

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

Transcontinental Gas Pipe Line Company, LLC)
Northeast Supply Enhancement Project)

Docket No. CP17-101-000

**REQUEST FOR REHEARING AND RESCISSION OF MAY 3, 2019 ORDER AND
MOTION FOR STAY BY
NY/NJ BAYKEEPER, FOOD & WATER WATCH – NEW JERSEY, CENTRAL JERSEY
SAFE ENERGY COALITION, THE PRINCETON MANOR HOMEOWNERS
ASSOCIATION AND SURFRIDER FOUNDATION**

Pursuant to Section 19(a) of the Natural Gas Act (“NGA”)¹ and Rule 713 of the Federal Energy Regulatory Commission’s (“FERC’s” or “Commission’s”) Rules of Practice and Procedure,² NY/NJ Baykeeper, Food & Water Watch – New Jersey, Central Jersey Safe Energy Coalition, the Princeton Manor Homeowners Association, and the Surfrider Foundation (collectively “Intervenors”) hereby request rehearing and rescission of the Commission’s May 3, 2019 Order (“Order”) granting a Certificate of Public Convenience and Necessity (“Certificate”) to Transcontinental Gas Pipe Line Company, LLC (“Transco” or “Applicant”) conditionally authorizing construction and operation of the proposed Northeast Supply Enhancement Project (“NESE Project” or “Project”).³ Pursuant to 5 U.S.C. § 705, Intervenors also hereby move for a stay of the Order. FERC granted the Intervenors’ respective motions to intervene in this proceeding. Thus, the Intervenors are “parties” to this proceeding and have standing to file this request for rehearing and motion for a stay.⁴ Furthermore, this request for rehearing is timely filed within 30 days of FERC’s May 3, 2018 Order.⁵

Intervenors seek rehearing and rescission of the Commission’s Order because the Order

¹ 15 U.S.C. § 717r(a).

² 18 C.F.R. § 385.713.

³ Transcontinental Gas Pipe Line Company, LLC, 167 FERC ¶ 61,110 (May 3, 2019) (hereinafter “Order”).

⁴ See 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

⁵ 30 days from the issuance of FERC’s Order is Sunday, June 2, 2019. Consequently, filing this request by the close of the next business day (Monday, June 3, 2019) is timely. See 18 C.F.R. § 385.2007(a).

fails to establish need, the Commission acted in an arbitrary and capricious manner by not releasing the CEII to certain members of the public until after both the DEIS and FEIS were issued, and the Order rests on an FEIS that is wholly deficient. With respect to CEII, we emphasize in particular that – while not reviewable under FOIA or NEPA – FERC’s handling of these information requests is not immune from the law. And FERC’s professed commitment to NEPA’s intent in its CEII regulations reveals the agency’s bad faith in its response to CEII-related comments on the DEIS. As part of Intervenors’ request for rehearing, they incorporate by reference their previous comments to FERC on the NESE Project.⁶

I. STATEMENT OF RELEVANT FACTS

On March 27, 2017, Transco submitted to FERC an application under Section 7(c) of the NGA requesting authorization to construct and operate its proposed NESE Project. NESE is a \$926.5 million proposed natural gas pipeline project that would transport fracked natural gas through New Jersey from the Marcellus Shale in Pennsylvania to energy markets in New York City and the surrounding area. The specific elements of the project primarily consist of (1) a new compressor station in Somerset County, NJ, (2) increased pipeline pressure and capacity throughout existing Pennsylvania and New Jersey pipelines, and (3) almost twenty-seven miles of new pipeline from Sayreville, New Jersey across the Raritan Bay to gas terminals in Rockaway Queens. The Project would provide up to 400,000 dekatherms per day (Dth/d) of natural gas to “National Grid’s residential and commercial customers in the New York City area.”⁷

On March 23, 2018, FERC issued a Draft Environmental Impact Statement (“DEIS”) on the

⁶ Including, but not limited to, the following comments under FERC Docket # CP17-101-000: EELC Comments on DEIS (dated April 9, 2018) (Accession # 20180410-5035), EELC Comments on DEIS (dated May 14, 2018) (Accession # 20180514-6168), Surfrider Foundation Comments on DEIS (dated May 12, 2018) (Accession # 20180514-5552), EELC Comments on Draft General Conformity Determination (dated October 18, 2018) (Accession # 20181018-5105), EELC Safety-Related Comments to FERC & DEP (dated January 10, 2019) (FERC Docket # CP17-101-000, Accession # 20190111-5005), EELC Letter on CEII Requests (dated January 23, 2019) (Accession # 20190123-5029), and EELC Comments on FEIS (dated March 14, 2019) (Accession # 20190314-5152).

⁷ Final Environmental Impact Statement (“FEIS”) for NESE Project (January 25, 2019), ES-1.

NESE Project. On April 4, 2018 and April 5, 2018, certain Intervenor⁸ safety/pipeline hydraulics expert (Richard Kuprewicz) and their lawyer, (Eastern Environmental Law Center's, "EELC's, Executive Director, Aaron Kleinbaum), respectively, submitted requests to FERC pursuant to 18 C.F.R. § 388.113 for access to the material that Transco had submitted to FERC as Critical Energy/Electric Infrastructure Information ("CEII").⁹ On April 9, 2019, EELC submitted initial comments on the DEIS requesting that FERC (1) issue a revised DEIS upon receipt of all missing information and verification of certain Transco data and (2) extend the public comment period to at least forty-five days after release of this revised DEIS. On April 27, 2018, FERC sent two letters to Transco notifying the company of Mr. Kuprewicz and Mr. Kleinbaum's CEII requests and providing the company five business days from the date of these letters to oppose the release of this CEII. On May 14, 2019, EELC submitted additional comments on the DEIS in which it outlined the document's failure to meet the standards of the National Environmental Policy Act ("NEPA") due to numerous deficiencies. Also on May 14, 2019, the Surfrider Foundation submitted comments on the DEIS in which it discussed the following issues: climate change impacts, impacts on marine life, lack of need, and public safety. On September 18, 2018, FERC sent a Data Request to Transco focused on the specific threat of internal pipeline corrosion to Transco's existing pipeline facilities and Transco's process for addressing integrity issues within its existing pipeline system.¹⁰ On October 5, 2018, Transco submitted its responses to FERC's September 18, 2018 Data Request.¹¹

On January 10, 2019, EELC submitted a letter to FERC pointing out that FERC's failure to respond – either positively or negatively – to the above CEII requests after nine months was

⁸ NY/NJ Baykeeper, Food & Water Watch – New Jersey, Central Jersey Safe Energy Coalition, and the Princeton Manor Homeowners Association.

⁹ See CEII-2018-41 (submitted April 4, 2018 by Richard Kuprewicz) and CEII-2018-43 (submitted April 5, 2018 by Aaron Kleinbaum, Executive Director of EELC).

¹⁰ FERC Data Request (dated September 18, 2018).

¹¹ Transco, Response to FERC Environmental Information Request issued September 18, 2018 (dated October 5, 2018), Accession Number 20181005-5181 under FERC Docket No. CP17-101-000.

completely unjustified. On January 15, 2019, Michael Watson of FERC contacted Mr. Kleinbaum, alleging that Mr. Kleinbaum's April 5, 2018 CEII request did not contain the required "signed statement." On January 17, 2019, Mr. Kleinbaum provided Michael Watson of FERC with the requested information, even though it was clear from the Record that a complete and adequate CEII request has already been provided to FERC by him (and Mr. Kuprewicz). On January 23, 2019, EELC submitted the email exchange between Michael Watson of FERC and Mr. Kleinbaum.

On January 25, 2019, FERC issued a Final Environmental Impact Statement ("FEIS") on the NESE Project in which the FERC staff concluded that the Project would not cause significant adverse environmental impacts with the implementation of Transco's proposed and FERC's recommended mitigation measures. On February 27, 2019, Transco submitted a letter to FERC providing more detailed information on downstream end use of the natural gas and the apparent quantity of downstream GHG emission reductions due to the Project.¹² On March 14, 2019, EELC submitted comments on the FEIS in which it noted that FERC's evaluation of alternatives and analysis of the Project's water, air, safety, and greenhouse gas emissions impacts still failed to meet the standards of NEPA. On March 21, 2019, FERC sent a letter to Mr. Kleinbaum granting his CEII request, finding that he "[had] demonstrated a legitimate need for the information requested."¹³ On April 1, 2019, Mr. Kleinbaum received the CEII.

