

# People's Dossier: FERC's Abuses of Power and Law

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## **Evidence of the Federal Energy Regulatory Commission's (FERC) abuses of law and power in communities and states across the country**

- Budget Issues
- Climate Change and Drilling Impacts Ignored
- Consultant Conflicts of Interest
- Critical Information Concealed
- Deficient EIS Analysis
- Deficient Needs Analysis
- Economic Harms
- Illegal Segmentation
- Lack of Public Assistance
- Public Participation Undermined
- Safety Threats Ignored
- Staff Conflicts of Interest
- Stripping People's Rights
- Undermining Federal Authority
- Undermining State Authority
- Violations Overlooked

*Complete People's Dossier: FERC's Abuses of Power and Law*

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Communities across America are being abused by the use and misuse of powers granted to the Federal Energy Regulatory Commission (FERC) pursuant to the Natural Gas Act. And so communities from across the nation are banding together to demand that Congress:

- Hold congressional hearings to investigate and learn about the many ways communities are being harmed by FERC's implementation of the Natural Gas Act and the agency's failure to meet the legal mandates of the National Environmental Policy Act; and
- Take swift affirmative action to reform the Natural Gas Act so as to better protect communities including eliminating the threats associated with natural gas infrastructure

With the Department of Energy Organization Act of 1977 (S.826) Congress reorganized the Department of Energy and created FERC, an independent executive agency. During Senate hearings on the bill, a rightfully skeptical Senator William V. Roth of Delaware had this to say about the critical role that an equitable energy policy plays in our society:

*If there is a single area where it is necessary for the American people to believe implicitly in the fairness and honesty of Government, where there can be no doubts whatsoever, it is in the field of energy...A sweetheart relationship between those who regulate and those who are regulated will strain the credibility of the most trusting citizens.*

Unfortunately, after four decades of FERC's unaccountable and irresponsible approach to energy development, the trust of the American people has been strained beyond the breaking point. As it currently stands, the language of the Natural Gas Act is being misused by FERC to strip people of their legal and constitutional rights; to undermine the legal authority of states and of other federal agencies; to prevent fair public participation in the pipeline review process; to ignore the mandates of the Clean Water Act and the National Environmental Policy Act; to take from residents and citizens their private property rights; to disregard the climate changing ramifications of its actions; to take from communities the protection of public parks, forests and conserved lands that they have invested heavily in protecting; to take jobs and destroy small businesses; to inflict on our communities health, safety and environmental harms ... all for the benefit of the pipeline industry seeking to advance its own corporate profits and business edge over its competitors.

Regulators and elected officials are beginning to take notice. In response to FERC's call for comments regarding its pipeline review process in 2018, the Commission received thousands of public comments critiquing its abusive and illegal practices, including a letter signed by seven state Attorneys General outlining FERC's regular and extensive violations of federal law. Even members of the Commission have started to speak out about the agency's violations of the law in dissenting orders.

The time has now come for Congress to investigate.

As this Dossier demonstrates, Congressional hearings are essential to inform Congress of the abuses of power and law that FERC is inflicting. Congressional hearings will also help identify smart and meaningful reforms that can accomplish the nation's energy goals without sacrificing people, communities, the law, or the environment.

Congressional Hearings have been requested by over 200 organizations representing communities across the nation. It is time for Congress to grant this request.





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### **FERC Bias is Emboldened by Its Ballooning Budget and Lack of Oversight**

Per federal law, FERC relies on the industry it regulates for its entire budget. (*42 U.S. Code § 7178(a)(1)*)<sup>1</sup>. This funding structure means that FERC is vulnerable to the whims and wishes of the very industry it's charged with overseeing. Nowhere is this more true than in the case of pipelines and related infrastructure including LNG facilities and compressors. The lack of oversight by other branches of government or watchdog agency helps to perpetuate FERC's biased decision making.

#### **FERC's Funding Structure Leads to Bias in Fact**

FERC issues a volume based per-unit charge on natural gas pipelines to cover the agency's costs. This means that the more pipelines, gas delivery, and LNG facilities FERC approves the more fees it is able to collect for its self-inflating, FERC-created budget.

As a result of this funding structure, FERC is all but compelled to decide in favor of pipeline companies. The record of pipeline project approvals by FERC Commissioners demonstrates a clear bias in FERC decision-making; in the last thirty years, FERC's Commissioners have denied only *one* pipeline project brought before them for approval, and that denial happened relatively recently, on March 11, 2016. Up until this time, FERC had a 100% approval rating for all natural gas pipeline projects brought before its Commissioners for a vote. Interestingly, FERC's singular denial came just one week after a challenge was filed against FERC's pipeline program in which its then-100% approval rate was cited as a key piece of evidence. There is not a single other federal agency that has this exceptionally high rate of approvals for applicants seeking an authorization or certification.

#### **FERC is Insulated from Oversight**

This industry-financing mechanism not only encourages the biased approval process for proposed projects, but it also provides FERC with a significant degree of insulation from the legislative branch of government. FERC is simultaneously free from the oversight of the executive branch because of the limitation of the President's power to remove FERC Commissioners. The "for-cause" limitation on the removal of FERC's Commissioners only allows the removal of Commissioners under a very narrow set of circumstances, i.e. "inefficiency, neglect of duty, or malfeasance." (*42 U.S. Code § 7171(b)(1)*).

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<sup>1</sup> See Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues, U.S. Government Accountability Office (GAO) Report to the Chairman, Committee on the Budget, House of Representatives, GAO/AIMD-98-11 (Identifying 27 agencies that rely on federal user fees for a significant portion of their budget, none of which are fully funded or nearly fully funded like FERC, are independent executive entities, presently exist, are independent executive agencies, and conduct direct adjudications that affect its finances) (December 19, 1997).

In fact, FERC brags about the lack of oversight it receives. According to FERC:

“FERC’s decisions are not reviewed by the President or Congress, maintaining FERC's independence as a regulatory agency, and providing for fair and unbiased decisions.”<sup>2</sup>

While FERC asserts the lack of oversight is beneficial for decisionmaking, the reality is actually quite different; FERC’s independence from the oversight of both the executive and legislative branches of government leaves FERC especially vulnerable to the undue influence of the industry that funds its budget. This is particularly true because FERC itself operates without the scrutiny of any type of regulatory oversight or regulatory board, i.e. a watchdog responsible for overseeing regulatory quality.

### **FERC’s Budget Outpaces Other Agencies - Including its Parent the DOE**

FERC’s ability to secure funding from the regulated industry has resulted in a budget that has grown appreciably faster than its parent government agency, the Department of Energy, as well as the Federal government as a whole. In fact, over the past decade, FERC has seen its annual budget grow by more than 60-percent - rocketing from sub-\$200 Million in 2004 to more than \$346 Million projected for 2017. A substantial portion of this boom occurred during a recessionary period that left other independent agencies reeling from budget slashes in the hundreds of millions of dollars.

The fiscal year 2017 budget request for FERC seeks a 3% increase in base operating costs and includes a “building modernization project” for FERC offices, the cost of which has nearly doubled from \$40 million dollars to \$79 million dollars.<sup>3</sup>

FERC’s growing budget demands are sustained by the Agency’s approval of an increasing number of infrastructure projects.

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### **Attachments:**

Budget Issues Attachment 1, Congressional Performance Budget Request, Fiscal Year 2014, pg. 5.

Budget Issues Attachment 2, Congressional Performance Budget Request, Fiscal Year 2017, pgs. ii-iii.

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<sup>2</sup> Budget Issues Attachment 1, Congressional Performance Budget Request, Fiscal Year 2014, pg. 5.

<sup>3</sup> Budget Issues Attachment 2, Congressional Performance Budget Request, Fiscal Year 2017, pgs. ii-iii.

People's Dossier: FERC's Abuses of Power and Law  
→ **Climate Change** and Drilling Impacts Ignored

**FERC Fails to Give Due Consideration to the Climate Change and Drilling Impacts of Pipeline Projects**

Despite the mandate of the National Environmental Policy Act (NEPA) that federal agencies take environmental considerations into account in their decision-making “to the fullest extent possible” (42 U.S.C. § 4332; 40 C.F.R. § 1500.2; *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658,684 (D.C. Cir.)) and FERC’s obligation under the Natural Gas Act (NGA) to protect the public interest, FERC routinely fails to meet its obligation to consider foreseeable impacts, both direct and indirect, resulting from its pipeline approvals, including effects on climate change, water impacts, air impacts, community impacts, and the ramifications of increased drilling and fracking operations.

**FERC’s NEPA Requirements and Violations Regarding Climate Change Impacts**

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). As such, it makes environmental protection a part of the mandate of every federal agency. *See* 42 U.S.C. § 4332.<sup>1</sup> NEPA requires that federal agencies take environmental considerations into account in their decision-making “to the fullest extent possible.” 42 U.S.C. § 4332. Federal agencies must consider environmental harms and the means of preventing them in a “detailed statement” before approving any “major federal action significantly affecting the quality of the human environment.” *Id.* § 4332(2)(C). FERC must consider past, present and “reasonably foreseeable” cumulative impacts caused by its decisions and actions.

Construction and operation of fracked gas pipelines, compressors and infrastructure are a direct, indirect and foreseeable cause of increased greenhouse gas (GHG) emissions, increased drilling and fracking for gas from shale, and all the associated environmental impacts, including climate change, pollution, environmental degradation, and a variety of community and economic harms. NEPA requires FERC to consider these foreseeable direct and indirect impacts in its review of proposed natural gas infrastructure projects.

On August 1, 2016, The Council on Environmental Quality (CEQ) issued 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. This Guidance offered direction on how FERC and other agencies could consider the climate change impacts of its decisions. While this guidance has been rolled back by the Trump administration,<sup>2</sup> the obligation to review the climate changing impacts of agency decision-making still exists as a mandate under NEPA.<sup>3</sup> The rollback

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<sup>1</sup> See R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012.

<sup>2</sup> Climate Change & Drilling Impacts Ignored Attachment 1, Presidential Executive Order on Promoting Energy Independence and Economic Growth, March 28, 2017.

<sup>3</sup> Climate Change & Drilling Impacts Ignored Attachment 2, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National



of the guidance does not change the NEPA obligation to consider the climate changing impacts of pipeline infrastructure approvals.

### **Consideration of Downstream Impacts Ignored**

The Court of Appeals for the DC Circuit in *Sierra Club v. FERC*, regarding the Sabal Trail Pipeline, made clear that an analysis of the downstream impacts of GHG emissions is reasonably foreseeable and required pursuant to NEPA.<sup>4</sup> It held that:

“... greenhouse-gas emissions are an indirect effect of authorizing this [pipeline] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. See 15 U.S.C. § 717f(e). The EIS accordingly needed to include a discussion of the “significance” of this indirect effect, see 40 C.F.R. § 1502.16(b), as well as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” see *WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7).”<sup>5</sup>

The obligation to consider the impacts of the downstream use of gas when approving pipeline projects, as made clear by the plain language of NEPA and the Sabal Trail decision, has been consistently circumvented by the Commission in its review and approval of pipeline projects. In a blatant refutation of the Sabal Trail decision, the Commission issued the blanket determination that:

“... to avoid confusion as to the scope of our obligations under NEPA and the factors that we find should be considered under NGA section 7(c) [...] the upstream production and downstream use of natural gas are not cumulative or indirect impacts of the proposed pipeline project, and consequently are outside the scope of our NEPA analysis.”<sup>6</sup>

However, this refusal to follow the law has come with regular dissenting opinions from both Commissioner Glick and Commissioner LaFleur, stating that:

“pipelines are driving the throughput of natural gas, connecting increased upstream resources to downstream consumption. With respect to downstream impacts, I believe it is reasonably foreseeable, in the vast majority of cases, that the gas being transported by pipelines we authorize will be burned for electric generation or residential, commercial, or industrial end uses. In those circumstances, there is a reasonably close causal relationship between the

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Environmental Policy Act Reviews, Christina Goldfuss, Council on Environmental Quality, August 1, 2016.

<sup>4</sup> See *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017) (“... greenhouse-gas emissions are an indirect effect of authorizing this [pipeline] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. See 15 U.S.C. § 717f(e). The EIS accordingly needed to include a discussion of the “significance” of this indirect effect, see 40 C.F.R. § 1502.16(b), as well as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” see *WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7). “)

<sup>5</sup> See decision rendered by the Court of Appeals for the DC Circuit on August 22, 2017 in *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017).

<sup>6</sup> Climate Change & Drilling Impacts Ignored Attachment 3, Order Denying Rehearing for Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

Commission’s action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the transported gas. We simply cannot ignore the environmental impacts associated with those downstream emissions.”<sup>7 8</sup>

In addition, the U.S. Environmental Protection Agency has explicitly commented that FERC should consider impacts from the development and production of natural gas being transported through a proposed pipeline, as well as impacts associated with the end use of the gas, particularly with regards to greenhouse gas emissions and climate change effects.<sup>9</sup>

### **Consideration of Upstream Impacts Ignored**

FERC also comprehensively excludes from its NEPA review consideration of the GHG and other environmental harms that result from induced gas drilling, despite acknowledging that increased gas production will result from the pipeline construction it is reviewing and approving.

