[323] Final EIS at 4-622.

[324] In any event, it is not clear how downstream GHG emissions have been "minimized." To the extent the Commission is referring to compliance with air permitting requirements, "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Sierra Club*, 867 F.3d at 1375 (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971)).

[325] Final EIS at 4-620.

analysis also fails. The final EIS states that "the emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described."[326] This unsupported statement fails to constitute an adequate analysis of the ACP's incremental impact when added to other past, present, and reasonably foreseeable future actions – including existing, currently proposed, and reasonably foreseeable regional national gas infrastructure. The Commission does not quantify the project's downstream GHG emissions in combination with other past, present, and reasonably foreseeable future projects in the region, despite many of those projects being directly under the Commission's review. The EIS impermissibly downplays the cumulative climate impacts of the gas infrastructure build-out now occurring in Pennsylvania,

[326] *Id.* In the EIS, the Commission listed some typical climate change impacts generally expected to burden the Project's geographic areas, such as rising sea levels, heat waves, and increased precipitation. Final EIS at 4-618 to 4-619. While listing these anticipated regional climate change impacts is insufficient for evaluating the *Project's* climate impacts, the Commission failed even in this regard by inexplicably omitting some of the severe impacts that it has cited in past environmental reviews. For example, in the EIS for the Atlantic Sunrise Project (issued in December 2016), the Commission wrote that the U.S. Global Change Research Program's 2014 climate change report noted that the "observations of environmental impacts that may be attributed to climate change in the Northeast region" include: 1) "areas that currently experience ozone pollution problems are projected to experience an increase in the number of days that fail to meet the federal air quality standards," 2) "an increase in health risks and costs for vulnerable populations due to projected additional heat stress and poor air quality," 3) rising sea levels that will "stress[] infrastructure (e.g. communications, energy, transportation, water, and wastewater)," 4) "severe flooding due to sea-level rise and heavy downpours is likely to occur more frequently," 5) "heat stress negatively affect crop yields; invasive weeds are projected to become more aggressive," 6) "an increase in carrier habitat and human exposure to vector-borne diseases (e.g. Lyme disease or West Nile)." Atlantic Sunrise Project Final EIS at 4-317. While the ACP EIS similarly purports to list "observations of environmental impacts that may be attributed to climate change in the Northeast region" per the same U.S. Global Change Research Program report, final EIS at 4-618, FERC has inexplicably omitted these enumerated impacts that were included in the Atlantic Sunrise Project EIS just seven months earlier.

West Virginia, Virginia, North Carolina, and other surrounding states, which could result in the transport of gas to other regions. For example, the Commission does not quantify the project's downstream GHG emissions in combination with past, present, and reasonably foreseeable future gas projects in the region, including those FERC-jurisdictional natural gas interstate transportation projects listed in Table W-1 of Appendix W to the final EIS. The Commission must consider the broader impacts of the proposed pipelines, including the cumulative impacts of the natural gas extraction system, well pads, more pipelines, and access roads, which are all an inevitable result of this project. The Commission's failure to meaningfully assess the significance of the total direct, indirect, and cumulative emissions resulting from the Project, including upstream and downstream emissions combined with emissions from past, present, and reasonably foreseeable future projects in the region, renders its final EIS deficient under NEPA.

The Commission's inadequate analysis also impermissibly downplayed the Project's downstream GHG emissions by stating that "it is anticipated that the projects would result in the displacement of some coal use, thereby *potentially offsetting* some regional GHG emissions."[327] The D.C. Circuit rejected this approach in *Sierra Club*:

> The effects an EIS is required to cover "include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8. In other words, when an agency thinks the good consequences of a project will outweigh the bad, the agency still

[327] Final EIS at 4-620 (emphasis added).

> needs to discuss both the good and the bad. In any case, the EIS itself acknowledges that only "portions" of the pipelines' capacity will be employed to reduce coal consumption. *See* J.A. 916. An agency decisionmaker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, *the EIS fails to fulfill its primary purpose*.[328]

The ACP EIS suffers from a similar defect, stating that "[b]ecause natural gas emits less CO_2 compared to other fuel sources (e.g., fuel oil or coal), it is anticipated that the eventual consumption of the distributed gas to converted power plants would reduce current GHGs emissions, thereby *potentially offsetting* some regional CO_2 emissions."[329] As with the invalidated Sabal Trail EIS, the ACP EIS makes no attempt to assess whether total emissions would be reduced or increased, or the degree of reduction or increase .[330]

The Commission's unsupported reasoning for its failure to analyze the impacts of the Project's indirect climate impacts likewise do not comport with what NEPA requires. As in the Sabal Trail case, here the Commission takes the position that it cannot assess the Project's climate impacts because "there is no scientifically-accepted methodology available to correlate specific amounts of GHG emissions

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[328] *Sierra Club*, 867 F.3d at 1375 (emphasis added).

[329] Final EIS at 4-621 (emphasis added).

[330] *See also id*. (like the fatally flawed Sabal Trail EIS, directing "[s]takeholders and other interested parties [to] review the DOE's National Energy Technology Laboratory's May 29, 2014 report: *Life Cycle Analysis of Natural Gas Extraction and Power Generation*" as support for FERC's displacement/offset argument, an approach that the D.C. Circuit rejected in *Sierra Club v. FERC*).

to discrete changes" in the environment or physical effects in the region.[331] The Commission has disavowed the use of the social cost of carbon methodology, but in *Sierra Club v. FERC*, the D.C. Circuit instructed the Commission to explain its refusal to use the social cost of carbon methodology to assess project-specific impacts:

> The EIS explained that there is no standard methodology for making this sort of prediction.... FERC has argued in a previous EIS that the Social Cost of Carbon is not useful for NEPA purposes.... We do not decide whether those arguments are applicable in this case as well, because FERC did not include them in the EIS that is now before us. On remand, FERC should explain in the EIS, as an aid to the relevant decisionmakers, whether the position on the Social Cost of Carbon that the agency took in *EarthReports* still holds, and why.[332]

Here, the Commission failed to provide this explanation in the ACP EIS.

In its Certificate Order, issued outside the NEPA process, the Commission claims that the social cost of carbon is not appropriate for project-level NEPA review.[333] The Commission, however, allows that the tool "may be useful for rulemakings or comparing regulatory alternatives using cost-benefit analyses where the same discount rate is consistently applied." The Commission does not explain why this could not be used to compare the "social cost" of the Project's emissions with those of reasonable alternatives, while keeping the discount rate

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[331] Final EIS at 4-620. *See also id.* (conclusory statement that "GHG emissions from the proposed projects and other regional projects would not have any direct impacts on the environment in the projects [*sic*] area.").

[332] *Sierra Club*, 867 F.3d at 1375; *see also* Comments of Shenandoah Valley Network at 231 – 257; Comments of Appalachian Mountain Advocates at 246 – 271.

[333] Certificate Order ¶ 307.

constant. Neither the final EIS nor the Certificate Order contains a comparison of the downstream GHG emission of the Project to the emissions of any reasonable alternatives. The Commission thus undermines the final EIS's alternatives analysis, which is the "is the heart of the environmental impact statement."[334]

Finally, as a consequence of its failure to take a hard look at the downstream GHG and climate impacts, the Commission also failed to adequately seek public input regarding possible mitigation measures.[335] In order to satisfy NEPA's mandate of informed decision-making, the Commission must meaningfully consider and analyze impacts from downstream combustion—and assesses mitigation measures and feasible alternatives accordingly (including the no-action alternative, and alternatives involving renewable energy and energy efficiency).[336] The Commission's unsupported statements in the ACP EIS undermined the ability of the public and decision-makers to fully compare alternatives and develop mitigation measures fails to satisfy NEPA. The Commission must fully analyze all of the direct, indirect, and cumulative GHG emissions resulting from the ACP project and use this analysis to compare alternatives and develop mitigation measures to address such emissions.[337]

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[334] 40 C.F.R. § 1502.14.

[335] *See Sierra Club,* 867 F.3d at 1374.

[336] *Id.* at 1374–75; *see also* Comments of Shenandoah Valley Network at 255 – 257; Comments of Appalachian Mountain Advocates at 269–70.

[337] *See, generally*, Comments of Shenandoah Valley Network at 231 – 257; Comments of Appalachian Mountain Advocates at 246 – 271.

G. The Commission's analysis of forest fragmentation violates NEPA.

Intervenors submitted detailed comments on the flaws and inadequacies in the draft EIS analysis of the Atlantic Coast Pipeline's fragmentation impacts on interior and core forests and associated wildlife, especially interior forest-inhabiting neotropical migrant bird species.[338] Their comments also addressed the failure of the mitigation measures proposed in the draft EIS and the Migratory Bird Plan to offset or even squarely address the impacts of the fragmentation of interior forest habitat that will occur due to this project.[339] These inadequacies persist in the final EIS.

The analysis of forest fragmentation is critical to the environmental review of the pipeline because the route will traverse some of the most intact forests in the southeastern United States.[340] For example, Pocahontas and Randolph Counties in West Virginia are both 90% forested, and Bath County in Virginia is 89% forested.[341] This region is also the location of the Monongahela and George Washington National Forests, and the pipeline will cross 21 miles of these public lands.

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[338] Draft EIS Comments at 89-120.

[339] *Id*. at 107-120.

[340] Todd R. Lookingbill, *Analysis of Potential Fragmentation Impacts of the Atlantic Coast Pipeline Proposed Route* (2017) [hereinafter Lookingbill Report], included with Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates.

[341] *Id.* at 9.

In the final EIS, the Commission concluded that forest fragmentation was one of the few pipeline-related impacts that would be significant. Nonetheless, it significantly underestimated the scope of that impact –

by more than 27,000 acres for Virginia alone. The forest resources of the central Appalachians are exceptional, and the Commission's failure to identify the full scope of those impacts results in a final EIS that, under NEPA, cannot serve as the basis for informed decision-making.

1. The final EIS significantly underestimates the impacts of interior forest fragmentation.

The final EIS, despite citing to two "comprehensive literature reviews,"[342] underestimates the impacts of interior forest fragmentation by more than 27,000 acres because it only quantifies the direct impacts to forests, *i.e.* forest clearing, and the amount of forest edge created, but not the indirect impacts of fragmentation in a landscape context, *i.e.*, the impact of fragmentation in light of the overall availability in the larger surrounding area of intact interior forest. Experts from commonwealth agencies, operating as part of the Virginia Forest Conservation Partnership,[343] identified this problem in an August 21, 2017 letter to the Commission, stating that the "[i]mpacts of forest fragmentation on a diverse suite of forest ecosystem services is not thoroughly acknowledged, analyzed, or

[342] Final EIS at 4-187.

[343] The VFCP includes agency staff from the Virginia Department of Conservation and Recreation (DCR), the Virginia Department of Forestry (DOF) and the Virginia Department of Game and Inland Fisheries (DGIF).

quantified in the ACP Final EIS."[344] The Partnership experts point out that the final EIS does not consider the landscape context of forest blocks that will be fragmented by the pipeline.

The landscape context is critical because "[u]nfragmented, large patches of forest contribute greater ecological benefits than the same total area of forest distributed among smaller patches."[345] According to Dr. Lesley Bulluck, Ph.D., Assistant Professor of Avian Ecology at Virginia Commonwealth University, "[f]ragmentation of the few remaining core interior forests has a larger impact than the fragmentation of smaller forest remnants."[346] The final EIS merely lists the size of the individual forest cores and patches that will be fragmented by the pipeline, but does not "take[ ] into account the relative amount of interior forest in an area,", *i.e.* the landscape context of a given forest patch, which is "preferable [to] simply summing the edge habitat created by the pipeline."[347] "Failing to account for indirect impacts of the ACP to forests would gravely underestimate the extent to which Virginia's forest habitat would be affected by the project."[348] The final EIS quantifies the total acreage lost to clearing and edge creation, but fails to

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[344] Letter from Thomas L. Smith, Deputy Director of Operations, Virginia Forest Conservation Partnership, to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission (Aug. 21, 2017) (hereinafter the "VFCP Letter") (eLibrary No. 20170821-5099).

[345] VFCP Letter.

[346] Lesly Bulluck, Ph.D., Comments on the Atlantic Coast Pipeline Draft Environmental Impact Statement at 1 (discussing analysis performed by Todd R. Lookingbill), included as attachments with Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates.

[347] *Id.*

[348] VFCP Letter.

"address the full range of loss of forest values [that occurs] when irreplaceable cores are permanently fragmented"[349] into smaller forest patches that function more like edge habitat than interior forest.[350]

The Virginia Forest Conservation Partnership recommended not merely the calculation of direct clearing of forest and acreage converted to edge, but the quantification of full scope of indirect impacts using a model that, unlike the approach in the final EIS, accounts for the fragmentation of intact forests greater than 100 acres into smaller forest patches and the reduced size of intact forests.[351] According to these expert agencies, the total acreage of direct and indirect impacts for core forest areas in Virginia is 47,650 acres. This figure is more than double the 20,498.2 acre estimate of impacted Virginia forests in the final EIS.[352]

Thus, the analysis of forest fragmentation in the final EIS is insufficient under NEPA because it fails to account for the true scope of indirect impacts to forests.

2. The final EIS and the Migratory Bird Plan fail to assess and present the impacts of forest fragmentation on forest interior songbirds and rely on misrepresentation of scientific data.

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[349] *Id.*; *see also* Bulluck Report at 2 ("Mitigation of these fragmentation-related impacts will be difficult to impossible as these are some of the last remaining tracts of core forest in the region[.]").

[350] The ACP Final EIS acknowledges the importance of the interaction between fragmentation, isolation of habitat, and edge effect, *see* ACP Final EIS at 4-189, but never undertakes any analysis of this interplay. *See* Laura S. Farwell, Potential Impacts of the Atlantic Coast Pipeline and Supply Header Project on Forest Interior Migratory Birds at 8 ("The DEIS fails to address the influence of the surrounding landscape matrix on species dynamics in fragmented systems [citing scientific studies]."), included as attachments with Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates.

[351] VFCP Letter.

[352] Final EIS at 4-194.

The final EIS and its appendix, the Migratory Bird Plan, fail to disclose and assess the impacts of forest fragmentation on migratory birds, particularly forest interior migrant songbirds. Both documents fail to address detailed scientific analysis provided in comments on the draft EIS, and in expert reports[353] attached to and informing those comments.

For example, the Migratory Bird Plan asserts that "vegetation clearing time restrictions will also minimize direct impacts on nesting . . . cerulean warbler[,]" referring to a restriction on clearing vegetation between March 15 and August 31.[354] However, the final EIS ignores scientific information provided in Intervenors' draft EIS comments and the attached report of wildlife and conservation ecologist Laura S. Farwell (the "Farwell Report") concerning Cerulean Warblers' preferential use of ridgetops as breeding habitat.[355] The draft EIS fails to acknowledge or assess this impact, even while stating that 82% of the Atlantic Coast Pipeline within the Monongahela National Forest and 65% within the George Washington National Forest will be routed on ridgetops.[356] The Farwell Report also documents other forest interior songbird species that use ridge-associated habitat to breed, and states that ridge-associated habitat is used "in high concentrations by raptors and songbirds during spring and fall

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[353] *See* Lookingbill Report; Farwell Report; Bulluck Report.

[354] Appendix B to the ACP Final EIS, Update to the Migratory Bird Plan, at 21 (May 5, 2017) (hereinafter the "Migratory Bird Plan").

[355] *See* Draft EIS Comments at 117; Farwell Report at 10.

[356] ACP Final EIS at ES-5.

migration[.]"[357] is The final EIS also ignores evidence in the Farwell Report that species are migrating upward in elevation in response to the effects of climate change, providing no exploration of the effects of the construction and operation of the pipeline on this process.[358]

The final EIS states that "Atlantic identified 35 acres as the minimum size of interior forest habitat that would support most interior forest bird species (Robbins et al., 1989)."[359] There follows no scientific assessment or evaluation of this claim, and no cited support aside from the single cited article. The draft EIS made the same statement.[360] However, the Farwell Report rebutted the 35-acre claim, and the Commission's mischaracterization of the Robbins article, in detail.[361] In the words of Ms. Farwell, the use of a 35-acre patch-size threshold

> is a misrepresentation of the original citation; Robbins et al. (1989) do not advocate use of a 35 acre (14 ha[.]) forest patch-size as a minimum habitat requirement for forest interior birds. In fact, the authors repeatedly state that many forest interior birds require continuous forest blocks nearly an order of magnitude larger (>100 ha[.] / 247 acres).[362]

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[357] Farwell Report at 10 (citing scientific literature).

[358] *See* Draft EIS Comments at 118; Farwell Report at 10 (citing scientific literature); *see also* Final EIS, George Washington National Forest Plan at 3-77 ("The overwhelming majority of studies of regional climate effects on terrestrial species reveal consistent response to warming trends, including poleward and elevational range shifts of flora and fauna.").

[359] Final EIS at 4-189.

[360] Draft EIS at 4-165.

[361] *See* Farwell Report at 7-8.

[362] *Id*. at 7.

Ms. Farwell further notes that the habitat requirements of the 26 forest bird species evaluated by Robbins et al. (1989) range from 0.5 to 2,471 acres, "which underscores the fallacy of using a one-size-fits-all definition of forest interior habitat."[363] Thus, the continued uncritical acceptance in the final EIS of Atlantic's representation of the minimum habitat size requirement for "most" interior forest birds is unsupported by the scientific literature, and the final EIS failed to respond to or include the information provided by Ms. Farwell.

The final EIS also makes broad, unsupported statements about the lack of impacts to "common species,"[364] while failing to consider impacts to particular forest interior species experiencing rapid and range-wide declines. The Bulluck Report points out that the Cerulean Warbler "is one of the most rapidly declining migratory songbirds in the US" and that nearly one-third of its breeding range overlaps the Utica/Marcellus Shale regions, including one-half of the "core/high abundance areas of its breeding range[.]"[365] "The cumulative impacts of forest fragmentation in this region from future roads and pipelines will likely have significant impacts on these and other already declining forest dependent birds whose global populations rely on this region more than any other."[366] The final EIS fails to specifically address these declining species.