On April 2, 2019, National Grid submitted a letter to FERC providing more detailed information on downstream end use of the natural gas.¹⁴ On April 24, 2019, Transco submitted a letter to FERC on the apparent quantity of downstream GHG emission reductions due to the Project.¹⁵ On April 29, 2019, intervenor Robert Wood submitted into the Record a report by

¹² Transco Letter to FERC (dated February 27, 2019).

¹³ FERC Letter to Aaron Kleinbaum (dated March 21, 2019) entitled "Notice of Intent to Release, CEII No. CE18-43."

¹⁴ National Grid Letter to FERC (dated April 2, 2019).

¹⁵ Transco Letter to FERC (dated April 24, 2019).

350.org (released on March 19, 2019) demonstrating that the additional gas the NESE Project would supply to the New York City area is unnecessary.¹⁶ On May 3, 2019, FERC issued the Order granting a Certificate of Public Convenience and Necessity, subject to “Transco’s compliance with the environmental conditions listed in the appendix to this order.”¹⁷

For the reasons set forth below, the Commission should ultimately grant Intervenors’ request for rehearing and rescind the Order, while staying the Order pending the Commission’s final disposition of this request for rehearing.

II. BASIS FOR REHEARING

A. CONCISE STATEMENT OF THE ALLEGED ERRORS IN THE ORDER

- 1. The Order Fails to Establish Need and Thus the Project is Not Required by the Public Convenience and Necessity under the NGA.*
 - a. Transco and National Grid wrongly argue that the pipeline is needed to carry out the locally mandated elimination of heavy oil from use in residential boilers.*
 - b. Transco And National Grid Wrongly Argue That The Pipeline Is Needed To Guarantee That Customers Will Be Able To Heat Their Homes On Cold Days.*
 - c. Transco and National Grid wrongly argue that the pipeline is needed to address future growth.*
- 2. The Commission Acted in an Arbitrary and Capricious Manner by Not Releasing the CEII to Certain Members of the Public until after Both the DEIS and FEIS Were Issued.*
- 3. FERC’s Order violates NEPA because it rests on an FEIS that is Wholly Deficient*
 - a. FERC Violated NEPA by Failing to Engage in a Robust Alternatives Analysis*
 - b. FERC failed to Properly analyze the Project’s GHG Emissions*
 - c. FERC Failed to Properly Analyze Onshore and Offshore Water Impacts*
 - d. FERC Failed to Properly Analyze Safety Impacts*

¹⁶ Comment of Robert J Wood (submission date: April 29, 2019), Accession # 20190429-5058.

¹⁷ Order P 93.

e. FERC Failed to Properly Analyze Air Impacts

B. STATEMENT OF THE ISSUES

1. The Order Fails to Establish Need and Thus the Project is Not Required by the Public Convenience and Necessity under the NGA.

In the Order, FERC concludes that “Transco has sufficiently demonstrated that there is market demand for the project. Transco has entered into long-term precedent agreements for firm service with the project shippers for the full amount of additional firm transportation service to be made possible by the project.”¹⁸ In its April 2018 Notice of Inquiry announcing a re-evaluation of FERC’s Certificate Policy Statement, FERC acknowledges that “[i]n practice, [it] does not look ‘behind’ or ‘beyond’ precedent agreements when making a determination about the need for new projects or the needs of the individual shippers.”¹⁹ But, if FERC were to actually conduct a more rigorous and thorough examination of “need” -- as it is considering doing under its April 2018 Notice of Inquiry, in which it requested “comments on potential modifications to its approach to determining whether a proposed project is required by the public convenience and necessity”²⁰ -- it would find that the NESE Project is not necessary.²¹ A report by 350.org in the record makes this abundantly clear.²²

The report by 350.org released on March 19, 2019²³ demonstrates that the purported justification for the NESE Project is based on fundamentally flawed, unsupported arguments about increasing demand for pipeline gas in National Grid’s service area. We note at the outset of our

¹⁸ Order P 16.

¹⁹ 83 Fed. Reg. 18020 dated April 25, 2018.

²⁰ *Id.* at 18030.

²¹ For similar reasons as those outline in this section, FERC failed to properly address purpose and need under NEPA in the FEIS.

²² We also note that a report by Mike Aucott indicates that Transco’s design delivers roughly twice the amount of gas to NYC than is needed for Transco’s stated purpose to convert oil heat for residential and commercial facilities to gas, which raises the question of “need” for the Project. *See* Aucott Report, attached to EELC Comments on DEIS (May 14, 2018).

²³ *See* “False Demand: The Case Against the Williams Fracked Pipeline,” by 350.org, available at https://350.org/wp-content/uploads/2019/03/Stop_Williams_False_Demand.pdf. (“350.org Report”)

discussion of this 350.org report that it is not new evidence being submitted here for the first time. Robert Wood submitted this 350.org report into the record as part of a comment to the FERC Docket on April 29, 2019²⁴ -- before FERC issued its Order with the Certificate on May 3, 2019. We are aware that this report was submitted to the record after the FEIS was issued on January 25, 2019. But FERC itself has noted that its determination of “public need” under the standard of the NGA (as opposed to “purpose and need” under NEPA) is not ultimately made until the Commission issues its final order.²⁵ Thus the Commission should have reviewed the 350.org report before issuing its Order for NESE.

The 350.org report refutes Transco and National Grid’s three main arguments that purportedly justify the need for the NESE Project.

a. Transco and National Grid wrongly argue that the pipeline is needed to carry out the locally mandated elimination of heavy oil from use in residential boilers.

The need for the proposed NESE pipeline is based on incorrect assumptions about the amount of residential and commercial customers in the New York City area that would convert from heavy heating oil to gas.²⁶

i. The data indicates that boiler conversions from oil to gas would be much lower than estimated by the Transco customer, National Grid

Transco’s sole customer, National Grid, incorrectly assumes that 100 percent of residential boilers would convert to gas, which is not occurring. Many boilers are converting to lighter oil.²⁷

In addition, although a consultant for New York City calculated in 2012 that the total conversion of

²⁴ See “Comment of Robert J Wood in Docket(s)/Project(s) CP17-101-000,” (dated April 29, 2019), Accession No. 20190429-5058.

²⁵ See 164 FERC ¶ 61,098 P 87 (Issued August 10, 2018) (“[W]hen determining ‘public need,’ the Commission balances public benefits, including market need, against project impacts...The Final EIS appropriately explained that it was not a ‘decision document,’ and that, under NGA section 7(c), *the final determination of the need for the projects lies with the Commission*...Neither NEPA nor the NGA requires the Commission to make its determination of whether the project is required by the public convenience and necessity *before its final order.*”) (emphasis added).

²⁶ 350.org report, p. 2.

²⁷ *Id.* at pp. 9-10.

No. 4 and No. 6 oil to gas would create a daily demand of roughly 213,000 dekatherms of gas and peak day demand of 746,000 dekatherms, National Grid's service area is only a small part of this amount. National Grid has an 11 percent share of the market, thus would be no more than an additional 23,200 dekatherms of average daily demand and 81,600 dekatherms of peak day demand. This estimate does not account for non-gas conversions, "improved performance of new boilers or existing and upcoming improvements in home and building energy efficiency."²⁸

ii. *The Need for No. 6 Oil Conversion has Been Met*

About 98 percent of New York City Housing Authority ("NYCHA") buildings rely primarily on natural gas for heating while fewer than 1 percent rely solely on No. 2 oil.²⁹ Nearly all New York City multifamily privately owned buildings using No. 6 oil had already transitioned to another fuel or energy source by late 2015. "By February 2016, the conversion (involving 5,300 [privately owned] buildings) was declared complete."³⁰ The Long Island housing sector is dominated by individual homes and small apartment buildings that have an overall low energy demand. However, nearly all-remaining fuel oil boilers on Long Island use No. 2 oil that can achieve greenhouse gas emissions comparable to natural gas when blended with other fuels.³¹

iii. *The Few Remaining No. 4 Boilers Will Not Necessarily Convert to Natural Gas*

Ultra Low Sulfur No. 2 oil boilers that blend biodiesel into the fuel make them environmentally competitive option with natural gas.³² Heat pumps (air or geothermal) could cut National Grid's gas needs for New York City and Long Island by at least 130,900 dekatherms, or 33 percent of the proposed Williams NESE pipeline capacity.³³ Furthermore, "[s]olar energy has growing uses for heating of water and individual home spaces, while both wind and solar are gaining strength in the

²⁸ *Id.* at p. 8.

²⁹ *Id.*

³⁰ *Id.* at p. 9.

