

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

In the Matter of

Columbia Gas Transmission, LLC

Docket No. CP17-80-000

FILED August 17, 2018

**REQUEST FOR REHEARING AND RESCISSION OF CERTIFICATE OF
POTOMAC RIVERKEEPER NETWORK AND CHESAPEAKE CLIMATE ACTION
NETWORK**

Pursuant to section 19(a) of the Natural Gas Act (“NGA”), 15 U.S.C. §717r(a) and Rule 713 of the Federal Regulatory Energy Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Chesapeake Climate Action Network, on behalf of itself and Potomac Riverkeeper Network (collectively “Intervenors”) hereby request rehearing of the Commission’s “Order Issuing Certificate,” issued July 19, 2018 in the above-captioned proceeding (“Certificate Order”).¹

The Commission granted Intervenors Potomac Riverkeeper Network and Chesapeake Climate Action Network’s 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

Intervenors request that the Certificate Order and deficient Environmental Assessment (“EA”) be withdrawn, and a full Environmental Impact Statement (“EIS”) be prepared in order

¹ See Columbia Gas Transmission, LLC, 164 FERC ¶ 61,036 (July 19, 2018).

² *Id.* at ¶ 7, 8.

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

to comply 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 March 15, 2017, Columbia Gas Transmission, LLC (“Columbia”) filed an application pursuant to section 7(c) of the NGA and Part 157 of the Commission’s regulations, for authorization to construct and operate its Eastern Panhandle Expansion Project (“Project”), extending from Fulton County, Pennsylvania to Morgan County, West Virginia.⁴ On April 14, 2017, Potomac Riverkeeper Network filed its Motion to Intervene in this proceeding.⁵ On May 25, 2017, Chesapeake Climate Action Network filed its Motion to Intervene in this proceeding.⁶

On April 25, 2017 the Commission published a Notice of Intent to Prepare an EA and requested scoping comments on the EA.⁷ On May 25, 2017, Potomac Riverkeeper Network submitted scoping comments on behalf of Upper Potomac Riverkeeper, Waterkeepers Chesapeake and Allegheny Defense Project.⁸ In its scoping comments, Potomac Riverkeeper Network requested that the Commission prepare an EIS and assess the impacts of the Mountaineer Gas pipeline as a connected, similar and cumulative action.⁹ On October 5, 2017, the Commission published a Notice of Schedule for Environmental Review of the Eastern

⁴ See FERC Notice of Application (March 29, 2017) (eLibrary No. 20170329-3005).

⁵ Potomac Riverkeeper Network, Motion to Intervene in Docket No. CP-17-80-000 (Apr. 14, 2017) (eLibrary No. 20170414-5032).

⁶ Chesapeake Climate Action Network, Motion to Intervene in Docket No. CP-17-80-000 (May 25, 2017) (eLibrary No. 20170525-5257).

⁷ FERC Notice of Intent to Prepare an Environmental Assessment for the Proposed Eastern Panhandle Expansion Project and Request for Comments on Environmental Issues (Apr. 25, 2017) (eLibrary No. 20170425-3010).

⁸ Comments of Potomac Riverkeeper Network and Upper Potomac Riverkeeper, Waterkeepers Chesapeake and Allegheny Defense Project (May 25, 2017) (eLibrary No. 20170525-5287) [hereinafter “Scoping Comments”].

⁹ *Id.* at 4.

Panhandle Expansion Project, in which it stated that the EA would be issued on January 26, 2018.¹⁰ The Notice also took note of the nearly two thousand signed comments from members of the Chesapeake Climate Action Network opposing the project, along with over 100 concerned citizens from the region.¹¹

On September 25, 2017, Potomac Riverkeeper Network filed a motion requesting that the Commission take administrative notice of the federal court ruling in *Sierra Club v. FERC*, No. 16-1329 (D.C. Circuit Court of Appeals) (Aug. 22, 2017), in which the court found that the Commission had failed to consider the reasonably foreseeable downstream indirect effects of the proposed pipeline as required by 40 C.F.R. § 1502.16(b).¹² The court remanded to the Commission with instructions to amend its EIS to quantify and consider that pipeline project's downstream carbon emissions or explain in detail why it could not do so. In its Motion, Potomac Riverkeeper Network repeated its request to the Commission to prepare an EIS for the project in order to fully analyze and inform the public about the impacts posed by this project.¹³

On January 26, 2018, the Commission published the EA for this project.¹⁴ Potomac Riverkeeper Network submitted comments on the EA on behalf of Chesapeake Climate Action Network, Upper Potomac Riverkeeper, Waterkeepers Chesapeake and Food and Water Watch on

¹⁰ Notice of Schedule for Environmental Review of Eastern Panhandle Expansion Project (Oct. 5, 2017) (eLibrary No. 20171005-3003).

¹¹ *Id.* at 2.

¹² Potomac Riverkeeper Network Motion Requesting FERC to Take Administrative Notice of *Sierra Club v. FERC*, No. 16-1329, D.C. Circuit Court of Appeals, Decided August 22, 2017 (Sept. 25, 2017) (eLibrary No. 20170926-5010).

¹³ *Id.* at 3.

¹⁴ Environmental Assessment for the Eastern Panhandle Expansion Project (Jan. 26, 2018) (eLibrary No. 20180126-3000) [hereinafter "EA"].

February 26, 2018.¹⁵ Intervenors' Comments pointed out numerous deficiencies in the EA, including the erroneous decision to make a finding of no significant impact, and once again requested that the Commission undertake the preparation of an EIS for this project.¹⁶

On March 27, 2018, Intervenors submitted a letter to the Commission requesting incorporation of permit conditions imposed by Maryland in its state Wetlands and Waterways permit for this project into any final Order issued by the Commission approving this pipeline.¹⁷ The March 16, 2018 Wetlands and Waterways permit issued by the Maryland Department of Environment for this project included 23 special conditions intended to ensure protection of water quality and public health during construction and operation of the pipeline.¹⁸

The Commission approved the certificate of public convenience and necessity for the Eastern Panhandle Expansion Project in a July 19, 2018 Order.¹⁹ In its Certificate Order, the Commission declined to require compliance with the permit conditions required by the state of Maryland in its Wetlands and Waterways Permit, instead merely encouraging the applicant to comply with conditions in state permits "to the extent that such conditions do not conflict with the conditions of this certificate."²⁰ Commissioner LaFleur filed a separate concurrence, in which

¹⁵ Comments of Potomac Riverkeeper Network and Upper Potomac Riverkeeper, Waterkeepers Chesapeake, Chesapeake Climate Action Network and Food and Water Watch on Environmental Assessment for Proposed Eastern Panhandle Expansion Project (Feb. 26, 2018) (eLibrary No. 20180227-5020) [hereinafter "Comments of Intervenors"].

¹⁶ *Id.* at 2.

¹⁷ Comments of Chesapeake Climate Action Network, Food and Water Watch, Potomac Riverkeeper Network, and Waterkeepers Chesapeake Requesting Incorporation of Maryland's Permit Conditions into Any Final FERC Order for the Eastern Panhandle Expansion Project (Mar. 27, 2018) (eLibrary No. 20180327-5054).