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[363] *Id*. at 8.

[364] *See* Final EIS at 5-17 ("We conclude that constructing and operating ACP and SHP would not significantly affect common wildlife species at range-wide population levels, although local populations could be negatively impacted and/or extirpated.")

[365] Bulluck Report at 3 (citations omitted).

[366] *Id*. (citations omitted).

3. The mitigation measures put forward in the final EIS and the Migratory Bird Plan do not address the impacts they purport to offset.

The final EIS and the Migratory Bird Plan put forth mitigation measures that fail to address the adverse impacts caused by the fragmentation of intact interior forests. Most fundamentally, the mitigation measures cannot address the full scope of adverse impacts because these impacts have not been fully disclosed or assessed by the final EIS. Furthermore, the mitigation measures put forward will not offset the harms being caused.

First, the Migratory Bird Plan claims that "[d]irect impacts on nesting birds are not anticipated due to the timing of construction activities" and that impacts to habitat will be temporary "as suitable habitat is available in areas adjacent to the right-of-way[.]"[367] As explained by Dr. Farwell, however, this assertion is "over-simplistic and unsupported by the literature[,]"[368]This view of the impacts to migratory birds ignores the impacts to the adjacent habitat of the fragmentation that will occur as a result of pipeline construction. This degradation in habitat quality and reduction in habitat area available to nesting forest interior migrant songbirds *will* have impacts on nesting birds. The time-of-year restrictions on construction will prevent the felling of trees containing active bird nests, but do not mitigate these other impacts.

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[367] Migratory Bird Plan at 17.

[368] Farwell Report at 9.

The Farwell Report additionally points out that "there are no proposed plans for pre-construction surveys of forest-interior [Birds of Conservation Concern], nor are there any plans for monitoring birds in impacted areas, post-construction."[369] The final EIS has not addressed the impacts of the pipeline on these species, and hence the Migratory Bird Plan does not address how to mitigate those impacts. Aside from raptor nests and winter roosts and wading bird rookery surveys, Atlantic has surveyed for only five avian species.[370] Two (Golden-Winged warbler and Loggerhead Shrike) prefer open and successional habitat; two (Northern Goshawk and Northern Saw-whet Owl) are raptors; one (Red-cockaded Woodpecker) inhabits pine savannas. Atlantic did not survey for a single forest interior songbird species along the route, nor did it consult publicly available data on bird occurrence and abundance, such as the North American Breeding Bird Survey.[371]

Second, the mitigation measures proposed in the final EIS and the Migratory Bird Plan will not remedy the impacts of fragmentation on interior forest communities. The discussion of mitigation in the final EIS includes restoration and rehabilitation of the construction corridor and operational right-of-way, limited mowing of the corridor, planting of native forbs, and other such measures.[372]

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[369] Farwell Report at 9.

[370] Migratory Bird Plan at 12.

[371] North American Breeding Bird Survey, Patuxent Wildlife Research Center, United States Geological Survey, https://www.pwrc.usgs.gov/bbs/.

[372] *See* Final EIS at 4-202.

However, the Virginia Forest Conservation Partnership concluded that "[w]hile some of these measures would yield some benefits, they would not offset the substantial indirect impacts *to interior forests*, including reduction in ecosystem services, resulting from construction of the ACP."[373]

The mitigation contained in the Migratory Bird Plan is also insufficient. The Plan claims that species such as Golden-winged Warbler and Loggerhead Shrike will benefit from open and successional habitat created by the pipeline corridor. As set out in the Bulluck Report, this assertion is subject to significant caveats.[374] Further, the assumption that the destruction and fragmentation of interior forest habitat is mitigated by the creation of edge and early successional habitat is "over-simplistic and fraught with issues."[375] These issues include the widespread population declines in forest interior species and the lack of such declines in edge species; the creation of a corridor by which predators and brood-parasitic Brown-headed Cowbirds may penetrate forests; biotic homogenization (replacement of habitat specialists with habitat generalists); loss of endemic species and ecosystem services they provide; and evidence that linear corridors "may comprise suboptimal habitat for many species (both forest and edge species), and may even

[373] VFCP Letter.

[374] Golden-winged Warblers in the southern Appalachians are restricted to elevations greater than or equal to 2,000 feet. Management to promote growth of native forbs and blackberry would be essential. Spraying with herbicides and/or regular mowing would render the habitat unsuitable for the species. "Other more common early successional species are more likely to benefit from the ACP and SHP such as Indigo Bunting and White-eyed Vireo." Bulluck Report at 3.

[375] Farwell Report at 6 (cautioning against viewing the exchange of forest interior species for edge species as "some sort of fair biological trade-off[.]").

function as ecological traps . . .[which] develop when natural cues that provide information about habitat quality become disconnected from reality[.]"[376]

The Migratory Bird Plan also states that Atlantic has acquired 2,820 forested acres "to be preserved across the project," and that these acquisitions "are intended to mitigate for adverse impacts (e.g., habitat loss) occurring on state/commonwealth-owned lands and will also offset habitat fragmentation impacts resulting from the ACP."[377] No analysis is presented demonstrating how these acquisitions offset habitat fragmentation and habitat loss impacts. For example, the Plan does not include a comparison of the habitat type and quality of the affected forests and the mitigation forests and does not indicate whether the mitigation forests are intact interior forests inhabited by the species of interior forest migrant songbirds being adversely impacted by the Atlantic Coast Pipeline. In addition, these properties were acquired purportedly to mitigate for impacts to forests on state-owned lands, not forests on federal or private lands. Finally, even if the habitat types and quality are comparable, the mere conservation of other forested lands does not "offset" the adverse impacts to forests along the pipeline route. In light of these problems, it is clear that state officials are correct in stating that the mitigation measures discussed in the final EIS and the Migratory Bird

[376] *Id*., citing and summarizing scientific literature.

[377] Migratory Bird Plan at 33.

Plan "would not offset the substantial indirect impacts *to interior forests*,"[378,379] including the migrant songbirds that depend on them.

H. The Commission Violated NEPA by Conducting an Arbitrary Demographic Analysis and Failing to Take a Hard Look at the Adverse Effects of the Atlantic Coast Pipeline on Environmental Justice Communities.

In the Certificate, as in the Final EIS, the Commission ignored critical flaws in its demographic analysis—flaws that rendered the entire environmental justice review arbitrary and capricious. As a result, the Commission failed to take a hard look at the harmful effects and enhanced risk the ACP imposes on low-income communities, communities of color, and American Indian tribes ("environmental justice communities"). When federal agencies fail to consider adequately how their decisions can harm these vulnerable, already over-burdened populations, the central goal of NEPA is thwarted. In the four pages of the Final EIS and in the cursory five paragraphs of the Certificate devoted to environmental justice concerns and demographic data, the Commission did not take a hard look at how pipeline construction and operation will degrade the "healthful environment" or cause disproportionate risks for environmental justice communities near the pipeline's route and its industrial infrastructure.

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[378] *Id*. (emphasis in original).

[379] We also agree in principle with VFCP that a "different ratio of mitigation acres to impact acres should be identified for each mitigation activity to ensure that an ACP forest mitigation program results in effective conservation benefits. Also, separate mitigation ratios should be developed to specifically account for the impacts to C1 and C2 cores; C3, C4 and C5 cores; and non-core forest blocks intersected by the pipeline and associated infrastructure."

As an initial matter, the Commission is wrong to assert that it does not need to comply with Executive Order 12898.[380] The Commission assumed the responsibility for conducting an environmental justice review in the final EIS, and will be held accountable to the same standards as any other federal agency.[381] Those standards are set forth in the Council on Environmental Quality's Environmental Justice Guidelines.[382] Federal agencies are required to consider whether their actions will have environmental impacts that disproportionately burden or jeopardize minority populations, low-income communities, and Native Americans.[383] The Commission failed to do so here.

By ignoring the well-documented flaws in its demographic analysis and environmental justice review, the Commission's Certificate is arbitrary and capricious and should be reconsidered.

1. **In neither the Final EIS nor the Certificate does the Commission address the critical flaws in the demographic analysis that underpinned its environmental justice review.**

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[380] Certificate, p. 99, para. 253. In addition to the obligations imposed by Executive Order 12898, the Commission has a duty to make sure its permitting decisions comport with the standards of the Equal Protection Clause as incorporated into the Constitution's Fifth Amendment and do not disproportionately harm communities of color and American Indians. *Weinberger v. Salfi*, 422 U.S. 749, 769 (1975)

[381] *Communities Against Runaway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (once the FAA exercised its discretion to include environmental justice as a consideration in its NEPA evaluation, its analysis was reviewable under the APA standard, irrespective of its contention that it was not bound by Executive Order 12898).

[382] Council on Environmental Quality, Environmental Justice Guidance under the National Environmental Policy Act (1997), https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.

[383] Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (Feb. 16, 1994), https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice.

In written comments on the Draft Environmental Impact Statement, Intervenors and others demonstrated critical errors in the Commission's demographic analysis and environmental justice review.[384] Those objections were not addressed in the Final EIS or the Certificate. Intervenors and other parties have submitted detailed information to the Commission showing that the Atlantic Coast Pipeline in general and the Buckingham compressor station in particular will have a disproportionately high and detrimental effect on environmental justice communities.

As discussed in Intervenors' comments on the draft EIS, the Commission should have provided more refined proximity analyses for those communities most affected by the pipeline, particularly for those near compressor stations, valve sites, metering and regulation stations, and pig launcher/receiver sites. Such sites are more prone to releases of methane and other harmful pollutants than the pipeline as a whole. Without more granular data about who lives close to these permanent, above-ground pieces of pipeline infrastructure, the Commission lacked the information necessary to complete an environmental justice analysis of the pipeline.

In comments on the draft EIS, Intervenors pointed out several examples where census block groups—smaller geographic units—that are directly in or closest to

[384] Intervenors were not alone. Joint Comments by Public Interest Groups on Draft Environmental Impact Statement, footnote 106 (April 5, 2017) (citing Allpress, J., Hofmann, J., Wraight, S., Depro, B., *U.S. Census Socioeconomic Data, Environmental Justice, The Atlantic Coast Pipeline: A Methods Report*. (2017)). (eLibrary No. 20170405-5307).

the pipeline route have significantly larger percentages of racial or ethnic minorities or people living in poverty than the broader census tract. The Commission did not address this critique in its final EIS or Certificate. The Commission's arbitrary choice to consider only census tract data, when more granular data were available, disguised the more direct and localized impacts felt by those communities closest to the pipeline and its infrastructure.

a. The Commission's decision to compare census tract data only to its parent county or city was arbitrary and capricious

By the same token, the Commission's decision to limit comparisons of the demographics of the affected census tracts only to the counties where those tracts are located—rather than to the state or region—masks the disproportionate impacts of this major industrial project. Federal environmental justice guidance for the NEPA process does not limit the Commission to such a narrow interpretation of an environmental justice community. Instead, the Commission can consider whether "the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the *general population* or *other appropriate unit of geographic analysis*," such as the state as a whole.[385] Even after being presented with critiques in its methodology, the Commission provided no explanation for its decision to limit its comparison of census tracts only to the county where those tracts are located. Since the pipeline would traverse counties and cities with higher than average minority populations,

[385] CEQ, Environmental Justice NEPA Guidance at 25 (emphasis added).

the Commission's limited comparison is too narrow to provide any useful information, and is therefore arbitrary.

b. The Commission's decision to lump all minority communities into one category caused it to overlook affected environmental justice communities

In its demographic analysis, the draft EIS lumps all "minorities" together when determining whether environmental justice concerns are present in a given census tract. This approach masked the impacts the pipeline would have on particular racial or ethnic groups. For example, the Commission concluded that there were no environmental justice concerns regarding potential effects on "minorities" in census tract 113 or 114 of Nash County, North Carolina, even though the Latino population in each of those tracts—23.6 and 24.6 percent, respectively—is about three times the statewide percentage and four times the county percentage. Under the Commission's own methodology, such Latino populations should have been designated as meaningfully greater than the county as a whole, because the population is "at least 20 percentage points more than in the comparison group."[386] The choice to group all minorities together is unsound and arbitrarily omitted census tracts that should have received more attention in a reasoned environmental justice review.

c. The Commission arbitrarily ignored the disproportionate effects that the ACP would have on State -recognized Indian tribes

[386] Final EIS at 4-512.

The final EIS did not consider the disproportionate impacts of pipeline construction, operation, and maintenance on State -recognized American Indian tribes. The Lumbee Tribe in particular would face disproportionate impacts from the pipeline. Over half of the census tracts affected by the pipeline in Robeson County, North Carolina, are over 50 percent Native American, and some are over 80 percent—a far higher percentage than in the county or state as a whole. Other native groups recognized by North Carolina will also be affected, including the Coharie and Haliwa-Saponi. In Virginia, the pipeline would threaten several groups recognized by the Commonwealth: the Monacan, Chickahominy, Eastern Chickahominy, Nansemond, and Nottoway nations.

The Indigenous Peoples Subcommittee of the National Environmental Justice Advisory Council issued guidance on consultation and collaboration with non-federal tribes:

> Although such groups lack recognition as sovereigns, they may have environmental and public health concerns that are different from other groups or from the general public…. Agencies should seek to identify such groups and to include them in the decision-making processes.[387]

The Commission made no effort to do so here. Further study and consultation with the Haliwa-Saponi and other State-recognized tribes must be undertaken

[387] *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*, National Environmental Justice Advisory Council's Indigenous Peoples Subcommittee Committee (2000), https://www.epa.gov/sites/production/files/2015-03/documents/ips-consultation-guide_0.pdf.

before the Commission will be in a position to satisfy its obligations to Native Americans who live along and near the pipeline route.

d. The Commission arbitrarily failed to make use of the limited data it did compile.

The Commission not only used overly broad data, arbitrarily narrow comparisons, and aggregated minority population data, it failed to weigh the importance of the data it did compile. Of the 105 census tracts within a mile of the Atlantic Coast Pipeline that are listed in final EIS within Virginia and North Carolina, 67 of those—64 percent of the total—are flagged for potential environmental justice concerns. In some instances, every single census tract identified in a particular county is flagged for potential environmental justice concerns because of significantly larger percentages of minority or impoverished communities (or both) within one mile of the pipeline route. But at no point in the final EIS or the Certificate does the Commission consider the environmental injustice of allowing a massive, new industrial project to cut through so many communities with high percentages of low-income families, people of color, and American Indians.

The high incidence of "environmental justice populations" along the pipeline route is a result of Atlantic's decision to traverse regions of Eastern North Carolina and Tidewater Virginia that are among the most ethnically and racially diverse and among the poorest regions in their respective states. The entire region will experience additional, compounding burdens as a result of this decision to

route the pipeline through communities that are already vulnerable. Atlantic and other utilities plan to build connector lines to the transmission pipeline that serve new, proposed gas plants and other industrial facilities that the utilities plan to build in this region.[388] The environmental justice implications of those other connections and facilities were not fully considered in the final EIS.[389]

e. The Commission did not consider the disproportionate exposure to risk of catastrophic accident along the pipeline route that environmental justice communities will face.

Concerns about environmental justice are not restricted to disturbances from construction and maintenance along the route, or to methane leaks or other emissions from the pipeline (which are explored in more detail below). A hard look at environmental justice is required because of the risk of catastrophic accidents that are inherent in this kind of transmission pipeline. The Commission failed to consider, as it was required to do, "[w]hether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group."[390]

The entire pipeline route, including the compressor stations, creates a risk of hazard exposure for those who live near the pipeline that appreciably exceeds the

[388] Final EIS at 4-596 to 4-600, Appendix W, Table W-1.

[389] Final EIS at 4-591 to 4-623 (no analysis of environmental justice concerns in cumulative impact analysis).

[390] CEQ, Environmental Justice NEPA Guidance at 26.

general population. Gas explodes. Accidents may be rare, but when they occur, they can be deadly. For the 20 years from 1997 through 2016, Pipeline and Hazardous Materials Safety Administration recorded 1,719 incidents (averaging 114 incidents a year for the last 10 years) on onshore gas transmission pipelines, with 48 fatalities and 179 injuries.[391] Since 2005, 166 people—both members of the public and industry workers—have been killed and 721 have been injured in serious pipeline incidents from all types of gas pipelines.[392] Intervenors provided some examples of deadly or dangerous accidents involving gas transmission pipelines in their comments on the drat EIS.

In its consideration of possible risk from earthquakes, the Commission failed to acknowledge earthquakes from 2017 that were centered in Buckingham County, the same place where Atlantic proposes constructing the sole Virginia compressor station.[393] Two magnitude 2.3 earthquakes have been recorded in Buckingham since March 22. These earthquakes could be connected to the new fault zone identified by geologists in the wake of the magnitude 5.8 earthquake in August of 2011 that caused significant damage in Virginia and indicate a higher degree of

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[391] U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA), Serious Incidents, https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends.

[392] *Id.*

[393] *Small Earthquake Reported in Buckingham County*, Fauquier Times (Aug. 3, 2017), http://www.fauquier.com/news/small-earthquake-reported-in-buckingham-county/article_6b06ade2-785b-11e7-9eb3-9374f9d48286.html.

risk from seismic activity on the pipeline and the Buckingham compressor station than considered by the Commission.

Additional analysis has demonstrated that the potential blast zone for a pipeline of this size, under the amounts of pressure set forth in the final EIS, would be larger than considered by the Company. The "Potential Impact Radius," also referred to as a "blast zone" or "incineration zone," is the area within which there is a reasonable risk of incineration in the event of a pipeline accident. This updated blast zone was calculated by Clean Water for North Carolina, using a formula developed by C-Fer Technologies.[394] Under this methodology, the blast zone extends at least 943 feet from the pipeline, about 43 percent greater than the 660-foot radius assumed by the Company.[395] This study demonstrates the critical importance of performing a more localized demographic analysis in order to assess whether environmental justice communities who live along and near the pipeline route face disproportionate risk of death or catastrophic loss in the event of a pipeline accident. For example, the town of Garysburg, North Carolina, which is approximately 95 percent African American[396], lies just west of the pipeline route, and includes residential neighborhoods that would be in the blast zone in the event of an accident.