This failure to consider the impacts of induced shale gas production as well as the end uses of the fracked gas is particularly troubling given that FERC has explicitly recognized that “upstream development and production of natural gas may be a ‘reasonably foreseeable’ effect of a proposed action,” and that a new pipeline would “alleviate some of the constraints on...natural gas production”.<sup>10</sup> Despite these recognitions, and others, FERC asserts that “the actual scope and extent of potential GHG emissions from upstream natural gas production is not reasonably foreseeable” and therefore no consideration pursuant to NEPA is necessary. Through this circular logic of recognizing induced drilling but then discounting it because FERC has failed to assess the extent of the GHG emissions that will occur, FERC ignores its NEPA obligation to consider the impacts.

The direct and indirect connection between FERC’s approval of shale gas infrastructure and climate change impacts resulting from upstream production of shale gas has been recognized by at least two FERC commissioners. Commissioner Glick recently stated:

“It is particularly important for the Commission to use its “best efforts” to identify and quantify the full scope of the environmental impacts of its pipeline certification decisions given that these pipelines are expanding the nation’s capacity to carry natural gas from the wellhead to end-use consumers. Adding capacity has the potential to “spur demand” and, for that reason, an agency conducting a NEPA review must, at the very least, examine the effects that an expansion of pipeline capacity might have on production and consumption. Indeed, if a proposed pipeline neither increases the

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<sup>7</sup> Climate Change & Drilling Impacts Ignored Attachment 4, Statement of Commissioner Cheryl A. LaFleur on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>8</sup> See Footnote Number 6 in Statement of Commissioner Cheryl LaFleur on Millennium Pipeline, FERC Docket No. CP16-486, July 24, 2018.

<sup>9</sup> Climate Change & Drilling Impacts Ignored Attachment 5, U.S. EPA Detailed Comments on the DEIS for the Leach Xpress Pipeline and Rayne Xpress Expansion Project, June 13, 2016.

<sup>10</sup> Climate Change & Drilling Impacts Ignored Attachment 14, Mountain Valley Pipeline DEIS at 3-1, FERC Docket No. CP16-10.



supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be “needed” in the first place.”<sup>11</sup> (citations omitted)

The only reason why FERC deems such impacts unforeseeable is because the agency itself chooses to remain purposefully blind. This kind of doublespeak – that shale gas production is reasonably foreseeable but at the same time it is not reasonably foreseeable – is used by FERC to arbitrarily limit its review of impacts. In a recent order, FERC attempted to cement this contradictory policy in order to evade its legal review obligations by falsely asserting:

“Even if a causal relationship between the proposed action here and upstream production was presumed, the scope of the impacts from any such production is too speculative and thus not reasonably foreseeable.”<sup>12</sup>

However, as Commissioner Glick clarified in his dissent:

“The fact that the pipeline’s exact effect on the demand for natural gas may be unknown is no reason not to consider the type of effect it is likely to have. As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure to transport fossil fuels—“if the *nature* of the effect” (i.e., increased emissions) is clear, the fact that “the *extent* of the effect is speculative” does not excuse an agency from considering that effect in its NEPA analysis.”<sup>13</sup>

In fact, the relationship between FERC approved pipeline projects and upstream production is foreseeable, direct and demonstrable, as the Delaware Riverkeeper Network has demonstrated on the PennEast pipeline docket. For example, in the case of the PennEast Pipeline (*FERC Docket CP15-558*) FERC failed to consider the emissions and other harms that will result from the shale gas production necessary to fulfill the claimed “need” for the project and to carry the volumes of gas proposed. The PennEast pipeline will likely induce the drilling of 3,000 new wells in Northeast Pennsylvania, in Bradford, Susquehanna, Lycoming, and Tioga counties.<sup>14</sup> Given recent estimates that “during the life cycle of an average shale-gas well, 3.6 to 7.9% of the total production of the well is emitted to the atmosphere as methane” (1), this failure to consider the GHG and climate changing impacts of the induced drilling operations and end uses of the gas these pipelines deliver is significant.

It is not just climate change that induced drilling and fracking operations seriously affect. Fracking operations are known to have severe impacts on water quality including drinking water, air quality,

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<sup>11</sup> Climate Change & Drilling Impacts Ignored Attachment 7, Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>12</sup> Climate Change & Drilling Impacts Ignored Attachment 3, Order Denying Rehearing for Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>13</sup> Climate Change & Drilling Impacts Ignored Attachment 7, Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>14</sup> Climate Change & Drilling Impacts Ignored Attachment 8, Delaware Riverkeeper Network Comment regarding PennEast DEIS, Sept 12, 2016.

property values, human health, public parks, farming and land use patterns. These impacts are known, quantifiable, and scientifically demonstrated through peer review articles. For example, the *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking*<sup>15</sup> is a fully updated and referenced scientific resource that can be used to assess the many direct and indirect effects of pipeline-induced-fracking.

FERC's self-inflicted ignorance on the subject does not alleviate the agency of its obligation to undertake an assessment of greenhouse gas emissions and other environmental and community impacts resulting from induced shale gas production associated with the infrastructure projects it reviews and approves.

### **Natural Gas Act Requirements Violated**

In addition to the requirements of NEPA, the NGA requires FERC to consider the climate changing ramifications of its pipeline and infrastructure decisions. As required by the NGA, FERC must consider "all factors bearing on the public interest," and, prior to issuing a certificate for new pipeline or compressor station construction, must find the project's benefits outweigh its harms.

Given that:

- science conclusively demonstrates that human release of greenhouse gas emissions including methane are a direct cause of climate change,
- natural gas pipelines and compressors are directly and indirectly a source of climate changing emissions,
- climate change has serious and significant environmental, economic and safety impacts, and
- as a result of its harmful impacts on our communities and environment, climate change poses one of the most extreme existential threats facing humanity,

FERC's consideration of the impacts resulting from the GHG of shale gas pipelines and compressors are clearly required as a result of the NGA.

The United Nations IPCC Report and the US 4<sup>th</sup> National Climate Assessment all make clear the grave consequences of climate change and reaching a 1.5 degree tipping point – the ramifications are to health, safety, our environment and our economy. NASA has determined, through its data gathering and research, that methane is responsible for about a quarter of the human induced climate effects and that the fossil fuel industry is responsible for most of the dramatic rise in methane emissions in the past 10 years.<sup>16</sup> Pipelines and fracking are a big part of this equation. FERC's refusal to consider the GHG emissions and the climate changing impacts, as well as other environmental harms associated with approval of pipelines, compressor stations and related infrastructure, brings with it dire consequences for the public interest of our communities and nation.

Commissioner Glick has clearly outlined FERC's NGA mandate to consider climate change impacts resulting from its actions and decisions in recent statements:

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<sup>15</sup> See *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking*, Physicians for Social Responsibility, March 2018, available at: [https://concernedhealthny.org/wp-content/uploads/2018/03/Fracking\\_Science\\_Compndium\\_5FINAL.pdf](https://concernedhealthny.org/wp-content/uploads/2018/03/Fracking_Science_Compndium_5FINAL.pdf)

<sup>16</sup> See *Nasa Led Study Solves a Methane Puzzle*, NASA, January 2, 2018, available at: <https://www.nasa.gov/feature/jpl/nasa-led-study-solves-a-methane-puzzle>

“Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project’s benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the existential threat of climate change.”<sup>17</sup>

Commissioner LaFleur has also referred to this legal obligation in recent statements:

“...deciding whether a project is in the public interest requires a careful balancing of the economic need for the project and all of its environmental impacts. Climate change impacts of GHG emissions are environmental effects of a project and are part of my public interest determination.”<sup>18</sup> (citations omitted)

### **FERC’s Refusal to Consider the Social Cost of Carbon in Its Climate Change Analysis**

Despite its claim to the contrary, FERC has many tools that would allow it to consider the climate changing ramifications of its pipeline decisions. Among the most readily available is the social cost of carbon. Despite court mandate, FERC has refused to avail itself of information and tools such as these to aid in its project reviews.

The social cost of carbon (SCC)— “a measure, in dollars, of the long-term damage done by a ton of carbon dioxide (CO<sub>2</sub>) emissions in a given year”<sup>19</sup>—is a tool that would allow FERC to measure economic impacts of climate change that would result from proposed pipelines as required by its NEPA and NGA mandates. Despite the fact that a federal court recently upheld the legitimacy of using the social cost of carbon as a viable statistic in climate change regulations,<sup>20</sup> and that the CEQ had recommended its use in its final guidance for federal agencies to consider climate change when evaluating proposed Federal actions,<sup>21</sup> the Commission continues to contend that it “has not

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<sup>17</sup> Climate Change & Drilling Impacts Ignored Attachment 9, Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

<sup>18</sup> Climate Change & Drilling Impacts Ignored Attachment 4, Statement of Commissioner Cheryl A. LaFleur on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>19</sup> See EPA Fact Sheet, Social Cost of Carbon, December 2016, available at:

[https://www.epa.gov/sites/production/files/2016-12/documents/social\\_cost\\_of\\_carbon\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf)

<sup>20</sup> See Susanne Brooks, Environmental Defense Fund, *In Win for Environment, Court Recognizes Social Cost of Carbon*, August 29, 2016, available at: <http://blogs.edf.org/markets/2016/08/29/in-win-for-environment-court-recognizes-social-cost-of-carbon/>

<sup>21</sup> Climate Change & Drilling Impacts Ignored Attachment 2, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National

identified a suitable method' for determining the impact from the Projects' contribution to climate change and, absent such a method, it simply 'cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment and how that impact would contribute to climate change.'"<sup>22</sup>

However, as Commissioners Glick and LaFleur have pointed out in response to multiple recent certificate order decisions, FERC is incorrect in its claims that there is "no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions"<sup>23</sup> and that "it cannot 'determine how a project's contribution to GHG emissions would translate into physical effects on the environment.'"<sup>24</sup> As Commissioner Glick explains<sup>25</sup>:

"That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency's obligation to consider how its actions contribute to the harm caused by climate change."<sup>26</sup>

"the Commission has the tools needed to evaluate the Projects' impacts on climate change. It simply refuses to use them."<sup>27</sup>

**Despite these clear mandates from NEPA, the Natural Gas Act, and the Courts, FERC continues to illegally narrow its consideration of climate change and the other community and environmental ramifications of its pipeline, compressor and related infrastructure decisionmaking.**

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Environmental Policy Act Reviews, Christina Goldfuss, Council on Environmental Quality, August 1, 2016.

<sup>22</sup> Climate Change & Drilling Impacts Ignored Attachment 9, Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

<sup>23</sup> *Id.* P 27. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at 2, 5–8 (2018) (Glick, Comm'r, dissenting).

<sup>24</sup> Climate Change & Drilling Impacts Ignored Attachment 10, Statement of Commissioner Cheryl LaFleur on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

<sup>25</sup> Climate Change & Drilling Impacts Ignored Attachment 11, Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC Docket Nos. CP17-441-000, CP17-441-001, July 19, 2018. See also Climate Change & Drilling Impacts Ignored Attachment 9, Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018; Climate Change & Drilling Impacts Ignored Attachment 12, Statement of Commissioner Richard Glick on Columbia Gas Transmission, L.L.C., July 19, 2018, Docket No.: CP17-80-000; Climate Change & Drilling Impacts Ignored Attachment 11, Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC Docket Nos. CP17-441-000, CP17-441-001, July 19, 2018.

<sup>26</sup> *Id.* at 5 (Glick, Comm'r, dissenting) (citing cases that discuss the Social Cost of Carbon when evaluating whether an agency complied with its obligation under NEPA to evaluate the climate change impacts of its decisions).

<sup>27</sup> Climate Change & Drilling Impacts Ignored Attachment 13, Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC, FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

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**Attachments:**

Climate Change & Drilling Impacts Ignored Attachment 1, Presidential Executive Order on Promoting Energy Independence and Economic Growth, March 28, 2017.

Climate Change & Drilling Impacts Ignored Attachment 2, 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, Christina Goldfuss, Council on Environmental Quality, August 1, 2016.

Climate Change & Drilling Impacts Ignored Attachment 3, Order Denying Rehearing for Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

Climate Change & Drilling Impacts Ignored Attachment 4, Statement of Commissioner Cheryl A. LaFleur on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

Climate Change & Drilling Impacts Ignored Attachment 5, U.S. EPA Detailed Comments on the DEIS for the Leach Xpress Pipeline and Rayne Xpress Expansion Project, June 13, 2016.

Climate Change & Drilling Impacts Ignored Attachment 6, Draft Environmental Impact Statement for the PennEast Pipeline Project, FERC Docket No. CP15-558, July 2016.

Climate Change & Drilling Impacts Ignored Attachment 7, Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

Climate Change & Drilling Impacts Ignored Attachment 8, Delaware Riverkeeper Network Comment regarding PennEast DEIS, Sept 12, 2016.

Climate Change & Drilling Impacts Ignored Attachment 9, Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

Climate Change & Drilling Impacts Ignored Attachment 10, Statement of Commissioner Cheryl LaFleur on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

Climate Change & Drilling Impacts Ignored Attachment 11, Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC Docket Nos. CP17-441-000, CP17-441-001, July 19, 2018.

Climate Change & Drilling Impacts Ignored Attachment 12, Statement of Commissioner Richard Glick on Columbia Gas Transmission, L.L.C., FERC Docket No. CP17-80-000, July 19, 2018.

Climate Change & Drilling Impacts Ignored Attachment 13, Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC, FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

Climate Change & Drilling Impacts Ignored Attachment 14, Mountain Valley Pipeline DEIS at 3-1, FERC Docket No. CP16-10.