¹⁸ *Id.*

¹⁹ 164 FERC ¶ 61,036, Order Issuing Certificate, Docket No. CP17-80-000 (July 19, 2018) (eLibrary No. 20180719-3054) [hereinafter "Certificate Order"].

²⁰ Certificate Order at ¶ 74.

she argued for use of the Social Cost of Carbon tool for calculating how a project's contribution to greenhouse gas emissions would affect the environment in terms of climate change impacts.²¹

Commissioner LaFleur also voiced her opposition to a new Commission policy that severely limits the review and disclosure of upstream and downstream greenhouse gas emission impacts in Commission environmental reviews conducted pursuant to the Natural Gas Act.²²

Commissioner Glick dissented from the majority Commission vote to approve this project, strongly disagreeing with the majority Commissioners' decision not to fully consider climate change impacts in their review of natural gas pipeline projects under the Natural Gas Act.²³

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

CONCISE STATEMENT OF ALLEGED ERRORS

1. The Commission violated NEPA by failing to adequately consider the indirect upstream and downstream greenhouse gas emissions the Project will cause. FERC failed to acknowledge that greenhouse gas emissions from the induced production of natural gas that this Project will trigger are indirect effects of the Project. 40 C.F.R. § 1508.8(b); *Sierra Club v. FERC*, 867 F.3d 1357, 1371–74 (D.C. Cir. 2017). FERC further violated NEPA by failing to take the requisite “hard look” at the significance of the impacts of these upstream and downstream greenhouse gas emissions on the environment. 40 C.F.R. § 1501.4(e); *Sierra Club*, 867 F.3d at 1357. Finally, FERC's analysis of direct and indirect greenhouse gas emissions from the Project was based on an outdated Global

²¹ Certificate Order, Docket No. CP17-80-000 (July 19, 2018) (eLibrary No. 20180723-3011) (LaFleur, concurring).

²² *Id.* at 3.

²³ Certificate Order, Docket No. CP17-80-000 (July 19, 2018) (eLibrary No. 201807233009) (Glick, dissenting).

Warming Potential for methane and thus failed to provide the “scientific integrity” that NEPA requires. 40 C.F.R. § 1502.24.

2. FERC violated NEPA by impermissibly segmenting the environmental review of the Project, failing to treat the Mountaineer Eastern Panhandle Expansion Project as a “similar” or “connected” action despite that project exhibiting characteristics of an interstate pipeline, including receiving out-of-state natural gas. 40 C.F.R. 1508.25(a); Delaware Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014). FERC’s failure to consider the Mountaineer Gas Pipeline as a similar or connected action resulted in its failure to adequately consider the cumulative impacts of the Project, in violation of NEPA. 40 C.F.R. § 1508.7.

STATEMENT OF ISSUES

I. FERC Failed to Take a Hard Look at the Direct and Indirect Effects of the Project on Climate Change.

The Commission issued a Certificate Order for the Eastern Panhandle Expansion Project based on an EA that failed to adequately examine the Project’s impacts to the climate. First, the EA failed to adequately analyze the indirect greenhouse gas (“GHG”) emissions of the Project. It completely ignored the upstream GHG emissions the Project would trigger. The EA quantified the downstream GHG emissions the Project, an analysis that these Intervenors found to be a helpful starting point to begin to understand the climate implications of this Project. FERC, however, did not take the necessary next step to provide an analysis of the significance of the indirect climate emissions. The EA upon which the Certificate Order was premised was incomplete without that analysis and the Commission must reconsider its approval. Finally, FERC also failed to adequately consider the direct emissions from the Project by using a mathematical formula the agency acknowledged to be inaccurate.

1. The Commission Erred by Failing to Adequately Analyze the Indirect Greenhouse Gas Emissions of the Project

The Commission failed to adequately analyze the indirect GHG emissions that the Project would trigger, as required by NEPA. Intervenors addressed this issue in their comments on the draft EA and the Potomac Riverkeeper Network addressed this issue further in its scoping comments.²⁴ Those comments are incorporated by reference and further explained below. NEPA requires agencies to assess not only the direct effects of a proposed action, but also the indirect effects. Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”²⁵ Indirect effects are defined broadly to include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”²⁶ Interstate natural gas pipelines trigger two types of indirect GHG emissions, emissions associated with upstream production and emissions associated with downstream consumption of the transported fuel. FERC erred by ignoring completely any upstream GHG emissions. The Commission provided an estimate of downstream emissions that helped shed light on the impacts of the Project, and it cannot backtrack on this effort now by claiming the emissions are too uncertain.

a. FERC Completely Failed to Consider Upstream GHG Emissions

²⁴ See generally, Comments of Intervenors at pp.10–20; see also Scoping Comments.

²⁵ 40 C.F.R. § 1508.8(b).

²⁶ *Id.*

In its Certificate Order, FERC concluded that upstream GHG emissions “are not indirect impacts of the . . . Project.”²⁷ This conclusion fails NEPA’s hard-look standard.²⁸

Under NEPA, federal agencies must consider the indirect impacts of their actions if those impacts have: (a) a sufficient causal relationship to the agency’s action; and (b) are reasonably foreseeable.²⁹ The U.S. Court of Appeals for the District of Columbia Circuit recently shed important light on the causation prong in *Sierra Club v. FERC (Sabal Trail)*.³⁰ There, the court was considering FERC’s decision to green-light a pipeline without considering indirect greenhouse gas emissions. The court determined that, where FERC has authority to “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct *and indirect* environmental effects of pipelines it approves.”³¹ Only when the agency “has no statutory authority *to act on [particular] information,*” is the causal link broken for NEPA purposes.³² While the issue before the court in *Sabal Trail* involved downstream GHG emissions, the court applied its finding generally to “indirect environmental effects of pipelines it approves”³³ and its reasoning holds true for upstream as well as downstream emissions.

²⁷ Certificate Order at ¶ 47.

²⁸ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

²⁹ 40 C.F.R. § 1508.8(b)

³⁰ 867 F.3d 1357 (D.C. Cir. 2017).

³¹ *Sabal Trail*, 867 F.3d at 1373 (emphasis added).

³² *Id.* at 1372.

³³ *Id.* at 1373.

In its Certificate Order, FERC relied on *Public Citizen* and the *Freeport* line of cases to claim that the agency was not the legally relevant cause of the indirect emissions.³⁴ The court in *Sabal Trail*, however, distinguished those cases, which involved international truck traffic and export facilities, from a case involving an interstate pipeline. In *Public Citizen*, the court reasoned that the Department of Transportation had no authority to exclude Mexican trucks from the United States and therefore had no obligation to gather data about the environmental harms of admitting them.³⁵ In the *Freeport* cases,³⁶ the court reasoned that DOE, not FERC, had the authority to grant a license to export natural gas from the United States through the liquefied natural gas terminals at issue. As a result, FERC had no legal authority to deny the export license—DOE did—and therefore no obligation to consider the GHG effects of those exports.

Unlike in *Public Citizen* and the *Freeport* line of cases, FERC has the authority under the NGA to reject the Project if its environmental impacts are too great. Congress broadly instructed the agency to consider “the public convenience and necessity” when evaluating applications to construct and operate interstate pipelines such as the Eastern Panhandle Expansion Project.³⁷ FERC’s policy in certifying new interstate gas pipelines is to balance the public benefits against the adverse effects of a project, including adverse environmental effects.³⁸ If the adverse effects

³⁴ Certificate Order at ¶ 42 n.73.