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[394] Mark J. Stephens, *A Model for Sizing High Consequence Areas Associated with Natural Gas Pipelines*, C-FER Technologies, Edmonton, Alberta T6N 1H.

[395] Oshin Paranjape, Hope Taylor, and Ericka Faircloth, *High Consequence Areas, Blast Zones and Public Safety along the Atlantic Coast Pipeline*, Clean Water for North Carolina (Sept. 2017), https://cwfnc.org/documents/Updated-Report-High-Consequence-Areas-Blast-Zones-Public-Safety-along-the-ACP-10-2-2017.pdf.

[396] Census Viewer, Garysburg, North Carolina, http://censusviewer.com/city/NC/Garysburg/2010.

Though Atlantic has said that it will comply with Department of Transportation safety requirements,[397] those safeguards have proven insufficient to prevent catastrophic accidents in gas transmission pipelines in the past. Nor did the Commission consider the disproportionate risk that communities of color and low-income communities face as a result of the pipeline route.[398] Rural residential communities along the ACP route may face greater risks of future accidents because federal regulations allow for different standards for pipelines in these "class 1" areas.[399] Without a more refined demographic analysis of the communities who live closest to the pipeline in those rural areas, the Commission lacked any reasoned way of assessing whether communities of color or low-income communities are at greater risk of harm from any possible accidents.

2. The Commission's faulty conclusions about the Buckingham compressor station exemplify its inadequate analysis.

When purporting to respond to criticism of its approach in the final EIS with regard to Compressor Station 2 in Buckingham County, Virginia, the Commission considered the "three census tracts within one mile" of the industrial facility and concluded that "*none* of the tracts were designated as minority environmental justice populations."[400]

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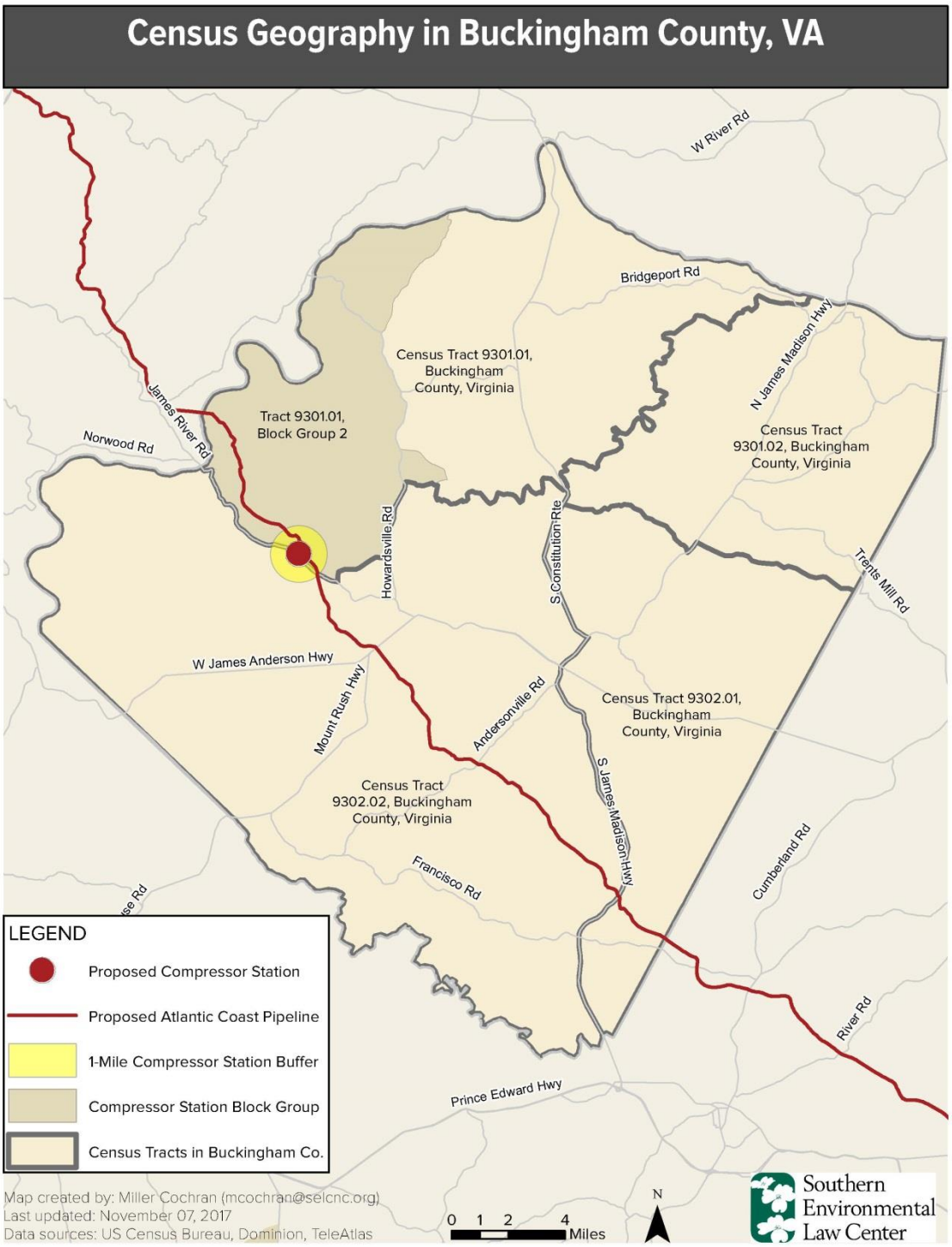
[397] Final EIS at 4-577 to 4-590 (discussion of pipeline safety issues does not consider disproportionate risk to environmental justice communities).

[398] *Id.*

[399] 49 CFR § 192.5; Final EIS at 4-578 to 4-579.

[400] Certificate, p. 100, para. 255 (citing EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses (April 1998)) (emphasis in original).

First, the Commission is simply wrong about the number of census tracts within one mile of the Buckingham compressor station.



As shown in the map, there are only two census tracts within one mile of Compressor Station 2 within Buckingham County (tract 9301.01 and tract 9302.02). The Certificate repeats incorrect information from the final EIS.[401] Because its analysis was based on a factual error, its conclusions are arbitrary and capricious.

Second, the Commission's conclusion that none of the three tracts it identified could be "designated" as "minority environmental justice populations" cannot be supported by the record. It is only by comparing the minority population of the three tracts to the overall minority population of Buckingham County that the Commission can come to this skewed conclusion. As noted above, this kind of comparison intentionally masks the disproportionate burdens, risks, and health effects from the ACP because so much of the designated route goes through counties that already have higher than average environmental justice populations.

There are only four census tracts in the whole of Buckingham County. It is thus not surprising that the three tracts within one mile of the pipeline route (or the two within one mile of Compressor Station 2) would share demographic characteristics with the county as a whole. After all, those three tracts make up about 84 percent of the total population of Buckingham County.[402] In contrast, the African American populations of the three tracts considered by the Commission

[401] Final EIS at 4-513.

[402] *Id.* at Appendix U, p. U-2 (Vol. III, Part 2, p. 233) (the 14,393 people in the three census tracts considered by the Commission make up 84.3 percent of the total population of the county listed in the final EIS, 17, 072).

are higher than the statewide average. The pipeline traverses through census tracts that have significantly higher percentages of African Americans than the Commonwealth as a whole.[403]

Looking more closely at the census block group where Compressor Station 2 would be built helps to illustrate the flaw in looking only at artificially limited census tract data. Among the 1,080 people who live closest to the proposed compressor station in Buckingham County, 33.1 percent are African American, a much higher concentration than in the state's population as a whole. But as documented by Friends of Buckingham in Intervenors' comments on the draft EIS, the population that will bear the brunt of the pollution from Compressor Station 2 in Buckingham County—those within a mile radius of the facility—live in the Union Hill community. Surveys conducted by Friends of Buckingham reached at least two-thirds of the households in this community, and documented that 85 percent of the households surveyed are African American or biracial. As set forth in more detail below, the harmful effects from air pollution are felt most acutely by those who live closest to or immediately downwind from a polluting facility. Thus, it was unreasonable for the Commission to ignore this evidence and instead consider only demographic information from three census tracts in Buckingham County.

[403] The census tracts within Buckingham County within one mile of the ACP are 27.9, 42.7, and 23.7 percent African American whereas the Commonwealth is 19.3 percent African American.

Though most pronounced for Compressor Stations 2 and 3, this fundamental error tainted the entire demographic analysis at the heart of the Commission's environmental justice review. By comparing the minority population of a census tract only with the demographics of the county where that tract is located, the Commission concealed the disproportionate harms and risks that the project has on environmental justice communities along the entire route.

The flaw in the Commission's methodology is clear from the following hypothetical example. Imagine that the Commission is faced with an application to construct a gas pipeline that straddles two states and that would include a compressor station in one of those states. In this example, the overall population of the state with the proposed compressor station is 90 percent white, eight percent African American, and two percent Native American. The compressor station in that state is to be sited in a county with a population that is 55 percent white, 30 percent African American, and 15 percent Native American. Under this hypothetical, the census tract where the compressor station would be built is similar to that county's demographics as a whole—51 percent white, 35 percent African American, and 14 percent Native American.

Under the Commission's unreasonable methodology, the census tract with the hypothetical compressor station would not be "designated" as containing "minority environmental justice populations." The Commission reviews the demographic information from a census tract and compares that population with the county where that tract is located. As long as the racial "minority" population

is less than 50 percent of the total and not "meaningfully" greater the county as a whole, it is not designated as containing a minority environmental justice population.[404] This faulty conclusion would be made in the above hypothetical even though the African American population is over four times higher than the state average and the Native American population is seven times higher than the state average.[405] Because the county's population has disproportionately high African American and Native American populations, the comparison to the census tract with the proposed compressor station does not trigger any additional scrutiny. But if the census tract's demographics are instead compared to the state as a whole, the risks of disproportionate harm to communities of color are conspicuous.

To take the example further, imagine the Commission is informed during the NEPA process that the neighborhood immediately surrounding the proposed compressor station—the people who will be most harmed by the pollution from the industrial facility—is 85 percent African American. Again, under the Commission's flawed demographic analysis, no "minority environmental justice populations" would appear from its review.

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[404] Final EIS at 4-512.

[405] For reasons that are not explained, the Commission arbitrarily used a different methodology when determining whether a "low-income" population exists in any given census tract along the pipeline route. When evaluating this factor, the Commission compared the percentage of the population of a census tract with the state's poverty level, rather than just comparing it to the county where the tract is located. *Id.* This disparate approach between evaluating potential effects on low-income communities versus racial or ethnic minority communities is arbitrary and capricious.

The direct impacts of pipeline construction and maintenance and the potential risk of catastrophic pipeline failure will be felt most directly by those closest to the pipeline. The Commission's arbitrary demographic analysis results in missing environmental justice concerns along much of the route through Virginia and North Carolina.

3. The Commission acknowledged the harmful health effects from expected air pollution at the compressor stations, but arbitrarily failed to consider the environmental injustice of that pollution.

Despite mentioning environmental justice in broad terms in the final EIS and Certificate, the Commission does not address the particular environmental justice concerns relating to the most polluting pipeline infrastructure—compressor stations. The compressor stations in both Virginia and North Carolina have been slated for predominantly African American communities in both states. In the final EIS, when reviewing the Buckingham compressor station, the Commission failed to consider population characteristics, cultural resources, and community environmental impacts of locating Virginia's ACP compressor station in a majority African American, Freedmen descendant community.

As set forth above, the Commission failed to consider the particular demographics of those who live closest to proposed Compressor Station 2 in Buckingham County, Virginia. The same is true for Compressor Station 3 in Northampton County, North Carolina. The census tract closest to the proposed Northampton County compressor station covers about 190 square miles and is home to about 6,180 people. That census tract is approximately 75 percent

African American, a much higher percentage than the African American population in the state as a whole, which is about 22 percent. The harmful pollution from that compressor station, however, will be most intense for those who live in the areas closest to and downwind of the compressor station.

Yet the draft EIS offers no information about the people or communities who live closest to that compressor station.[406] The Northampton compressor station is within census block group 6 (a subset of census tract 9203). Within that census block group, 79.2 percent are African American. But even this narrower subset of the population does not reveal who neighbors the proposed compressor station. Without that information, no meaningful environmental justice review was completed.

A survey conducted by Friends of Buckingham reached approximately two-thirds of the homes in the Union Hill community and discovered that over 85 percent of those residents reached who live closest to the Buckingham compressor station are African American or biracial. The community surrounding the Buckingham compressor station is more densely populated than the county is on average. It was unreasonable for the Commission to only consider the county's average population density of 29.6 people per square mile when considering the possible harmful effects of this polluting facility.[407] In addition to finding that the

[406] Demographics Near the Proposed Northampton Compressor Station, included as an attachment to Comments of Shenandoah Valley Network and Comments of Appalachian Mountain Advocates.

[407] Final EIS at 4-485.

compressor station will have a racially disproportionate impact, this survey found many instances of respiratory ailments that would likely be exacerbated by the construction and operation of the compressor station in such close proximity to their neighborhood. Many elderly residents report suffering from chronic respiratory ailments such as asthma, Chronic Obstructive Pulmonary Disease (COPD), bronchitis, allergies, and other unspecified heart and lung ailments. In addition, many of these residents report high blood pressure, heart disease, diabetes, and other ailments that would make them particularly susceptible to the pollution of the compressor station. A number of children were reported to suffer from asthma and other chronic lung diseases as well.

Multiple studies have found that African Americans are more than twice as likely as white Americans to live near sources of harmful air pollution and have suffered disproportionately from respiratory sickness as a result.[408] Putting the compressor station in this predominately African American community will compound this legacy of concentrating environmental harms in poorer communities and communities of color. One of the chief reasons for Executive Order 12898 and federal environmental justice review are to identify vulnerable

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[408] Gamble, J.L., *et al.*, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*. Ch. 9: Populations of Concern, U.S. Global Change Research Program, Washington, DC (2016). http://dx.doi.org/10.7930/J0Q81B0T (citing Frumkin, *Urban sprawl and public health*. Public Health Reports, pp. 117, 201-217 (2002)); Robert Bullard, *et al.*, *Toxic Wastes and Race at Twenty: Why Race Still Matters After all of These Years*, 38 Environmental Law 371, 379 (2007) (citing David Pace, *More Blacks Live with Pollution*, Associated Press (2005) (noting that most pollution inequities result from historical land use decisions that were based on racial segregation and the prevalence of regulators focusing on one plant or one pollutant without regard to the potential cumulative impact of multiple sources of pollutants).

populations who are at risk of disproportionate and cumulative harm from polluting facilities.

The Commission made no effort to do so here. It failed to identify the community that would be directly harmed by the compressor station. There is also no information about the prevailing winds, which would indicate which communities are most at risk from pollution from the compressor station. Without a more robust analysis of the people directly affected by the compressor station, the Commission does not have the information it needs to conduct an environmental justice review.

Intervenors and others have submitted substantial evidence that the Buckingham compressor station will have a disproportionately high and adverse effect on the health of the predominantly African American community that lives close to the site. The Commission's conclusion that there would be no increased health risks from the operation of this compressor station is unsupported and simply no credible.

The gas turbines for the Buckingham compressor station would run nearly continuously throughout the year to maintain pressure in the Atlantic Coast and existing Transco Pipelines. According to the final EIS, operating the Buckingham Compressor Station will result in the emission of an *additional* 11.7 micrograms per cubic meter of air volume (μg/m3) of fine particulate matter ($PM_{2.5}$) in a 24-hour period. When combined with the existing background particulate pollution, these gas-fired turbines would result in mean concentrations of 28.7 μg/m3 in a

24-hour period. The Commission found that this level of exposure is below the National Ambient Air Quality Standard of 35 μg/m3 (24-hour), and thus concluded that there will be no health impacts to the surrounding community.[409]

The final EIS projects a *40-percent increase* in $PM_{2.5}$ exposure in a 24-hour period from the Buckingham compressor station—a significant level of increased exposure to a dangerous category of pollutants. This increased pollution is above the World Health Organization's threshold of 25 μg/m3 in a 24- hour period and almost to the limit of its threshold for annual mean concentrations. [410] At these levels, long-term exposure can cause an increase in mortality and increased serious health problems, such as respiratory ailments and cardiovascular disease, as set forth in more detail below.[411] Even short-term exposure can cause health problems, particularly in sensitive populations like those with respiratory problems or heart disease—like many of those who live near the proposed compressor station.[412]

The Buckingham Compressor Station would also dramatically increase nitrogen dioxide (NO_2) pollution, both a harmful pollutant in its own right and a

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[409] Final EIS at 4-559 to 4-561.

[410] World Health Organization, Fact sheet: Ambient (outdoor) air quality and health (Sept. 2016), http://www.who.int/mediacentre/factsheets/fs313/en/ ("WHO Fact Sheet") ("There is a close, quantitative relationship between exposure to high concentrations of small particulates (PM_{10} and $PM_{2.5}$) and increased mortality or morbidity, both daily and over time.").

[411] Frank J. Kelly and Julia C. Fussell, *Air Pollution and Public Health: Emerging Hazards and Improved Understanding of Risk*, Environ Geochem Health, Vol. 37(4) 631–649 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4516868/.

[412] *Id.*

key precursor to particulate pollution and ozone (also known as smog).[413] The additional NO_2 pollution generated by the compressor station in a 24-hour period would represent an increase of 54.5 percent over the existing background NO_2 pollution. The likely resulting increase in ozone pollution on sunny, warm days will be particularly hard on those residents who already suffer from respiratory diseases.