*Complete People's Dossier: FERC's Abuses of Power and Law*  
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## People's Dossier of FERC Abuses of Power and Law →Consultant Conflicts of Interest

### **FERC Routinely Uses Conflicted Consultants to Conduct Project Reviews and Make Recommendations**

FERC routinely hires third party consultants to lead its project reviews knowing full well that these same consultants are simultaneously working as consultants for the pipeline companies seeking FERC approval for their projects. The use of these conflicted consultants, that are operating on both sides of the FERC approval process at the same moment in time, sometimes even on directly related projects, injects an obvious source of bias and concern.

For example:

The FERC Environmental Assessment (EA) for Spectra Energy's [now Enbridge] Atlantic Bridge project was prepared with the help of NRG [now Environmental Resource Management (ERM)], a third party contractor hired by FERC. At the same time, Spectra had also retained NRG as a "public outreach and relations" consultant on the PennEast pipeline project, of which Spectra owns 10% interest. This means that NRG was hired by FERC to conduct an objective, unbiased review of Spectra's Atlantic Bridge project, while at the same time receiving money from Spectra Energy to conduct the preliminary review for another of the company's proposed pipelines (i.e. PennEast pipeline). Additionally, the two projects (PennEast and Atlantic Bridge) are physically connected, further entrenching the conflict of interest. It is no stretch of the imagination that NRG would financially benefit from Spectra's Atlantic Bridge project if the project were approved, a project which NRG was partially tasked by FERC with "objectively" reviewing. In fact, while NRG was conducting its "review", Spectra hired NRG for *no less than five other projects*.<sup>1</sup>

FERC's own handbook defines such a situation as a conflict of interest, stating a conflict of interest exists when a contractor has an ongoing relationship with an applicant. The conflicts involving NRG, Spectra, the PennEast Pipeline (*FERC Docket No. CP15-558*), and the Atlantic Bridge Pipeline (*FERC Docket No. CP16-9*) were brought to FERC's attention by concerned community members and two U.S. Senators. Instead of conducting a new, unbiased review, FERC's then-Chairman Norman Bay simply responded by quoting sections of FERC's handbook on hiring third-party contractors. NRG's review still stands intact because despite clear evidence to the contrary, FERC took NRG's word that no conflicts existed.<sup>2</sup> Documents revealed after these comments were made and FERC had approved the project reveal that FERC had clear information that a contractor [NRG] hired to review Spectra Energy's proposed Atlantic Bridge gas project did not fully disclose its work for Spectra on a related project [PennEast]."<sup>3</sup>

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<sup>1</sup> Consultant Conflicts of Interest Attachment 1, DeSmog Blog, *Revealed: Contractors Hired by FERC to Review a New Spectra Energy Pipeline Work for Spectra on a Related Project*, May 26, 2016.

<sup>2</sup> Consultant Conflicts of Interest Attachment 2, DeSmog Blog, *Despite Senate Inquiry into Potential Conflicts of Interest, FERC Approves Spectra Energy's Atlantic Bridge Project*, January 26, 2017.

<sup>3</sup> Consultant Conflicts of Interest Attachment 3, DeSmog Blog, *Documents Suggest FERC Approved Spectra's*

Recently, Canada's Enbridge purchased Spectra Energy. Because ERM currently works for Enbridge on several other projects, the contractor is conflicted and required to get special approval from FERC to continue working on Atlantic Bridge, providing construction compliance monitoring in the state of New York. FERC staff acknowledged in an internal memo "that ERM currently works for Enbridge and thus has a conflict of interest."<sup>4</sup> But instead of finally taking corrective action regarding the extensive conflicts of interest involved in the project, FERC ultimately ruled that the company may serve as third-party contractor to monitor Atlantic Bridge's construction phase, "reasoning that hiring a new contractor would have 'detrimental consequences' for the project, which 'would be contrary to the public interest'" and would impose further significant delays on the construction of this project" (specifically citing the construction schedule's limited tree-clearing window),<sup>5</sup> and that because "ERM reported it had received less than one percent of its income from Enbridge in each of the previous three years."<sup>6</sup> However, FERC does not independently verify financial reporting from third-party contractors and documents obtained by DeSmog Blog reveal that ERM's relationship with Enbridge may in fact be more extensive.<sup>7</sup>

By way of further example:

Tetra Tech is a known consultant for FERC, most recently on the PennEast Pipeline project. Tetra Tech is also a member of the Marcellus Shale Coalition. Founded in 2008, the Marcellus Shale Coalition works to advance production and distribution of gas fracked from the Marcellus and Utica Shales. The support of the Marcellus Shale Coalition is not just well known, but is touted by the PennEast Pipeline company raising another significant conflict for FERC on the PennEast Pipeline project.<sup>8</sup>

In addition to Tetra Tech's clear bias for natural gas infrastructure, FERC was aware of the company's history of bias and misconduct and that "a federal court previously found evidence indicating that Tetra-Tech tried to influence agency policy in the course of preparing an EIS:"<sup>9</sup>

In the case involving Tetra-Tech's preparation of an environmental impact statement for the

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*Atlantic Bridge Project Despite Knowing of Contractor's Flawed Conflict Disclosure*, April 7, 2017.

<sup>4</sup> Consultant Conflicts of Interest Attachment 4, DeSmog Blog, *Government Contractor Monitoring Enbridge's Atlantic Gas Project Works Extensively for the Company*, January 14, 2018.

<sup>5</sup> Consultant Conflicts of Interest Attachment 5, DeSmog Blog, *FERC Allows Conflicted Contractor to Supervise Enbridge's Atlantic Bridge Gas Project*, October 8, 2017.

<sup>6</sup> Consultant Conflicts of Interest Attachment 4, DeSmog Blog, *Government Contractor Monitoring Enbridge's Atlantic Gas Project Works Extensively for the Company*, January 14, 2018.

<sup>7</sup> Consultant Conflicts of Interest Attachment 4, DeSmog Blog, *Government Contractor Monitoring Enbridge's Atlantic Gas Project Works Extensively for the Company*, January 14, 2018.

<sup>8</sup> Consultant Conflicts of Interest Attachment 6, Times of Trenton, *PennEast Natural Gas Pipeline Environmental Study Firm's Connection to Shale Coalition is Questioned*, February 28, 2015.

<sup>9</sup> See *Colorado Wild, Inc. v. U.S. Forest Serv.*, as paraphrased in Lower Saucon, Pennsylvania's Request for Rehearing and Motion for Stay re PennEast Pipeline Company, LLC. ) Docket No. CP15-558-000, Before the Federal Energy Regulatory Commission.

U.S. Forest Service (“USFS”), a federal judge also found that evidence of Tetra-Tech’s bias and improper conduct raised such serious problems that it authorized the extraordinary remedy of preliminary injunction against a USFS decision to grant special use authorization to a real estate developer for certain rights-of-way across National Forest System (NFS) lands.

Even worse, a federal magistrate judge found that Tetra-Tech destroyed evidence relating to the claims of improper email communications concerning the EIS with the project proponent by erasing the computer hard drive of its employee. In the Colorado Wild case, the Court found the agency administrative record filed with the Court to have been “incomplete”, due to Tetra-Tech’s destruction of documents by erasing a computer hard drive.<sup>10</sup>

In response to Tetra Tech’s role in PennEast, FERC acknowledged the conflicts while claiming it did not constitute their disqualification, adding that this sort of bias is the norm for third-party contractors working on pipeline proposals:

“...allegations that Tetra Tech has a “financial, business, and corporate interest” in promoting natural gas infrastructure in the Marcellus Shale region do not demonstrate that Tetra Tech has an OCI that necessitates an invalidation of the Final EIS. ...Nor do we believe that Tetra Tech’s membership in, or role as a technical consultant to, a trade organization that promotes the development of natural gas supplies in the Marcellus Shale region constitutes a disqualifying OCI. It would be inappropriate to disqualify Tetra Tech from serving as a third-party contractor for belonging to a professional organization. Were this the standard for conflicts of interest, nearly all third-party contracts would likely be disqualified for conflicts of interest.”<sup>11</sup>

**Attachments:**

Consultant Conflicts of Interest Attachment 1, DeSmog Blog, *Revealed: Contractors Hired by FERC to Review a New Spectra Energy Pipeline Work for Spectra on a Related Project*, May 26, 2016.

Consultant Conflicts of Interest Attachment 2, DeSmog Blog, *Despite Senate Inquiry into Potential Conflicts of Interest, FERC Approves Spectra Energy’s Atlantic Bridge Project*, January 26, 2017.

Consultant Conflicts of Interest Attachment 3, DeSmog Blog, *Documents Suggest FERC Approved Spectra’s Atlantic Bridge Project Despite Knowing of Contractor’s Flawed Conflict Disclosure*, April 7, 2017.

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<sup>10</sup> See *Colorado Wild, Inc. v. U.S. Forest Serv.*, as paraphrased in Lower Saucon, Pennsylvania’s Request for Rehearing and Motion for Stay re PennEast Pipeline Company, LLC. ) Docket No. CP15-558-000, Before the Federal Energy Regulatory Commission.

<sup>11</sup> See Federal Energy Regulatory Commission’s Order on Rehearing, PennEast Pipeline Company, LLC Docket No. CP15-558-001 (Issued August 10, 2018).



Consultant Conflicts of Interest Attachment 4, DeSmog Blog, *Government Contractor Monitoring Enbridge's Atlantic Gas Project Works Extensively for the Company*, January 14, 2018.

Consultant Conflicts of Interest Attachment 5, DeSmog Blog, *FERC Allows Conflicted Contractor to Supervise Enbridge's Atlantic Bridge Gas Project*, October 8, 2017.

Consultant Conflicts of Interest Attachment 6, Times of Trenton, *PennEast Natural Gas Pipeline Environmental Study Firm's Connection to Shale Coalition is Questioned*, February 28, 2015.

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## People's Dossier: FERC's Abuses of Power and Law → Critical Information Concealed

### **FERC Intentionally Conceals Critical Information from States and the Public**

FERC has intentionally, both individually and jointly with pipeline companies, withheld critical information and facts from state lawmakers and the public so as to inappropriately drive the outcome of pipeline infrastructure decisionmaking.

In their review of the Tennessee Gas Pipeline Company, LLC's ("Tennessee") Orion Project ("Orion") (*FERC Docket CP16-4*), FERC concealed information from the Pennsylvania Department of Environmental Protection ("PADEP") regarding a project Alternative that would have greatly reduced the project footprint and its impact on water resources, and therefore could have had a substantial influence on the State's Clean Water Act ("CWA") Section 401 Certification determination, as well as the public's understanding and opinion.

The Delaware Riverkeeper Network was involved in two legal challenges to the Orion project, allowing the organization to secure documents through litigation that were not otherwise available to the public or the state through public information requests.<sup>1</sup> Were it not for this litigation, evidence of FERC concealing critical information would never have come to light. The fact that this information was only made available as the result of litigation and was not otherwise available through federal Freedom of Information Act requests demonstrates the critical need for a formal Congressional investigation – without which there is no way to know how frequently this collusion to hide information and mislead State decisionmaking and public perception is actually occurring.

### **Facts demonstrating that FERC withheld analyses of viable, technically feasible, and environmentally preferable alternatives from the state and the public:**

- ⇒ On or about July 10, 2016, FERC generated a Draft Environmental Assessment (Draft EA) for Tennessee's Orion Project.
- ⇒ In the Draft EA, FERC identified and evaluated alternatives to the Orion Pipeline proposal.
- ⇒ As a result, the Draft EA included a detailed analysis regarding an Alternative which eliminated the need for the 12 miles of pipeline looping being proposed and which would eliminate all waterbody impacts.<sup>2</sup>
- ⇒ The Draft EA included a detailed description of the Alternative and concluded that this Alternative "meets the purpose and need" of the Orion Project, and "is technically feasible."

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<sup>1</sup> Critical Information Concealed Attachment 1, Delaware Riverkeeper Network Reply Brief in Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection et al., June 6, 2017.

<sup>2</sup> Critical Information Concealed Attachment 2, Draft Environmental Assessment for Tennessee's Orion Project, June 10, 2016.

- ⇒ The Draft EA also concluded that the Alternative “would eliminate the need for 12.9 miles of new pipeline construction, which would eliminate 30 waterbody crossings, 13 road crossings, and impacts on wetlands and other land use impacts along the pipeline route.”
- ⇒ The Draft EA included a table showing the different impacts resulting from the Alternative in comparison to the proposed looping pipeline project. The analysis showed that while the Alternative had its own set of impacts which required full and thoughtful consideration, the proposed looping project would harmfully impact 30 waterbodies, would have significant wetland impacts, as well as result in 222.6 more acres of total disturbed land, over 100 more acres of impact to agricultural lands, would traverse 2,100 feet of steep slopes, and would necessitate the long-term deforestation of between 9 and 19 more acres of upland forests.

Therefore, not only did the Draft EA conclude that the Alternative was technically feasible and would meet the purpose and need of the Orion Project, but it also concluded that the Alternative’s environmental impacts would be significantly smaller, thereby making it the environmentally preferred option. However, without reason or any explanation, FERC scrubbed this entire analysis of the Alternative from the final Environmental Assessment that was eventually released to the public, and to the State of Pennsylvania.<sup>3</sup>

***The public and state agencies were never made aware of the analysis scrubbed from the Draft EA.***

As such, both the public and state were never provided, by FERC, critical information regarding the scope and breadth of potential alternatives to the proposed Orion Pipeline Project, including the less environmentally harmful Alternative.