³¹ *Id.* at pp. 2 & 9.

³² *Id.* at p. 10. *See also* Table 2 on p. 12; Table 3 on p. 13.

³³ *Id.* at p. 11.

electrical grid."³⁴

iv. Energy Demand Will be Reduced by Efficiency

Energy efficiency will improve by 25 percent as older boilers are replaced.³⁵ Further efficiencies of about 16 percent are gained by separating a domestic hot water system from a space heating system, which allows a building to shut down its space-heating boiler in the summer and possibly downsize it as well. This 16 percent savings is a substantial opportunity for energy conservation, given that in New York City, 80 percent of multifamily properties used their space-heating steam boilers to heat their hot water as well."³⁶

In addition, "[t]he New York State Fire Prevention and Building Code Council's 2016 updated New York building codes will achieve 30 percent energy savings for new residential construction and seven percent for new commercial construction over the prior building code."³⁷ "National Grid provides rebates to customers for installing already available energy efficiency measures and makes specific statements on their effectiveness." These include: (1) thermostatic radiator valves; (2) weather-sensitive reset controls; (3) insulating hot water pipes; (4) and wi-fi enabled thermostats.³⁸

v. The NESE Pipeline Owner Has Already Added More than Twice the Projected Gas Estimated for Total Boiler Conversions

Substantial new gas pipeline capacity has been added to National Grid's service area, including the Rockaway Delivery Lateral/Northeast Connector and the New York Bay Expansion project.³⁹

"The total capacity of these two projects is more than twice the amount of additional peak capacity and nearly four times the amount of average daily capacity predicted to be needed even if

³⁴ *Id.* at p. 13.

³⁵ *Id.* at pp. 14–15.

³⁶ *Id.* at p. 15.

³⁷ *Id.*

³⁸ *Id.* at p. 16.

³⁹ *Id.* at p. 17.

all New York City No. 6 and No. 4 boilers switched to pipeline gas – which half of the No. 6 boilers did not do, and which many of the No. 4 boilers will not do."⁴⁰

b. Transco And National Grid Wrongly Argue That The Pipeline Is Needed To Guarantee That Customers Will Be Able To Heat Their Homes On Cold Days.

The proposed NESE pipeline is not needed to guarantee that customers will be able to heat their homes and businesses during the peak demand days. New York City and Long Island do not go without heat on peak demand days. Effective strategies are available to manage sporadic peak demand.⁴¹

Strategies to manage peak demand include supplemental gas sources and demand reduction strategies.⁴² "National Grid explicitly acknowledges the potential for further Demand Response to avoid pipeline construction. It declares that “a successful program would create more responsive relationships with participating customers and may provide a cost-effective Non-Pipe Alternative solution, deferring traditional more expensive gas system upgrades while promoting a more dynamic gas system.”⁴³

c. Transco and National Grid wrongly argue that the pipeline is needed to address future growth.

Williams/Transco admits that the “gas share into power generation continues to grow but renewables capture load growth. Several states in New England or the west with high penetration of renewable generation could experience flat to negative gas demand growth in the long term.”⁴⁴ As early as 2009, the New York State Energy Plan observed that the total number of residential and commercial natural gas customers had increased, particularly in the New York City area; however, the overall statewide gas consumption remained relatively flat. The Plan attributed the decreased

⁴⁰ *Id.*

⁴¹ *Id.* at p. 18.

⁴² *Id.*

⁴³ *Id.* at p. 19.

⁴⁴ *Id.* p. 20.

due to customer conservation measures and increased efficiency for new natural gas appliances.⁴⁵ Confirming this trend, the national forecast for natural gas by the U.S. Energy Information Administration is that “[n]atural gas consumption in the residential and commercial sectors [will] remain... largely flat because of efficiency gains and population shifts that counterbalance demand growth.”⁴⁶

2. The Commission Acted in an Arbitrary and Capricious Manner by Not Releasing the CEII to Certain Members of the Public until after Both the DEIS and FEIS Were Issued.

In order to perform an independent analysis of the assumptions underlying Transco’s and FERC’s conclusions on system alternatives and safety with respect to the NESE Project, Mr. Kleinbaum and Mr. Kuprewicz (on behalf of certain Intervenors⁴⁷) submitted requests for CEII (i.e. Transco’s Exhibit Gs, containing technical details such as flow diagrams and data) to FERC on April 4, 2018 and April 5, 2018, respectively. In each of these CEII requests, Mr. Kleinbaum and Mr. Kuprewicz made explicitly clear that they needed this CEII to “participate” in FERC Docket No. CP17-101-000 and that the information was needed “expeditiously” in order to participate effectively in this proceeding. In particular, both Mr. Kleinbaum and Mr. Kuprewicz made clear that they needed this CEII “expeditiously” in light of the deadline of May 14, 2018 to submit public comments on the DEIS.⁴⁸ Thus, FERC was on notice as of early April 2018 that Mr. Kleinbaum and Mr. Kuprewicz needed this CEII before May 14, 2018 in order to inform their

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ NY/NJ Baykeeper, Food & Water Watch – New Jersey, Central Jersey Safe Energy Coalition, and the Princeton Manor Homeowners Association.

⁴⁸ See CEII-2018-43 (submitted April 5, 2018 by Aaron Kleinbaum) (“I request expedited review of this application so that I may have access to the information in order to timely file comments or other legal filings before FERC on the appropriateness and completeness of the Application and associated DEIS. Comments are due on May 14, 2018.”) and CEII-2018-41 (submitted April 4, 2018 by Richard Kuprewicz) [“I have a direct and concrete need for the CEII. Specifically, in order to verify or disprove perspectives, assertions, claims or need statements by applicant (as well as many conclusions made in the NESE Project DEIS of March 2018)...I request expedited review of this application so that I may have access to the information in order to timely file a motion before FERC on the appropriateness and completeness of the Application and associated DEIS...Expedited as there is a response deadline to the DEIS.”].

public comments (subject to the relevant CEII confidentiality restrictions)⁴⁹ on the DEIS regarding system alternatives and safety, two important issues in FERC’s required NEPA analysis of this Project.⁵⁰ Nevertheless, FERC did not grant Mr. Kleinbaum and Mr. Kuprewicz’s CEII requests until on or about March 21, 2019 – more than ten months after the deadline for submitting public comments on the DEIS (and nearly two months after FERC’s issuance of the FEIS on January 10, 2019).

The circumstances described above are unlawful under the Administrative Procedure Act’s (“APA’s”) arbitrary and capricious standard of review,⁵¹ as explained below.

The failure of FERC to act lawfully under an APA analysis, however, is distinct from the question of whether FERC’s decision under these circumstances is unlawful as a per se violation of NEPA. The Council on Environmental Quality’s (“CEQ’s”) NEPA regulations require federal agencies to “[m]ake diligent efforts *to involve the public* in preparing and implementing their NEPA procedures.”⁵² In this vein, “NEPA procedures must insure that *environmental information* is available to public officials and citizens *before* decisions are made and *before* actions are taken...Accurate scientific analysis, expert agency comments, and *public scrutiny* are essential to implementing NEPA.”⁵³ At the same time, however, we are aware that “NEPA’s public disclosure requirements are ‘expressly governed by FOIA.’...Thus, ‘in a given situation a federal agency might have to include environmental considerations in its decisionmaking process, *yet withhold*

⁴⁹ See 18 C.F.R. § 388.113(h)(2) (“Any individual who requests information pursuant to paragraph (g)(5) of this section must sign and execute a non-disclosure agreement, which indicates the individual’s willingness to adhere to limitations on the use and disclosure of the information requested.”).

⁵⁰ See DEIS at 3-3 to 3-12 (discussion of “System Alternatives”) and DEIS at 4-304 to 4-317 (discussion of “Reliability and Safety”).

⁵¹ 5 U.S.C. § 706 (“The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

⁵² 40 C.F.R. § 1506.6(a) (emphasis added).