The Commission collected no information about preexisting health conditions of the many people who live close to the proposed compressor station and thus have no basis for its conclusion that the reported increased pollution will not affect the health of those who live nearby. The Commission acknowledged that African Americans, on average, suffer asthma at higher rates than the general population and may be more susceptible to increases in air pollution from construction and operation of the ACP. "'African Americans have one of the highest rates of current asthma compared to other racial/ethnic groups'" and that "[p]revalence [of asthma] in children is highest in African Americans when compared to other racial/ethnic groups."[414] In addition, the Commission recognized the general danger of air pollution from the ACP and its attendant compressor stations:

> air pollutants associated with ACP…include increased dust as a result of construction equipment and vehicles, and compressor station emissions, which include

[413] U.S. EPA, Fact Sheet: Final Revisions to the National Ambient Air Quality Standards for Ozone (2008), https://www.epa.gov/sites/production/files/2015-08/documents/ozone_fact_sheet.pdf.

[414] Final EIS at 4-513 (quoting American Lung Association, 2010) and 4-514 (citing Center for Disease Control and Prevention, 2013).

> carbon monoxide (CO), carbon dioxide (CO2), methane, and nitrous oxide (NOx); volatile organic compounds (VOCs); and particulate matter with an aerodynamic diameter less than or equal to 2.5 microns (PM2.5). These air pollutants are known to increase the effects of asthma and may increase the risk of lung cancer.[415]

But because of the flawed and incomplete demographic analysis, the Commission failed to recognize how these harms will fall disproportionately on African-American communities and low-income communities, particularly those near the Buckingham and Northampton compressor stations.

There is no evidence of a safe level of exposure for ozone or fine-particle pollutants, and both have adverse health effects, even at levels below the current National Ambient Air Quality Standards (NAAQS).[416] Thus, the Commission's reliance only on those standards in its final EIS and Certificate is unreasonable.[417] In addition, the Commission had an independent obligation to assess the environmental and human health effects from pollution from the proposed compressor stations. That analysis should consider the characteristics of those who live near the source of the pollution and who will be at most risk of exposure

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[415] Final EIS at 4-513 to 514.

[416] *See Am. Trucking Ass'ns., Inc. v. EPA*, 283 F.3d 355, 360 (D.C. Cir. 2002) (internal quotation marks and alterations omitted) (recognizing the "lack of a threshold concentration below which [particulate matter and ozone] are known to be harmless"); EPA, *NAAQS for Particulate Matter*, 78 Fed. Reg. 3,086, 3,098 (Jan. 15, 2013) (explaining that there is "no population threshold, below which it can be concluded with confidence that $PM_{2.5}$ related effects do not occur").

[417] Final EIS at 4-514.

to it.[418] Finally, whether a new source of air pollution can obtain a permit is not the same as weighing what adverse health effects a new facility will cause.[419]

In addition, the Commission evaluated background air pollution by considering monitoring stations that are not close to the planned compressor stations.[420] For example, for background levels of NO_2 at the Buckingham compressor station, the Commission relied on modeling that considered concentrations at Roanoke (about 75 miles away) and Harrisonburg (over 85 miles away). Similarly, when establishing background levels for $PM_{2.5}$ at the Northampton compressor station, the Commission looked to Richmond (about 70 miles away). This methodology provides little assurance that the Commission has any idea of whether the communities close to the proposed compressor stations will actually be exposed to compounding, harmful air pollution from other nearby sources. For example, in Northampton County, the proposed compressor station is located near major sources of air pollution, including a wood pellet plant, Georgia-Pacific lumber processing facility, and another compressor station, one that operates under a Title V permit.

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[418] *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (holding that a federal agency fails to take a hard look when it "defers to the scrutiny of others.")

[419] *Calvert Cliff's Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971); *U.S. WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation, and Enf't,* 104 F. Supp. 3d 1208, 1227-28 (D. Colo. 2015) (rejecting argument that coal mine's compliance with Clean Air Act exempts the mine from review for significant effects to the environment under NEPA).

[420] Final EIS at 4-560.

4. The Commission failed to consider cultural resources in an historic African-American community threatened with a new, polluting compressor station.

In preparing the final EIS and before issuing a Certificate, the Commission was required to consider impacts not just on the environment, but on related social and cultural aspects of the community as well.[421]

The Commission gave such consideration to a predominantly white area in neighboring Nelson County—the Norwood-Wingina Rural Historic District. That census tract is approximately 80 percent white, and only about 18.5 percent African American.[422] When the Norwood-Wingina community raised concerns about the ACP's route, the Company planned alternative routes to avoid their historic district. The final EIS noted that, following comments, the Company rerouted the pipeline to avoid the Norwood-Wingina Rural Historic District so that there would be no effects on cultural resources there.[423] The census tract (Nelson County, CT 9501) where the Norwood-Wingina Rural Historic District is located is less racially diverse than the Commonwealth as a whole.

In stark contrast, Union Hill contains a historic African American community that is being considered for Historic District status by the Department of Historic Resources of the Commonwealth of Virginia. Preservation Virginia listed it as a

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[421] 40 C.F.R. § 1508.14.

[422] U.S. Census Bureau, 2010-2014 American Community Survey 5-Year Estimates, Data Set S1701, https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml.

[423] Final EIS at 4-527.

"Most Endangered Historic Place" in May 2016.[424] Many of the African American members of this community trace their heritage back to the Freedmen who settled this area following emancipation after the Civil War.

Yet when summarizing comments received about impacts on historic districts and related cultural resources, the final EIS makes no mention of the Union Hill area, which contains a historically significant African American community.[425]

The Commission's conclusion that the Buckingham compressor station would be "consistent with the existing visual conditions in the area" is not accurate and not supported by the record.[426] This industrial facility is instead located in a largely residential, historic, and agricultural community that is ill-suited to an industrial compressor station.[427]

The Commission's failure to recognize the Union Hill community and its historical significance runs counter to federal guidelines for incorporating environmental justice in the NEPA process: "[a]gencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action."[428] These concerns were voiced in comments on the draft EIS and remain

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[424] *2016 Virginia's Most Endangered Historic Places*, Preservation Virginia (May 3, 2016), https://preservationvirginia.org/press-room/release/2016-virginias-most-endangered-historic-places.

[425] Final EIS at 4-518 to 4-529.

[426] *Id.* at 4-422.

[427] *See* Comments of Shenandoah Valley Network at 257-305; Comments of Appalachian Mountain Advocates at 271-319.

[428] CEQ, Environmental Justice NEPA Guidance at 9.

unaddressed. In order to comply with its environmental justice obligations, the Commission needs to gather and consider additional information about the historic and cultural factors that define the Union Hill area.

5. The final EIS alternatives analysis made no reference to environmental justice or demographics.

The Commission's alternatives analysis completely ignored environmental justice concerns. At no point did the Commission consider whether any proposed alternatives would have a greater or lesser impact on environmental justice communities.

The Commission considered and rejected only one alternative location for Compressor Station 2, approximately two miles southwest of the proposed Buckingham compressor station.[429] The Commission had *no* demographic information for the area surrounding the sole alternative site for Compressor Station 2. Without such information, and without any meaningful proximity analysis regarding the communities that would be most affected, the Commission lacked the information it needed to assess the environmental justice implications of the alternative site. Instead, the Commission only considered that the alternative site would "require additional pipeline and would increase the construction footprint." There is *no* information about whether the alternative or preferred site would further harm already over-burdened communities.

[429] Final EIS at 3-58.

The same was true when the Commission considered whether electric motors rather than gas turbines for the compressor stations would confer a net benefit in improved air quality, and concluded they would not. However, it failed to consider whether the gas-fired turbines at the Buckingham and Northampton compressor stations would create hotspots of localized air pollution that could be harmful to the health of low-income and African-American communities.[430]

The Commission recited its obligations under NEPA to "'identify the reasonable alternatives to the contemplated action' and 'look hard at the environmental effects of [its] decision[ ].'"[431] But it failed in its obligation to consider alternatives that would lessen the pipeline's disproportionate effects on environmental justice communities.

6. Conclusion

CEQ's NEPA guidance cautions that identifying a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe "should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population."[432] The final EIS and Certificate reveal that the Commission ignored these fundamental

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[430] Final EIS at 3-60.

[431] Certificate, p. 127 (citing *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000) (quoting *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C.Cir.1999)).

[432] CEQ, Environmental Justice NEPA Guidance at 10.

concerns for environmental justice. Given the skewed selection of data for evaluation and comparison, and given its insufficient attention to potential environmental health and cultural concerns of environmental justice communities in the final EIS, the Commission should reconsider its Certificate, acquire additional demographic information, and complete a valid environmental justice review.

I. The EIS Assessment of the Project's Air and Water Quality Impacts from NOx Emissions is Inadequate.

The EIS failed adequately to assess the impacts from the project's air emissions to air and water quality.

The project will be routed almost entirely within the Chesapeake Bay airshed.[433] Accordingly, nitrogen oxide (NO_x) emissions from the project will impact the Bay and Bay tributaries. In 2010, the Environmental Protection Agency issued the Chesapeake Bay TMDL which, along with state watershed implementation plans, comprises the regional blueprint for restoring the Bay and its tributaries to water quality standards; as part of that process, the Chesapeake Bay Program identified atmospheric deposition of nitrogen as the highest nitrogen input load to the Chesapeake Bay watershed.[434] Atmospheric nitrogen comes from nitrogen oxides (NO_x) and ammonia (NH3). The principle sources of NO_x are air

[433] Emma Andrews, *Map: Chesapeake Bay Airshed*, CHESAPEAKE BAY PROGRAM (Feb. 7, 2008), https://www.chesapeakebay.net/what/maps/chesapeake_bay_airshed.

[434] Chesapeake Bay TMDL, App'x L: Setting the Chesapeake Bay Atmospheric Nitrogen Deposition Allocations, L-1 (2010), https://www.epa.gov/sites/production/files/2015-02/documents/appendix_l_atmos_n_deposition_allocations_final.pdf.

emissions from industrial-sized boilers and internal combustion engines, such as the engines that will be used at the Project's compressor stations.[435] In addition to nitrogen deposition to waterways, NO_x can combine with volatile organic compounds (VOCs) in sunlight to create ground level ozone, a human health hazard.[436]

The EIS explains that "[a]ir emissions would be generated during construction of the new mainline and lateral pipelines, modifications at four existing compressor stations, construction of three new compressor stations, and construction of ten new M&R stations."[437] The construction of the ACP and SHP would take two years and would generate 4,513 tons of NO_x.[438] Once the Project is operating, the ACP and SHP will emit an estimated 230 tons of NO_x per year.[439] Using compressor station information provided in air permit applications for the project[440] and the CALPUFF air modeling system, project emissions are estimated to contribute an additional 13,297 pounds of nitrogen deposition per year to the

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[435] *Id*.

[436] *See Health Effects of Ozone Pollution*, EPA, https://www.epa.gov/ozone-pollution/health-effects-ozone-pollution.

[437] EIS 4-556.

[438] *See* EIS 4-557.

[439] *See* EIS, Tables 4.11.1-7, 1-8, and 1-9, at 4-559 (three ACP compressor stations: 112.4 tpy; ACP metering and regulation stations: 22.396 tpy; four SHP compressor stations: 95.4 tpy).

[440] *See* ACP and SHP Air Permit Applications, FERC Docket CP15-554, Accession No. 20151001-5220 (filed Oct. 1, 2015), *available at* https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14002125; *see also*, Atlantic Coast Pipeline, Resource Report 9, FERC Docket CP-15-554, Accession No. 20150918-5212, at 9-37–9-59 (filed Sep. 18, 2015), https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13990956.

land and water within the Chesapeake Bay watershed.[441] Of this total, the James River watershed will receive an estimated 4,213 pounds of nitrogen deposition per year. The James River watershed—like all sub-watersheds within the Bay watershed—is subject to specific nitrogen allocations in the Bay TMDL.[442] The Bay watershed jurisdictions are responsible for meeting these nitrogen allocations and this additional load of nitrogen pollution must be accounted for and managed by each jurisdiction.

The Chesapeake Bay TMDL accounted for all existing sources of nitrogen in the watershed and established pollution caps that are maintained through implementation of each state's Watershed Implementation Plan (WIP); offsets are required for new sources. The direct, indirect, and cumulative impacts analyses in the EIS fail to discuss the water quality impacts due to atmospheric nitrogen deposition, both within the HUC-10 watersheds or the larger context of the Chesapeake Bay watershed. The Commission should identify the Project's increased deposition of nitrogen to land and surface waters and should address how this new load of nitrogen will be offset or accounted for within the Bay TMDL framework.

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[441] This estimate only includes operating emissions from the three new (Marts, Buckingham, and Northampton) and three modified (Crayne, JB Tonkin, and Mockingbird Hill) compressor stations and does not include construction emissions.

[442] *See* Chesapeake Bay TMDL, Section 9. Chesapeake Bay TMDLs, "Table 9-1. Chesapeake Bay TMDL total nitrogen (TN) annual allocations (pounds per year) by Chesapeake Bay segment to attain Chesapeake Bay WQS," at 9-4 (2010), https://www.epa.gov/sites/production/files/2014-12/documents/cbay_final_tmdl_section_9_final_0.pdf.

In addition to nitrogen deposition to land and waterways, nitrogen dioxide (NO_2)—one type of NO_x gas—can irritate airways in the human respiratory system.[443] National Ambient Air Quality Standards (NAAQS) for NO_2 establish the limits necessary to protect human health and welfare. Relying upon AERMOD modeling performed by Atlantic, the EIS concludes that neither the ACP compressors stations or the SHP compressor stations would cause or contribute to a violation of the NAAQS for NO_2.[444] However, because of the results of this modeling, Commission staff should carefully examine the dataset inputs and background assumptions used by Atlantic.

Atlantic used AERMOD in a screening mode (the MAKEMET meteorological dataset), in which the source and receptors are defined completely but the meteorological data are not actual/observed data, but rather represent a "worst-case" scenario.[445] The screening mode only provides estimates of hourly impacts. The thinking behind this approach is that if the Project does not violate the NAAQS using the screening approach, then Atlantic would not need to gather five years of actual meteorological data to demonstrate compliance. The screening approach is adequate if the results are definitive and a project's emissions are without question below the NAAQS. However, if the screening results are close to the NAAQS limits (as was the case with three of the six modeled compressor

[443] *See* EPA, Health Effects of NO_2, https://www.epa.gov/no2-pollution/basic-information-about-no2#Effects.

[444] EIS at 4-561, 4-563.

[445] EIS at 4-560.

stations for the 1-hour NO_2 NAAQS), *and* if any of the assumptions regarding the source data are significantly in error *or* the assumed background level is chosen inappropriately, then the results of the screening approach may not accurately reflect the NAAQS attainment status for the modeled sources.

Background levels are supposed to represent the contributions from all other emissions sources and the regional background for the NAAQS limit. The assumed background level can have a significant effect on the modeled results (e.g., attainment vs. non-attainment), especially if the background levels are not far below the NAAQS (i.e., even a relatively modest-sized additional source would trigger a violation). Examination of the assumptions regarding the selection of background levels for each of the NAAQS standards reveals that there is at least some uncertainty regarding the value for the 1-hour NO_2 NAAQS at the Buckingham and JB Tonkin compressor stations.

According to the Air Quality Model Results for the Project (using the AERMOD screening mode), the 1-hour NO_2 values at the Buckingham County ("Compressor Station 2"), JB Tonkin, and Mockingbird Hill compressor stations (modeled source impact plus assumed background) are greater than 150 ug/m3; the 1-hour NO_2 NAAQS standard is 188 ug/m3.[446] Because these modeled concentrations are close to the 1-hour NO_2 NAAQS standards, the Commission should have performed a careful examination of (a) the appropriateness and/or

[446] EIS at 4-561, 4-563 (Tables 4.11.1-11 and 4.11.1-13).

representativeness of the assumed background levels and (b) the assumptions regarding the data used for the MAKEMET "worst-case" screening data. In addition, AERMOD modeling of the Project using actual meteorological data (instead of screening mode) to determine local NO_2 concentration impacts and to demonstrate attainment with the 1-hour NO_2 NAAQS should have been required. The Commission failed to address these issues.

J. The Commission failed to adequately consider the impacts on protected species in violation of NEPA.

In addition to the deficiencies listed above, the Commission's draft EIS (and indeed its final EIS) failed to include sufficient information regarding impacts to wildlife protected by the Endangered Species Act (ESA),[447] such as the Indiana and northern long-eared bats. Critically, the Commission issued the draft EIS, and later the final EIS, prior to substantially completing the ESA Section 7 consultation process with U.S. Fish and Wildlife Service (FWS). It is only through that process that the full impacts to listed species are determined. Disclosure of the impacts revealed through the consultation process in the draft EIS was vital because the public does not have an opportunity for comment on the development of a Biological Assessment or Biological Opinion.[448] Inclusion of this information

[447] 16 U.S.C. 1531 et seq.

[448] While the Commission contends that the Threatened and Endangered Species section of the DEIS "essentially summarizes our BA," this is insufficient to overcome the failure to provide sufficient information on impacts to listed species in the draft EIS. Further, the information provided in the DEIS did not even come close to fulfilling the requirements of a BA, which must not only identify the species that may be impacted, but for each species must describe the current habitat conditions and status trends, and how the action may affect those species. The FWS Guidance for the development of BAs further states that this must be supported with

in the draft EIS is particularly important to determining and inviting input on cumulative impacts to listed species, because the analyses resulting from the consultation process will only assess the direct impacts of the Project. The Commission's failure to gather and reveal this information in the draft EIS thus violated both the spirit and the letter of 40 C.F.R. § 1502.25(a), which requires that, "[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analysis and related surveys and studies required by . . . the Endangered Species Act."

K. The Commission failed to adequately examine the impacts on historic and cultural resources in violation of NEPA and the National Historic Preservation Act.

The review required by Section 106 of the National Historic Preservation Act, 54 USC § 300101, has been woefully inadequate and fails to meet both the letter and spirit of the law. Among other serious flaws, FERC has failed to identify or invite parties entitled to be consulting parties to participate as such in the section process, or has only belatedly done so (as is the case with the Nelson County Board of Supervisors).[449] FERC has also failed to adequately consider and consult regarding requests from individuals and organizations to participate as consulting

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documentation that indicates "what, when and how the protected resource will be exposed to and how such individuals or habitats are likely to respond to this exposure." None of this information has been provided in the draft EIS. Moreover, if FERC is able to "summarize" its BA, it is entirely unclear why the actual BA was not provided along with the draft EIS, as required by 40 C.F.R. § 1502.25(a), so that the public could provide comment.