FERC’s decision to hide this information from the state and the public was particularly egregious because, under the 401 Certification, the central issues that PADEP was required to analyze were:

1. whether the project was “water dependent,” and
2. whether there were any practicable alternatives that would not impact aquatic resources.

Had PADEP been provided access to the draft Environmental Assessment and/or the analysis and conclusions regarding the Alternative, it is likely they would have been legally bound to choose the Alternative as opposed to the pipeline looping Project.

**In the case of Orion, it is clear that FERC:**

- **deliberately and intentionally excluded an analysis of a viable, technically feasible, and environmentally preferable Alternative, which involved substantive issues that**

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<sup>3</sup> Critical Information Concealed Attachment 3, Environmental Assessment for Tennessee’s Orion Project, August 2016.



**materially implicated Pennsylvania’s legal permitting obligations for the Orion Project, without providing any reason or explanation, and**

- **through this action, may have intentionally sought to inappropriately influence permitting decisions in order to secure the outcome sought by the pipeline company, as opposed to the outcome that was best for the environment or the state.**

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**Attachments:**

Critical Information Concealed Attachment 1, Delaware Riverkeeper Network Reply Brief in Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection et al., June 6, 2017.

Critical Information Concealed Attachment 2, Draft Environmental Assessment for Tennessee’s Orion Project, June 10, 2016.

Critical Information Concealed Attachment 3, Environmental Assessment for Tennessee’s Orion Project, August 2016.

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## People's Dossier: FERC's Abuse of Power and Law → Deficient EIS Analysis

### **FERC Consistently Approves Pipeline Projects Based on Applications and NEPA Reviews that are Demonstrably Deficient, False and Misleading**

The National Environmental Policy Act (NEPA) (*18 CFR § 380.3(b)(2)*) requires an applicant to supply the information necessary to determine a project's impact on the environment and natural resources. Complete and accurate information is essential for informed decision making, yet FERC consistently approves projects that lack proper NEPA documentation. FERC approves applications that are filled with data gaps, misrepresentations, and inaccurate, false, or even conflicting information. Additionally, FERC approves projects based on information that has been solidly debunked, contradicted, and undermined by expert, agency, and public comment. The NEPA documents upon which FERC bases its pipeline approvals are of such poor quality that they cannot support legitimate or defensible conclusions.

### **Missing Information Is a Frequent Deficiency in FERC NEPA Documents**

Often, it is the *lack* of information in NEPA documents which is the most egregious. For example, FERC documentation for the PennEast Pipeline Project (*FERC Docket CP15-558*) lacks: detailed locational maps; accurate lists of wetland, waterbody, and/or aquifer crossings; restoration measures and/or impact mitigation; accurate fisheries classifications; accurate information on vegetative cover impacts; accurate and complete information on endangered or threatened species impacts; an accurate list of biological/ecological impacts; fails to consider socioeconomic conditions and the project's impacts thereon; lacks accurate information on geologic hazards; lacks accurate information on existing air quality; etc.<sup>1</sup>

### **FERC NEPA Documents Routinely Rely Upon Inaccurate Information**

The incorrect information supplied by pipeline companies and adopted by FERC often disregards the most basic of environmental impacts. For example:

- When field-truthing just *one half of a mile* of the proposed PennEast Pipeline route, the Delaware Riverkeeper Network found twelve vernal pool complexes and groundwater seeps, where the pipeline company indicated in its materials to FERC that there were only two in the same area.
- PennEast failed to delineate an intermittent stream in another section of the proposed route, despite the fact that the stream was delineated on government mapping.
- Penneast completely left out from its assessment of project impacts any discussion of eight NJ state threatened, endangered, or special concern mussel species that potentially exist along the project route. In addition, the DEIS asserted "there are no private water supply wells or springs located within 150 feet of the pipeline construction workspace in Pennsylvania", which was proven false by ground-truthing efforts.<sup>2</sup>

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<sup>1</sup> Deficient EIS Analysis Attachment 1, Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, September 12, 2016.

<sup>2</sup> Deficient EIS Analysis Attachment 1, Delaware Riverkeeper Network Comment Regarding the PennEast

**FERC Routinely Finds No Significant Impact Even When It Has Identified Deficiencies** Data gaps are often acknowledged by FERC itself, yet the agency approves applications despite this lack of information. For example, FERC identified over thirty data gaps in PennEast’s application, the majority of which were substantial, such as the failure to identify working and abandoned mines near waterbody crossings and migratory bird conservation plans. Experts identified and notified FERC of dozens of additional data gaps. Despite these known gaps, FERC issued the DEIS, concluding that while the Project “would result in some adverse environmental impacts...impacts would be reduced to less-than-significant levels...”

### **Induced Drilling Impacts a Frequent Deficiency in FERC NEPA Documents**

FERC’s cumulative impact analyses for pipelines frequently mischaracterize the degree of harm that will result from the project by ignoring reasonably foreseeable future actions. Natural gas production and its subsequent impacts are among the cumulative effects that FERC must consider under NEPA when determining whether an action will have a significant impact. A pipeline’s capacity will necessarily lead to additional consumption of natural gas, with consequences for its price, production, and use – these are direct, indirect and clearly foreseeable outcomes, yet FERC fails to consider them. For example, FERC ignored that the PennEast pipeline will likely induce the drilling of 3,000 new wells in Northeast Pennsylvania, Bradford, Susquehanna, Lycoming, and Tioga counties.<sup>3</sup> FERC fails to address these future actions even when the applicants themselves state that more wells will be drilled to feed the proposal pipeline project.<sup>4</sup> Read More in [People’s Dossier: Drilling Impacts & Climate Change Ignored](#).

### **Economic Harms & Benefits Routinely Misrepresented in FERC NEPA Documents**

FERC routinely fails to independently verify a pipeline company’s assertions of economic benefits, and ignores expert evidence to the contrary. FERC fails to consider the economic harms proposed projects will inflict such as reduced crop production for farmers, adverse impacts to businesses along or near the pipeline right of way, the implications for ecotourism and related businesses and jobs, etc.<sup>5</sup> Read More in [People’s Dossier: Economic Harms](#).

Relatedly, FERC uniformly accepts industry assertions that property values are not harmed by pipeline rights of way or by location within the blast radius or evacuation zone of a pipeline, despite significant evidence to the contrary.<sup>6</sup> Reduced property values also reduce the property

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Pipeline DEIS, September 12, 2016 and Deficient EIS Analysis Attachment 11, Delaware Riverkeeper Network, Field-Truthing and Monitoring of the Proposed PennEast Pipeline, FERC Draft EIS, September 2016.

<sup>3</sup> Deficient EIS Analysis Attachment 1, Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, September 12, 2016.

<sup>4</sup> Deficient EIS Analysis Attachment 14, *Mountain Valley Pipeline DEIS at 3-1*, Docket No. CP 16-10 (“According to Mountain Valley, the MVP would alleviate some of the constraints on...natural gas production”).

<sup>5</sup> Deficient EIS Analysis Attachment 2, Key-Log Economics, Economic Costs of the Mountain Valley Pipeline, May 2016 and Deficient EIS Analysis Attachment 3, Key-Log Economics, Economic Costs of the PennEast Pipeline, January 2017.

<sup>6</sup> Deficient EIS Analysis Attachment 15, Key-Log Economics, Memo on effects of pipelines on property values, March 11, 2015.

taxes that can be collected by local governments. For example:

- An analysis by Key-Log Economics determined that construction of the PennEast pipeline would result in a loss of \$158.3 to \$176.0 million in property value in the right of way and evacuation zone.<sup>7</sup>
- For the Mountain Valley Pipeline, projected property value losses result in a loss of \$42.2 to \$53.3 million in property tax revenue annually.<sup>8</sup>
- In fact, in Hancock, New York, “three homeowners have had their property assessments reduced, two by 25% and one by 50%, due to the impact of truck traffic, noise, odors, and poor air quality associated with the compressor station” that was proposed as part of the project.<sup>9</sup>

Economic losses resulting from pipelines can be dramatic, and far outweigh the claimed public benefits of the pipeline companies; for example, expert review determined that the PennEast Pipeline could result in as much as \$56.6 billion in total economic harm. By comparison, the company claimed only \$2.3 billion in economic benefit over a 30 year period. Similar findings have been documented for the Mountain Valley Pipeline, the Atlantic Coast Pipeline and the Millennium Eastern System Upgrade Project. In every instance, FERC ignored detailed reports demonstrating economic harm while accepting industry assertions describing only benefits.

Attachment 13 includes four summaries of economic harm for pipeline projects including the PennEast Pipeline Project, the Mountain Valley Pipeline Project, the Millennium Eastern System Upgrade Project and the Atlantic Coast Pipeline Project outlining the significance of economic harms that are routinely ignored by FERC.<sup>10</sup>

### **Health Harms Routinely Ignored in FERC NEPA Documents**

FERC NEPA analyses consistently fail to fully assess health impacts of proposed pipelines. For example, those living near compressor stations and other natural gas facilities often suffer from asthma, nosebleeds, dizziness, weakness, and rashes. Some residents are forced to sell or abandon their homes because of these health impacts—however, FERC turns a blind eye to these well-documented issues when assessing a natural gas project.

Proximity to compressor stations inflicts various harms; impacts can be severe, with at least one documented case of a family forced to abandon their \$250,000 home rather than continue to suffer

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<sup>7</sup> Deficient EIS Analysis Attachment 3, Key-Log Economics, Economic Costs of the PennEast Pipeline, January 2017.

<sup>8</sup> Deficient EIS Analysis Attachment 2, Key-Log Economics, Economic Costs of the Mountain Valley Pipeline, May 2016.

<sup>9</sup> Deficient EIS Analysis Attachment 4, Catskill Citizens for Safe Energy, press release, “Proximity of Compressor Station Devalues Homes by as Much as 50%”, July 7, 2015 and Deficient EIS Analysis Attachment 5, Letter from Key-Log Economics to Secretary Kimberly Bose & Deputy Secretary Nathaniel J. Davis, September 9, 2016.

<sup>10</sup> Deficient EIS Analysis Attachment 13, Key-Log Economics, Four Summaries of Economic Harm (PennEast Pipeline Project, the Mountain Valley Pipeline Project, the Millennium Eastern System Upgrade Project and the Atlantic Coast Pipeline Project). Attachments 2, 3, and 12 include the full analyses for each project.

the health, safety, and other harms they were experiencing.<sup>11</sup> People and experts have urged FERC to adequately consider health impacts during NEPA review, including the establishment of baseline air quality, and FERC routinely refuses.<sup>12</sup>

### **Harms to Historic Resources Routinely Ignored in FERC NEPA Documents**

Historic and cultural resources are also among the impacts routinely ignored by FERC. For example, the Atlantic Coast Pipeline was found to have no impact on cultural resources, despite the fact that its proposed route slices through the "Most Endangered Historic Place" in Virginia, as found by Preservation Virginia.<sup>13</sup>

The public that has been forced through the FERC process with regards to infrastructure review and approvals has, almost uniformly, the same experience -- deficient EIS/EA documentation, lack of fair access to FERC or to be heard through the NEPA process, the undermining of legal rights and opportunities upon completion of the process.<sup>14</sup>

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#### **Attachments:**

Deficient EIS Analysis Attachment 1, Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, September 12, 2016.

Deficient EIS Analysis Attachment 2, Key-Log Economics, Economic Costs of the Mountain Valley Pipeline, May 2016.

Deficient EIS Analysis Attachment 3, Key-Log Economics, Economic Costs of the PennEast Pipeline, January 2017.

Deficient EIS Analysis Attachment 4, Catskill Citizens for Safe Energy, press release, "Proximity of Compressor Station Devalues Homes by as Much as 50%", July 7, 2015.

Deficient EIS Analysis Attachment 5, Letter from Key-Log Economics to Secretary Kimberly Bose & Deputy Secretary Nathaniel J. Davis, September 9, 2016.

Deficient EIS Analysis Attachment 6, Jessica Cohen, *House Abandoned Because of Minisink Compressor Station -- Family Walks Away from \$250,000*, The River Reporter November 24,

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<sup>11</sup> Deficient EIS Analysis Attachment 6, Jessica Cohen, *House Abandoned Because of Minisink Compressor Station -- Family Walks Away from \$250,000*, The River Reporter November 24, 2015.

<sup>12</sup> Deficient EIS Analysis Attachment 7, Neighbors Oppose Wawayanda Gas Plant; Health Concerns Top the List, July 31, 2015; Deficient EIS Analysis Attachment 8, NH Pipeline Committee Letter to Secretary Bose, January 14, 2016; and Deficient EIS Analysis Attachment 9, Times Union, *Bethlehem Lawmakers Oppose Natural Gas Pipeline*, February 11, 2016.

<sup>13</sup> Deficient EIS Analysis Attachment 10, Union Hill/Woods Corner Rural Historic District Comments on Docket No. CP15-554, June 2, 2016.

<sup>14</sup> See, for example, Deficient EIS Analysis Attachment 16, Letter from Pipeline Awareness Southern Oregon to Maya van Rossum, the Delaware Riverkeeper, February 4, 2016; and consider the testimony available at [www.PeoplesHearing.org](http://www.PeoplesHearing.org).