⁵³ 40 C.F.R. § 1500.1(b) (emphasis added). In other pipeline proceedings, FERC has made a point to note that the “EIS is not a decision document” (see FEIS for Mountain Valley Project at 1-9). Even presuming that this characterization of an FEIS is accurate, we are not making a NEPA argument here and the rhetorical point still applies to these circumstances: FERC should make environmental information available to the public before major developments (e.g. the DEIS and FEIS) in the regulatory process.

public disclosure of any NEPA documents, in whole or in part, under the authority of an FOIA exemption.”⁵⁴ Both CEQ’s and FERC’s NEPA regulations establish this FOIA (Freedom of Information Act) limitation on NEPA’s public disclosure requirements.⁵⁵

In the case of CEII, the Fixing America’s Surface Transportation Act (“FAST Act”) of 2015 establishes that this information is exempt from release under FOIA.⁵⁶ In particular, Section 61003 of the FAST Act establishes that CEII “shall be exempt from disclosure under *section 552(b)(3)* of title 5, United States Code; and...shall not be made available by any Federal, State, political subdivision or tribal authority *pursuant to* any Federal, State, political subdivision or tribal law *requiring* public disclosure of information or records.”⁵⁷ This places CEII within the third of FOIA’s nine exemptions, which provides that FOIA’s requirements of disclosure “[do] not apply to matters that are...(3) specifically exempted from disclosure by statute...if that statute...(i) requires that the matters be withheld from the public in such a manner as to leave *no discretion* on the issue; *or* (ii) establishes *particular criteria* for withholding or refers to particular types of matters to be withheld.”⁵⁸ Here, in FERC’s letter dated March 21, 2019 granting Mr. Kleinbaum’s CEII request, FERC properly noted that the requested CEII “is exempt from *mandatory* disclosure *pursuant to* FOIA Exemption 3 in accordance with the Commission’s CEII regulations.”⁵⁹

A crucial distinction is that, while the FAST Act exempts CEII from mandatory disclosure pursuant to FOIA, the statute – as interpreted by FERC itself – did not create a blanket prohibition forbidding the agency from disclosing this information under any circumstances. Section

⁵⁴ San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 635 F.3d 1109, 1115 (9th Cir. 2011) (quoting Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981)) (emphasis added).

⁵⁵ See 40 C.F.R. § 1506.6(f) and 18 C.F.R. § 380.9(b) [“The Commission will make environmental impact statements, environmental assessments, the comments received, and *any underlying documents* available to the public *pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552 (1982)).*”] (emphasis added).

⁵⁶ Pub. L. No. 114-94 § 61003 (entitled “Critical Electric Infrastructure Security”).

⁵⁷ Pub. L. No. 114-94 § 61003(d)(1) (emphasis added).

⁵⁸ 5 U.S.C. § 552(b) (emphasis added).

⁵⁹ FERC Letter to Aaron Kleinbaum (dated March 21, 2019) entitled “Notice of Intent to Release, CEII No. CE18-43.” (emphasis added). The Commission’s CEII regulations at 18 C.F.R. § 388.113 define CEII as “exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(3).”

61003(d)(2) of the statute, entitled “Designation and Sharing of [CEII],” requires FERC to “promulgate such regulations as necessary to” – amongst other things – “prohibit the *unauthorized* disclosure of [CEII].”⁶⁰ In its Notice of Proposed Rulemaking implementing FAST Act Section 61003 (issued June 16, 2016), FERC interprets this phrase as allowing the agency “to ensure that the CEII is only shared with those who need it.”⁶¹ Accordingly, FERC amended its existing CEII regulations “to require a person seeking CEII to demonstrate a legitimate need for the information.”⁶² FERC assesses the legitimacy of this need by considering the following six factors:

(1) the extent to which a particular function is dependent upon access to the information; (2) why the function cannot be achieved or performed without access to the information; (3) whether other information is available to the requester that could facilitate the same objective; (4) how long the information will be needed; (5) whether or not the information is needed *to participate in a specific proceeding* (with that proceeding identified); and (6) *whether the information is needed expeditiously*.⁶³

In FERC’s CEII regulations, the agency leaves no doubt that it is “in [FERC’s] *discretion* [to] make...CEII available to the CEII requester in view of the requester’s asserted legitimacy and need.”⁶⁴ Thus, FERC clearly considers the FAST Act to be a FOIA Exemption 3 statute that does leave discretion to the agency on whether to disclose the covered information.

The regulatory history of FERC’s CEII regulations demonstrates that FERC is well aware that timing – and its relation to the NEPA process – is a key factor in whether or not the agency actually satisfies a CEII requester’s need for the information. In its Final Rule implementing FAST Act Section 61003 (dated December 21, 2016), FERC stated that it was “not persuaded that additional clarifications regarding timing are necessary” because 18 C.F.R. § 388.113(g)(5)(vii) “indicates that the time period for responding to CEII requests should mirror the period for

⁶⁰ Pub. L. No. 114-94 § 61003(d)(2) (emphasis added).

⁶¹ 155 FERC ¶ 61,278 (June 16, 2016), pg. 19 ¶ 33 (“[A]nother means to prevent unauthorized disclosure of CEII is to ensure that the CEII is only shared with those who need it.”).

⁶² *Id.*

⁶³ *Id.* at 19-20 ¶ 33 (emphasis added).

⁶⁴ 18 C.F.R. § 388.113(g)(5)(iv) (emphasis added).

responding to FOIA requests.”⁶⁵ FERC’s FOIA regulations generally require that the agency either (1) comply with or (2) deny a request for agency records within 20 working days after receipt of such request.⁶⁶ Moreover, in response to comments suggesting “a default time period for the Commission to respond to a request for CEII unless the information is needed sooner,” FERC stated, “expedited treatment is not needed, as a requester *may include a timeframe in which it needs the information*, and the Commission *will endeavor* to respond in that period.”⁶⁷

FERC’s 2002-2003 rulemaking establishing its initial CEII regulations⁶⁸ explicitly acknowledged “[t]he major concern initially about withholding information about proposed projects was that people might not be able *to participate effectively in the National Environmental Policy Act (NEPA) process*.”⁶⁹ But the Commission determined that it could strike a balance between protecting CEII and adhering to the goals of the NEPA process by “releas[ing] location information generally needed to participate in the National Environmental Policy Act (NEPA) process, while protecting information containing *technical details not usually needed by most NEPA participants*.”⁷⁰ FERC elaborated on this conclusion by noting the following (and providing examples of “technical details”):

*[M]ost NEPA commenters will want to know the location of a proposed pipeline and the footprint of aboveground facilities, but few will need diagrams of valve and piping details, or flow diagrams, or need to know which building will house security and which one will house the computer operations center. Those who do have such a need may file a request for that information using the CEII request procedures in new § 388.113(d) of the Commission’s regulations.*⁷¹

⁶⁵ 81 Fed. Reg. 93,732, 93,747 (December 21, 2016).

⁶⁶ See 18 C.F.R. § 388.108(c).

⁶⁷ *Id.* (emphasis added).

⁶⁸ While this 2002-2003 rulemaking precedes the FAST Act of 2015, FERC’s 2016 rulemaking implementing FAST Act Section 61003 built upon the legal and policy foundation set by the 2002-2003 rulemaking: “The Commission...proposes *modifications* to its *existing* Critical Energy Infrastructure Information process, in part, to comply with the FAST Act. The *amended* process will be referred to as the Critical Energy/Electric Infrastructure Information (CEII) process.” [155 FERC ¶ 61,278 (June 16, 2016), pg. 2 ¶ 2] (emphasis added).

⁶⁹ 68 Fed. Reg. 9,857, 9,862 (March , 2003) (quoting the Sept. 13, 2002 Notice of Proposed Rulemaking and Revised Statement of Policy) (emphasis added).

⁷⁰ *Id.* (emphasis added).

⁷¹ *Id.* at 9,863 (emphasis added).

Thus, while CEII is not subject to the NEPA public disclosure requirements listed earlier, FERC has committed itself to their intent – with respect to certain members of the public (i.e. the minority of NEPA participants) – in the agency’s CEII regulations. This includes the fact that when a NEPA participant receives CEII largely determines its ability to participate effectively in the NEPA process, a major component of which is the public comment time period. We note here that FERC’s professed commitment to NEPA’s intent with respect to certain members of the public reveals FERC’s bad faith in its response to CEII-related comments on the DEIS. FERC states that CEII “is reviewed by FERC staff and other regulatory agencies; however, it is not releasable *to the public* per federal statutes and FERC regulations.”⁷² While this is technically true (i.e. CEII cannot be released to the public at large), it conveniently omits that the same FERC regulations being cited allow for certain members of the public to receive CEII.