[449] *See, e.g.*, 36 C.F.R. § 800.3(f)(1) ("The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).")

parties.[450] Further, FERC has not adequately included non-consulting party members of the public in the Section 106 review process and ensured that the public has opportunities to provide input on key determinations. As a result, FERC and its agents' efforts to identify potential resources, evaluate their historic significance, assess whether the undertaking will adversely affect them, and then evaluate ways to avoid, minimize, or mitigate adverse effects have all lacked the necessary and invaluable input from informed and knowledgeable parties that are vital to satisfying the statute and ensuring an effective Section 106 review.[451]

FERC has also failed to properly address potential impacts to several important historic resources, such as the Union Hill/Woods Corner Rural Historic District in Buckingham County. FERC largely assessed such districts as collections of individual architectural resources and structures without adequately considering impacts of the project on these resources' broader landscape and setting. National Park Service Bulletin #30 states that changes to historic landscapes such as loss of vegetation and the introduction of public utilities can threaten historic integrity, and such impacts to this and other historic districts impacted by the project have been improperly overlooked or downplayed.

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[450] *See*, *e.g.*, 36 C.F.R. 36 C.F.R. § 800.3(f)(3) ("The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.")

[451] *See* 30 C.F.R. § 800.2(d)(1) ("The views of the public are essential to informed Federal decisionmaking in the section 106 process.")

In addition, the extent to which FERC has deferred aspects of the Section 106 process until after major decisions have been made about the project—including the granting of a certificate of public convenience and necessity prior to a draft programmatic agreement even being circulated to consulting parties—has severely limited the consideration of alternatives that could avoid, minimize, or mitigate harm to historic resources, in violation of the statute and regulations.[452] It has also foreclosed any opportunity of the Advisory Council on Historic Preservation to comment meaningfully on proposed avoidance and mitigation prior to approval of the undertaking.[453]

These serious shortcomings permeate the entire Section 106 review of this project and render it in clear violation of the NHPA.

III. THE COMMISSION'S USE OF CONDITIONAL CERTIFICATES IS STATUTORILY AND CONSTITUTIONALLY FLAWED.

A. Granting Conditional Certificates Like ACP's Violates the NGA.

15 U.S.C. §717f(e) provides that "the Commission shall have the power to attach to the issuance of the certificate . . . such reasonable . . . conditions as the public convenience and necessity may require." The Commission often uses this language to grant certificates before a project is fully permitted by all relevant authorities. In other words, some Commission certificates are "conditional on" Atlantic's eventually obtaining those permits. But legislative history and case law

[452] *See* 36 C.F.R. § 800.1(c).

[453] See, *e.g.*, 36 C.F.R. §800.9(b) ("Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed.")

indicate that this is the wrong way to interpret the Commission's conditioning power under §717f(e). These sources indicate that the statute empowers the Commission to impose "conditions" on pipeline activity in the sense of "limitations," not to make certificates "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence.

An analogy illustrates the difference between conditions as prerequisites and conditions as limitations. Suppose a teenager wants to use her parents' car. The parents can impose two sorts of "conditions":

- "You can use the car if you finish your homework first." This sort of "condition" is a *prerequisite* to using the car.
- "You can use the car, but you must be home by 10 P.M." This sort of "condition" is a *limitation* on the use of the car.

When the Commission grants a "conditional" certificate before an applicant has obtained all necessary permits, it is acting like the parents in the first (prerequisite) sense. In contrast, when the Commission grants a "conditional" certificate by imposing restrictions on how a fully permitted applicant can operate, the Commission is acting like the parents in the second (limitation) sense.

The problem with granting "conditional" certificates in the prerequisite sense is that Congress never intended "conditions" in §717f(e) to be interpreted that way. Rather, it intended "conditions" to mean "conditions *on the terms of the proposed service itself*"—i.e., *limitations*, not prerequisites.[454] Historically, the cases

[454] *N. Nat. Gas Co., Div. of InterNorth, Inc. v. F.E.R.C.*, 827 F.2d 779, 782 (D.C. Cir. 1987) (emphasis added).

considering §717f(e) "conditioning power" concern "rates and contractual provisions for the services to be certificated," not whether those services can begin acquiring property via condemnation before they are fully permitted.[455]

The Supreme Court has observed that the "conditions" clause in "Section 7(e) vests in the Commission control over the conditions *under which gas may be initially dedicated to interstate use*" so that "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act."[456] "Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate."[457] This purpose is clearly one of imposing limitations on pipeline activity, not of allowing pipelines to commence operations before they are fully permitted. "[T]he Commission may not use its §7 conditioning power to do indirectly . . . things that it cannot do at all."[458]

Despite these considerations, some district courts have issued opinions and orders that seem to bless the Commission's use of "conditional" certificates in the prerequisite sense.[459]

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[455] *Panhandle E. Pipe Line Co. v. F.E.R.C.*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979).

[456] *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389, 392 (1959) (emphasis added).

[457] *Id*. at 392.

[458] *Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

[459] *See, e.g.*, *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, No. CV 17-1725, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017); *Constitution Pipeline Co., LLC v. Permanent Easement for 0.42 Acres*, No. 114-CV-2057, 2015 WL 12556145, at *2 (N.D.N.Y. Apr. 17, 2015).

The Commission should not rely on those opinions and orders to justify the practice. First, none of those opinions and orders considered the argument made here—namely, that Congress intended "conditions" in §717f(e) to mean "limitations" rather than "prerequisites." Rather, the opinions and orders were only considering the argument that pipelines companies could not commence eminent-domain activities until certain conditions (prerequisites) were met. Second, and more important, those opinions and orders came from district courts, which have extremely limited jurisdiction to review Commission orders.[460] Lack of jurisdiction appeared to be the primary driver behind district courts' refusal to second-guess Commission practices. The Commission itself, however, can of course consider whether its conditional-certificate practices are consistent with congressional intent[461]—which, as explained above, they are not.

B. Granting Conditional Certificates Like ACP's Violates the Fifth Amendment.

Issuing certificates before applicants are fully permitted creates problems not just under the NGA but also under the Fifth Amendment. As soon as the Commission issues a certificate, even a "conditional" one, the certificated pipeline entity can arguably start acquiring property by condemnation.[462] But if the entity

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[460] *See Transcon. Gas Pipe Line Co.*, 2017 WL 3624250 at *3 ("District Courts . . . are limited to jurisdiction to order condemnation of property in accord with a facially valid certificate. Questions of the propriety or validity of the certificate must first be brought to the Commission upon an application for rehearing and the Commissioner's action thereafter may be reviewed by a United States Court of Appeals.") (internal punctuation and citation omitted).

[461] *Id.*

[462] 15 U.S.C. §717f(h).

still has additional permits to obtain, there is a chance it will fail to obtain those permits. If that happens, the entity will never be allowed to begin operations—and it will have taken private property for no reason (i.e., without a public necessity) in violation of the Fifth Amendment.

This concern—that an applicant with a conditional certificate may never become fully permitted—is not merely theoretical here. The applicant is far from obtaining all necessary permits, including: final authorization by the Forest Service and Department of the Interior for permission to cross federal lands; authorization from the U.S. Army Corps of Engineers for all stream and wetland crossings; and multiple Clean Water Act authorizations from West Virginia, Virginia, and North Carolina. All of those permits require compliance with substantive standards that cannot be presumed by the Commission's grant of a certificate of public convenience and necessity.

With such uncertainty that the ACP project will ever commence construction, let alone complete construction and begin transporting gas, there is simply no public necessity for it to begin taking private property. Yet the Commission's grant of a "conditional" certificate empowers ACP to do just that.

C. By Allowing Conditional-Certificate Holders to Exercise Eminent Domain Before They Have Obtained All Necessary Approvals, the Commission Interprets the NGA in a Manner That Violates the Constitution.

The NGA provides that once the Commission issues a certificate, the applicant is immediately invested with the power of eminent domain.[463] As explained above, it is constitutionally problematic to extend this rule to conditional certificate holders that have not yet obtained all necessary state and federal approvals. The Commission could obviate these problems by imposing conditions (of the "limitation" variety) prohibiting applicants from exercising eminent domain until after they obtained all necessary approvals.[464] Indeed, under the doctrine of constitutional avoidance, the Commission *should* do so.[465] But it does not, running afoul of that doctrine.

IV. THE COMMISSION'S USE OF BLANKET CERTIFICATES IS STATUTORILY AND CONSTITUTIONALLY FLAWED.

A. Granting Blanket Certificates Like ACP's Exceeds the Commission's Statutory Authority.

ACP's certificate cannot stand as issued for additional reasons. The eminent-domain authority it purports to confer exceeds statutory limits insofar as it grants ACP's request for "a blanket certificate under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and

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[463] 15 U.S.C. §717f(h).

[464] *See Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011) (holding that, as a certificate condition, Commission could validly prohibit applicant from exercising eminent domain).

[465] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

operations," including "future facility construction, operation, and abandonment."[466]

The blanket authority that the certificate purports to confer under Commission regulations is impermissibly broad. Without any need for further Commission approval, the certificate holder is allowed, subject only to a per-project cost limitation just shy of $12 million, to do any of the following, among other "automatically authorized" acts:

- "acquire, construct, replace, or operate any eligible facility," defined to mean any facility within the Commission's statutory jurisdiction "that is necessary to provide service within existing certificated levels," subject to certain narrow exceptions;[467]
- "make miscellaneous rearrangements of any facility," including "relocation of existing facilities" for various reasons including highway construction, erosion, or "encroachment of residential, commercial, or industrial areas";[468]
- "acquire, construct, replace, modify, or operate any delivery point";[469]
- "acquire, construct, modify, replace, and operate facilities for the remediation and maintenance of an existing underground storage facility";[470] and
- "acquire, construct and operate natural gas pipeline and compression facilities . . . for the testing or development of underground reservoirs for the possible storage of gas".[471]

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[466] Certificate Order 1, 6, 37, 128-29.

[467] 18 C.F.R. §§157.208(a), 157.202(b)(2)(i)

[468] *Id.* §§157.208(a), 157.202(b)(6)

[469] *Id.* §157.211(a)(1)

[470] *Id.* §157.213(a)

[471] *Id.* §157.215.

The "facilities" to which these activities apply include both "auxiliary" ones installed to "obtain[] more efficient or more economical operation" and replacements—but only to the extent that such "auxiliary" or replacement facilities are *not* located within the certificated pipeline right-of-way or an already authorized facility site.[472] That is, the grant of blanket authority is expressly—almost exclusively—directed toward projects about which the most the Commission presently knows, to a virtual certainty, will *not* be where ACP's application describes the pipeline as being. And, in connection with any of these activities, the certificate holder has effectively unrestricted authority to exercise eminent-domain power to force sales of private property, including of properties outside the areas described in ACP's application.[473]

Practically speaking, this authority gives ACP free rein to use eminent-domain authority to acquire and construct pipeline facilities well outside the footprint considered and approved by the Commission. So long as ACP spends only $11.8 million on construction for any given "project,"[474] it need never again ask permission from the Commission to add small-diameter lateral or gathering lines, delivery or receipt points, or interconnection facilities, no matter where they are

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[472] *See id.* §157.202(b)(3).

[473] 15 U.S.C. §717f(h).

[474] Under 18 C.F.R. §157.202(b)(8)'s narrow definition of "project cost," only "the total actual cost of constructing the jurisdictional portions of a project" is taken into account, thereby excluding both the costs of eminent-domain property acquisition and any nonjurisdictional portions of a project in determining whether an activity is automatically authorized. Moreover, Commission practice demonstrates that even this limited restraint is merely nominal, as the cost cap can be, and regularly is, waived.

located. Likewise, ACP, under the guise of "replacement" or even "rearrangement," can move even segments of its main line to different property than the project footprint the Commission has approved. And whenever it does so, ACP can seize whatever property it wants from nearby landowners through eminent domain, without any oversight by the Commission.

Such a remarkable degree of laissez-faire is incompatible with the statutory requirements imposed by the NGA. Section 7(c) of the NGA bars "the construction or expansion of any facilities" for the transportation or sale of natural gas, or the acquisition or operation of any such facilities or extensions, unless the Commission issues a certificate specifically "authorizing such acts or operations."[475] Moreover, the Commission's authority to grant a certificate under Section 7(c) is limited to approval of an "operation, sale, service, extension, or acquisition *covered by the application*"—that is, the activity in question must have actually been "proposed" by the applicant and so considered by the Commission.[476] Approval of particular activities is further restricted to those that, upon the Commission's finding, are or "will be required by the present or future public convenience and necessity."[477]

In light of those application and finding requirements, the Commission's authority does not extend to blanket approvals of unknown future extensions,

[475] 15 U.S.C. §717f(c)(1)(A).

[476] *Id.* §717f(e) (emphasis added).

[477] *Id.*

expansions, rearrangements, or replacements, at least where such actions are not limited to the pipeline footprint actually proposed by an applicant and considered and approved by the Commission.[478]

B. Granting Blanket Certificates Violates the Commission's Statutory Mandate to Evaluate the Economic and Environmental Impacts of Proposed Projects.

The Commission has a statutory mandate to evaluate the economic and environmental impacts of proposed pipeline projects.[479] By definition, however, whenever the Commission grants a "blanket" certificate that authorizes construction outside a project footprint the Commission has expressly evaluated and approved, the Commission is authorizing the applicant to undertake construction that the Commission has not evaluated for economic and environmental impact. The Commission practices of granting "blanket" certificates—at least those that authorize construction outside evaluated and approved project footprints—violates the Commission's statutory mandate to consider the economic and environmental impacts of proposed pipeline projects.

C. Granting Blanket Certificates Violates the NGA's Notice-and-Hearing Requirements.

Except in cases of emergency, an application for authority to engage in acts requiring a certificate of public convenience and necessity requires the

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[478] *See Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008) ("[A] CPCN holder's power of eminent domain 'extends only to the property located within the geographic area designated on the map or maps attached to the application for the certificate.'" (quoting *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 578 F.Supp. 930, 932 (N.D. Ohio 1984), *aff'd*, 776 F.2d 125 (6th Cir. 1985))).

[479] See 15 U.S.C. §717f(a) (projects must be in the public interest).

Commission to "set the matter for hearing" and to give "reasonable notice of the hearing . . . to all interested persons."[480] That requirement—and the statutory due-process rights conferred on "interested persons"—is impermissibly evaded by the purported grant of "blanket authorization" for "future facility construction" contemplated but not specified by a certificate application.

D. Permitting the Blanket Certificates Here Would Violate the Due Process Clause of the Fifth Amendment.

The fact that blanket authorization also allows private exercise of the sovereign power of eminent domain for previously unconsidered project expansions or "rearrangements" creates significant constitutional concerns. As the Fifth Circuit recently explained, "when private parties have the unrestrained ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without 'process of law.'"[481] That is why, "when the power of eminent domain is partially delegated to a private company, that delegation must be as limited as possible to protect landowners from abusive takings under the Fifth Amendment."[482] The Commission's overly broad blanket-certificate practices violate this principle.

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[480] 15 U.S.C. §717f(c)(1)(B).

[481] *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017).

[482] *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 328 (3d Cir. 2014) (Jordan, J., dissenting); *accord United States v. Certain Parcels of Land*, 215 F.2d 140, 148 (3d Cir. 1954) ("the eminent domain power delegated to private groups has always been more closely limited than that inherent in sovereignty").

E. Granting the Blanket Certificates Here Would Violate the Constitutional Separation of Powers, Including by Violating the Private Nondelegation Doctrine.

By statute, "[a] natural gas company may not condemn additional property that is not specifically described in its existing CPCN, even if the natural gas company seeks to acquire such property in order to operate and maintain an existing [pipeline] facility."[483] That limit must be rigorously enforced, because the failure to do so transmogrifies the NGA's partial delegation of eminent-domain power to a private entity into an unchecked abdication of sovereign authority. As the Supreme Court explained long ago, "[a] distinction exists" between provisions that "authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves."[484] The latter type, such as Section 7(h) of the NGA, "are, in their very nature, *grants of limited powers*."[485]

Because the certificate's "blanket authorization," coupled with Section 7(h)'s conferral of eminent-domain authority, grants to a private entity precisely the type of "unrestrained ability to decide" to take another citizen's property that the private nondelegation doctrine condemns, *Boerschig*, 2017 WL 4367151 at *5, the certificate cannot stand as issued.

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[483] *Williston Basin*, 524 F.3d at 1099.

[484] *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946).

[485] *Id.* (emphasis added).

V. CONDITIONAL AND BLANKET CERTIFICATES BOTH VIOLATE FIFTH AMENDMENT JUST COMPENSATION REQUIREMENTS.

The Takings Clause requires the payment of "just compensation" when private property is taken for public use.[486] Because the duty to pay just compensation is "inseparable from the exercise of the right of eminent domain," any act granting condemnation power "must provide for compensation" with absolute certainty.[487]

It is not enough for a statute simply to say that just compensation will be paid. Rather, "the owner is entitled to reasonable, certain, and adequate provision before his occupancy is disturbed."[488] Proving "adequate provision" of just compensation requires showing that "the means for securing indemnity [are] such that the owner will be put to no risk or unreasonable delay."[489] And a statute that "attempts to authorize the appropriation of public property for public uses, without making adequate provision for compensation, is unconstitutional and void and does not justify an entry on the land of the owner without his consent."[490]

To satisfy the Takings Clause, "compensation must be either ascertained and paid to [the landowner] before his property is thus appropriated, or an appropriate remedy must be provided, *and upon an adequate fund*, whereby he may obtain

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[486] U.S. CONST. amend. V.

[487] *Sweet v. Rechel*, 159 U.S. 380, 400-01 (1895) (citation omitted).

[488] *Id*. at 403.

[489] *Id.* at 401 (citation omitted).