2015.

Deficient EIS Analysis Attachment 7, Neighbors Oppose Wawayanda Gas Plant; Health Concerns Top the List, July 31, 2015.

Deficient EIS Analysis Attachment 8, NH Pipeline Committee Letter to Secretary Bose, January 14, 2016.

Deficient EIS Analysis Attachment 9, Times Union, *Bethlehem Lawmakers Oppose Natural Gas Pipeline*, February 11, 2016.

Deficient EIS Analysis Attachment 10, Union Hill/Woods Corner Rural Historic District Comments on Docket No. CP15-554, June 2, 2016.

Deficient EIS Analysis Attachment 11, Delaware Riverkeeper Network, Field-Truthing and Monitoring of the Proposed PennEast Pipeline, FERC Draft EIS, September 2016.

Deficient EIS Analysis Attachment 12, Key-Log Economics, Economic Costs of the Atlantic Coast Pipeline, February 2016.

Deficient EIS Analysis Attachment 13, Key-Log Economics, Four Summaries of Economic Harm (PennEast Pipeline Project, the Mountain Valley Pipeline Project, the Millennium Eastern System Upgrade Project and the Atlantic Coast Pipeline Project).

Deficient EIS Analysis Attachment 14, Mountain Valley Pipeline DEIS at 3-1, Docket No. CP 16-10.

Deficient EIS Analysis Attachment 15, Key-Log Economics, Memo on effects of pipelines on property values, March 11, 2015.

Deficient EIS Analysis Attachment 16, Letter from Pipeline Awareness Southern Oregon to Maya van Rossum, the Delaware Riverkeeper, February 4, 2016.

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People's Dossier: FERC's Abuses of Power and Law  
→ **Deficient Needs Analysis**

**FERC's Failure to Mandate Genuine Demonstration of Need  
Results In Pipeline Overbuild**

FERC approval of a pipeline requires a demonstration of need and that, on balance, the project will serve the public interest. (*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, further certified, 92 FERC ¶ 61,094 (2000)). And yet, FERC routinely ignores evidence that there is no genuine public need for a proposed pipeline project. Further, instead of requiring a demonstration of genuine need, FERC allows pipeline companies to assert increased profits, competitive advantage, and self-manufactured claims of need to fulfill the public necessity mandate.

Rather than engage in objective and independent review of the claims of need, “FERC has increasingly relied on information supplied by pipeline operators in making decisions to grant approvals....”<sup>1</sup>, routinely ignoring evidence that there is no genuine public need for a proposed pipeline project from outside parties and independent, credible sources. The failure to objectively consider claims of “need” results in poorly informed and often inappropriate decision making.

**FERC's failure to ensure “need” for a pipeline will result in overbuild**

Industry experts themselves have recognized that there is no need for additional pipeline capacity and that we are on the path to overbuild. For example:

→ Industry expert Rusty Braziel, speaking to attendees at the 21st Annual LDC Gas Forums Northeast conference regarding capacity in the Northeast, said:

*“an evaluation of price and production scenarios through 2021 suggests the industry is planning too many pipelines to relieve the region’s current capacity constraints... What we’re really seeing is the tail end of a bubble, and what’s actually happened is that bubble attracted billions of dollars’ worth of infrastructure investment that now has to be worked off.”*<sup>2</sup>

→ And Elle G. Atme, Vice President, Marketing and Midstream operations for independent producer Range Resources has said:

*“We believe that the Appalachian Basin’s takeaway capacity will be largely overbuilt by the 2016-2017 time frame.”*<sup>3</sup>

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<sup>1</sup> Deficient Needs Analysis Attachment 1, Tom Pawlicki, *FERC deference to pipeline operators seen contributing to overbuild*, snl.com, March 24, 2016.

<sup>2</sup> Deficient Needs Analysis Attachment 2, Jeremiah Shelor, *Marcellus/Utica on Pace for Pipeline Overbuild, Says Braziel*, Natural Gas Intelligence, June 8, 2016.

<sup>3</sup> Deficient Needs Analysis Attachment 3, *Marcellus-Utica could soon be overpiped*, Kallanish Energy,

→ A 2017 study from the Analysis Group found that FERC approved capacity already exceeds national peak demand:

*“Since 1999 FERC has approved approximately 400 pipeline applications for an additional 180 billion cubic feet per day (Bcf/d) of pipeline capacity. This amount of additional capacity on the interstate pipeline system is significant, considering that the average consumption of natural gas in the U.S. during January 2017 was 93.1 Bcf/d, and the all-time peak-day consumption was 137 Bcf/d during the 2014 Polar Vortex.”*<sup>4</sup>

**When credible and expert evidence is provided that the asserted “need” for a new gas project is false, FERC routinely and without explanation ignores that evidence, instead embracing pipeline company assertions to the contrary.**

In the following cases, expert analyses have directly contradicted company assertions of “need.” And yet, in each instance, the information was largely ignored by FERC as it continued, instead, to rely on the assertions of the pipeline companies:

NorthEast Direct Pipeline (FERC Docket No. CP 16-21): A 2015 study conducted by Analysis Group at the request of the Massachusetts Attorney General that was placed on the FERC docket for the Northeast Energy Direct pipeline, found that new interstate natural gas pipeline capacity is **not** needed in New England through the year 2030.<sup>5</sup>

Mountain Valley (FERC Docket No. CP16-13) and Atlantic Coast Pipelines (FERC Docket No. CP15-554): According to a 2016 study conducted by Synapse Energy considering the need for the Mountain Valley and Atlantic Coast pipelines that are purported to deliver natural gas from West Virginia to Virginia and the Carolinas: “The region’s anticipated natural gas supply on existing and upgraded infrastructure is sufficient to meet maximum natural gas demand from 2017 through 2030. Additional interstate natural gas pipelines, like the Atlantic Coast Pipeline and the Mountain Valley Pipeline, are not needed to keep the lights on, homes and businesses heated, and industrial facilities in production.”<sup>6</sup> In a separate analysis, Synapse found that Dominion overestimated the Atlantic Coast Pipeline's economic benefits in reports to FERC and failed to account for any of the environmental and societal costs that the pipeline would impose on local communities.<sup>7</sup>

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February 2, 2016

<sup>4</sup> See Susan Tierney, Ph.D., Analysis Group, *Natural Gas Pipeline Certification: Policy Considerations for a Changing Industry*, November 6, 2017, available at:

[https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag\\_ferc\\_natural\\_gas\\_pipeline\\_certification.pdf](https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_ferc_natural_gas_pipeline_certification.pdf), citations removed.

<sup>5</sup> Deficient Needs Analysis Attachment 4, Power System Reliability in New England, Analysis Group, Inc., November 2015 and Deficient Needs Analysis Attachment 5, Press Release, Mass Attorney General’s office, AG Study: Increased Gas Capacity Not Needed to Meet State's Electric Reliability Needs, November 18, 2015.

<sup>6</sup> Deficient Needs Analysis Attachment 6, Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? Synapse Energy, September 12, 2016.

<sup>7</sup> Deficient Needs Analysis Attachment 15, Atlantic Coast Pipeline Benefits Review, Synapse Energy, June 12, 2015.

The Synapse finding, that existing infrastructure was sufficient to support regional need, was also supported by pipeline operators in the region. In a filing to the Public Service Commission of South Carolina (which was later filed on the FERC docket), Transcontinental Gas Pipe Line Company (Transco) claims Dominion Energy planned infrastructure (Atlantic Coast Pipeline) would be “duplicative.” Transco claims their own established and operational pipeline infrastructure is enough to meet the natural gas needs of the Southeast for many years. According to the filing, the costs for the Atlantic Coast Pipeline would be passed off to captive ratepayers, and “could ultimately lead to stranded infrastructure assets that Transco has installed.”<sup>8</sup>

Constitution Pipeline (FERC Docket No. CP13-499): In the case of the Constitution Pipeline, one detailed report on the record concluded that New York City’s existing infrastructure is “large, dynamic, and more than adequate” to support the City’s needs. The report also provided evidence that the Constitution Pipeline does not, in fact, seek to supply the City with natural gas, but instead seeks to export the natural gas.<sup>9</sup>

PennEast Pipeline (FERC Docket No. CP15-558): The asserted public “need” advanced by the PennEast pipeline company for the PennEast Pipeline Project and accepted by FERC included assertions that the proposed pipeline is necessary to serve New Jersey and eastern Pennsylvania communities and some unstated number of “surrounding states.” However, multiple expert reports on the PennEast docket demonstrate there is in fact no such “need” for the gas that PennEast would transport, and that if the pipeline were to be built there would be an increased gas surplus in both NJ and PA:

- “The proposed PennEast Pipeline would deliver an additional 1 Bcf/d of natural gas to New Jersey potentially creating a 53% supply surplus above the current level of consumption.” “...Pennsylvania has no unfulfilled demand...”<sup>10</sup>
- “Local gas distribution companies in the Eastern Pennsylvania and New Jersey market have more than enough firm capacity to meet the needs of customers during peak winter periods. Our analysis shows there is currently *49.9% more capacity than needed to meet even the harsh winter experienced in 2013.*”<sup>11</sup>

These expert analyses were disregarded by FERC in favor of PennEast’s claim of need.

Sabal Trail Pipeline (FERC Docket No. CP14-554): FERC refused to revisit the alleged “need” for

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<sup>8</sup> See Petition for Rehearing and/or Reconsideration, *In Re Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy*, No. 2017-370-E (Public Service Commission of South Carolina July 16, 2018).

<sup>9</sup> Deficient Needs Analysis Attachment 7, Report on Need for the Constitution Pipeline, April 7, 2014.

<sup>10</sup> Deficient Needs Analysis Attachment 8, Arthur Berman, Labyrinth Consulting Services, Inc., Professional Opinion on the PennEast Pipeline, February 2015 and Deficient Needs Analysis Attachment 9, Arthur Berman, Labyrinth Consulting Services, Inc., PennEast Updated Opinion, September 11, 2016.

<sup>11</sup> Deficient Needs Analysis Attachment 10, Analysis of Public Benefit Regarding PennEast, Skipping Stone, March 9, 2016

the Sabal Trail pipeline through Alabama, Georgia, and Florida, despite admissions by Florida Power and Light (FPL) that the region’s needs had dramatically changed. In 2016, FPL’s Ten Year Plan stated firmly that “FPL does not project a significant long-term additional resource need until the years 2024 and 2025” and, at the same time, acknowledged that growing investments in efficiency and solar power will stave off and reduce Florida’s need for increased natural gas deliveries. Given the predictions that shale gas will peak by 2020, seriously declining thereafter, that FPL’s predictions for its energy needs changed significantly between its 2013 and 2016 energy plans, and the significant advancements in efficiency and clean energy options, FERC’s refusal to reconsider the question of need for the Sabal Trail pipeline is yet another example of irresponsible consideration of “need.”<sup>12</sup>

Atlantic Sunrise Pipeline (FERC Docket No. CP15-138): In the case of the Atlantic Sunrise Pipeline, FERC took Transco’s word over the word of a Pennsylvania electric utility. According to the record, FERC’s approval of Transco’s Atlantic Sunrise Pipeline would directly negatively affect the public and the electric grid; and Transco’s use of a public utility’s right-of-way would condemn the right-of-way, rendering it unusable for the utility’s transmission infrastructure. FERC issued a Certificate to Atlantic Sunrise despite the fact that its interference with the utility’s right-of-way would negatively affect the electric grid’s reliability and resiliency, forcing the utility to intervene before FERC in an effort to preserve its own rights. Approval of the Atlantic Sunrise pipeline demonstrates FERC’s skewed definition of public need, which favors natural gas infrastructure over the security of the electric grid.<sup>13</sup>

Spire STL Pipeline (FERC Docket No. CP17-40): In the case of the Spire STL Pipeline (Spire), FERC again took the word of the pipeline company, Spire STL Pipeline LLC, over the Missouri Public Service Commission (Missouri PSC) and an existing pipeline operator, Enable Mississippi River Transmission, LLC (MRT). FERC’s determination of need for Spire relied solely on Spire’s precedent agreement with its affiliate Spire Missouri, while the Missouri PSC, a regulator of the affiliate, asserted that “there is no clear need for the Spire Project given no new demand for gas capacity, a mature St. Louis market, and a track record of failed projects proposing to bring gas [through the same path].”<sup>14</sup> To justify the public benefit to the Commission, “Spire Missouri estimated cost savings of \$20 million over 20 years,” which FERC accepted despite “MRT data which suggests the unit cost used by Spire Missouri in their calculations significantly overstates the unit cost of gas delivered on the MRT system.”<sup>15</sup>

Northeast Supply Enhancement Pipeline (FERC Docket No. CP17-101): A technical report from 350.org, [False Demand: The case against the Williams fracked gas pipeline](#), found that the

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<sup>12</sup> Deficient Needs Analysis Attachment 11, Florida Power and Light, Ten Year Power Plant Site Plan, 2016-2025, April 2016, p.56-62.

<sup>13</sup> Deficient Needs Analysis Attachment 16, Motion to Intervene out-of-time of the PPL Electric Utilities Corporation re the Transcontinental Gas Pipeline Company, FERC Docket No. CP15-138, March 6, 2017.