³⁵ Dept. of Transp. v. Public Citizen, 541 U.S. 752, 766–67, 770 (2004).

³⁶ Sierra Club v. FERC (*Freeport*), 827 F.3d 36 (D.C. Cir. 2016); Sierra Club v. FERC (*Sabine Pass*), 827 F.3d 59 (D.C. Cir. 2016); EarthReports, Inc. v. FERC, 828 F.3d 949 (D.C. Cir. 2016).

³⁷ 15 U.S.C. § 717f(e).

³⁸ 88 FERC ¶ 61,227, Certification of New Interstate Natural Gas Pipeline Facilities (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000); *see also* Minisink Residents for Env'tl. Preservation & Safety v. FERC, 762 F.3d 97, 101–02 (D.C. Cir. 2014) (adverse effects generally); Myersville Citizens for a Rural Cmty. v. FERC, 783 F.3d 1301, 1309 (D.C. Cir. 2014) (environmental effects).

outweigh the benefits, FERC is authorized to deny the permit.³⁹ Because FERC had the authority to deny the certification if the adverse effects from the Eastern Panhandle Expansion Project outweighed the benefits, FERC is a legally relevant cause of any upstream GHG emissions produced by authorizing the Project.

In its discussion of causality, FERC goes on to claim that:

A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if: (1) the proposed pipeline would transport new production from a specific production area; and (2) that production would not occur in the absence of the proposed pipeline (i.e., there will be no other possible way to move the gas).⁴⁰

Here, FERC appears to be conflating causality with foreseeability. FERC's proffered definition of causality is not contemplated by the court in *Public Citizen* and *Freeport*—two cases cited in the Certificate Order's discussion of causality—nor was it contemplated by the court in *Sabal Trail*. In those cases, the court looked at an agency's statutory authority to act on particular information in order to determine causality. Moreover, FERC's narrow definition is not contemplated by the regulations or the courts, which expect agencies to make “educated assumptions about an uncertain future.”⁴¹ As the Court of Appeals for the District of Columbia Circuit explained as early as 1973:

[T]he 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. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA

³⁹ 15 U.S.C. § 717f(e) (“[A] certificate shall be issued . . . if it is found that . . . the propos[al] . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.”).

⁴⁰ Certificate Order at ¶ 44.

⁴¹ See, e.g., *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014).

by labeling any and all discussion of future environmental effects as “crystal ball inquiry.”⁴²

If an indirect effect was able to satisfy this test put forward by FERC, much, if not all, of the uncertainty would be removed. While specificity is helpful, the specificity that FERC is demanding with this causality test is not necessary under NEPA.

Indirect effects must also be reasonably foreseeable. NEPA uses a reasonable person standard, asking whether “a person of ordinary prudence would take [the effect] into account in reaching a decision.”⁴³ Some courts have used the analogy of “two links of a single chain” to describe the scope of indirect effects that an agency should review under NEPA.⁴⁴ As described below, courts, federal agencies, and sitting FERC Commissioners have all concluded that an increase in infrastructure to transport a product results in an increase in production of that product. Multiple statements by the gas industry further corroborate that gas production and transport are “two links in a single chain.”

As described in *Barnes v. U.S. Department of Transportation*,⁴⁵ an increase in infrastructure to transport a product results in an increase in production of that product. There, the court was considering a “major . . . capacity expansion project” that therefore had a “unique potential to create demand.”⁴⁶ The court reasoned that the “growth inducing effect” of a new runway at an airport could not be ignored in a NEPA review and sent the issue back to the

⁴² *Scientists’ Inst. for Public Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079,1092 (D.C. Cir. 1973) (emphasis added).

⁴³ *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016).

⁴⁴ *Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394, 400 (9th Cir. 1989).

⁴⁵ 655 F.3d 1124 (9th Cir. 2011).

⁴⁶ *Id.* at 1138–39.

agency “to consider the environmental impact of increased demand resulting from the . . . expansion project.”⁴⁷

The U.S. Energy Information Administration, a federal agency collects and disseminates information on energy trends, has likewise found that pipeline projects facilitate an increase in production. In a 2014 report, EIA stated that “[e]thane production is increasing as midstream infrastructure projects become operational and ethane recovery and transport capacities grow.”⁴⁸

Statements from the gas industry itself further bolster the case that approving additional infrastructure spurs production. The Interstate Natural Gas Association of America (“INGAA”) recently explained how gas development and infrastructure are “two links of a single chain”:

[M]idstream infrastructure development is crucial for efficient delivery of growing supplies to markets. Sufficient infrastructure goes hand in hand with well-functioning markets. Insufficient infrastructure can constrain market growth and strand supplies New infrastructure will be required to move hydrocarbons from regions where production is expected to grow to locations where the hydrocarbons are used. Not all areas will require significant new pipeline infrastructure, but many areas (even those that have a large amount of existing pipeline capacity) may require investment in new capacity to connect new supplies to markets. In analogous cases to date, oil and gas producers and marketers have been the principal shippers on new pipelines. These “anchor shippers” have been willing to commit to long-term contracts for transportation services that provide the financial basis for pipeline companies to pursue projects. Going forward, producers will likely continue to be motivated to ensure that the capacity exists to move supplies via pipelines. Producers have learned from past experience that the consequences of insufficient infrastructure for gas transport are severe, and that the cost of pipeline transport is a relatively small cost compared with the revenues lost as a result of price reductions or well shut-ins that occur when transport from producing areas to liquid pricing points are constrained.⁴⁹

⁴⁷ *Id.* at 1139.

⁴⁸ EIA, *Hydrocarbon Gas Liquids (HGL): Recent Market Trends and Issues*, p.6 (Nov. 2014), available at <http://www.eia.gov/analysis/hgl/pdf/hgl.pdf>.

⁴⁹ INGAA, *North American Midstream Infrastructure through 2035: Capitalizing on Our Energy Abundance*, executive Summary, P.1, 8 – 9 (Mar. 18, 2014), available at <http://www.ingaa.org/file.aspx?id=21498>.

In other words, according to a natural gas trade association, gas producers rely on the presence of sufficient infrastructure capacity to continue and expand production activities. In May 2015, Dennis Xander, the president of Denex Petroleum, spoke about the recent downturn in gas drilling, stating that “[d]rilling is hard to justify” due, in part, “to lack of infrastructure.”⁵⁰ According to Corky DeMarco, executive director of the West Virginia Oil and Natural Gas Association, “when drilling slows down, that is when you build pipelines” because “[i]t’s just the way the industry works.”⁵¹ Perhaps the most straightforward statement came from Tim Greene, owner of Land and Mineral Management of Appalachia, who explained that “more pipelines will lead to more drilling.”⁵² Capacity and production, therefore, are two links in a single chain.

As Intervenors presented in their comments on the EA, publicly available evidence estimates that 60,000 shale gas wells could eventually be drilled in Pennsylvania.⁵³ The EA noted that the Eastern Panhandle Expansion Project will provide capacity for “projected” shippers, which are likely to be upstream drillers who would drill less without this pipeline.⁵⁴ In its comments, the Natural Gas Supply Association noted that “insufficient infrastructure” limits “users’ ability to tap into [natural gas] supplies that are close to their market” and that “additional natural gas infrastructure must be in place to transport natural gas from the wellhead to

⁵⁰ Casey Junkins, *Number of Drilling Rigs on the Decline*, INTELLIGENCER/WHEELING NEWS-REGISTER, May 19, 2015, available at <http://www.theintelligencer.net/page/content.detail/id/633293/Number-of-Drilling-Rigs-on-the-Decline.html?nav=526>.