[490] *Id.* at 402 (citation omitted).

compensation through the courts of justice."[491] In other words, if the taker wants to take the property before compensation is finally decided by the court, the taker must have an "adequate fund" for the payment of compensation awards.

Different rules apply to government takers and private entities in proving an "adequate fund" for just-compensation awards. When the taker is a governmental entity, the pledge of "the public faith and credit" is enough to ensure just compensation.[492] But when, as here, the taker is a private entity, the taker "has neither sovereign authority nor the backing of the U.S. Treasury to assure adequate provision of payment."[493] Thus, a private taker must do more than just promise to pay to "satisf[y] the constitutional requirements" of the "'just compensation' guarantee."[494] In *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, the taker met that burden by showing that it (1) "ha[d] the ability to be sued" and (2) owned "very substantial assets" such that "just compensation [was], to a virtual certainty, guaranteed."[495]

Here, ACP has not met that test. While ACP may be sued, it has not shown that it has such "substantial assets" that just compensation is guaranteed "to a virtual

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[491] *Id.* at 406 (emphasis added).

[492] *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cty.*, 706 F.2d 1312, 1320-21 (4th Cir. 1983).

[493] *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa County*, 550 F.3d 770, 775 (9th Cir. 2008).

[494] *Id.* at 1321.

[495] *Id.; see also E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 824 (4th Cir. 2004) (finding adequate assurance that landowners would receive just compensation because taker's parent company reported earnings of $1.17 billion from its natural-gas transmission division in year before taking).

certainty."[496] The Commission never required such a showing before delegating eminent-domain power to ACP, which means there is no record of ACP's assets—whether encumbered or unencumbered—in the Commission's docket.

Moreover, there is ample reason to worry that ACP lacks sufficient assets to guarantee just compensation. ACP is a Delaware limited-liability company and is a special-purpose, joint-venture entity set up in 2014 for the sole purpose of this particular pipeline project.[497] According to an SEC filing by ACP's 47% owner (Duke Energy), ACP has "insufficient equity to finance [its] own activities without subordinated financial support."[498] Even so, Duke indicated it "does not have . . . the obligation to absorb losses" of ACP.[499] ACP's other principal owner—Dominion, which owns a 48% membership interest in ACP—likewise concluded that ACP "has insufficient equity to finance its activities without additional subordinated financial support."[500] And, like Duke, Dominion has not made any financial guarantees to ensure payment of just compensation: "Dominion's maximum exposure to loss is limited to its current and future investment."[501]

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[496] *Id.*

[497] Atlantic Coast Pipeline, LLC Certificate of Formation (filed Aug. 27, 2014), included as **Attachment 14.**

[498] Duke Energy Corporation 2016 Quarterly Report 84 (Form 10-Q, period ending June 30, 2017) (filed Aug. 3, 2017), included as **Attachment 15**.

[499] *Id.*

[500] Dominion Resources, Inc. et al. 2016 Annual Report 129 (Form 10-K), included as **Attachment 16**.

[501] *Id.*; *see also id.* at 130 ("DTI has no obligation to absorb any losses of the VIE.").

ACP is a fledgling joint venture set up specifically for this project. As a private company, it could go bust. Indeed, its owners have already admitted that ACP has "insufficient equity" to finance construction. Its owners have also disclaimed responsibility for losses beyond their current investments and any investments they might choose to make in the future. Given all this, the landowners facing condemnation by this fledgling venture do not have "adequate provision" or an "adequate fund" to ensure that "just compensation is, to a virtual certainty, guaranteed."[502]

As the Commission further recognizes, "greenfield pipelines undertaken by a new entrant in the market" like ACP "face higher business risks than existing pipelines proposing incremental expansion projects." Order at 43. Even disregarding its greenfield status, ACP is inherently at risk of going bust because it is a private company. Indeed, ACP's 47% owner has already admitted in an SEC filing that ACP has "insufficient equity to finance [its] own activities."[503]

Given all this, the landowners facing condemnation by this fledgling venture do not have "adequate provision" or an "adequate fund" to ensure that "just compensation is, to a virtual certainty, guaranteed."[504] ACP cannot overcome this problem by arguing that potential earnings from the project "would probably be

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[502] *Wash. Metro.*, 706 F.2d at 1320-21.

[503] Duke Energy Corporation 2016 Quarterly Report 84 (Form 10-Q, period ending June 30, 2017).

[504] *Wash. Metro.*, 706 F.2d at 1320-21.

sufficient to meet and extinguish claims for damages for lands taken."[505] As the Supreme Court has explained, such arguments and expectations "f[all] short of the constitutional requirement that the owner of property shall have prompt and certain compensation, without being subjected to undue risk or unreasonable delay."[506] Because ACP has not proven it has an "adequate fund" to pay just-compensation awards, the Commission cannot allow ACP to exercise the power of eminent domain under a certificate of convenience and necessity.

VI. THE COMMISSION VIOLATES THE NGA BY FAILING TO MAKE FINDINGS ABOUT APPLICANTS' ABILITY TO PAY JUST COMPENSATION.

Questions about whether an applicant will ultimately be able to pay just compensation do not implicate only the Fifth Amendment; they implicate the NGA, too. 15 U.S.C. §717f(e) provides that an applicant can obtain a certificate only "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter." One of the "acts" contemplated by "this chapter" of the NGA is eminent domain, *see* 15 U.S.C. §717f(h), and the only way "properly to do" eminent domain is to pay just compensation. Thus, to comply with 15 U.S.C. §717f(e), the Commission must make a finding that an applicant "is able and willing properly to" pay just compensation. Its failure to do so in a given certificate is fatal.[507]

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[505] *Sweet*, 159 U.S. at 402.

[506] *Id.*

[507] *See Steere Tank Lines, Inc. v. I.C.C.*, 714 F.2d 1300, 1314 (5th Cir. 1983) ("[T]he absence of required findings is fatal to the validity of an administrative decision regardless of whether there

VII. "QUICK-TAKE" UNDER THE NATURAL GAS ACT IS UNCONSTITUTIONAL.

A. By failing to preclude applicants from "quick-taking" property, the Commission interprets the NGA in a manner that violates the Constitution.

Once the Commission issues a certificate, the applicant is immediately invested with the power of eminent domain.[508] But to begin actually taking property, it must first file suit in federal district court.[509] By statute, "[t]he practice and procedure in any action or proceeding for that purpose" is supposed to "conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated."[510] In reality, though, district courts in the Fourth Circuit (where these takings will occur) have created a "quick-take" procedure whereby they allow pipelines to take property through an abridged procedure that mirrors the rule of civil procedure that governs injunctions (Rule 65).[511]

As explained in the following sections, the judicially-created quick-take procedure causes constitutional problems. The Commission could obviate these problems by imposing conditions (of the "limitation" variety) prohibiting

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may be in the record evidence to support proper findings.") ((internal punctuation and citation omitted).

[508] 15 U.S.C. §717f(h).

[509] *Id.*

[510] *Id.*

[511] *See E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004).

applicants from using the quick-take procedure.[512] Indeed, under the doctrine of constitutional avoidance, the Commission *should* do so.[513] But it does not, running afoul of that doctrine.

B. By Failing to Preclude Applicants From "Quick-Taking" Property, the Commission's Order Violates Constitutional Separation-of-Powers Doctrine.

Only Congress has the power to delegate eminent-domain authority; the Judicial Branch cannot do it, and neither can the Executive Branch.[514] Pursuant to that power Congress has expressly imbued governmental agencies with quick-take power, *see* 40 U.S.C. §3114, and has occasionally granted to power to nongovernmental entities. But, critically, the NGA contains no such quick-take provision for private pipeline companies.

Even so, certificate holders have frequently—and oftentimes successfully—invoked their Commission certificates as a ground for courts to authorize "quick-take" (rather than "straight") condemnations. This invocation is not baseless, as the certificates implicitly bless quick-take by authorizing construction to begin once all project permits have issued—even if a final judicial determination of just compensation has not yet occurred.

The Commission could prevent this state of affairs by imposing conditions expressly limiting ACP's exercise of eminent domain until after the court system

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[512] *Cf. Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011) (holding that, as a certificate condition, Commission could validly prohibit applicant from exercising eminent domain).

[513] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

[514] *Berman v. Parker*, 348 U.S. 26, 32 (1954).

has finally determined the proper amount of just compensation for the affected properties.

C. By Failing to Preclude Applicants From "Quick-Taking" Property, the Commission Facilitates Due-Process Problems.

When a pipeline company avails itself of the quick-take procedure, the landowner has no opportunity to conduct discovery, obtain its own appraisal of just compensation, or avail itself of any of the other procedural protections inherent in traditional judicial proceedings. This violates the due-process guarantee of the Fifth Amendment. Again, the Commission could prevent this due-process violation by prohibiting applicants from utilizing quick take.

D. By Failing to Preclude Applicants From "Quick-Taking" Property, the Commission Violates the Just Compensation Clause of the Fifth Amendment.

As explained above, every time a private, for-profit entity takes property, there is a real risk that it will ultimately be unable to pay just compensation.[515] (As also explained above, that risk is especially apparent in this case.) That risk is mitigated when the entity does not take property until after (1) a full and final judicial determination of just compensation and (2) a guarantee of payment (deposit or bond) based on that figure. That is what happens in a "straight" condemnation proceeding.[516] But with the quick-take procedure, a pipeline company is able to take property based on only its own, self-serving appraisal of what just

[515] In contrast, there is no such risk when the federal government takes property, which is why the federal government's quick-take power (40 U.S.C. §3114) is constitutionally unproblematic.

[516] *See Sage*, 361 F.3d at 821.

compensation will ultimately be.[517] This poses constitutionally unacceptable risk that the landowner will not ultimately receive just compensation if it proves to be more than the pipeline company estimated.[518] Again, the Commission could obviate that risk by prohibiting applicants from using "quick take," which Congress has not authorized under the NGA.

VIII. THE COMMISSION'S REFUSAL TO CONSIDER CONSTITUTIONAL CHALLENGES VIOLATES LANDOWNERS' FIFTH AMENDMENT DUE PROCESS RIGHTS.

The Commission contends that review under Section 7r does not extend to determinations of the constitutionality of the Natural Gas Act and the exercise of eminent domain thereunder. The Commission claims that such matters are outside the scope of its jurisdiction.[519] As a result, unless allowed to raise such arguments in a separate suit (i.e., in federal district court), landowners cannot raise constitutional challenges to proposed pipeline projects in the Commission. Further, if the Commission lacks jurisdiction to adjudicate such claims, it seems unlikely the federal appellate courts could review arguments that were not properly before the Commission. And even if the appellate courts could review such arguments, the damage would have already been done by the time the appellate courts get the case, as certificated pipeline companies have often long since taken property and commenced construction, irreversibly altering the

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[517] *See id*. at 823-27 (citing FED. R. CIV. P. 71.1).

[518] *See Sweet*, 159 U.S. at 400-04.

[519] *See* at 81.

landowners' property. By denying landowners any opportunity to raise constitutional challenges until after their property is already taken and irreversibly altered, the Commission denies those landowners the due process of law required by the Fifth Amendment.

IX. THE COMMISSION DENIED LANDOWNERS DUE PROCESS BY REFUSING THEM ACCESS TO KEY DOCUMENTS.

In granting ACP's conditional certificate, the Commission relied on privileged and confidential information submitted by ACP in its application—specifically, ACP's Precedent Agreements and Exhibit G flow diagrams—to find project need.[520] Despite landowners' repeated demands for disclosure, the Commission denied them access to this evidence, thus preventing them from meaningfully responding to or rebutting the Commission's conclusions in the Certificate Order.

The Precedent Agreements and Exhibit G diagrams were clearly critical to the Commission's assessment of project need. The Commission's Certificate Order characterizes the precedent agreements as "the best evidence" of project need and relies on them heavily, over the dissent of Commissioner LaFleur, to justify a grant of the certificate. Similarly, the Exhibit G diagrams are central to the Commission's analysis because (1) they can be used to independently verify need and (2) they reflect capacity with and without the proposed facilities in place, the utilization of each component of the facility, and the maximum allowable operating pressure (MAOP) of each line, which in turn informs whether each line

[520] The Certificate Order Precedent Agreements were included in the application heavily redacted, while the Exhibit G filings did not appear on the Commission's public docket at all.

can accommodate additional capacity.[521] In past cases, experts have used Exhibit G diagrams to show that a pipeline has been segmented,[522] is overbuilt,[523] that system alternatives are feasible,[524] or that, contrary to the project sponsor's claims, the gas was bound for export.[525]

In May 2017, shortly after intervening in the proceeding, the Bold Alliance filed with the Commission's FOIA and CEII Office a CEII Request to obtain ACP's Exhibit G diagrams and Precedent Agreements. Bold Alliance explained that it was an intervenor in the proceeding and that it sought the Exhibit G diagrams and Precedent Agreements to enable it to meaningfully participate in the certificate proceeding on behalf of its landowner members. Yet neither the Commission nor ACP ever produced the Exhibit G diagrams.

Bold's inability to obtain the CEII information is not for lack of trying. In May 2017, counsel for Bold sent at least five emails to staff inquiring about the status of its CEII requests, and spent several hours discussing its requests with

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[521] *See* 18 C.F.R. §157.14 (a)(8) (describing Exhibit G requirements).

[522] *Algonquin Gas Transmission,* 154 FERC ¶61,048 at 68 (referring to expert findings of segmentation based on Exhibit G diagrams).

[523] *See* Tennessee Gas Pipeline, 158 FERC ¶ 61,110 (2017) at 37 (noting that expert, relying on Exhibit G diagrams, found that 36-inch pipeline could be reduced to 16 inches); *Algonquin Gas Transmission,* 154 FERC ¶ 61,048 (2016) at 68 (referencing expert report concluding, based on Exhibit G Diagrams that pipeline is overbuilt to compensate for anticipated expansion), Comments of Delaware Riverkeeper Network, *Millennium Eastern Upgrade*, CP16-486 (March 26, 2017)(submitting expert testimony showing that proposed pipeline is unnecessary).

[524] *See Millennium Pipeline,* 141 F.E.R.C. P61,198 at 77 (2012)(agreeing with expert finding based on Exhibit G diagrams that system alternative is viable).

[525] *Dominion Gas LLC,* 148 FERC ¶ 61,244 at 255 (2014) (acknowledging expert's analysis based on Exhibit G that facilities that company claimed would not support gas export showed that facility would support delivery to Cove Point).

staff during four phone conversations during that period. With no success, Bold complained about staff's non-disclosure directly to the Commission by letter dated September 27, 2017.

Bold Alliance's lack of access to the Exhibit G diagrams severely compromised its ability to meaningfully participate in the proceeding. The Commission presumably relied on Exhibit G diagrams to evaluate and subsequently reject as infeasible several project alternatives, including the ACP–MVP single-pipeline option endorsed by Commissioner LaFleur in her dissent. Without access to the Exhibit G diagrams, the intervenors cannot meaningfully challenge the Certificate Order or rebut the Commission's conclusions. Additionally, the Commission relied on Precedent Agreements in the Certificate Order, referring to them multiple times and characterizing them as "the best evidence" of need.

The opportunity to review and timely rebut evidence in support of a decision that will result in deprivation of property rights is a "fundamental requirement of due process."[526] With opportunity to respond to evidence upon which the Commission relied in making a decision, due process is satisfied.[527]

The Commissions has not satisfied those minimal due-process requirements here. Because intervenors, including Bold Alliance, were denied access to Exhibit G diagrams submitted by the applicants, they can neither evaluate nor verify the

[526] *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

[527] *See Minisink Residents for Envtl. Pres. v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1328 (D.C. Cir. 2014).

information contained in ACP's submissions or meaningfully challenge the Commission's conclusions that the undisclosed documents undergird. This proceeding stands in stark contrast those challenged in *Minisink* and *Myersville Citizens*, where the court found no due-process violations because the impacted parties had access to all record evidence filed by the applicants and relied on by the Commission—including confidential filings—and an opportunity to rebut the evidence in advance of the deadline for rehearing.

Moreover, the Commission cannot cure its violation of the intervenors' due-process rights by disclosing the Exhibit G diagrams after this rehearing request is filed. By that time, the deadline for rehearing will have passed, and Bold's arguments based on the previously undisclosed information will be untimely under §717f(a) of the NGA. The only way for the Commission to rectify these due-process violations is to stay the proceeding and either vacate the certificate entirely or reopen the record to allow for full and timely consideration of the intervenors' arguments.

MOTION FOR STAY

In addition to their request for rehearing, Intervenors also move the Commission for a stay of the Certificate Order pending resolution of Intervenors' request for rehearing. The Commission has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where "justice so requires."[528] While the Commission's "general policy is to refrain from granting stays to ensure definiteness and finality in our proceedings,"[529] the Commission also takes the position that its orders are not non-final and subject to modification at any time prior to conclusion of the rehearing process.[530] To prevent impacts during the pendency of the rehearing process that are indeed final with respect to Intervenors and their members, the Commission should stay the Certificate Order based on the three factors that it considers in determining whether justice requires a stay. Those factors are "(1) whether the party requesting the stay will suffer irreparable injury without a stay, (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest."[531]

The totality of the circumstances surrounding the Project requires a stay in the interest of justice. Absent a stay, irreparable harm will befall the forests and

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[528] Intervenors note that because their request for rehearing is paired with a motion for stay, its request for rehearing is not a "stand alone" request and, therefore, the Commission has not delegated authority to the Secretary to toll the time for action on Intervenors' request for rehearing. 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

[529] 154 FERC ¶ 61,092 at P 9.

[530] *See, e.g.*, Order Denying Stay of Atlantic Sunrise Project, 160 FERC ¶ 61,042 P 18.

[531] 154 FERC ¶ 61,263 at P 4.

streams along the ACP right-of-way, including forests and streams treasured, owned, and managed by Intervenors' members. Moreover, any harm from a stay to the applicant would merely be economic, and the public interest favors a stay.