<sup>14</sup> Deficient Needs Analysis Attachment 17, Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.

<sup>15</sup> Deficient Needs Analysis Attachment 17, Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.



“purported justification for [Northeast Supply Enhancement Pipeline] project is based on fundamentally flawed, unsupported arguments about increasing demand for pipeline gas in National Grid’s service area. These arguments have never undergone, and would not withstand, public review.”<sup>16</sup>

The report found that, while the company claims that the pipeline is needed to convert boilers from oil to gas, most oil boiler conversions had actually been completed already and mainstream alternatives to new gas hookups are common.

### **Pipeline Claims of Higher Profits or Competitive Advantage are Inappropriately Adopted by FERC as Demonstrating Need**

FERC routinely allows self-serving claims that a proposed project will help the pipeline company increase corporate profits, give them a competitive edge, or otherwise advance company goals to stand in lieu of a genuine demonstration of need.

Among the assertions of “need” advanced by the PennEast Pipeline Company and endorsed by FERC, are to provide “enhanced competition among natural gas suppliers and pipeline transportation providers;” to “provide low cost natural gas produced from the Marcellus Shale region;” and to allow “supply flexibility,” “diversity,” better pricing, etc.

By any reasonable definition, none of these are public “needs.” These are very clearly private goals and gains that are sought for the benefit of private industry and should not justify the power of eminent domain and avoidance of state and local regulations in the construction, operation and maintenance of the pipeline.

### **Self-Dealing is Inappropriately Accepted By FERC as Proof of Need**

FERC routinely, and inappropriately, allows companies to put themselves forth as the customers in “need” of a proposed pipeline project and do so using unverifiable data and information.

The PennEast Pipeline Company asserts that the need for its pipeline is demonstrated by contracts for most of the proposed pipeline’s capacity. FERC accepts this “need” demonstration at face value. But, as described by the New Jersey Division of Rate Counsel’s comments on the PennEast Docket these contracts do not in fact demonstrate need:

“PennEast bases its claim of need on “precedent agreements with seven foundation shippers and twelve total shippers, which together combine for a commitment of firm capacity of 990,000 dekatherms per day (‘Dth/d’),” approximately 90% of the Project’s total capacity...In this case, approximately 610,000 Dth/d of the 990,000 Dth/d of capacity has been contracted by affiliates of the Project owners... Of the twelve shippers that have subscribed to Project capacity, five of them are affiliates of companies that collectively own PennEast... **Thus, two-thirds of the demand for the pipeline exists because the**

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<sup>16</sup> See Suzanne Mattei for 350.org & 350 Brooklyn, *False Demand: The Case Against the Williams Fracked Gas Pipeline*, available at: [http://350.org/wp-content/uploads/2019/03/Stop\\_Williams\\_False\\_Demand.pdf](http://350.org/wp-content/uploads/2019/03/Stop_Williams_False_Demand.pdf), March 2019.

**Project’s stakeholders have said it is needed. This self-dealing undermines the assertion of need that the DEIS relies upon.”** (emphasis added; *citations omitted*).<sup>17</sup>

Commissioner Glick dissented from the Commission’s decision to approve PennEast’s certificate in part for this reason:

“the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed. Pursuant to these agreements, PennEast’s affiliates hold more than 75 percent of the pipeline’s subscribed capacity. While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline, contracts among affiliates may be less probative of that need because they are not necessarily the result of an arms-length negotiation. By itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer’s burden to show that the pipeline is needed.”<sup>18</sup> (citations omitted)

In Empire Pipeline (*FERC Docket No. CP15-115*), then-Commissioner Norman Bay acknowledged that the Agency’s reliance on precedent agreements to establish need is misplaced. Former Commissioner Bay stated that FERC should consider “whether precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize” among other considerations.<sup>19</sup> Despite these facts, FERC makes no investigation into the legitimacy of the claims resulting from self-dealing.

On October 13, 2017, FERC issued a certificate for the Mountain Valley Pipeline (MVP) Project, relying its need determination solely on five precedent agreements—all with corporate affiliates of the Projects’ developers. The Commission defended this decision in its June 15, 2018 order denying rehearing of the pipeline’s certificate, stating that they do “not distinguish between pipelines’ precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project.”<sup>20</sup> Commissioner Glick dissented from the order, stating that it “fails to comply with our obligations under section 7 of the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA)” (citations omitted):

Two issues are particularly egregious. First, the Commission concludes that precedent agreements among affiliates of the same corporation are sufficient to demonstrate that the Projects are needed. I disagree. The mere existence of affiliate precedent agreements—which, by their very nature, are not necessarily the product of arms-length negotiations—is insufficient to demonstrate that the Projects are needed. ... [This consideration,] the need for

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<sup>17</sup> Deficient Needs Analysis Attachment 14, Comments of the New Jersey Division of Rate Counsel on PennEast Pipeline, FERC Docket No. CP15-558, Sept. 12, 2016.

<sup>18</sup> Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018.

<sup>19</sup> Deficient Needs Analysis Attachment 13, Commissioner Bay Separate Statement, p.3, FERC Docket No. CP15-115.

<sup>20</sup> FERC Order On Rehearing, Mountain Valley Pipeline, *FERC Docket No. CP16-13*, June 15, 2018.

the Projects ... [is] critical to determining whether the Projects are in the public interest. Therefore, the Commission's failure to adequately address [this] is a sufficient basis for vacating this certificate. For these reasons, I dissent from today's order." (citations omitted).<sup>21</sup>

In fact, as FERC states in an apparent effort to justify the practice because it has followed it in the past, "the Commission has approved numerous projects in which there was a single, affiliated shipper, including those with less than 100 percent project capacity under contract."<sup>22</sup> By way of example:

- Entrega Gas Pipeline (FERC Docket No. CP04-413): On August 9, 2005, FERC issued Entrega Gas Pipeline Inc. a certificate approving a new 328-mile interstate pipeline in Colorado and Wyoming project in which there was one affiliated shipper receiving service pursuant to discounted rates.<sup>23</sup>
- Sundance Trail Expansion Project (FERC Docket No. CP09-415): On November 19, 2009, FERC granted Northwest Pipeline GP a certificate for its Sundance Trail Expansion Project in Wyoming and Utah, a project in which there was a single affiliated shipper.<sup>24</sup>
- Ohio Valley Connector Project (FERC Docket No. CP15-41): On December 30, 2015, FERC issued Equitrans, L.P. a certificate for the Ohio Valley Connector Project in West Virginia and Ohio where the pipeline company had executed a precedent agreement with only one affiliated shipper for approximately 76 percent of the project's capacity.<sup>25</sup>
- Mainline Extension Interconnect Project (FERC Docket No. CP10-76): On September 3, 2010, FERC issued a certificate to the Eastern Shore Natural Gas Company for its Mainline Extension Interconnect Project, a project that had no additional natural gas demand.<sup>26</sup> FERC determined it was in the public interest based solely on its precedent agreements with two affiliated LDCs for 80 percent of the total proposed project capacity.<sup>27</sup>

Recent pipeline projects have been even more brazen in their self-dealing. In the case of the Spire STL Pipeline, FERC issued certificate on August 3, 2018 despite its recognition that "All parties,

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<sup>21</sup> Deficient Needs Analysis Attachment 18, Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC and Equitrans, L.P., FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

<sup>22</sup> See FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, On August 3, 2018.

<sup>23</sup> See FERC Order Issuing Certificates, Entrega Gas Pipeline, FERC Docket No. CP04-413, August 9, 2005.

<sup>24</sup> See FERC Order Issuing Certificate and Granting Abandonment, Sundance Trail Expansion Project, FERC Docket No. CP09-415, November 19, 2009.

<sup>25</sup> See FERC Order Issuing Certificate, Ohio Valley Connector Project, FERC Docket No. CP15-41, December 30, 2015.

<sup>26</sup> Deficient Needs Analysis Attachment 17, Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.

<sup>27</sup> See FERC Order Issuing Certificate, Mainline Extension Interconnect Project, FERC Docket No. CP10-76, On September 3, 2010.

including Spire, agree that the new capacity is not meant to serve new demand, as load forecasts for the region are flat for the foreseeable future.”<sup>28</sup> Spire had a single precedent agreement for its project with Spire Missouri, with an affiliated shipper, for 87.5% of the total design capacity of the project. Spire asserts that this affiliate agreement for less than full capacity is “substantial and compelling evidence of market need”, and FERC accepted this as a demonstration of project need. In its certificate order, FERC acknowledges “that without new demand, existing pipelines in the area will likely see a drop in utilization once supplies begin to flow on the project.”<sup>29</sup>

As opponents of the project aptly pointed out, “although the Commission may have approved projects in various cases where there was only a single shipper, or the shipper was an affiliate of the pipeline or an affiliated LDC, or where less than 100 percent of the project capacity had been subscribed, or where no market study had been provided or state agency need findings made”, there does appear to be “any single prior case in which the Commission approved a pipeline project with all of these [deficiencies].”<sup>30</sup>

FERC’s own guidance questions the use of contracts with affiliates as the sole demonstration of need and suggests that rather than merely relying on precedent agreements, multiple factors should inform the determination of whether there is project need. FERC’s Certificate Policy Statement provides that “[r]ather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project,” including “demand projections, potential cost saving to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”<sup>31</sup> Further, the Certificate Policy Statement recognizes that “[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates.”<sup>32</sup> Instead of heeding this guidance, FERC insists that “nothing in its Certificate Policy Statement requires it to look beyond precedent agreements.” As Commissioner Glick has explained, “the fact that it is not required to look beyond precedent agreements does not excuse the Commission from failing to recognize that affiliate precedent agreements may not demonstrate need,”<sup>33</sup> a vital consideration to the public interest determination required by the Natural Gas Act.

### **FERC Fails To Provide Independent Assessment or Review of Pipeline “Need” Claims and Thereby Perpetuates Overbuilding**

Attorneys General of Massachusetts, Illinois, Maryland, New Jersey, Rhode Island, and Washington, and the District of Columbia observed that “[i]n assessing project need, the

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<sup>28</sup> See FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, August 3, 2018.

<sup>29</sup> See FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, August 3, 2018.

<sup>30</sup> See FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, August 3, 2018.

<sup>31</sup> See Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, at 61,747 (1999)

<sup>32</sup> See Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, at 61,744 (1999) (Certificate Policy Statement), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000).

<sup>33</sup> Deficient Needs Analysis Attachment 18, Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC and Equitrans, L.P., FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

Commission generally fails to account for the extent of regional need for new gas capacity or the evolving market for gas demand and relies too heavily on precedent agreements as proof of need for isolated projects.”<sup>34</sup> As reported by the Institute for Energy Economics and Financial Analysis, pipeline companies have an incentive to overbuild, and no reason to self-moderate or limit their construction. The failure of FERC to provide any independent review or oversight over self-serving claims of “need” undermines the requirements of the law and the actual needs of the public.

- “...current low natural gas prices in the Marcellus and Utica region are driving a race among natural gas pipeline companies .... An individual pipeline company acquires a competitive advantage if it can build a well-connected pipeline network...; thus, pipeline companies competing to see who can build out the best networks the quickest. This is likely to result in more pipelines being proposed than are actually needed to meet demand in those higher-priced markets.”
- “...[T]he regulatory environment created by FERC encourages pipeline overbuild. The high returns on equity that pipelines are authorized to earn by FERC and the fact that, in practice, pipelines tend to earn even higher returns, mean that the pipeline business is an attractive place to invest capital. And because, as discussed previously, there is no planning process for natural gas pipeline infrastructure, there is a high likelihood that more capital will be attracted into pipeline construction than is actually needed.”
- “The pipeline capacity being proposed exceeds the amount of natural gas likely to be produced from the Marcellus and Utica formations over the lifetime of the pipelines. An October 2014 analysis by Moody’s Investors Service stated that pipelines in various stages of development will transport an additional 27 billion cubic feet per day from the Marcellus and Utica region. This number dwarfs current production from the Marcellus and Utica (approximately 18 billion cubic feet per day). ... pipeline capacity out of the Marcellus and Utica will exceed expected production by early 2017.”
- “The loss borne by the public, businesses, and critical irreparable natural resources when a natural gas pipeline is approved by FERC requires that the Agency sufficiently consider whether an infrastructure project is actually necessary and for the public good. Instead, FERC uses an inappropriate and counterintuitive definition of “need” which is contrary to the historic underpinnings and intent of the Natural Gas Act, and results in the overbuild of unnecessary pipelines to pad companies’ quarterly balance sheets.”<sup>35</sup>

In the case of the Spire STL Pipeline, FERC acknowledged that the

“Project would bring up to 400,000 Dth per day of new pipeline capacity into the St. Louis

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<sup>34</sup> See Comments of the Attorney General of New York, FERC Docket No. PL18-1, July 25, 2018.