⁵¹ *Id.*

⁵² Casey Junkins, Billion-Dollar Projects To ‘Become the Norm’, The Intelligencer/Wheeling News-Register, Oct. 26, 2014, available at <http://www.theintelligencer.net/news/top-headlines/2014/10/billion-dollar-projects-to-become-the-norm/>.

⁵³ Comments of Intervenors at 9.

⁵⁴ EA at 2.

consumers.”⁵⁵ A closer look at the Eastern Panhandle Expansion Project’s bidding process indicates that the gas the Project will transport is meant to satisfy a local distribution company’s demand for additional natural gas—gas that is not currently available using existing infrastructure. The company behind the Eastern Panhandle Expansion Project received two bids, one from Columbia Gas of Maryland and one from Mountaineer Gas. The company declined Columbia Gas of Maryland’s offer because it determined it could meet that need using its existing system.⁵⁶ Thus, the Eastern Panhandle Expansion Project was specifically designed to increase transportation capacity and get additional gas to market. Similar to the issue in *Barnes*, FERC was faced with a “capacity expansion project” that had a “unique potential to create demand.”⁵⁷ As a result, FERC should have “consider[ed] the environmental impact of increased demand resulting from the . . . expansion project.”⁵⁸

Other federal agencies have considered upstream GHG emissions. The approach taken by the U.S. Department of Energy (“DOE”), and upheld by the D.C. Circuit, in analyzing upstream GHG emissions of a liquefied natural gas export facility provides a telling example. When deciding whether to approve the facility, DOE commissioned a report assessing the “life cycle—from the wellhead to power plant—of greenhouse-gas emissions.”⁵⁹ The report disclosed the amount of GHGs that would be emitted from “induced gas production.”⁶⁰ Upon review of

⁵⁵ Dena E. Wiggins, Natural Gas Supply Association, Comment Letter on Eastern Panhandle Expansion Project, (May 12, 2017) (eLibrary No. [20170512-5102](#)).

⁵⁶ Certificate Order at ¶ 5.

⁵⁷ *Barnes v. DOT*, 655 F.3d 1124, 1139 (9th Cir. 2011).

⁵⁸ *Id.*

⁵⁹ *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 202 (D.C. Cir. 2017).

⁶⁰ *Id.*

DOE’s analysis, the D.C. Circuit found that DOE had commissioned the report to supplement FERC’s environmental review, which had not addressed upstream GHG emissions, in order to “justify its ‘hard look’ under NEPA.”⁶¹ DOE, therefore, understood (and the D.C. Circuit recognized) that failure to consider GHG emissions from induced upstream production did not constitute the hard look NEPA requires.

Finally, as FERC Commissioner Richard Glick pointed out in his dissenting statement, “[i]n the case of new natural gas pipelines, it is reasonable to assume that building incremental transportation capacity will spur additional production, even if the exact details of the method or location are not definite.” The purpose of NEPA is to “provide decision makers with enough information to ‘aid in the substantive decision whether to proceed with the project in light of its environmental consequence,’ and to provide the public with information and an opportunity to participate in gathering information.”⁶² Some assumptions are inevitable, but those assumptions “can be checked by disclosing [them] so that readers can take the resulting estimates with the appropriate amount of salt.”⁶³ FERC has a duty under NEPA to inform readers about the effects of induced production and its failure to do so violated NEPA’s hard-look requirement.

b. FERC is Able to Quantify Downstream Emissions, as It Did for the Eastern Panhandle Expansion Project, and Cannot Shirk this Responsibility in the Future

By quantifying downstream emissions in its EA,⁶⁴ FERC followed the clear directive of the court in *Sabal Trail*. That case established that an agency is required to quantify GHG

⁶¹ *Id.* at 197.

⁶² *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282–83 (9th Cir.1974)).

⁶³ *Sabal Trail*, 867 F.3d at 1374.

⁶⁴ EA at 77.

emissions (or explain why quantification is not possible).⁶⁵ As discussed above, NEPA analysis requires some “reasonable forecasting.”⁶⁶ Given that FERC’s Certificate Order approved a new pipeline meant to supply gas to a local distribution company to “meet[] the current and future needs of residents and businesses,”⁶⁷ a reasonable person would conclude that the approval of the Project would result in combustion of the gas.

The EA for the Eastern Panhandle Expansion Project demonstrates that quantification of downstream GHG emissions is not only possible, but also relatively simple. The Commission dedicated five sentences in its EA to quantifying the emissions and explaining the underlying assumptions⁶⁸—not a significant burden in a 174-page document. The quantification of downstream GHG emissions provided an important starting point for the public and decision makers to understand the impact of the pipeline.

FERC provided this helpful quantification of GHG emissions before it announced its policy change in *New Market*.⁶⁹ In that Order, FERC announced that it had gone “beyond that which is required by NEPA [when it provided] the public with information regarding the potential impacts associated with . . . downstream combustion of natural gas.” When considering most natural gas infrastructure proposals, its new policy is to stop providing this baseline

⁶⁵ 867 F.3d 1357, 1374 (D.C. Cir. 2017) (“the EIS for the [pipeline 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.”).

⁶⁶ *Id.* at 1373.

⁶⁷ EA at 2.

⁶⁸ *Id.* at 77.

⁶⁹ 163 FERC ¶ 61,128, Order Denying Rehearing (May 18, 2018) [hereinafter “New Market”]; *see also* Certificate Order (Glick, dissenting in part), at n.8.

quantification of downstream GHG emissions because it is “inherently speculative” and overly “generic.”⁷⁰

NEPA, however, contemplates this type of speculation: “[S]ome educated assumptions are inevitable in the NEPA process.”⁷¹ These assumptions can be mitigated by disclosing them to the reader. This disclosure is exactly what FERC did when it took a few sentences to explain that, in quantifying downstream GHG emissions from the Eastern Panhandle Expansion Project, it assumed that all the gas transported was combusted and therefore the GHG estimate represented an upper limit.⁷² NEPA requires an agency to consider a project “in light of its environmental consequence.”⁷³ FERC cannot get out of this requirement by claiming GHG emissions are too uncertain when it has demonstrated an ability to provide this information in a meaningful and informative way.

2. FERC Erred by Not Considering the Significance of Indirect GHG Emissions

Quantification of upstream and downstream GHG emissions, however, is just a first step in providing meaningful information on the consequences of a federal action. NEPA also requires a discussion of the significance of these indirect effects.⁷⁴ FERC failed to do that here. In its Certificate Order, FERC refused to analyze the significance of these indirect effects, claiming that it lacked the means to do so.⁷⁵ FERC cited an “absence of an accepted

⁷⁰ New Market at ¶ 41–42.

⁷¹ *Sabal Trail*, 867 F.3d at 1374.

⁷² EA at 77.

⁷³ *Citizens for a Better Henderson*, 768 F.2d at 1056.