I. CONSTRUCTION OF THE PROJECT WILL CAUSE IRREPARABLE HARM TO THE ENVIRONMENT, INTERVENORS, AND THEIR MEMBERS.

Construction of the Project would result in permanent, irreparable harm. As its 519.7-mile long path snakes up and over the Appalachian Mountains and through forests and streams, the Project will require a 125-foot wide construction right-of-way and a 50-foot permanent right-of-way.[532] Construction would disturb approximately 11,775.9 acres of land, and leave 4,929.6 acres in the permanent right-of-way.[533] During overland construction, the applicant will survey the right-of-way, clear it of vegetation, and grade it.[534] Heavy machinery will traverse the corridor, digging a trench up to nine-feet deep in which to bury the 3.5 diameter pipe.[535] At waterbody crossings, the applicant will dewater a work area within the stream and dig a trench in the streambed.[536] The applicant will bury the pipeline at a depth of two to four feet below the streambed, depending on whether consolidated rock is encountered.[537] If the applicant cannot reach easement agreements with the owners of the properties on which it intends to build the

[532] Final EIS at 1-2, 2-15, 2-19.

[533] *Id.* at 2-18.

[534] *Id.* at 2-31 to 2-33.

[535] *Id.* at 2-33 to 2-34.

[536] *Id.* at 2-38 to 2-40.

[537] *Id.* at 2-39.

pipeline, it will seize the easements it needs through the power of eminent domain under 15 U.S.C. § 717f(h).[538] The deforestation, effects on surface and groundwaters, visual impacts, effects on historic resources, and condemnation of private property through eminent domain that would result from right-of-way construction constitute irreparable harm justifying a stay of the Certificate Order.

II. TIMBERING THE PROJECT RIGHT-OF-WAY DURING CONSTRUCTION, AND MAINTAINING THE EASEMENT DURING OPERATION, WILL FRAGMENT IMPORTANT CORE FORESTS AND IRREPARABLY HARM THE ENVIRONMENT, INTERVENORS, AND THEIR MEMBERS.

The Commission concluded in its final EIS that, "[d]ue to the length of time required to recover forested vegetation" "forested areas would experience significant [and long-term to permanent] impacts as a result of fragmentation and where forest land would convert to herbaceous vegetation in the permanent rights-of-way."[539] Construction of the Project will affect 6,137 acres of upland forest.[540] Nearly 5,000 of those disturbed acres, or approximately 80%, are within contiguous interior forest areas.[541] By the Commission's calculation, that would result in the conversion of 30,025 acres of interior forest into edge habitat.[542]

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[538] *Id.* at 4-372.

[539] *Id.* at 5-14.

[540] *Id.* at 4-178, 5-11.

[541] *Id.* at 4-200.

[542] *Id.* As discussed above in Intervenors' request for rehearing, the Commission's calculation vastly underestimates the full scope of fragmentation effects by ignoring, among other things, the landscape context of the forest blocks that will be fragmented.

Detailing the effects of the large-scale forest fragmentation that would result from the construction and operation of the Project, the Commission stated

> Fragmentation can be described as the breaking up of contiguous vegetation into smaller patches. Fragmentation and a loss of habitat connectivity could also impact wildlife. Where forest cover is extensive and well-connected, forest patches (small fragment areas) can be recolonized by individuals from adjacent patches; however, as the overall amount of available habitat and connectivity between those habitats decline, recolonization also declines, increasing chances of extirpation . . . . The removal of interior forest to create the rights-of-way would result in the conversion of forest to herbaceous and/or scrub/shrub vegetation and would remove habitat for interior species. Species that require large tracts of unbroken forest land would need to seek suitable habitat elsewhere. As discussed above, overall forest cover is the most important factor in determining long-term persistence of forest species; however, as fragmentation of habitat increases, the configuration of the remaining habitat patches become more important in supporting the remaining species in the landscape. This becomes increasingly important for species of more limited mobility and home ranges (e.g., amphibians, small mammals). Although small patches can provide habitat for some species, the preservation of larger patches is necessary for the long-term survival of forest populations. Larger forest patches have greater diversity of habitat niches and area, and therefore can support greater species diversity. . . .
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> This removal of forest interior creates "edge habitat," which is different from the interior habitat cores and supports different numbers and ranges of species. Forest edges play a crucial role in ecosystem interactions and landscape functions, including the distribution of plants and animals, fire spread, vegetation structure, and wildlife habitat. Creation of new forest edge along dense canopy forests could impact interior forest microclimate factors such as wind, humidity, and light and could lead to a change in vegetation

> species composition within the adjacent forest or increase the spread of invasive species. Vegetation along forest edges receive more direct solar radiation during the day, lose more long-wave radiation at night, have lower humidity, and receive less short-wave radiation than areas in the forest interior. Increased solar radiation and wind could desiccate vegetation by increasing evapotranspiration, affect which species survive along the edge (typically favoring shade intolerant species), and impact soil characteristics. Corridors and forest edges are also common vectors for the introduction and spread of non-native invasive plant species, since many of them are shade-intolerant and grow at a faster rate than other native species. Edge effects could include a change in available habitat for some species due to the introduction of non-native invasive plant species, and an increase in light and temperature levels on the forest floor and the subsequent reduction in soil moisture; such changes may result in habitat that would no longer be suitable for species that require these specific habitat conditions . . . . [543]

Because of its long-term and large-scale effects on forests, the Commission has concluded that the Project would have a significant and long-term effect on the forests through which it will cut.[544] Those significant effects alone constitute sufficient irreparable harm to require a stay of the Certificate Order pending the Commission's rehearing.

Intervenors' members will suffer irreparable harm if construction for the Project is permitted prior to rehearing by the Commission or judicial review. Sierra Club members Robert and Roberta Koontz own a unique 1,000-acre property known as The Wilderness in Bath County, Virginia that would be crossed

[543] *Id.* at 4-188 to 4-189 (internal citations omitted).

[544] *Id.* at 5-14.

by the Project.[545] The Koontz's property is subject to a conservation easement held by the Virginia Outdoors Foundation, which the Koontzes established "to preserve the property in perpetuity, and to safeguard its character."[546] As the Commission acknowledged in the final EIS, the Virginia Outdoors Foundation "is a public organization that was created by the Virginia General Assembly with the goal to preserve open-space lands and the natural, scenic, historic, scientific, open-space, and recreational areas of the common wealth."[547] The Project right-of-way would cross more than 9,000 feet of the Koontz's property, through its vast forests.[548] The Koontzes purchased their property "after an exhaustive search of unique properties across many states" because of "its unspoiled beauty."[549] The Commission acknowledges that, where the Project right-of-way crosses conservation easements held by the Virginia Outdoors Foundation, "forested areas would experience a permanent impact as a result of converting the operational right-of-way to open land[, which] in turn would result in different vegetation and wildlife."[550] Accordingly, the Koontzes are correct when they assert that "construction and operation of the [Project] will result in irreparable injury to [our]

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[545] Declaration of Robert Koontz ¶¶ 1–3, included as **Attachment 17**; Declaration of Roberta Koontz ¶¶ 1–3, included as **Attachment 18**.

[546] Declaration of Robert Koontz ¶ 10; Declaration of Roberta Koontz ¶ 10.

[547] Final EIS at 4-401 to 4-402.

[548] Declaration of Robert Koontz ¶ 5; Declaration of Roberta Koontz ¶ 5.

[549] Declaration of Robert Koontz ¶¶ 3–4; Declaration of Roberta Koontz ¶¶ 3–4.

[550] Final EIS at 4-403.

property and [our] person[s].”[551] The irreparable harm that would befall the Koontzes and their forests is precisely the type of harm that a stay “when justice so requires” is designed to prevent.

The Koontzes are not alone among Intervenors’ members whose interests in the forests to be destroyed by the Project would be irreparably harmed absent a stay. Lynn Cameron is a member of the Potomac Appalachian Trail Club, co-chair of the Friends of Shenandoah Mountain, and board member of the Virginia Wilderness Committee.[552] She regularly hikes in the George Washington National Forest, drawn to it by its “beauty, biodiversity, and wildness.”[553] Regarding the Project’s impacts on that forest, Ms. Cameron states:

> It is concerning to think of how the pipeline will diminish my future experiences in the GW and how it will degrade the beauty, aesthetic, and recreational opportunities I so highly value and that have been an important part of my life for over three decades. The oak and hickory trees that will be cut during construction will not grow back during my lifetime, and the corridor will similarly not be restored during my lifetime, even if the pipeline is not built. Clearing the corridor will diminish my regular use and enjoyment of the National Forest and will lead to fragmentation and edge effects. These impacts will in turn leave interior forest species vulnerable to nest parasitism and predation. No longer will the area provide habitat for special species like the ovenbird or cerulean warbler, or provide a wild and natural forest for outdoor recreation. This loss of important habitat and untouched forest will greatly diminish my plans to continue to regularly use and enjoy the GW. I believe this pipeline is the worst thing to happen to the George Washington National

[551] Declaration of Robert Koontz ¶ 12; Declaration of Roberta Koontz ¶ 12.

[552] Declaration of Lynn Cameron ¶ 1, included as **Attachment 19**.

[553] *Id.* ¶¶ 2–3.

> Forest in the 35 years I have been hiking, camping, picnicking, leading church group outings and PATC hikes, doing volunteer trail work, and studying the natural world in this area.[554]

In sum, the deforestation of more than 6,100 acres of forests and the conversion of more than 30,000 acres of interior core forest to edge habitat (by the Commission's underestimation) will visit irreparable harm to the forests along the Project right-of-way and to Intervenors' members. That is precisely the type of harm that justifies a stay pending rehearing. Intervenors' showing here is more than just a "mere recitation that it has an issue regarding deforestation [that] fails to show how irreparable harm will occur absent a stay."[555] Rather, it is an injury "both certain and great" that would be "actual and not theoretical."[556] The Commission conceded that the impacts of the Project on forests will be long-term and significant.[557] Such harm is cognizable irreparable harm the supports issuance of a stay.[558]

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[554] *Id.* ¶ 21.

[555] 112 FERC ¶ 61,172 at P 13.

[556] *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[557] Final EIS at 5-14.

[558] *See, e.g.*, *Amoco Prod. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("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."); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding timbering and loss of use of enjoyment of forested areas to constitute irreparable harm); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (recognizing timbering as an irreparable harm); *Env't Def. Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1183–84 (6th Cir. 1972) (holding that cutting and burning of timber is the type of permanent "defacing [of] the natural environment" to constitute irreparable harm supporting an injunction); *Sierra Club v. Bosworth*, Civ. No. C-04-02588-CRB, 2005 WL 3096149 at *11 (N.D. Cal. Nov. 14, 2005) ("Timber cutting that has an environmental impact always has a strong potential of causing irreparable harm justifying preliminary relief.").

III. CONSTRUCTION AND OPERATION OF THE PROJECT WILL CAUSE IRREPARABLE HARM TO SURFACE- AND GROUND-WATERS, INTERVENORS, AND THEIR MEMBERS.

Construction and operation of the Project also threatens imminent harm to the environment, Intervenors, and their members through its effects on surface- and ground-waters. The Project right-of-way requires 1,669 waterbody crossings.[559] The ACP right-of-way also crosses vast swaths of karst terrain, and "karst development greatly increases the susceptibility of underlying aquifers to contamination sources (e.g., stormwater runoff, chemical spills, or other contaminants) originating at the ground surface. Where mature karst surface topography is developed, there is a discernable lack of perennial surface streams, as water is lost rapidly to the subsurface network of karst conduits; as such, karst areas are susceptible to a greater range of environmental impact."[560] The Commission concluded that the Project "could have significant adverse impacts on karst . . . ."[561]

Moreover, surface waters will receive sedimentation from construction and operation of the Project as a result of stream crossings and construction in areas adjacent to streams.[562] As the Commission acknowledged in the final EIS, "[t]he projects would impact over 5,144 acres (43.7 percent) of soils that have a

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[559] Final EIS at 5-9.

[560] *Id.* at 4-95.

[561] *Id.* at 5-1.

[562] *Id.* at 4-129.

representative slope class greater than 8 percent. We analyzed the influence of slope percent as a variable factor in rugged mountainous terrain. Based on this analysis we find that construction practices would temporarily increase the erosion potential for soils crossed by ACP . . . ."[563] The Commission also recognized that, "[i]n West Virginia, 73 percent of the AP-1 mainline route would cross areas with a high incidence of and high susceptibility to landslides. In Virginia, about 28 percent of the AP-1 mainline route would cross areas with a high incidence of and high susceptibility to landslides . . . ."[564] The Commission further concluded that "[v]egetation clearing, grading for construction, and soil compaction by heavy equipment near stream banks could promote erosion of the banks and the transport of sediment into waterbodies by stormwater runoff."[565] Accordingly, the risk of sedimentation from construction and operation of the Project is high.

The construction and operation of the Project also threatens the Cowpasture River with sedimentation, blasting, and interference with recreation at the location at which it would cross that important stream. The Cowpasture River is listed in the Nationwide River Inventory because of its status as a "free-flowing river segment[] that [is] identified as having at least one [outstandingly remarkable

[563] *Id.* at 5-6.

[564] *Id.* at 4-27.

[565] *Id.* at 4-114.

natural or cultural value]."[566] Indeed, local conservation groups tout the Cowpasture River as "the cleanest river east of the Mississippi."[567]

Intervenors' members will experience the above-described irreparable injuries in a personal way. Lynn Cameron is a member of the Potomac Appalachian Trail Club, co-chair of the Friends of Shenandoah Mountain, and a board member of the Virginia Wilderness Committee who frequently hikes in the George Washington National Forest.[568] Brown's pond in the George Washington National Forest is located in karst topography and is among the areas of that Forest that Ms. Cameron most values.[569] The Project will widen an access road near Brown's Pond, which threatens to dewater Brown's Pond, which is located in a sinkhole, and threatens habitat for rare plants.[570]

Construction and operation of the Project also threatens the Cowpasture River, which Ms. Cameron visits and enjoys at least annually.[571] The Project will cross the Cowpasture River via cofferdam/dam and pump and will increase sedimentation into its watershed.[572] Ms. Cameron is "concerned that the pipeline will degrade the GW portion of the Cowpasture River by diminishing its scenic and recreational qualities and its value as habitat for the aquatic species, mammals,

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[566] *Id.* at 4-406 to 4-407.

[567] Declaration of Lynn Cameron ¶ 15.

[568] *Id.* ¶¶ 1–2.

[569] *Id.* ¶¶ 12–13.

[570] *Id.* ¶ 13.

[571] *Id.* ¶ 15.

[572] Final EIS at 44-104, 4-241.

and birds that we enjoy so much" to the degree that "the Cowpasture River will no longer be eligible as a National Recreational River once the pipeline and access roads are built."[573] That imminent threat of irreparable harm to waterbodies that Ms. Cameron enjoys supports a stay of the Certificate Order.

Finally, Sierra Club member Libra Max owns property on the James River at the location that the Project crosses the river that she "value[s] for its riverside beauty and for its tranquility."[574] Ms. Max's interests in the aesthetic and recreational use of her property are threatened with irreparable harm from the use of her property as "the site of a large-scale boring operation in which ACP intends to drill a pipeline path underneath the James River. That operation is expected to involve heavy equipment and extensive land clearing and disturbance."[575] Ms. Max suspects that the Project will "cause irreparable harm to the property and would permanently and adversely degrade its unique value and setting. In truth, the pipeline would ruin the qualities that make the property special to me."[576]

In sum, the environmental damage that will result from construction and operation of the Project on water resources near and in its path threatens

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[573] Declaration of Lynn Cameron ¶ 15.

[574] Declaration of Libra Max ¶¶ 1–9, included as **Attachment 20**.

[575] *Id.* ¶ 4.

[576] *Id.* ¶ 8.

irreparable harm to streams, Intervenors, and their members. That sort of irreparable harm is sufficient to support a stay of the Certificate Order.[577]

IV. THE IMPACTS ON VISUAL RESOURCES WILL CAUSE IRREPARABLE HARM TO INTERVENORS' MEMBERS.

As the Commission conceded in the final EIS,

> Pipeline construction would result in a greater degree of visual impacts in heavily forested areas with high elevations and along steep mountainsides. In West Virginia and Virginia, portions of the AP-1 mainline would be constructed in steep, mountainous terrain and require the removal of trees. Restoration and the establishment of vegetation in these areas typically takes several years to decades and re-planting trees in the right-of-way would be prohibited due to operational and safety concerns. The cleared and maintained right-of-way in heavily forested areas would create a visual contrast more noticeable to viewers and result in a greater degree of visual impacts. Most heavily forested areas associated with the project are in remote, less populated areas where views of the cleared right-of-way would be intermittent. Impacts on scenery would be greatest where maintained herbaceous right-of-way on mountainsides and ridgetops with a predominant surrounding landscape character of intact forest canopy is viewed from valleys and adjacent mountains.[578]

These long-term visual effects will permanently harm the scenic nature of the rural areas through which the ACP right-of-way will pass and irreparably harm the scenic integrity of areas in the George Washington National Forest.[579]

Intervenors members will suffer irreparable harm to their recreational and aesthetic interests as a result of the visual impacts of construction of the Project. For example, Lynn Cameron, a member of the Potomac Appalachian Trail Club,

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[577] *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1194–95 (9th Cir. 1988) (concluding that harm related to stream sedimentation from logging was sufficient to support preliminary injunction).

[578] Final EIS at 4-417.

[579] *Id*. at 4-464.

co-chair of Friends of Shenandoah Mountain, and board member of Virginia Wilderness Committee, frequently hikes and explores the George Washington National Forest.[580] Many of the vistas that she enjoys in the George Washington National Forest will be permanently harmed by the Project. She describes the Torry Ridge Tail, with its views of the Blue Ridge Mountains, as having the "best scenic views of any trail in the Sherando Recreation Area."[581] The Commission determined in its final EIS that views of the Blue Ridge Mountains from the Torry Ridge Trail would become dominated by the Project, and until revegetation of the construction right-of-way matures, the views would not meet their designated scenic integrity.[582]

Ms. Cameron also treasures the views from the Shenandoah Mountain Trail to the South Sister Special Biological Area.[583] Indeed, she reports that, "[f]rom South Sister, we can see one of the best scenic views in Virginia – the Cowpasture River Valley to the south, and the surrounding mountains."[584] She leads organized hikes to this area every year, but, because the Project right-of-way "will be highly visible from the South Sister scenic viewpoint," her continued enjoyment of the area will be severely diminished.[585]

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[580] Declaration of Lynn Cameron ¶¶ 1–2.