<sup>35</sup> Deficient Needs Analysis Attachment 12, IEEFA, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, April 2016.

area. All parties, including Spire, agree that **the new capacity is not meant to serve new demand**, as load forecasts for the region are flat for the foreseeable future. We acknowledge that without new demand, **existing pipelines in the area will likely see a drop in utilization once supplies begin to flow on the project.**"

As Commissioner Fleur explains in her dissent of the project approval:

The Spire Project is the unusual case of a pipeline application that squarely fails the threshold economic test. The record does not demonstrate a sufficient need for the project. [The project] ... will force **duplicative gas transportation capacity** into a regional market of flat demand, shifting gas supply away from an existing pipeline and adversely impacting rates for the existing pipeline captive customers.<sup>36</sup>

Rather than a "need," Commissioner LaFleur points out, "the precedent agreement reflects a desire to shift Spire Missouri's firm transportation capacity from an existing pipeline with Mississippi River Transmission (MRT) to the Spire Project... Ultimately, because need has not been demonstrated, there is a significant risk of overbuilding into a region that cannot support additional pipeline infrastructure."<sup>37</sup>

**FERC fails to consider the demonstrated ability for renewable energy sources to fulfill energy needs being asserted.**

Growing renewable energy markets are already, or projected to soon, outcompete natural gas, and as such are essential factors to FERC's consideration of need and public interest in its review of pipelines. However, FERC instead continues to ignore renewable energy alternatives in assessing the need for a pipeline, considering each pipeline project in isolation of one another and of the larger market trends and realities. As a result, FERC encourages the building of natural gas infrastructure, and the environmental, economic, and social costs that come with it, that may be obsolete within years of construction. New market analyses indicate that continued natural gas infrastructure buildout is a shortsighted investment in an industry that is becoming obsolete, wasting economic resources while great external costs are borne on the public.

In a May 2018 report on *The Economics of Clean Energy Portfolios*, the Rocky Mountain Institute found that:

→ "across a wide range of case studies, regionally specific clean energy portfolios already outcompete proposed gas-fired generators, and/or threaten to erode their revenue within the next 10 years. Thus, the \$112 billion of gas-fired power plants currently proposed or under construction, along with \$32 billion of proposed gas pipelines to serve these power plants, are already at risk of becoming stranded assets. This has significant implications for

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<sup>36</sup> Deficient Needs Analysis Attachment 17, Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.

<sup>37</sup> Deficient Needs Analysis Attachment 17, Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.

investors in gas projects (both utilities and independent power producers) as well as regulators responsible for approving investment in vertically integrated territories.”<sup>38</sup>

→ Due to the ‘expected cost declines in renewable energy and battery storage technology...the costs of optimized clean energy portfolios [could] fall by [about] 40% within the next 20 years. Depending on the price of natural gas, the calling costs of clean energy portfolios will begin to outcompete just the operating costs of a highly efficient gas plant by 2026,”<sup>39</sup>

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**Attachments:**

Deficient Needs Analysis Attachment 1, Tom Pawlicki, *FERC deference to pipeline operators seen contributing to overbuild*, snl.com, March 24, 2016.

Deficient Needs Analysis Attachment 2, Jeremiah Shelor, *Marcellus/Utica on Pace for Pipeline Overbuild, Says Brazier*, Natural Gas Intelligence, June 8, 2016.

Deficient Needs Analysis Attachment 3, *Marcellus-Utica could soon be overpiped*, Kallanish Energy, February 2, 2016.

Deficient Needs Analysis Attachment 4, Power System Reliability in New England, Analysis Group, Inc., November 2015.

Deficient Needs Analysis Attachment 5, Press Release, Mass Attorney General’s office, AG Study: Increased Gas Capacity Not Needed to Meet State’s Electric Reliability Needs, November 18, 2015.

Deficient Needs Analysis Attachment 6, Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? Synapse Energy, September 12, 2016.

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Deficient Needs Analysis Attachment 11, Florida Power and Light, Ten Year Power Plant Site Plan, 2016-2025, April 2016, p.56-62.

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<sup>38</sup> See Mark Dyson, et al., Rocky Mountain Institute, *The Economics of Clean Energy Portfolios*, May 2018.

<sup>39</sup> See Mark Dyson, et al., Rocky Mountain Institute, *The Economics of Clean Energy Portfolios*, May 2018.

Deficient Needs Analysis Attachment 12, IEEFA, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, April 2016.

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Deficient Needs Analysis Attachment 18, Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC and Equitrans, L.P., FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

***Complete People's Dossier: FERC's Abuses of Power and Law***

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## FERC Routinely Ignores the Economic Costs of Pipeline and Compressor Infrastructure Projects

FERC's section 7 duty to consider the public interest is broader than promoting a plentiful supply of cheap gas. (*See Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 649 (D.C. Cir. 2010)). Rather, FERC must ensure "the [public] benefits of the proposal outweigh the adverse effects on other economic interests." *AES Ocean Express, LLC*, 103 F.E.R.C. ¶ 61,030 at ¶ 19.

Despite this clear mandate, FERC routinely ignores documented economic harms anticipated from proposed pipelines, while accepting at face value company claims of benefit. As Dr. Spencer Phillips, Ph.D. articulates, FERC's policy that guides its review of pipeline economics "is completely inadequate for evaluating the costs and benefits of proposed pipelines."<sup>1</sup>

- First, FERC's stated policy is for the applicant to provide information that supports FERC's approval. By asking only for information **supporting a foregone conclusion**, FERC fails to subject pipeline applications to a full, rigorous, or economically adequate examination of the proposals.
- Second, FERC relies almost **exclusively on cost and benefit information supplied by applicants** and their consultants, who have – and act upon – their self-interest by presenting inflated estimates of benefits and greatly discounted estimates of costs. As most recently demonstrated by the Atlantic Coast Pipeline<sup>2</sup> (*FERC Docket No. CP15-554*), Mountain Valley Pipeline<sup>3</sup> (*FERC Docket No. CP16-13*), PennEast Pipeline<sup>4</sup> (*FERC Docket No. CP15-558*), Millennium Eastern System Upgrade Project<sup>5</sup> (*FERC Docket No. CP16-486*), Atlantic Sunrise pipeline<sup>6</sup> (*FERC Docket No. CP15-138*), and Adelpia Gateway Project (*FERC Docket Nos. CP18-46*).<sup>7</sup> FERC's NEPA review relies almost entirely on the information provided by the applicant and as a result, provides no serious consideration of the costs of pipeline construction, operation and maintenance.

### Property Value Costs and Lost Tax Revenues Are Significant and Ignored

Some of the important costs that pipeline applicants and FERC fail to consider include:

- Reductions in private property values along the length of pipelines and extending

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<sup>1</sup> Economic Harms Attachment 1, Testimony of Dr. Spencer Phillips, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016.

<sup>2</sup> Economic Harms Attachment 2, Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, February 2016.

<sup>3</sup> Economic Harms Attachment 3, Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016.

<sup>4</sup> Economic Harms Attachment 4, Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

<sup>5</sup> Economic Harms Attachment 5, Key-Log Economics, LLC, *Economic Costs At a Glance of the Millennium Eastern System Upgrade Project*, Publication of Full Report Pending.

<sup>6</sup> Economic Harms Attachment 7, Key-Log Economics, LLC, *FERC's Approval Based on Incomplete Picture of Economic Impacts*, March 2017

<sup>7</sup> Economic Harms Attachment 9, Key-Log Economics, LLC, *The Social Cost of Carbon of the Adelpia Gateway Project*, February 2019.

outward through the right-of-way, the “high consequence area,” and the evacuation zone. These reductions in property value translate into a reduction in the property taxes collected by local governments. These property value reductions can be significant:

→ construction and operation of the Penneast Pipeline, for example, would result in a loss of property value of \$159.7 to \$177.3 million resulting in a \$2.7 to \$3.0 million loss in property tax revenue annually<sup>8</sup>;

→ construction and operation of the Mountain Valley Pipeline would result in losses of \$42.2 to \$53.3 million in property value (resulting in losses ranging from \$243,500 to \$308,400 tax revenue annually).<sup>9</sup>

- Reductions in property value are not limited to pipelines; compressor stations were responsible for a 25-50% reduction of property assessments for homes in Hancock, NY.<sup>10</sup>

Credible, independent research shows that pipelines do in fact have significant negative effects on property values. See “Claims That Pipelines Do Not Harm Property Value Are Invalid” beginning on page 20 of Key-Log Economics’ report on the Millennium Eastern System Upgrade project. And yet, FERC routinely cites fundamentally flawed, industry-sponsored studies that claim there is no such property value effect, ignoring the independent data and real world experiences to the contrary.

### **Environmental, Business, Farming, and Other Economic Costs are Far Reaching, Staggering, and Ignored**

Additional costs resulting from pipeline construction, operation, and maintenance that are ignored by FERC include:

- Loss of water purification, water storage, air quality benefits, flood protection, aesthetic quality and wildlife habitat, are among the costs that are ignored. These benefits are lost, minimized and/or significantly reduced when land uses/land covers like forests, wetlands, natural meadows, and natural open space that produce these benefits at a high rate are converted to pipeline associated industrial operations and/or shrub/scrub that produce far less, and frequently no, natural benefits.
- Economic harms such as reduced crop production for farmers, adverse impacts to businesses along or near the pipeline right of way, and adverse impacts to ecotourism and related businesses and jobs.
- Forgone economic development opportunity from recreationists, tourists, retirees, entrepreneurs, and workers who will choose safer, more environmentally healthy, and more aesthetically pleasing locations the ones associated with construction and operation of the proposed pipeline/compressor.
- Social Cost of Carbon resulting from upstream and downstream greenhouse gas emissions that are facilitated by additional natural gas transmission

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<sup>8</sup> Economic Harms Attachment 4, Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

<sup>9</sup> Economic Harms Attachment 3, Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016.

<sup>10</sup> Economic Harms Attachment 6, Catskill Citizens, Press Release, *Proximity of Compressor Station Devalues Homes by as Much as 50%*, July 7, 2015.

<sup>11</sup> Economic Harms Attachment 5, Key-Log Economics, LLC, *Economic Costs of the Millennium Eastern System Upgrade Project*, April 2017.



These costs can be significant and staggering:<sup>12</sup>

**Table 1: Summary of Cost Estimates for Several Proposed Interstate Natural Gas Transmission Projects.**

Estimated impacts (costs)	Atlantic Coast Pipeline <sup>a</sup>	Mountain Valley Pipeline <sup>b</sup>	PennEast Pipeline <sup>c</sup>	Atlantic Sunrise Pipeline <sup>d</sup>	Millennium Eastern System Upgrade <sup>e</sup>
Lost Property Value (one-time cost)	\$57.8 - 83.0 million	\$43.7 - 55.2 million	\$165.1 - 183.4 million	Not Estimated	\$2.1 million
Lost Property Tax Revenue (Annual loss for the life of the project)	\$0.29 - 0.42 million	\$.25 - 0.32 million	\$2.8 - 3.1 million	Not Estimated	\$0.0376 million
Lost Ecosystem Service Value during Construction (one-time)	\$17.5 - 63.2 million	\$23.6 - 85.0 million	\$6.5 - 22.8 million	\$6.3 - 23.1 million	Not Estimated
Lost Ecosystem Service Value during Operation (annual)	\$5.0 - 18.4 million	\$4.2 - 15.3 million	\$2.5 - 9.3 million	\$3.0 - 11.4 million	Not Estimated
Forgone Economic Development <sup>f</sup> (annual)	\$51.3 million 387 jobs	\$136.9 million 1,164 jobs	\$537.6 million 4,090 jobs	Not Estimated	\$85.3 million 745 jobs
Social Cost of Carbon <sup>g</sup> (annual)	Not Estimated	Not Estimated	\$301.8 - 2,339.0 million	\$466.5 - 3,615.1 million	\$51.8 - 434.5 million
Lifetime costs in Present Discounted Value	\$9.5 - 11.8 billion	\$23.7 - 25.8 billion	\$14.5 - 60.3 billion <sup>h</sup>	\$22.2 - 95.1 billion <sup>h</sup>	\$4.9 - 19.5 billion

### FERC Accepts Exaggerated Pipeline Benefits as the Basis for Decisionmaking

Pipeline companies seeking FERC approval typically claim that construction of their project will result in positive economic impacts, job creation, increases in personal income, and lower end-user energy costs for natural gas and/or for electricity generated in gas-fired power plants that will

<sup>12</sup> See table from Economic Harms Attachment 8, Key-Log Economics, LLC, Economic Issues related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines and FERC Docket No. PL18-1, *Economic Costs of the Atlantic Coast Pipeline*, July 23, 2018.



spur further economic development. However, independent expert analyses submitted to FERC consistently find these claims to be exaggerated or entirely false.

For example, in a thorough, retrospective, statistical analysis of the experience of the region affected by the Marcellus Shale-based boom in natural gas availability and natural gas pipeline construction since 2000, Key-Log Economics found that, despite claims that increased pipeline capacity drives down electricity prices, electricity prices have instead increased during the Marcellus Shale boom:<sup>13</sup>

From 2001 through 2015—a period encompassing the beginning of the Marcellus Shale gas boom—the total natural gas transmission capacity available in the Marcellus region increased from 20,195 million cubic feet per day (Mmcf) in 2001 to 1,098,894 Mmcf. That is an increase of more than 5,300%. If the contentions that increased pipeline capacity drives down electricity prices were true, we would expect to see dramatically lower electricity prices during this same period. What we observe, however, is the opposite: total electricity prices (including residential, commercial, and industrial customers for utilities), have increased from an average of 69.62\$/MWh in 2001 to 98.80\$/MWh in 2015 (in inflation-adjusted 2017\$)—a 42% increase. For residential customers, the price increase was 36%, from 86.65\$/MWh in 2001 to 118.12 \$/MWh in 2015 (in 2017 \$). During the same time period, however, the average price of natural gas to end users (i.e. “distribution price”) did fall from \$9.04/Mcf to \$4.80/Mcf (in 2017\$).