⁷⁴ See *Sabal Trail*, 867 F.3d at 1374 (“The EIS accordingly needed to include a discussion of the ‘significance’ of this indirect effect.”).

⁷⁵ Certificate Order at ¶ 55.

methodology.”⁷⁶ The agency went on to explain that “no standard methodology . . . exists to determine how a project’s contribution to greenhouse gas emissions would translate into physical effects on the environment for the purposes of evaluating the project’s impacts on climate change.”⁷⁷ Yet this is exactly what a tool, known as the Social Cost of Carbon, does. An “interagency group of experts” designed the tool “to quantify a project’s contribution to costs associated with global climate change.”⁷⁸

Two agencies that are critical to overseeing and implementing NEPA, the Environmental Protection Agency (“EPA”) and the Council on Environmental Quality (“CEQ”), have encouraged the use of the social-cost-of-carbon tool to better understand the climate implications of a federal action. The EPA has expressed support for its use in the pipeline context, including recommending that the State Department use the tool to characterize the impact of GHG emissions from the Keystone XL pipeline.⁷⁹ The CEQ, which oversees NEPA, likewise approved its use, concluding that the social cost of carbon tool “provides a harmonized, interagency metric that can give decision makers and the public useful information for their NEPA review.”⁸⁰

⁷⁶ *Id.* at ¶ 57.

⁷⁷ *Id.*

⁷⁸ *High Country Conservation Advocates v. Forest Service*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014).

⁷⁹ See Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 TUL. L.REV. 511, 545–46 & n.160 (2013).

⁸⁰ Council on Env'tl. Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 33 n.86 (2016), *withdrawn* 82 FED. REG. 16,576 (Apr. 5, 2017) [hereinafter “CEQ Guidance”]. Although the Guidance was withdrawn for further consideration, the Guidance did not create new legal requirements, but merely advised the regulated community as to CEQ’s understanding of existing NEPA requirements. See Council on Env'tl. Quality, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions p.11 (Feb. 18, 2010) (stating that climate change is “not a ‘new’ component of NEPA analysis, but rather . . . a potentially important factor to be considered within the existing NEPA framework.”). Therefore, it remains a relevant method to determine the CEQ’s interpretation of NEPA.

Courts are increasingly asking FERC to consider the social-cost-of-carbon tool. In *High Country Conservation Advocates v. Forest Service*,⁸¹ for example, the Colorado District Court ordered the Bureau of Land Management to evaluate the impacts of a project’s GHG emissions using the social cost of carbon. The court held that “a ‘hard look’ has to include a ‘hard look’ at whether [the use of the social cost of carbon], however imprecise it might be, would contribute to a more informed assessment of the impacts than if it were simply ignored.”⁸² It is not reasonable, according to the court, “to ignore a tool in which an interagency group of experts invested time and expertise.”⁸³ Likewise, in *Sabal Trail*, the court asked FERC to reconsider its position on the social cost of carbon.⁸⁴ While some courts in the past have accepted an agency’s conclusion that it lacked appropriate models and research to estimate the effect of a project on global climate change, those courts did not appear to be aware of the social-cost-of-carbon tool.⁸⁵

FERC complains that, even if it were to use the tool, it still would not have appropriate scientific methodologies to quantify the related climate change effects. But, the CEQ already provides a helpful framework for agencies to use when assessing the significance of a project’s environmental effects, directing agencies to consider “context” and “intensity.”⁸⁶ If FERC is unable to sufficiently quantify the effects, it cannot just throw up its hands and give up. Instead, it should analyze them qualitatively. CEQ suggests this approach in a 2016 guidance document:

⁸¹ 52 F. Supp. 3d 1174 (D. Colo. 2014).

⁸² *Id.* at 1193.

⁸³ *Id.*

⁸⁴ *Sabal Trail*, 867 F.3d at 1375.

⁸⁵ *See, e.g.,* WildEarth Guardians v. U.S. Forest Service, 828 F. Supp. 2d 1223, 1240 (D. Colo. 2011); WildEarth Guardians v. Jewell, 738 F.3d 298, 309–12 (D.C. Cir. 2013). *But see High Country*, 52 F. Supp. 3d 1174, 1193 D. Colo. (2014) (“[I]n [those two] cases, the protocol was never suggested as a possible tool, and the courts appear to have based their holdings, at least in part, on the fact that no such tool existed at the time.”).

⁸⁶ 40 C.F.R. § 1508.27.

“[W]here agencies do not quantify a proposed agency action’s projected GHG emissions because tools, methodologies, or data inputs are not reasonably available to support calculations for a quantitative analysis, [CEQ recommends that] agencies include a qualitative analysis in the NEPA document and explain the basis for determining that quantification is not reasonably available.”⁸⁷ EPA recently recommended this approach in its comments on FERC’s pending review of the natural gas certification process.⁸⁸ In sum, the Commission erred by failing to assess the significance of the Project’s GHG emissions.

3. FERC Erred by Using the Wrong Global Warming Potential for GHG Emissions

The Commission understated the Project’s direct and indirect GHG emissions by understating the impact of methane emissions. Natural gas is primarily composed of methane and methane is a potent GHG. The EA did not identify the Project’s methane emissions. Instead, it reported GHG emissions in terms of carbon dioxide equivalents, or CO_{2e}.⁸⁹ Converting methane emissions into CO_{2e} requires multiplying the amount of emissions by methane’s “global warming potential” (“GWP”). This conversion accounts for the amount of warming one ton of methane causes compared to the amount of warming that would be caused by one ton of CO₂.⁹⁰ While methane is a much more potent GHG than carbon dioxide, methane

⁸⁷ CEQ Guidance at 4.

⁸⁸ U.S. Envtl. Protection Agency, Comments, Docket No. PL18-1-000, at 4–5 (filed June 21, 2018).

⁸⁹ EA at 77, Table 22.

⁹⁰ See UNFCCC, *Glossary of climate change acronyms and terms - Carbon Dioxide Equivalent*, <https://unfccc.int/process-and-meetings/the-convention/glossary-of-climate-change-acronyms-and-terms#g> (last visited Aug. 2, 2018).

is much shorter-lived in the atmosphere.⁹¹ Thus, in converting methane to CO_{2e}, different values must be used for different timescales.

The most recent report from the Intergovernmental Panel on Climate Change (“IPCC”), known as the Fifth Assessment Report, represents the global consensus and the best available science on climate change. The Commission, however, refused to use the GWPs recommended by in the Fifth Assessment Report for particular timescales.⁹² Instead it converted methane to CO_{2e} using a 100-year GWP of 25 rather than 36. The Commission’s sole justification for using this outdated GWP was that “this is the value EPA established on November 29, 2013, for reporting GHG emissions.”⁹³ But the GWP of 25 does not reflect the current scientific consensus on methane’s global warming impacts.

NEPA requires agencies to insure the “scientific integrity . . . of the discussions and analyses in environmental impact statements.”⁹⁴ FERC itself admitted in this Certificate Order that using the newer Fifth Assessment Report, instead of the outdated report it used, “could lead to more accurate assessments of climate impacts.”⁹⁵ Likewise, DOE has acknowledged that the IPCC’s most recent Fifth Assessment Report represents the best available science regarding methane’s GWP.⁹⁶ Using science that is widely acknowledged to be outdated is inconsistent with NEPA’s mandate.