FERC’s application of its CEII regulations to Mr. Kleinbaum and Mr. Kuprewicz’s CEII requests – while not reviewable under FOIA or NEPA – is subject to the ordinary administrative law principles of review. That is, just because it is not a FOIA or NEPA violation, FERC’s handling of these CEII requests is not immune from the law. In Aronson v. I.R.S., 973 F.2d 962 (1st Cir. 1992), the First Circuit found that “once a court determines that the statute in question is [a FOIA] Exemption 3 statute, and that the information requested at least arguably falls within the statute...[a]ny further review must take place under...administrative law standards.”⁷³ In that case, the court evaluated whether a federal agency had “exercise[d] the *permissive* authority [of the underlying] statute” in a manner that was ““arbitrary, capricious, [or] an abuse of discretion.””⁷⁴

Here, FERC was exercising the permissive authority of the FAST Act --- the underlying statute applicable to FOIA Exemption 3 – via its CEII Regulations. As FERC itself stated in its

⁷² See FEIS at M-113, GEN-31 (emphasis added).

⁷³ Aronson v. I.R.S., 973 F.2d 962, 967 (1st Cir. 1992).

⁷⁴ Id. at 965 [citing 5 U.S.C. § 706(2)(A)] (emphasis in original).

March 21, 2019 letter, the agency “must balance a requester’s need for the information against the sensitivity of the information.”⁷⁵ And, as established above, timing is a key factor in assessing a requester’s need. Nevertheless, while both Mr. Kleinbaum and Mr. Kuprewicz made clear in early April 2018 that they needed this CEII “expeditiously” in light of the deadline of May 14, 2018 to submit public comments on the DEIS, FERC did not grant Mr. Kleinbaum and Mr. Kuprewicz’s CEII requests until on or about March 21, 2019. Nothing in the record justifies FERC delaying rendering its ultimate decision until ten months after the public comment deadline.

FERC’s March 21, 2019 letter can fairly be characterized as FERC’s decision that – under its own stated balancing test – (1) Mr. Kleinbaum’s need for the information outweighed (2) the sensitivity of the information. As for the second of these two elements, FERC found that Transco “has not demonstrated that the information is privileged or confidential.”⁷⁶ But Transco raised this argument on May 4, 2018.⁷⁷ FERC’s grounds for dismissing this argument – that disclosure of the information would neither “impair the government’s ability to obtain similar information in the future” or “cause substantial harm to the competitive position of the submitter of the information”⁷⁸ – could easily have been established by the agency on or soon after May 4, 2018.

As for the first element, FERC found that Mr. Kleinbaum “demonstrated a legitimate need for the information requested.”⁷⁹ FERC’s grounds for this finding were that (1) “Commission staff has verified that you are an attorney representing New York/New Jersey Baykeeper,” (2) “you have agreed to adhere to the terms of the nondisclosure agreement executed on April 5, 2018,” (3) “on January 17, 2019 you provided a signed statement in accordance with 18 C.F.R. § 388.113(g)(5)(i)(D),” and (4) “You state that you need the information to further the interest of your

⁷⁵ FERC Letter to Aaron Kleinbaum (dated March 21, 2019) entitled “Notice of Intent to Release, CEII No. CE18-43.”

⁷⁶ FERC Letter to Aaron Kleinbaum (dated March 21, 2019) entitled “Notice of Intent to Release, CEII No. CE18-43.”

⁷⁷ *Id.* (“On May 4, 2018, Transco asserted that your request should be denied under FOIA Exemption 4 because their Exhibit G Diagrams contain confidential commercial information.”)

⁷⁸ *Id.*

⁷⁹ *Id.*

client.”⁸⁰ FERC could have easily established the first two grounds on or soon after April 5, 2018 (when Mr. Kleinbaum submitted his CEII request). As for the third ground, as Mr. Kleinbaum noted in his January 17, 2019 email to Michael Watson of FERC, it actually “is clear from the Record that a complete and adequate request had already been provided to FERC by me and our consultant, Richard Kuprewicz in April 2018.”⁸¹ Mr. Kleinbaum pointed out that “the fact that FERC saw fit to send two letters on April 27, 2018 to Transco regarding our requests undermine FERC’s current position that a ‘signed statement’ was necessary to ‘complete the processing of your request.’”⁸² And two EELC documents filed with FERC on May 14, 2018 mentioned these CEII requests, putting FERC on further notice of them. Yet “FERC did not flag this issue of the lack of a ‘signed statement’ at the outset or after [these] subsequent filings.”⁸³

The fourth ground -- “You state that you need the information to further the interest of your client” – is a clear reference to the “detailed Statement of Need” in FERC’s CEII regulations⁸⁴, which consists of the six factors listed earlier.⁸⁵ Yet FERC makes no reference to the timing factor (whether the information is needed expeditiously), let alone the specific proceeding factor (whether or not the information is needed to participate in a specific proceeding). In his CEII request, Mr. Kleinbaum had clearly explained the nature of his need in light of these two factors, as established above. Therefore, FERC was aware of the nature of this need in April 2018 and delayed rendering its ultimate decision despite having already established each and every one of the other grounds for this decision in April/May of 2018. Alternatively, FERC failed to even consider the nature of this

⁸⁰ *Id.*

⁸¹ EELC Letter on CEII Requests (dated January 23, 2019) (Accession # 20190123-5029).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 18 C.F.R. § 388.113(g)(5)(i)(B).

⁸⁵ *Id.* (“[1] The extent to which a particular function is dependent upon access to the information; [2] why the function cannot be achieved or performed without access to the information; [3] an explanation of whether other information is available to the requester that could facilitate the same objective; [4] how long the information will be needed; [5] whether or not the information is needed to participate in a specific proceeding (with that proceeding identified); and [6] an explanation of whether the information is needed expeditiously.”)

need in April 2018 and thus saw no reason not to delay rendering its ultimate decision. Under either scenario, FERC has made “a clear error of judgment.”⁸⁶ Consequently, FERC’s handling of these CEII requests is unlawful under the APA’s arbitrary and capricious standard of review.⁸⁷ Given the agency’s unlawful decision on these CEII requests, FERC’s May 3, 2019 Order granting Transco a Certificate was the product of an unlawful overall application review process and must be set aside.

The magnitude of FERC’s clear error in its handling of these CEII requests was revealed once Mr. Kleinbaum and Mr. Kuprewicz actually received the CEII data from FERC on or about April 1, 2019 and had a chance to evaluate it. Regarding system alternatives, Mr. Kuprewicz concluded that the data fails to justify the proposed pipeline or compressor station modifications. Significantly, based on his review of the incomplete data, it is impossible to determine the need of the Project’s Compressor Station 206.⁸⁸ Regarding safety impacts, Mr. Kuprewicz determined that the data is deficient and thus it remains impossible to independently analyze the assumptions underlying Transco’s and FERC’s safety-related conclusions.⁸⁹ Mr. Kuprewicz’s conclusions – which he was unable to provide FERC by the May 14, 2018 public comment deadline on the DEIS (let alone by mid-December 2018, the apparent cutoff for comments in advance of the FEIS⁹⁰) -- provide further evidence that he was inhibited by FERC from “participat[ing] *effectively* in the National Environmental Policy Act (NEPA) process.”⁹¹ This underscores the arbitrary and capricious manner of FERC’s actions.

⁸⁶ Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (“Section 706(2)(A) requires a finding that the actual choice made was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ 5 U.S.C. s 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a *consideration of the relevant factors* and whether there has been a *clear error of judgment*.”) (emphasis added).

⁸⁷ Id.

⁸⁸ See attached, Accufacts Public Comments for EELC on CEII Data Concerning Transco’s NESE Project (dated April 24, 2019).

⁸⁹ Id.

⁹⁰ See FEIS at ES-2 (“All environmental comments that were received on the draft EIS through mid-December 2018 have been addressed in this final EIS.”).

⁹¹ 68 Fed. Reg. 9,857, 9,862 (March , 2003) (quoting the Sept. 13, 2002 Notice of Proposed Rulemaking and Revised Statement of Policy) (emphasis added).