[581] *Id.* ¶ 11.

[582] Final EIS at 4-471.

[583] Declaration of Lynn Cameron ¶ 14.

[584] *Id.*

[585] *Id.*

Regarding the Bald Ridge Trail, Ms. Cameron expresses the opinion that "these views are better than any from Shenandoah National Park."[586] For that reason, she leads organized hikes on that trail each New Year's Day "to start the New Year off on the right foot by visiting one of Virginia's premier wild places."[587] The Commission determined in its final EIS that the Project's construction right-of-way would dominate the vistas from the Bald Ridge Trail and prevent it from meeting its designated scenic integrity.[588] Because of the "permanent scar on the landscape [she] so highly value[s]," Ms. Cameron predicts that the irreparable harm to the views from the Bald Ridge Trail will deprive her of enjoyment of her hikes on that trail.[589]

The harm to Ms. Cameron's and other hikers' recreational and aesthetic interests is irreparable because it cannot be remedied by money and because of its long-lasting, if not permanent, character.[590] Accordingly, the visual impacts of the Project's construction justify a stay of the Certificate Order.

V. PROJECT CONSTRUCTION THREATENS IMMINENT HARM TO HISTORIC RESOURCES.

Sierra Club members Robert and Roberta Koontz own a 1,000-acre property known as The Wilderness in Bath County, Virginia, across which the Project

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[586] *Id.* ¶ 16.

[587] *Id.*

[588] Final EIS at 4-473 to 4-474.

[589] Declaration of Lynn Cameron ¶ 16.

[590] *Amoco Prod.*, 480 U.S. at 545; *Anglers of the Au Sable v. U.S. Forest Serv.*, 402 F. Supp. 2d 826, 838 (E.D. Mich. 2005) (finding irreparable harm based in part on visual impacts).

would be constructed.[591] Their home dates to at least 1797.[592] Their entire property has been recognized by the Virginia Department of Historic Resources, which has determined that the pipeline would adversely affect the property.[593] Their property has also been placed on the National Register of Historic Places.[594] The Commission acknowledged the threat of harm to the historic nature of The Wilderness in its final EIS, stating

> The Koontz family filed comments about their property known as "The Wilderness" in Bath County, Virginia (site number 008-0011). The historic farmstead meets the criteria for listing on the NRHP and includes a residence, numerous outbuildings, and agricultural fields. The VDHR commented that the property was determined eligible for listing on the NRHP in its review of the historic architecture survey report that documented the property. In addition, on June 15, 2017, the VDHR review boards approved the nomination of the Wilderness for listing on the Virginia Landmarks Registry and the NRHP. In response to our request for more information, Atlantic reported that the driveway that passes next to the main residence of The Wilderness has been removed from the project design for use as an access road. However, the pipeline is still located in the wooded and agricultural portions of the property. An assessment of effects and proposed mitigation for the historic property would be completed before project construction.[595]

In its Certificate Order, the Commission once again acknowledged the risk to The Wilderness from construction of the Project:

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[591] Declaration of Robert Koontz ¶¶ 1–3; Declaration of Roberta Koontz ¶¶ 1–3.

[592] Final EIS at 4-402.

[593] Declaration of Robert Koontz ¶ 8; Declaration of Roberta Koontz ¶ 8.

[594] Declaration of Robert Koontz ¶ 9; Declaration of Roberta Koontz ¶ 9.

[595] Final EIS at 4-528.

> After the issuance of the final EIS, Roberta Koontz, co-owner of "The Wilderness," filed comments taking issue with Atlantic's survey of the property and Atlantic's recommendations regarding eligibility for listing in the National Register. The Virginia Department of Historic Resources commented that the property was determined eligible for listing on the National Register, and the Virginia Department of Historic Resources review board approved the nomination of "The Wilderness" for listing on the Virginia Landmarks Registry and the National Register. While discrepancies in the absolute boundaries of the parcel and exact location of structures are apparent, we clarify here, as did the final EIS, that the historic farmstead "The Wilderness" does meet the criteria for listing on the National Register and includes a residence, numerous outbuildings, and agricultural fields. Thus, the property will continue to be considered as part of staff's ongoing consultations under the National Historic Preservation Act. An assessment of effects and proposed mitigation for the historic property is required to be completed before project construction.[596]

The Commission appears to maintain that Environmental Condition 56 precludes any construction until consultation under the National Historic Preservation Act is complete.[597]

Nonetheless, irreparable harm to historic resources such as The Wilderness may occur without a stay. The Commission has not clarified whether it considers tree clearing a construction activity, but the Certificate Order appears to treat them as distinct.[598] Accordingly, tree clearing could occur on The Wilderness and other historic properties prior to the satisfaction of Condition 56 and the assessment of

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[596] Certificate Order ¶ 267.

[597] *Id.* ¶ 269.

[598] Certificate Order Appendix A Condition 62 (imposing a condition "[p]rior to construction, but following tree clearing").

effects on The Wilderness. That would constitute irreparable harm because, in addition to the irreparable harm to the forests on The Wilderness, tree clearing could irrevocably alter the historic character of The Wilderness. Moreover, allowing other activity under the Certificate Order prior to completion of an assessment of The Wilderness could result in a bureaucratic steam roller effect, in which bureaucratic momentum and pressure to approve the Project would render an assessment of The Wilderness's historic value meaningless.[599] If the applicant continues working on the Project, including tree clearing, and then later presents an assessment of the historic resources at The Wilderness, "the options open to [the Commission] would diminish, and at some point [its] consideration [of that assessment] would become a meaningless formality."[600] The "sheer momentum of [the Project] dooms the favorable consideration" of concerns about the effects of the Project on the historic character of The Wilderness.[601] Accordingly, a stay of the Certificate Order pending rehearing is necessary to avoid the irreparable harm

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[599] *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (identifying the "bureaucratic steam roller" phenomenon, and stating that "[t]he difficulty of stopping a bureaucratic steam roller, once started," is a valid consideration in determining whether to protect the status quo); *Davis v. Mineta*, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002) (*abrogation recognized on other grounds by Dine Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016)) (noting that any construction on a proposed project presents a serious risk that administrative decisionmakers will allow the construction of the entire project); *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) ("Bureaucratic rationalization and bureaucratic momentum are real dangers."); *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (committing "to the proposition that when a major federal action is undertaken, no part may be constructed without a[valid Environmental Impact Statement]").

[600] *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1982).

[601] *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 188 (4th Cir. 1999).

that would befall The Wilderness and the Commission's consideration of its historic assessment.

VI. THE APPLICANTS USE OF EMINENT DOMAIN BASED ON THE CERTIFICATE ORDER WILL IRREPARABLY HARM INTERVENORS' MEMBERS ABSENT A STAY.

Absent a stay of the Certificate Order, Intervenors' members are threatened with irreparable injury resulting from condemnation proceedings to seize easements across their land that may be based on an unlawful Certificate Order.[602] The Commission takes the position that the applicant received the power of eminent domain once the Certificate Order was issued.[603] Accordingly, in the Commission's view, the applicant need not wait for any further action by the Commission—including resolving Intervenors' request for rehearing—prior to commencing condemnation actions against landowners unwilling to convey easements for the Project to the applicant. That is, the applicant could commence condemnation actions in federal or state court at any time.

In any such action, the applicant is likely to rely on United States Court of Appeals for the Fourth Circuit precedent to demand possession of easements prior to the final resolution of the condemnation proceedings in order to begin construction.[604] Accordingly, landowners unwilling to convey easements to the applicant are threatened with an imminent risk of litigation, premature entry of

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[602] 15 U.S.C. § 717f(h).

[603] Final EIS at 4-373; Certificate Order ¶ 78.

[604] *East Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823 (4th Cir. 2004).

their property, premature timbering of their forests, and premature trenching on their property before the Commission acts on Intervenors' request for rehearing and before judicial review of the Certificate Order is available. Such premature destruction of private property under the color of a legally deficient Certificate of Public Convenience and Necessity threatens those landowners with irreparable injury.[605]

Sierra Club member Libra Max is an example of a landowner facing irreparable injury due to premature and wrongful condemnation while Intervenors' request for rehearing is pending.[606] Ms. Max owns property in Buckingham County, Virginia, located where the Project will cross the James River.[607] The Project will cut across more than 2,000 feet on her property, through forests and fields.[608] Ms. Max has no intention to voluntarily convey her property or an easement across it for Project construction.[609] If her forests are timbered and drilling under the James River commences under the color of the Commission's legally deficient Certificate Order, those forests will not mature and those

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[605] *See Carpenter Technology Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain); *Tioronda, LLC v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005) (holding that deprivation of an interest in real property, and damage to sensitive vegetation and wetlands that would result from wrongful condemnation, constitutes irreparable harm); *Monarch Chem. Works, Inc. v. Exon*, 452 F. Supp. 493, 502 (D. Neb. 1978) (holding condemnation of land can result in irreparable injury).

[606] Declaration of Libra Max ¶¶ 1–9.

[607] *Id.* ¶¶ 1–4.

[608] *Id.* ¶ 5.

[609] *Id.* ¶ 7.

streambanks will not be restored in her lifetime. Those irreparable harms can only be avoided through a stay of the Certificate Order.

VII. ANY HARM TO THE APPLICANT WOULD NOT BE IRREPARABLE AND IS OUTWEIGHED BY THE IMMINENT IRREPARABLE HARM TO THE ENVIRONMENT, INTERVENORS, AND THEIR MEMBERS.

The injury to Intervenors, the public, and the environment outweighs any harm that a stay may cause the applicant or the Commission. Any delay in construction that would result from a stay would be, at most, merely economic harm, no matter how the applicant may try to spin it. Any harm that will befall the applicant stems directly from the fact that it entered into contracts and shipping agreements *in anticipation of a Certificate Order to which it had no guarantee*. Accordingly, the applicant, from the beginning of this venture, assumed the risk to its outlays in time and capital.[610]

Moreover, it is well established that economic harm is not irreparable. The D.C. Circuit has explained that "monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business."[611] No matter how costly, the applicant cannot seriously contend that a stay would jeopardize its very existence without undermining its argument that it is sufficiently capitalized to undertake this endeavor, purportedly in the public

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[610] *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (finding where permittees "jump the gun or anticipate a pro forma result in permitting application they become largely responsible for their own harm," even where company spent $800 million on plant construction before a permit was issued) (internal quotations omitted).

[611] *Wis. Gas Co.*, 758 F.2d at 674.

convenience and necessity. Accordingly, economic harm to the applicant is not irreparable and does not provide an adequate basis for denying a stay, particularly when balanced against the irreparable harm to the environment, Intervenors, and their members.[612] Even the Commission acknowledges that principle.[613]

VIII. A STAY OF THE CERTIFICATE ORDER 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.[614] Moreover, the public interest is served by ensuring that federal agencies scrupulously comply with their statutory duties.[615] The public "has a strong interest in maintaining the

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[612] *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (potential monetary injury is not irreparable); *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"); *Ohio Valley Env't. Coal. v. U.S. Army Corps of Eng'rs*, 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."); *Alaska Ctr. 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*, Civ. No. 95-1702 (GK), 1995 WL 748246 at *11 (D.D.C. Dec. 8, 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").

[613] *See, e.g.*, 154 FERC ¶ 61,263 at P 6.

[614] *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").

[615] *See N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010); *Apotex, Inc. v. U.S. F.D.A.*, 508 F. Supp. 2d 78, 88 (D.D.C. 2007) ("When administrative agencies fail to follow statutory procedures, the public suffers."); *Citizen's Alert*, 1995 WL 748246 at *11 (compliance with the law "is especially appropriate in light of the strong public policy expressed in the

balance Congress sought to establish between economic gain and environmental protection."[616] Congress instructed federal agencies to comply with NEPA "to the fullest extent possible."[617] Congressional intent and statutory purpose are statements of the public interest.[618] Accordingly, there "is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely."[619]

Indeed, the alternatives analysis is "the heart of the environmental impact statement."[620] Allowing construction to continue while the Certificate Order is under rehearing dilutes the availability of a "no-action" and other potential alternatives to the Project if the Commission ultimately reconsiders its NEPA analysis. In that event, the applicant would be able to push its preferred alternative through via construction without NEPA compliance, by maintaining that neither the "no action" alternative nor other alternatives are viable once the pipeline is finished. Such an outcome is most certainly not in the public interest.[621] If construction is allowed to continue it would defeat the purpose and intent of

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nation's environmental laws" (citation omitted)); *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (finding "meticulous compliance with the law by public officials" as relevant to the public interest).

[616] *Ohio Valley Env't. Coal.*, 528 F. Supp. 2d at 633.

[617] 42 U.S.C. § 4332.

[618] *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984).

[619] *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009).

[620] 40 C.F.R. § 1502.14.

[621] *See Davis*, 302 F.3d at 1115 n.7 (once a part of a project proceeds "before environmental analysis is complete a serious risk arises that the analyses of alternatives required by NEPA will be skewed toward completion of the entire [p]roject").

NEPA, in contravention of the public's congressionally recognized interest in fully informed environmental decision-making.

Moreover, the Project will cause or contribute to increased upstream gas production through hydraulic-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 that result from the combustion of natural gas are known to cause serious adverse health effects. Thus, there is a strong interest in protecting the public from those effects.

Additionally, a stay is in the public interest in light of the Commission's use of so-called "tolling orders" on requests for rehearing, which the Commission maintains preclude judicial review. The public has an interest in judicial review of an agency action at a time that matters. If the Commission follows its normal practice of tolling the time to act on the merits of Intervenors' request for rehearing, yet allows the applicant to construct the Project, it will deprive the public of meaningful administrative and judicial process. For the Commission to treat the Certificate Order as "final" for one purpose (allowing the applicant to construct the Project), yet insist that it is not final for others (including for purposes of judicial review) violates the public's trust in this Nation's administrative bodies to execute the laws of this Nation in a fair and equitable

manner. Without a stay, the Commission will essentially be stacking the deck for the applicant, and leaving the public, the environment, and affected landowners with no opportunity for meaningful relief.

The public interest also lies in affording parties due process of law under the Fifth Amendment to the United States Constitution. Intervenors and their members will be deprived of constitutionally-protected procedural due process rights. Construction of the pipeline will begin, private property will be condemned, and irreparable environmental harm will occur before the Commission acts on the merits of Intervenors' request for rehearing. The Commission will oppose judicial review of its NEPA and NGA analyses prior to action on the merits of Intervenors' request for rehearing, and potential condemnees such as Sierra Club member Libra Max may not be able to collaterally challenge the validity of the Certificate Order in the condemnation proceedings.[622]

Procedural due process guarantees an "opportunity to be heard . . . at a meaningful time and in a meaningful manner."[623] As the Supreme Court of the United States has observed, "[t]he basic guarantees of our Constitution are warrants for the here and now . . . ."[624] Without a stay, the environment, Intervenors, their members, and the public will be cast into administrative limbo.

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[622] *See, e.g.*, *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989).

[623] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[624] *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963).

Without a stay, pipeline construction will proceed and the Commission will insist that it maintains jurisdiction indefinitely over Intervenors' rehearing request.

For procedural due process, that will not suffice. Without a stay, the Commission will insist that Intervenors sit on the sidelines and wait for the Commission to act on the merits of their request for rehearing; meanwhile, it will allow the applicant to proceed with construction of the Project under the challenged Certificate Order. The only solution to protect the public's interest in the Constitutional exercise of the Commission's administrative authority is a stay of the Certificate Order. "[I]t is always in the public interest to prevent violation of a party's constitutional rights."[625]

Finally, given the high stakes, a stay of the Certificate Order and construction pending a final decision on the merits is clearly in the public interest. A stay will help ensure that a full and complete analysis of the impacts, and potential mitigation, occurs before alternatives are foreclosed by 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

[625] *Déjà Vu of Nashville, Inc. v. Metro, Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

request is considered fully on the merits.[626] Accordingly, the public interest favors a stay.

IX. BASED ON THE THREE FACTORS, JUSTICE REQUIRES A STAY OF THE CERTIFICATE ORDER.

For the foregoing reasons, justice requires a stay of the Certificate Order pending resolution of Intervenors' request for rehearing. Construction of the Project threatens irreparable harm to the environment, Intervenors, and their members that far outweighs the exclusively economic harm that the applicant might incur from a stay. Moreover, the public interest lies with the protection of the environment, compliance with federal laws, proper administrative procedure, and the protection of Constitutional rights. Accordingly, Intervenors respectfully request that the Commission grant their motion for a stay pending resolution of their request for rehearing.

[626] *See San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) (holding that voluminous public comments indicate a public interest in maintaining status quo pending proper review).

COMMUNICATIONS

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

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CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Intervenors respectfully request that the Commission:

1. Grant Intervenors' request for rehearing;
2. Grant Intervenors' motion for a stay and immediately stay applicants and their contractors from taking any action authorized by the Certificate Order including, but not limited to, construction of the projects (including tree clearing) and any attempt to use the power of eminent domain pending final action on the request for rehearing;
3. Upon completion of the rehearing process, rescind the Certificate Order;
4. Grant Intervenors' request for an evidentiary hearing concerning the market demand for the Atlantic Coast Pipeline;
5. Before making any new certificate ruling, conduct an analysis of whether the projects are required by the public convenience and necessity, as required under the NGA, that complies with the Commission's Certificate Policy Statement;
6. Before making any new certificate ruling, conduct a NEPA analysis that addresses the direct, indirect, and cumulative impacts of the projects; provides a robust analysis of alternatives, including the existing infrastructure alternatives; and addresses the other NEPA-specific issues set forth in this request and Intervenors' previous comments in these dockets.
7. Grant any and all other relief to which Intervenors are entitled.

Respectfully submitted,

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November 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have on November 13, 2017, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

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