⁹¹ IPCC, *Climate Change 2013: The Physical Science Basis, Carbon and Other Biogeochemical Cycles* 473 (2013), available at http://www.climatechange2013.org/images/report/WG1AR5_Chapter06_FINAL.pdf.

⁹² Certificate Order at ¶ 54.

⁹³ *Id.*

⁹⁴ 40 C.F.R. § 1502.24.

⁹⁵ Certificate Order at ¶ 54.

⁹⁶ Dept. of Energy, Nat’l Energy Technology Lab., *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States* (May 29, 2014), available at <http://www.energy.gov/sites/prod/files/2014/05/f16/Life%20Cycle%20GHG%20Perspective%20Report.pdf>; see

Furthermore, FERC’s reason for failing to consider a GWP that reflects the best available science in order to “remain consistent” with EPA⁹⁷ is disingenuous. Until recently, FERC had refused to consider any GHG emissions beyond those from the project itself,⁹⁸ and now it appears to be backtracking on recent efforts to quantify downstream GHG emissions.⁹⁹ This practice of ignoring indirect GHG emissions is out of step with other federal agencies¹⁰⁰ and guidance from the CEQ.¹⁰¹

The Commission also appears to cherry-pick the EPA-approved tools upon which it relies. As discussed above, FERC refused to incorporate the social-cost-of-carbon tool into its analysis even though the EPA has recommended its use in pipeline-related decisions.¹⁰² EPA’s

also IPCC, *Climate Change 2013: The Physical Science Basis, Anthropogenic and Natural Radiative Forcing* 714, Table 8.7 (2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_Chapter08_FINAL.pdf.

⁹⁷ Certificate Order at ¶ 54.

⁹⁸ *See, e.g.*, Cove Point Environmental Assessment, at 170 (May 2014), *available at* <https://www.ferc.gov/industries/gas/enviro/eis/2014/05-15-14-ea/ea.pdf>.

⁹⁹ New Market at ¶ 41–42 (stating that the Commission had gone “beyond that which is required by NEPA” when it quantified downstream GHG emissions and that it would no longer do so moving forward because it “muddles the scope of our obligations under NEPA.”).

¹⁰⁰ *See, e.g.*, U.S. Dept. of Agric., Final EIS, Federal Coal Lease Modifications COC-1362 & COC 67232, at 79–80 (Aug. 2012), http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/68608_FSPLT2_263949.pdf (environmental review of a coal-leasing program which calculated the potential GHG emissions from combustion of the mined coal even though the exact location of combustion was unknown); U.S. Army Corps of Eng’rs, Final EIS, Alaska Stand Alone Gas Pipeline §§ 5.20.68 to 5.20.78 (Oct. 2012), http://asapgas.agdc.us/pdfs/documents/eis/5_20_ASAP_FEIS_Cumulative_Effects.pdf (Army Corps review analyzing the total lifecycle GHG effects of a proposed gas pipeline, including emissions from increased gas production induced by the pipeline and emissions from burning the fuel transported by the pipeline).

¹⁰¹ CEQ Guidance at 11.

¹⁰² Sarah E. Light, *NEPA’s Footprint: Information Disclosure as a Quasi–Carbon Tax on Agencies*, 87 TUL. L.REV. 511, 545–46 & n.160 (2013).

approval of the tool is insufficient for FERC in that case. Yet, when it comes to the EPA-approved GWP—which FERC recognizes is flawed¹⁰³—EPA’s stamp of approval is sufficient.

Finally, as Intervenors explained in their EA Comments, the use of a 100-year-long assessment period is inappropriate given the need to act on climate change immediately.¹⁰⁴ The EA should have calculated the methane emission by using both the 20-year and 100-year GWPs. If it only used one of the two GWPs, it should have used the 20-year GWP because of the urgency of acting on climate.

The Commission issued its Certificate Order based on an Environmental Assessment that failed to adequately examine the Project’s impacts to the climate. For these reasons, the Commission erred in issuing its Certificate to the Eastern Panhandle Expansion Project.

II. FERC Impermissibly Segmented the Environmental Review of the Project in Violation of NEPA

The Federal Energy Regulatory Commission issued a Certificate Order for the Eastern Panhandle Expansion Project based on an EA that failed to adequately examine the Project’s connected, cumulative, and similar actions. First, the EA failed to adequately analyze the Mountaineer Gas Pipeline as a connected action subject to full NEPA review and requiring an EIS. The Mountaineer Gas Pipeline and the Project are connected functionally, physically, and financially; FERC failed to establish a “logical terminus,” substantial independent utility, or a lack of temporal nexus between the two projects and thus impermissibly segmented these projects. Second, the EA failed to consider the interstate nature of the Mountaineer Gas Pipeline and dismissed full environmental analysis of this pipeline due to its non-jurisdictional status.

¹⁰³ Certificate Order at ¶ 54 (citing EPA’s acknowledgement that the more recent “Fifth Assessment Report could lead to more accurate assessments of climate impacts in the future”).

¹⁰⁴ Comments of Intervenors at 16.

Finally, the EA failed to adequately consider cumulative impacts from the Mountaineer Gas Pipeline and this Project due to a number of reasons, including its failure to consider soil, wildlife and waterway impacts, among others.

1. The Commission Erred by Failing to Review the Mountaineer Gas Pipeline as a Connected Action Subject to NEPA Review

Under the CEQ’s NEPA regulations, FERC is required to include “connected actions,” “cumulative actions,” and “similar actions” in a project EA.¹⁰⁵ This requirement is meant “to prevent the government from ‘segment[ing]’ its *own* ‘federal actions into separate projects and thereby fail[ing] to address the true scope and impact of the activities that should be under consideration.’”¹⁰⁶ In *Delaware Riverkeeper v. FERC*, the D.C. Circuit Court stated: “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.”¹⁰⁷ Connected actions include actions that are “interdependent parts of a larger action and depend on the larger action for their justification” or actions that “cannot or will not proceed unless other actions are taken previously or simultaneously.”¹⁰⁸ As discussed in further detail below, the Project and the three-phase Mountaineer Gas’ Infrastructure Replacement and Expansion Projects (“Mountaineer Gas Pipeline”) are indisputably related and significantly “connected” because “[t]here is a clear physical, functional, and temporal nexus between the projects.”¹⁰⁹ FERC impermissibly

¹⁰⁵ 40 C.F.R. § 1508.25(a).

¹⁰⁶ *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 49–50 (D.C. Cir. 2015) (brackets omitted) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

¹⁰⁷ 753 F.3d 1304, 1307 (D.C. Cir. 2014).

¹⁰⁸ *Id.*; *see also* § 1508.25(a)(1)(iii).