3. FERC's Order violates NEPA because it rests on an FEIS that is Wholly Deficient

The National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., requires FERC to take a hard look at the environmental consequences of the NESE Project (and its alternatives) *before* issuing the FEIS, and to involve the public in the NEPA process to the fullest extent practicable. FERC violated these requirements. As a result, the agency's decision to issue the FEIS and Order was uninformed, arbitrary, and capricious.

a. FERC Violated NEPA by Failing to Engage in a Robust Alternatives Analysis

i. FERC failed to adequately consider the no action alternative

The following comment made by the New York DEC in its May 14, 2018 comments on the DEIS is equally applicable to the FEIS⁹², on which the Order is based:

Section 3.0 states the alternatives of using renewable energy or reducing energy demand will not be considered alternatives to the NESE Project, because the purpose of the NESE Project is to bring incremental natural gas capacity to National Grid. This narrow definition of the purpose of the NESE Project inappropriately excludes from consideration various alternatives, *including a meaningful consideration of the No Action Alternative* as well as of using renewable energy and conservation measures to reduce natural gas demand. Implementing conservation measures and promoting the use of renewable energy provide significant environmental advantages, particularly when compared to the additional production, supply, and combustion of natural gas. This is true because of the climate change, greenhouse gas (GHG), and other air pollutant emission impacts associated with natural gas, as well as the other environmental impacts associated with the construction of the NESE Project. Yet despite these benefits, such renewable energy or energy conservation alternatives are dismissed outright from consideration as part of the DEIS.⁹³

ii. FERC failed to adequately consider system alternatives

See discussion under Section II.B.2 (“The Commission Acted in an Arbitrary and Capricious Manner by Not Releasing the CEII to Certain Members of the Public until after Both the DEIS and FEIS Were Issued.”)

⁹² See FEIS at 3-3.

⁹³ Comments of New York DEC on DEIS, pp. 4-5 (May 14, 2018) (emphasis added), Accession No. 20180514-6081.

b. FERC failed to properly analyze the Project's GHG Emissions

As Commissioner Glick thoroughly explained in his dissent from the Order, the Commission's "failure to identify the reasonably foreseeable [GHG emissions from downstream combustion and upstream production due to] the Project"⁹⁴ and "refusal to consider the significance of the Project's contribution to climate change"⁹⁵ are both arbitrary and capricious.⁹⁶ Regarding downstream emissions, Commissioner Glick notes "*Sabal Trail* held the reasonably foreseeable combustion of gas transported through a pipeline was an indirect effect."⁹⁷ And Commissioner Glick explains that "downstream end uses are causally connected to the...Project"⁹⁸: "There is no real question that the natural gas to be transported by the Project will be combusted...the very purpose of the Project is to provide natural gas to residential and commercial customers in New York City."⁹⁹ Regarding upstream production, "[t]he Commission cannot ignore the fact that adding firm transportation capacity is likely to spur demand' for natural gas."¹⁰⁰ In addition, Commissioner Glick noted that – notwithstanding the Commission's claim that it "lacks a widely accepted standard for evaluating the significance of GHG emissions"¹⁰¹ -- the Social Cost of Carbon "provides the 'hard look' required by NEPA, and gives both the Commission and the public a means to translate a discrete project's climate impacts into concrete and comprehensible terms."¹⁰²

⁹⁴ Order (Glick, Comm'r, dissenting at pg. 5).

⁹⁵ *Id.* at pg. 1.

⁹⁶ We note here that we are – and have been – aware that the FEIS did quantify greenhouse gas ("GHG") emissions during the Project's construction and operation. In its Order, FERC incorrectly states that EELC's Comments on the FEIS "reiterate[] comments it previously filed on the draft EIS, namely that the Commission *fails to disclose* greenhouse gas (GHG) emissions, or include an estimate of the project's downstream emissions." (Order P 90) (emphasis). EELC actually commented that "FERC has failed to include required GHG emissions information." (EELC Comments on FEIS; March 14, 2019). This required information includes "an estimate of the Project's downstream carbon emissions." (*Id.*).

⁹⁷ Order (Glick, Comm'r, dissenting at pg. 1).

⁹⁸ Order P 90.

⁹⁹ Order (Glick, Comm'r, dissenting at pg. 5).

¹⁰⁰ *Id.* at 8 [citing Barnes v. U.S. Dep't of Transp., 655 F.3d 1124 (9th Cir. 2011)].

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 4.

In addition to the above points, we stress that Commissioner LaFleur’s consideration and quantification of the Project’s downstream GHG emissions in her concurrence does not remedy the Commission’s failure to satisfy NEPA on this specific issue.¹⁰³ Even if Commissioner LaFleur had just used the raw data contained in the FEIS to estimate the Project’s downstream GHG emissions – which, as explained below, she did not – her concurrence does not satisfy NEPA. The D.C. Circuit generally noted that an environmental impact statement has two aims. First, “[i]t forces the agency to take a ‘hard look’ at the environmental consequences of its actions.”¹⁰⁴ Second, “[i]t...ensures that these environmental consequences, and the agency’s consideration of them, are disclosed to the public.”¹⁰⁵ The court also highlighted that “[a]n EIS is deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS does not contain ‘*sufficient discussion of the relevant issues and opposing viewpoints.*’”¹⁰⁶

The D.C. Court ultimately “conclude[d] that *the EIS* for the [SMP] Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.”¹⁰⁷ The court vacated and remanded the relevant orders “to FERC for *the preparation of an environmental impact statement* that is consistent with this opinion.”¹⁰⁸ The court ordered the preparation of an environmental impact statement despite the fact that the original FEIS for the SMP Project “already estimated how much gas the pipelines will transport...[which could] be used to estimate greenhouse-gas emissions from the power plants.”¹⁰⁹ Thus, the court made clear that an “estimate greenhouse-gas emissions from the power plants” must be done via an

¹⁰³ See Order (LaFleur, Comm’r, concurring at pp. 1-5).

¹⁰⁴ Sierra Club v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017).

¹⁰⁵ Id.

¹⁰⁶ Id. at 1368 [citing Nevada v. Dep’t of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006) (quoting Nat. Res. Def. Council v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988))] (emphasis added).

¹⁰⁷ Id. at 1374 (emphasis added).

¹⁰⁸ Id. at 1379 (emphasis added).

¹⁰⁹ Id. at 1374.

EIS, as the original FEIS had not contained a “sufficient discussion” of this specific issue and only a new EIS would ensure the agency took a hard look at these environmental consequences and properly disclosed them to the public. In light of the above, Commissioner LaFleur’s calculation of the Project’s downstream GHG emissions outside of an EIS (or Supplemental EIS¹¹⁰) is deficient under NEPA.

Commissioner LaFleur’s use in her calculation of information submitted to the record after the FEIS was issued on January 25, 2019 further compounds the error noted above. In particular, Commissioner LaFleur relied on post-FEIS submissions from Transco (dated February 27, 2019 and April 24, 2019) and National Grid (dated April 2, 2019) that provided more detailed information on downstream end use of the natural gas and the apparent quantity of downstream GHG emission reductions due to the Project.¹¹¹ If the D.C. Circuit found that FERC needed to prepare an additional EIS even when the original EIS contained the raw data necessary to conduct the analysis it found lacking, then the court certainly would find a post-FEIS calculation partly based on information submitted after the FEIS to be even more deficient under NEPA.

c. FERC Failed to Properly Analyze Onshore and Offshore Water Impacts

i. Onshore Water Impacts: FERC Failed to Take a Hard Look at Impacts to Wetlands

EELC’s comments on the FEIS referring to onshore water impacts were not addressed in the Order. We highlight them again here. In the FEIS, FERC’s selection of the Compressor Station 206 site continues to be based on the flawed assumption that Transco will satisfy “all applicable

¹¹⁰ See 162 FERC ¶ 61,233, P 12 and P 14 (issued March 14, 2018) [in response to the court’s order in Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017), FERC issued a draft Supplemental EIS for the SMP Project on September 27, 2017 and a final Supplemental EIS on February 5, 2018.]

¹¹¹ See Order (LaFleur, Comm’r, concurring at pg. 2) (“The Commission received detailed information on downstream end use from both Transco and National Grid. I appreciate companies proactively submitting specific information into the record to assist the Commission in quantifying and considering the downstream indirect impacts a proposed project.”).

laws and regulations.”¹¹² There are two reasons why such compliance cannot be assumed. First, Transco’s NESE Project will need to comply with both New Jersey’s Freshwater Protection Act (“FWPA”) Rules and EPA’s Clean Water Act (“CWA”) Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The FWPA Rules and CWA Section 404(b)(1) Guidelines require a realistic, site-specific analysis of wetlands impacts. But FERC’s discussion of wetlands impacts in the FEIS¹¹³ relies on generalized statements that do not acknowledge the severity of the impacts that will occur to wetlands – as well as to wetland transition areas – as a result of this Project. Second, to meet the FWPA Rules, Transco’s NESE Project will also need to comply with New Jersey’s Stormwater Management Rules. But Transco’s proposed Compressor Station 206 site basin – even after multiple design iterations – still fails to satisfy the minimum design standards of the Stormwater Best Management Practices (“BMP”) manual.