¹⁰⁹ *Del. Riverkeeper*, 753 F.3d at 1308.

segmented the Project and the Mountaineer Gas Pipeline because it failed to establish ‘logical termini,’ substantial independent utility, or a lack of temporal nexus.¹¹⁰

As an initial matter, in addition to being a connected action, the Mountaineer Gas Pipeline and the Project are also “similar actions” under CEQ regulations, in addition to being “connected actions.”¹¹¹ Similar actions are those actions that, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.¹¹² Importantly, “significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”¹¹³ While FERC decided that the Mountaineer Gas Pipeline was not a similar action due to its lack of being a “federal action,” the Mountaineer Gas Pipeline should indeed be considered a federal action due to its interstate nature, which is discussed in further detail later in this request. There’s no dispute that the Project and Mountaineer Gas Pipeline overlap in timing and geography as portions of both will be located in the Potomac River watershed. Due to the similar and connected nature of these pipelines, FERC should have considered the projects as similar actions and reviewed the environmental impacts of both projects as a whole in an EIS.

a. FERC Failed to Consider the Interstate Nature of the Mountaineer Gas Pipeline

¹¹⁰ See, e.g., *Del. Riverkeeper*, 753 F.3d at 1315–19.

¹¹¹ 40 C.F.R. § 1508.25(a)(3).

¹¹² *Id.*

¹¹³ *Id.* at § 1508.27(b)(7).

While FERC’s Certificate Order contended that “a connected action must be a federal action,” relying on the reasoning from *Big Bend Conservation Alliance v. FERC*,¹¹⁴ and that the Mountaineer Gas Pipeline is “non-jurisdictional” and therefore not a federal action, the Mountaineer Gas Pipeline is distinguishable from the pipeline in *Big Bend*. In *Big Bend*, the D.C. Circuit found that an export facility located in Texas was jurisdictional due to its interstate nature, but a connecting Texas pipeline was non-jurisdictional because of its intrastate nature.¹¹⁵ In deciding that the Texas pipeline was indeed intrastate, and therefore not subject to Section 7 of the Natural Gas Act, the Court highlighted that the pipeline would only transport natural gas produced in Texas and received from other intrastate pipelines in Texas, and would not need to rely on interstate volumes of natural gas due to an abundant in-state gas supply.¹¹⁶ Unlike this intrastate Texas pipeline, the Mountaineer Gas Pipeline will carry natural gas from out of state through the Project.¹¹⁷ Furthermore, Mountaineer Gas put out a bid for an additional 46,500 Dth/d of capacity for its pipeline, presumably due to the lack of capacity to firmly supply the Mountaineer Gas Pipeline from within the state.¹¹⁸ Both the Mountaineer Gas Pipeline and the Project are “linear and physically interdependent; gas enters the system at one end, and passes through”¹¹⁹ the other end, bringing natural gas from Pennsylvania to West Virginia. The Certificate Order does not dispute this fact: “The non-jurisdictional pipeline will interconnect

¹¹⁴ No. 17-1002 (D.C. Cir. July 17, 2018) (“The connected-actions doctrine does not require the aggregation of federal and non-federal actions.”).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ EA at 1.

¹¹⁸ *Id.* at 2.

¹¹⁹ *Del. Riverkeeper*, 753 F.3d at 1308.

with Columbia's Eastern Panhandle Expansion Project."¹²⁰ Given the interstate nature of the Mountaineer Gas Pipeline, FERC should have considered the Mountaineer Gas Pipeline as a connected, federal action subject to NEPA review along with the Project and meriting a full EIS.

b. FERC Failed to Establish Substantial Independent Utility

Similar to *Delaware Riverkeeper*, the EA did not include any evidence that "each project has substantial independent utility apart from the other."¹²¹ While the EA mentioned the Mountaineer Gas Pipeline more than thirty times, FERC again dismissed the interconnected nature of the pipeline as outside the scope of review due to its non-jurisdictional status. According to Eric Degruyter, a technical analyst at the West Virginia Public Service Commission, in a journal article regarding the Project, "Mountaineer was getting to a point where they were going to have to start refusing customers. The key [wa]s to get added capacity."¹²² The article went on to discuss how the primary purpose of the Project was to bring natural gas from Pennsylvania to West Virginia for this added capacity. The Certificate Order reiterated this by stating, "the Eastern Panhandle Expansion Project was designed to meet Mountaineer Gas' request for 47,500 Dth/d of capacity, and Mountaineer Gas and Columbia entered into a precedent agreement for the entire capacity of the project for a 20-year primary term."¹²³ The EA stated, "[t]he Eastern Panhandle Expansion Project will enable Columbia to provide up to 47,500 Dth/d of incremental firm transportation service to Mountaineer Gas."¹²⁴ In

¹²⁰ Certificate Order at ¶ 35 n.52.

¹²¹ 753 F.3d at 1309.

¹²² Danyel Vanreenen, *Natural gas pipeline project moving forward*, JOURNAL, Mar. 25, 2017, available at <http://www.journal-news.net/news/local-news/2017/03/natural-gas-pipeline-project-moving-forward/>.

¹²³ Certificate Order at ¶ 5.

¹²⁴ *Id.* at ¶ 4.

other words, without the Mountaineer Gas Pipeline, there would be no need for the Project, and without the Project the proposed three-phase Mountaineer Gas Pipeline would not have the added capacity necessary to make it worth constructing. Similar to the projects in *Delaware Riverkeeper v. FERC*,¹²⁵ the Mountaineer Gas Pipeline and the Project are not only functionally interdependent but they are financially interdependent as well.¹²⁶ All of this, taken together with the temporal nexus of the projects, demonstrates the lack of independent utility.

c. FERC Failed to Establish Logical Termini

The EA for this project simply dismissed the Mountaineer Gas Pipeline as non-jurisdictional and did not attempt to establish a logical terminus between the two projects. Similar to the nature of the four pipeline projects in *Delaware Riverkeeper*, there is no logical terminus between the Project and the Mountaineer Gas Pipeline; if the pipelines are to be constructed as planned, they will connect and create one physical pipeline that delivers natural gas from Pennsylvania to West Virginia.¹²⁷

d. FERC Failed to Establish a Lack of Temporal Nexus

There is a strong temporal nexus between the applications for this Project and the Mountaineer Gas Pipeline. The first phase of the Mountaineer Gas Project was approved at the end of 2016¹²⁸ and just four months later, in the spring of 2017, Columbia Gas filed an application with FERC to construct the Project. Commissioner LaFleur reiterated this in her dissenting statement when she pointed out how the Mountaineer Gas Pipeline is “being

¹²⁵ 753 F.3d at 1307.

¹²⁶ *Id.* at 1316 (‘Not only did Tennessee Gas acknowledge the functional interdependence of the 300 Line Project and the Northeast Project, it made clear that the projects are financially interdependent as well.’).

¹²⁷ *See generally id.* at 1309.

¹²⁸ Comments of Intervenors at 5.

constructed concurrently with the Eastern Panhandle Project, and will interconnect with, and receive gas from, the Eastern Panhandle Project.”¹²⁹ Similar to *Delaware Riverkeeper*, the “timing [of the projects] does not support the independence of the projects; rather, we are left with the fact that financially interdependent pipeline improvements were considered separately even though there was no apparent logic to where one project began and the other ended.”¹³⁰ Likewise, the phases of development for the Mountaineer Gas Pipeline and the Project “fit with the others like puzzle pieces to complete an entirely new pipeline.”¹³¹ FERC was obligated to look at the total environmental effects of these two projects as the end result will be one, functional pipeline if all construction plans move forward.

FERC should not have segmented the Project and the Mountaineer Gas Pipeline, thereby “dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”¹³²

2. The Commission Erred by Failing to Review the Mountaineer Gas Pipeline as a Cumulative Action Subject to NEPA Review

In addition to being a connected action, the Mountaineer Gas Pipeline and the Project are also cumulative actions since they could have cumulatively significant impacts¹³³ given the temporal, functional and geographical nexus of the construction and operation of these projects. According to *Sierra Club v. U.S. Army Corps of Engineers*,¹³⁴ the cumulative actions doctrine

¹²⁹ Certificate Order (LaFleur, concurring).

¹³⁰ *Del. Riverkeeper*, 753 F.3d at 1318.

¹³¹ *Id.* at 1319.

¹³² *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988).

¹³³ 40 C.F.R. § 1508.25(a)(2).

¹³⁴ 803 F.3d 31, 51 (D.C. Cir. 2015).

“prevents agencies from ignoring the environmental effects of other actions, without regard to whether their author was federal, because those effects set the baseline state of affairs and thus the context in which the significance of proposed federal action must be evaluated.” CEQ’s NEPA regulations state that a cumulative impacts analysis should measure

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.¹³⁵

While FERC’s EA on the Project discussed the Mountaineer Gas Pipeline in the Cumulative Impacts section, FERC did not adequately take into consideration the cumulative impacts of these projects in terms of soils, water bodies, wetlands, vegetation and wildlife.¹³⁶ In *Grand Canyon Trust*, the D.C. Circuit Court explained:

[A] meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.¹³⁷

As explained in more detail below and in the Comments of Intervenors, the cumulative impacts from both of these projects could be significant and FERC failed to adequately engage in a meaningful cumulative impacts analysis.

In terms of soils, the EA acknowledged that “significant grading and excavation for pipeline construction . . . would result in similar impacts on soils as the Project within the

¹³⁵ 40 C.F.R. § 1508.7.

¹³⁶ See generally Comments of Intervenors.

¹³⁷ *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002).

vicinity. When construction of these two projects overlaps in time with the Project, there would be localized, repetitive impacts on soils.”¹³⁸ The EA went on to conclusively state that “[m]itigation measures would be employed for individual soil characteristics. Consequently, any cumulative impacts on soil resources are anticipated to be minor and temporary during construction.”¹³⁹ These mitigation measures are not spelled out anywhere within the EA, nor is it clear that Columbia Gas Transmission or Mountaineer Gas Company would be required to follow through with these mitigation measures. FERC dismissed any meaningful consideration of potential cumulative impacts that could occur from both projects based on mitigation measures that may or may not come to fruition. The cumulative impacts to these soils merited further consideration given the near contemporaneous nature of the construction of these projects.

Similarly, the EA failed to adequately consider the cumulative impacts from both these projects to water bodies in the affected area. The EA stated that, “[a]lthough we don’t know specific data for waterbody impacts within the same HUC-12 watersheds as the Project, we know the entire Mountaineer Project would impact 54 water bodies totaling about 4,000 linear feet.”¹⁴⁰ Despite this, FERC went on to “conclude that the Project would not significantly contribute to cumulative impacts on waterbodies when considered with other projects in the geographic scope” because a “limited number” of waterbodies would be crossed using the open cut method, causing temporary turbidity issues and longer term sedimentation issues that could affect downstream aquatic habitat and stream morphology.¹⁴¹ FERC relied on Columbia Gas’s

¹³⁸ EA at 92.

¹³⁹ *Id.*

¹⁴⁰ EA at 92–93.

¹⁴¹ *Id.*

“mitigation measures” to lessen any impacts to water bodies, failing to lay out what those mitigation measures would look like or how they would be enforced.¹⁴² Even more, FERC conclusively dismissed any type of impact that could occur from Horizontal Directional Drilling (“HDD”) to water bodies without explanation.¹⁴³ As discussed in further detail in the Comments of Intervenors, the construction of both of these pipelines, including the use of HDD, could impair local water quality and aquatic habitat and the cumulative impact of this practice for both projects could be detrimental. The Comments of Intervenors also included direct evidence of how the method of using HDD to install pipelines has significantly impaired water quality in the past. FERC’s cumulative impacts analysis on water bodies does not demonstrate that it seriously considered the “overall impact that can be expected if the individual impacts are allowed to accumulate.”¹⁴⁴

Similarly, the EA failed to adequately consider cumulative impacts to wetlands or wildlife. Resembling its cumulative impacts analysis for water bodies, FERC admitted “we don’t know specific data for wetland impacts for each HUC-12 watershed it crosses, [but] we know the entire Mountaineer project would impact 14 wetlands totaling about 0.5 acre.”¹⁴⁵ FERC went on to dismiss any type of cumulative impacts to wetlands because both projects would be required to “comply with applicable federal and state permit requirements to protect wetland resources and the Project would only contribute impacts on 0.06 acre of wetland.”¹⁴⁶ FERC failed to

¹⁴² *Id.*

¹⁴³ *Id.* at 93 (“Waterbodies crossed by the HDD method and existing access roads would not be affected.”).

¹⁴⁴ *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002).

¹⁴⁵ EA at 93.

¹⁴⁶ *Id.*

adequately consider the full wetland impacts because it admittedly did not have the specific data to do so. It failed fully to consider the cumulative impacts to wildlife from both projects, despite admitting that the Project would have “long-term cumulative impacts on forested habitats used by wildlife.”¹⁴⁷ The numerous concerns regarding cumulative impacts to wetlands and wildlife from these projects that FERC failed to consider are further laid out in the Comments of Intervenors.

In light of the close connection between the Project and the Mountaineer Gas Pipeline, FERC was obligated to assess the cumulative impacts and fully analyze coupled impacts to water, aquatic habitat, soil, forested land, wildlife, wetlands and other areas of concern. Despite this, similar to *Delaware Riverkeeper*, “[i]t is apparent that FERC did not draft these pages with any serious consideration of the cumulative effects of the other project”¹⁴⁸ together with the Eastern Panhandle Expansion Project.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Intervenors respectfully request that the Commission:

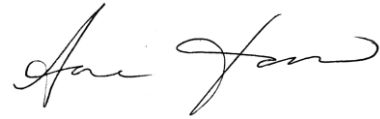
1. Grant Intervenors’ request for rehearing;
2. Upon completion of the rehearing process, rescind the Certificate Order;
3. Before making any new certificate ruling, conduct a NEPA analysis that addresses the direct, indirect, and cumulative impacts of the projects, and addresses the other NEPA-specific issues set forth in this request and Intervenors’ previous comments in these dockets.
4. Grant any and all other relief to which Intervenors are entitled.

Dated: August 17, 2018

¹⁴⁷ *Id.* at 94–95.

¹⁴⁸ *Del. Riverkeeper*, 753 F.3d at 1320.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anne Havemann". The signature is fluid and cursive, with the first name "Anne" and last name "Havemann" clearly distinguishable.

Anne Havemann
General Counsel
Chesapeake Climate Action Network
6930 Carroll Avenue, Suite 720
Takoma Park, MD 20912
(240) 396-1984
anne@chesapeakeclimate.org

CERTIFICATE OF SERVICE

I hereby certify that I have on August 17, 2018 caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Anne Havemann_____

Anne Havemann
General Counsel
Chesapeake Climate Action Network
6930 Carroll Avenue, Suite 720
Takoma Park, MD 20912
(240) 396-1984
anne@chesapeakeclimate.org