We note here that, should Transco’s current Freshwater Wetlands (“FWW”) permit application be approved by the New Jersey DEP, that development does not per se constitute satisfaction of New Jersey’s FWPA Rules. As EELC has made clear to NJDEP in numerous comments to that state agency, Transco’s current FWW permit application does not satisfy the FWPA Rules. If New Jersey DEP issues Transco a FWW permit based on this current application, EELC reserves the right to challenge that permit in the relevant administrative and judicial forums based on its violation of the FWPA Rules.

ii. Offshore Water Impacts: FERC Failed to Take a Hard Look at How Construction Activities May Impact the Raritan Bay

The record shows that FERC failed to take a hard look at how the Project may change to reduce the exposure of Raritan Bay to mercury and copper, among other toxins.

(a). The Record Reveals Significant Risks to Raritan Bay Water Quality

¹¹² FEIS, at 4-1.

¹¹³ See *id.* at 4-63 to 68.

From Construction

The Project entails a massive one-year construction effort that will extend onshore and offshore over three states, New York, New Jersey and Pennsylvania involving the construction and operation of over 37 miles of new onshore and offshore pipeline loops, modification of an existing compressor station in Chester County Pennsylvania, construction of a new compressor station in Somerset County, NJ and ancillary facilities.¹¹⁴ Along with other components in Pennsylvania and New Jersey, the NESE Project involves installing 23.5 miles of gas pipeline within New York and New Jersey state waters. The offshore work will directly disturb over 87 acres and indirectly affect over 947 acres of ocean floor.¹¹⁵ This offshore section of the pipeline is known as the Raritan Bay Loop.¹¹⁶ Direct impacts to marine organisms include “mortality, injury or temporary displacement,” indirect impacts include suspension of sediments “which clog fish gills... and redistribution of sediments ... resulting in mortality...”¹¹⁷ Before commencing construction of the Raritan Bay Loop portion of the NESE Project, Transco must obtain a Water Quality Certification (“WQC”) from the New York State Department of Environmental Conservation (“NYDEC”) and [NJDEP].¹¹⁸ Based on Transco's contaminant modeling results, water quality standards for mercury and copper would not be met.¹¹⁹ This is especially worrisome because at sufficiently high levels, heavy metals such as mercury and copper are toxic to aquatic organisms and humans. FERC addresses these risks by allowing Transco to rely on undetermined field monitoring during construction, to “ensure compliance with water quality standards.” To verify that aquatic organisms recover, Transco is permitted to “file a post-construction benthic sampling and monitoring plan” that allows Transco to chose the duration, time, success criteria and other reporting criteria after the project is

¹¹⁴ *See* FEIS §§ 1.0 & 2.0.

¹¹⁵ FEIS, 4-106.

¹¹⁶ *Id.*

¹¹⁷ FEIS at pp. 4-106 to 107.

¹¹⁸ 33 U.S.C. § 1341 (2012).

¹¹⁹ FEIS at ES-12.

completed.¹²⁰

(b). NEPA Rejects FERC's "Act First Study Later" Approach and Lack of Public Participation

The FEIS asserts that after the Order issues, known and suspected contamination within the construction zone will be monitored, evaluated and mitigated if necessary.¹²¹ The problem with this approach, however, is that the environmental consequences of proposed actions are supposed to be considered *before* actions are taken, not after.¹²²

Transco's construction activities will disturb the Raritan Bay with known and suspected contamination. The question remaining is whether monitoring, evaluation and possible mitigation of these activities will reduce known significant risks for aquatic organisms with related impacts to important areas for shellfish propagation and survival. In violation of NEPA, FERC left questions unanswered when significant known violations of water quality were identified. While FERC promises that another public agency will perform the necessary analysis after the Order issues, that is too late in this case.¹²³

In support of its lack of action, FERC points to NYDEC as the appropriate agency to identify and police the monitoring, evaluation and possible mitigation.¹²⁴ However, NYDEC's permit, if it is obtained, will likely have significant changes to the analysis of the known water quality violations and the proposed construction methods in addition to likely new mitigation

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 40 C.F.R. §1500.1 (b)-(c); *see also*, *National Parks & Conservation Assoc. v. Babbitt*, 241 F.3d 722, 728-733 (9th Cir. 2001), *abrogated on other grounds by Monsanto v. Geertson Seed Farms*, 130 S.Ct. 2743, 2757 (2010), (holding that proposed research and monitoring plan to fill information needs and understand the project's effects was precisely the information and understanding that is required before an agency decision is made); *see also Fritiofson v. Alexander*, 772 F.2d 1225, 1244 (5th Cir. 1985) (the lead agency cannot "cloak[] itself in ignorance. . . . the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known.");

¹²³ *See NRDC v. ACE*, 399 F. Supp. 2d 386, 388-89 ("the Corps' decision to begin dredging without taking the required hard look at this problem was arbitrary and capricious").

¹²⁴ *See*, Notice of Denial of Water Quality Certification, New York State Department of Environmental Conservation, (dated May 15, 2019) (Accession # 20190517-5219) (DEC denied Transco's WQC application because Transco was unable to demonstrate that the project would comply with all applicable water quality standards in New York state waters.)

requirements.¹²⁵ For example, NYDEC may require different modeling to analyze the water quality violations, leading to additional violations of mercury, copper and other water quality standards, as well as different construction methods.¹²⁶ However, the FEIS does not address the possibility of different modeling or construction methods and the potential to the overall impact to the rest of the Project.¹²⁷

Thus, the referral to another agency means little if it is not supported by the FEIS record and adequate coordination.¹²⁸ In short, there is no evidence in the record supporting the undetermined post-Order monitoring, evaluation and mitigation due to known water quality violations identified in the FEIS. As a result, FERC's decision to issue its FEIS and Order and forego complete fact finding was arbitrary and capricious.

d. FERC Failed to Properly Analyze Safety Impacts

EELC's comments on the FEIS referring to safety impacts were not addressed in the Order. We highlight them again here. Regarding the existing pipeline, the FEIS refers to Transco's October 5, 2018 filing.¹²⁹ But EELC's safety expert concluded that, in this filing, "Transco has failed to respond to FERC's specific data request in a manner that would adequately demonstrate that the risks of corrosion attack on its pipeline facilities and/or system is under control and would not be exacerbated by the NESE Project."¹³⁰

Regarding the new pipeline, two PHMSA letters (dated January 18, 2018 and November 16, 2018) alleging prior Transco pipeline safety violations raise doubts about the credibility of

¹²⁵ DEC Notice at p. 7 - 8.

¹²⁶ *Id.*

¹²⁷ See FEIS at ES-12, 4-122, 4-148, 4-183, 4-367, and 5-11 (discussing and referring to modeling a 500-foot mixing zone but not mentioning other modeling or other corrective methods such as different construction work windows).

¹²⁸ See *NRDC v. ACE* at 408-09 (S.D.N.Y. 2005) ("An agency is justified in relying on another agency, where that agency's finding of *no significant impact* is supported by reasoned analysis... The expertise and analysis underlying the agency's findings must be apparent from the [NEPA] record. *That is not the case here.*")(Emphasis added.)

¹²⁹ FEIS at 4-333.

¹³⁰ EELC Safety-Related Comments to FERC & DEP (dated January 10, 2019), *supra* note 1, p. 5.

Transco's statements that the NESE Project will be designed, installed, inspected, tested, constructed, operated, replaced, and maintained in keeping with PHMSA's safety standards.¹³¹

Nevertheless, FERC continues to maintain that pipeline operator compliance and incident history available through PHMSA is "not relevant to the Commission's review of the NESE Project."¹³²

Also see discussion under Section II.B.2 ("The Commission Acted in an Arbitrary and Capricious Manner by Not Releasing the CEII to Certain Members of the Public until after Both the DEIS and FEIS Were Issued.").

e. FERC Failed to Properly Analyze Air Impacts

Given that its emissions of six different HAPs grossly exceed the New Jersey Department of Environmental Protection's ("DEP's") new reporting thresholds, Compressor Station 206 must undergo a health impact assessment.¹³³

III. INTERVENORS' MOTION FOR STAY

In addition to their request for rehearing and rescission, Intervenor also move the Commission for a stay of the Certificate Order pending resolution of the merits of Intervenor's request for rehearing and rescission. The Commission has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where "justice so requires."¹³⁴ To prevent impacts during the pendency of the rehearing process that are indeed final with respect to Intervenor 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. Intervenor meet all three factors that the Commission considers in making a decision in response to the request for a stay: (1) Intervenor will suffer irreparable harm without a stay, (2) issuing a stay will not substantially

¹³¹ *Id.*

¹³² FEIS at 4-334.

¹³³ See EELC Comments on DEIS (dated May 14, 2018), *supra* note 1, pp. 17-18

¹³⁴ 5 U.S.C. § 705.

harm Transco, and (3) a stay is in the public interest.¹³⁵ The cumulative and irreversible impacts of the NESE Project require a stay in the interest of justice.

A. INTERVENORS AND THEIR MEMBERS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY

The Order allows Transco to proceed with pre-construction activity, which includes tree removal and land clearing. These activities would constitute damage that cannot be undone even if Intervenor are granted a rehearing request or Transco does not ultimately receive its required state permits.

B. TRANSCO WILL NOT BE HARMED BY A STAY

The Order is conditioned on Transco receiving certain state-level permits and approvals before commencing construction, such as Water Quality Certifications from New York and New Jersey¹³⁶ and concurrence from New York and New Jersey with Transco's Coastal Zone Management Act Consistency Certification.¹³⁷ Given that Transco does not yet have these state-level permits and approvals, it cannot commence construction. Thus, Transco cannot begin construction at this point anyways, so a stay of the Order at this juncture would not be the proximate cause for preventing construction.

C. A STAY IS IN THE PUBLIC INTEREST

Intervenors and the public have a significant interest in seeing the Natural Gas Act properly administered. The NGA's "fundamental purpose is to protect natural gas consumers from the

¹³⁵ Tennessee Gas Pipeline Company, L.L.C., 154 FERC ¶ 61,263, 4, Docket No. CP14-529, Accession No. 20160330-3085 (Mar. 30, 2016).

¹³⁶ See Order, pg. 41 P 10 ["Transco must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Transco must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)."]

¹³⁷ See Order, pg. 43 P 20 ("**Prior to construction**, Transco shall file with the Secretary documentation of concurrence from the New Jersey DEP, New York Department of State, and New York City Department of City Planning that the project is consistent with the Coastal Zone Management Act.>").

monopoly power of natural gas pipelines.”¹³⁸ By taking the arguments of the project proponents (i.e. Transco and National Grid) which it is charged with regulating at face value, FERC has failed to discharge its duty under the NGA. When FERC ignores that congressional charge, the public suffers due to a lack of a competitive, consumer-friendly natural gas market.¹³⁹

IV. CONCLUSION

For the foregoing reasons, the Commission must **GRANT** the Intervenor’s request for rehearing, **RESCIND** the Order, and **GRANT** the stay request.

Respectfully Submitted,

/s/Aaron Kleinbaum

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Surfrider Foundation*

Dated: June 3, 2019

Enclosure: Accufacts Public Comments for EELC on CEII Data Concerning Transco’s NESE Project (dated April 24, 2019).

¹³⁸ Nat’l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 833 (D.C. Cir. 2006).

¹³⁹ JIM WELLS, U.S. GOV’T ACCOUNTABILITY OFF., GAO-03-726R, ELECTRICITY MARKETS: FERC’S ROLE IN PROTECTING CONSUMERS 1—5 (2003).

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Re: Accufacts Comments on CEII Data Concerning Transco’s NESE Project,
CE18-41, Docket Number CP17-101-000

Eastern Environmental Law Center (EELC) asked me to review various documents associated with the Transcontinental Gas Pipe Line Company, LLC (Transco) NESE Project (Project) filing to the Federal Energy Regulatory Commission (FERC), Docket No. CP17-101-000. EELC represents NY/NJ Baykeeper, Food & Water Watch, Central Jersey Safe Energy Coalition and the Princeton Manor Homeowners Association. Specifically, EELC asked me to review the project’s proposed modifications for the capacity increase claimed by Transco, the applicant, as well as possible system alternatives, including the proposed new Compressor Station 206, before the end of FERC’s comment period for the Project’s Draft Environmental Impact Statement (Draft EIS).

Based upon my review, which was substantially delayed by FERC’s failure to provide confidential information in a timely manner, I conclude that neither the public nor I can verify Transco’s assertions about the new and modified pipeline equipment that is proposed to deliver an additional 400,000 dekatherms of gas per day to New York. In particular, the lack of specific information for the Transco system as listed in the confidential Attachment 1, does not permit an independent verification of this Project’s equipment assertions. Such an independent verification is needed given the Project’s claim for significant power in the new proposed Compressor Station 206 that is in very close proximity to the next upstream existing Compressor Station 205.

In order to complete my work when I was retained by EELC a year ago, I needed documents submitted to FERC, including Transco’s Resource Report 11 on Reliability & Safety, and FERC’s Draft EIS dated March 2018 for the Project. In addition to these documents, to perform an appropriate engineering analysis to independently verify Transco’s assertions for equipment (pipeline looping (paralleling) and new and upgraded compressor stations) modifications or additions to justify the Project’s capacity increases, I also requested the following:

- 1) Complete flow diagrams of the affected segments of Transco’s system for both base pre-Project and post-Project cases,

- 2) Transco's pipeline hydraulic modeling approach and subsequent flow/pressure results along the specific key segments of the Project's affected system for each case, including at supply and delivery points,
- 3) Various pipeline system parameters (pipe grade, pipe thickness, pipe diameter, and maximum allowable operating pressure, or MAOP) of the existing and newly proposed pipelines affected by the Project,¹ and

The three above listed items are typically supplied with the pipeline applicant's filing to FERC as Exhibit Gs, and are usually claimed as confidential and labeled Critical Energy/Electric Infrastructure Information (CEII) protected under 18 C.F.R. § 388.113. As discussed below, FERC failed to respond in a timely manner to my April 2018 request for the CEII. FERC provided the Exhibit Gs, a year later, on April 1, 2019, after FERC issued its Final EIS.

My review of the Exhibit G CEII data indicates that the exhibits and data are incomplete with respect to many of the items listed above. I have provided a confidential Attachment that refers to the CEII data and itemizes some of the important missing information. The lack of this information prevents FERC, its consultants, the public, and me the ability to verify the assertions of Transco concerning the NESE Project.

Thus, in my expert opinion, it is impossible to evaluate the claims made by Transco on the pipeline or justify the added power from the compressors for the Project. I cannot evaluate system alternatives based on the inadequate information supplied in the Exhibit G CEII. In my opinion, FERC cannot substantiate Transco's claims that the pipeline/compressors modifications are needed, including the proposed new Compressor Station 206 for the Project based on the incomplete Exhibit G CEII data supplied to me.

The following timeline represents my formal CEII request for important system information in this matter:

On April 4, 2018, I submitted a formal CEII request using FERC's Electronic Request Form for the above docket on FERC's website, noting in my application certain information that I expected in response to this CEII request. As is usually required with CEII filings, I signed a non-disclosure agreement. This requested information is not unique, and I have made many such requests in other pipeline filings to FERC.

On April 4, 2018 FERC acknowledged my request.

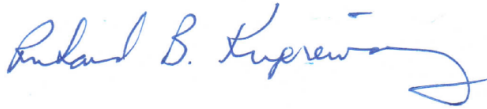
On April 12, 2018 FERC emailed me with a subject titled: CEII Acceptance Letter – CEII-2018-41 Richard Kuprewicz.

¹ It should be noted that MAOP can change by pipe segment (existing or new) and the MAOP is not operating pressure, as it is a term specifically defined in federal minimum pipeline safety regulations that carry special operating limitations.
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A year later, on March 28, 2019 I received an email from FERC containing a letter indicating the Commission has determined that I am “a legitimate requester with a need for the information.” FERC’s untimely decision clearly demonstrates a failure of its CEII process.

On April 1, 2019 I received, via certified mail, CEII data in response to my April 4, 2018 CEII request.

In conclusion, FERC’s decision to issue a January 25, 2019 Final EIS was wrong because: 1. The Transco Exhibit G CEII data fails to justify the proposed pipeline or compressor station modifications because important information is missing, and 2. The yearlong delay in responding to Accufacts’ legitimate request for the CEII data did not allow EELC or its clients a chance to comment on Transco’s assertions for the pipeline and compressor modifications for this Project. Finally, based on my review of the incomplete data, it is impossible to determine the need of the Project’s Compressor Station 206 that is unusually close to the existing upstream compressor station 205.

A handwritten signature in blue ink that reads "Richard B. Kuprewicz". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard B. Kuprewicz,
President,
Accufacts Inc.

CEII Confidential Attachment 1: Critical Energy/Electric Infrastructure Information (CEII)
CE18-41, CP17-101 - Not for public release.