Despite clear evidence dispelling pipeline companies’ claims of economic benefits, FERC accepts their claims at face value as the basis for its public interest determination.

### **FERC Refuses to Consider the Social Cost of Carbon in Its Pipeline Analysis**

FERC fails to use readily available tools to quantify the public costs of the projects it reviews in order to ensure “projects that have residual adverse effects would be approved only where the public benefits to be achieved from the project can be found to outweigh the adverse effects” (88 FERC 61,227, p. 23). Among the most significant and calculable residual adverse effects resulting from fracked gas infrastructure projects are the incremental economic impacts of incremental greenhouse gas (GHG) emissions.

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Sierra Club, et al. v FERC*, 867 F.3d 1357, (D.C. Cir., Aug. 22, 2017), found that FERC is required to consider and quantify the downstream greenhouse gas (“GHG”) emissions from the combustion of the natural gas transported by a project as part of their National Environmental Policy Act review. In light of the recent D.C. Circuit’s decision, FERC must:

- quantify pipeline projects’ emissions combined with past, present, and reasonably foreseeable future gas projects in the region;
- and adopt appropriate mitigation measures in recognition of the past, present, reasonably foreseeable future gas projects in the region to reduce the severity of cumulative impacts from the project.

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<sup>13</sup> Economic Harms Attachment 8, Key-Log Economics, LLC, Economic Issues related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines and FERC Docket No. PL18-1, *Economic Costs of the Atlantic Coast Pipeline*, July 23, 2018.



The social cost of carbon (SCC), “a measure, in dollars, of the long-term damage done by a ton of carbon dioxide (CO<sub>2</sub>) emissions in a given year,”<sup>14</sup> is an available and appropriate tool that would allow FERC to measure economic impacts of climate change that would result from proposed pipelines as required by NEPA and the NGA.

Despite the fact that a federal court recently upheld the legitimacy of using the social cost of carbon as a viable statistic in climate change regulations,<sup>15</sup> and that the CEQ had recommended its use in its final guidance for federal agencies to consider climate change when evaluating proposed Federal actions,<sup>16</sup> the Commission continues to contend that it “‘has not identified a suitable method’ for determining the impact from the Projects’ contribution to climate change and, absent such a method, it simply ‘cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment and how that impact would contribute to climate change.’”<sup>17</sup>

However, as Commissioners Glick and LaFleur have pointed out in response to multiple recent certificate order decisions, FERC is incorrect in its claims that there is “no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions”<sup>18</sup> and that “it cannot ‘determine how a project’s contribution to GHG emissions would translate into physical effects on the environment.’”<sup>19</sup> As Commissioner Glick explains<sup>20</sup>:

“That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency’s obligation to consider how its actions contribute to the harm caused by climate change.”<sup>21</sup>

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<sup>14</sup> EPA Fact Sheet, Social Cost of Carbon, December 2016, retrieved from: [https://www.epa.gov/sites/production/files/2016-12/documents/social\\_cost\\_of\\_carbon\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf)

<sup>15</sup> Susanne Brooks, Environmental Defense Fund, *In Win for Environment, Court Recognizes Social Cost of Carbon*, August 29, 2016.

<sup>16</sup> Final Guidance on Greenhouse Gases and Climate Change, Council on Environmental Quality, August 2016.

<sup>17</sup> Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

<sup>18</sup> *Id.* P 27. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at 2, 5–8 (2018) (Glick, Comm’r, dissenting).

<sup>19</sup> Statement of Commissioner Cheryl A. LaFleur on Texas Eastern’s Texas Industrial Market Expansion Project, FERC Docket No. CP18-10, July 19, 2018 referencing Texas Eastern Certificate Order at P 33.

<sup>20</sup> Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC Docket Nos. CP17-441-000, CP17-441-001, July 19, 2018. See also Texas Eastern Transmission, LP, July 19, 2018, Docket No.: CP18-10-000; partial dissent on Columbia Gas Transmission, L.L.C., July 19, 2018, Docket No.: CP17-80-000; July 19, 2018, Docket No.: CP17-80-000; partial dissent of the Northwest Pipeline certificate order.

<sup>21</sup> *Id.* at 5 (Glick, Comm’r, dissenting) (citing cases that discuss the Social Cost of Carbon when evaluating whether an agency complied with its obligation under NEPA to evaluate the climate change impacts of its decisions).



“the Commission has the tools needed to evaluate the Projects’ impacts on climate change. It simply refuses to use them.”<sup>22</sup>

The SCC for pipeline projects, conservatively estimated, can run into tens of billions of dollars over their designed lifetime of a pipeline. Key-Log Economics recently calculated that the additional 325 million cubic feet of natural gas capacity per day created by the Adelpia Gateway Project translates to 6.3 million metric tons of CO<sub>2</sub> equivalent in GHG in each year of operation. Using a range of conservative discount rates, the SCC of the project over 30 years of operation ranges from \$300 million to \$40 billion.<sup>23</sup>

Key-Log Economics has also calculated staggering SCC estimates resulting from pipeline projects each year:

- The PennEast Pipeline would result in SCC costs of \$301.8-2.3 billion annually.<sup>24</sup>
- The Atlantic Sunrise Pipeline would result in a SCC of \$466.5 million to \$3.6 billion each year.<sup>25</sup>
- The Millennium Eastern System Upgrade would impose \$51.8 – 343.5 million in SCC annually.<sup>26</sup>

Despite the clear mandates from NEPA, the Natural Gas Act, and the Courts, FERC continues to illegally narrow its consideration of the adverse societal impacts of pipelines, compressors and related infrastructure in its decisionmaking.

### **FERC Lacks the Economic Expertise to Remedy Its Economic Failings**

It is also important to note that FERC’s reliance on pipeline applicants to provide information about the need for, as well as the benefits and costs of, their proposals is exacerbated by FERC’s lack of capacity to review and filter the economic information they receive, let alone to conduct analyses of its own. The Office of Energy Projects (OEP), whose “mission...is to foster economic and environmental benefits for the nation through the approval and oversight of hydroelectric and natural gas pipeline energy projects that are in the public interest”<sup>27</sup> has no economists among its staff.<sup>28</sup> The Office of Energy Policy and Innovation, which otherwise collaborates with other FERC offices to evaluate industry proposals, does not support OEP by providing any economic review and analysis of pipeline certification projects.<sup>29</sup>

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<sup>22</sup> Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC , FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

<sup>23</sup> Economic Harms Attachment 9, Key-Log Economics, LLC, *The Social Cost of Carbon of the Adelpia Gateway Project*, February 2019.

<sup>24</sup> See Economic Harms Attachment 4, Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

<sup>25</sup> Economic Harms Attachment 7, Key-Log Economics, LLC, *FERC’s Approval Based on Incomplete Picture of Economic Impacts*, March 2017

<sup>26</sup> Economic Harms Attachment 5, Key-Log Economics, LLC, *Economic Costs of the Millennium Eastern System Upgrade Project*, April 2017.

<sup>27</sup> FERC, Office of Energy Projects, Updated March 20, 2017, available at <https://www.ferc.gov/about/offices/oep.asp>

<sup>28</sup> 2017 FERC Employee Phone Directory, available at <https://www.ferc.gov/contact-us/tel-num/phone.pdf>

<sup>29</sup> Personal communication of Dr. Spencer Phillips (Key-Log Economics) with OEPI’s Administrative Officer, March 17, 2017.



It does not seem plausible that an agency responsible for evaluating the economic merits of energy project proposals could do so without benefit of qualified economic expertise. Indeed, as we have noted above and as is detailed in the attachments listed below, FERC has not provided adequate review of the economic costs and benefits of pipelines. The predictable result will be too much pipeline capacity, too many environmental and other external costs, and a loss of economic vitality for American people and communities.

**Attachments:**

Economic Harms Attachment 1, Testimony of Dr. Spencer Phillips, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016.

Economic Harms Attachment 2, Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, February 2016.

Economic Harms Attachment 3, Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016.

Economic Harms Attachment 4, Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

Economic Harms Attachment 5, Key-Log Economics, LLC, *Economic Costs of the Millennium Eastern System Upgrade Project*, April 2017.

Economic Harms Attachment 6, Catskill Citizens, Press Release, *Proximity of Compressor Station Devalues Homes by as Much as 50%*, July 7, 2015.

Economic Harms Attachment 7, Key-Log Economics, LLC, *FERC's Approval Based on Incomplete Picture of Economic Impacts*, March 2017.

Economic Harms Attachment 8, Key-Log Economics, LLC, Economic Issues related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines and FERC Docket No. PL18-1, *Economic Costs of the Atlantic Coast Pipeline*, July 23, 2018.

Economic Harms Attachment 9, Key-Log Economics, LLC, *The Social Cost of Carbon of the Adelpia Gateway Project*, February 2019.

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People's Dossier: FERC's Abuses of Power and Law  
→Illegal Segmentation

**FERC Engages in Segmentation in Order to Prevent Full Consideration of Environmental and Community Impacts**

FERC routinely and illegally narrows its environmental review of pipeline projects by allowing for the practice of segmentation.

On January 22, 2013, Delaware Riverkeeper Network, NJ Sierra Club and New Jersey Highlands Coalition filed a legal action challenging FERC's May 2012 approval of the Tennessee Gas Pipeline Company's Northeast Upgrade Project (NEUP). Delaware Riverkeeper Network *et al.* successfully argued that FERC's approval was illegal because it had segmented its environmental review when it ignored three other connected and interdependent pipeline projects that were simultaneously before FERC. A map clearly demonstrates that the 300 Line Project, the Northeast Supply Diversification Project, the MPP Project and the NEUP were merely separate parts of the same pipeline and, therefore, FERC was legally obligated to consider all of these projects together when reviewing the NEUP for environmental impacts.<sup>1</sup> On June 6, 2014, the United States Court of Appeals for the District of Columbia issued an opinion and order finding that FERC's segmentation violated NEPA and that FERC had failed to consider the cumulative impacts of these projects.<sup>2</sup>

Despite this ruling, FERC continues to rely upon segmentation as a matter of common practice in its pipeline reviews. For example:

**SouthEast Leidy - Atlantic Sunrise pipelines:**

Just six months after the Court's ruling, FERC engaged in the same unlawfully segmented NEPA process for Transcontinental Pipeline Company's Leidy Southeast Upgrade Project (*FERC Docket No. CP13-551*), the Northeast Supply Diversification Project (*FERC Docket No. CP11-30*), and the Atlantic Sunrise Project (*FERC Docket No. CP15-138*) – all parts of the same pipeline that were illegally segmented for FERC review. The Combined Transco Leidy Line Project Map<sup>3</sup> clearly demonstrates the connection between the projects.

**Orion Pipeline:**

On February 2, 2017 FERC approved the Tennessee Gas Company's proposed Orion Pipeline project – another segmented project designed to further upgrade the 300 Line project – known as 300-3 – that was the subject of the *Delaware Riverkeeper Network, et al.* case. Tennessee

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<sup>1</sup> Illegal Segmentation Attachment 1, Maps of NEUP, 300LU, NSD, and MPP.

<sup>2</sup> Illegal Segmentation Attachments 2 & 3, *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission*, 753 F.3d 1304, at 1314-1315 (D.C. Cir. 2014) & Delaware Riverkeeper Network Press Release, *Federal Court Rules FERC Violated Federal Law When Issued Approvals for NEUP Pipeline Project*, June 6, 2014.

<sup>3</sup> Illegal Segmentation Attachment 4, Combined Transco Leidy Line Project Map.



has improperly segmented its 300-3 pipeline into pieces for review: the Orion Project, the Triad Expansion project, and the Susquehanna West project.

Application for the proposed Susquehanna West project was submitted on April 2, 2015

- (*FERC Docket No. CP15-148*). Anticipated in-service date of November 1, 2017.
- Application for the Triad Expansion project was submitted on June 19, 2015 (*FERC Docket No. CP15-520*). Anticipated in-service date of November 1, 2017.
- Application for the Orion project was submitted October 9, 2015 (*FERC Docket No. CP16-4*). Anticipated in-service date of June 1, 2018.

The three 300-3 line Tennessee projects were all proposed within roughly six months of each other. Tennessee Gas's Orion, Triad, and Susquehanna West Map<sup>4</sup> demonstrates the interconnected nature of the three projects -- they are all clearly part of the same pipeline system -- each upgrading a different section of the pre-existing 300 pipeline.

### **National Fuel's Northern Access 2016:**

FERC also engaged in illegal segmentation when considering the National Fuel's Northern Access 2016 project, the latest of National Fuel's pipeline projects in the Northeast. The figure on p.10 of the Northern Access Comment shows the segmentation of the company's in-service and proposed pipelines, and hints at further expansion and segmentation with stranded gathering lines.<sup>5</sup>

For discussion of the significance of the *Delaware Riverkeeper Network et al. v. FERC* case, see the article by Michael R. Pincus of the American Bar Association.<sup>6</sup>

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### **Attachments:**

Illegal Segmentation Attachment 1, Maps of NEUP, 300LU, NSD, and MPP.

Illegal Segmentation Attachment 2, Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission, 753 F.3d 1304, at 1314-1315 (D.C. Cir. 2014).

Illegal Segmentation Attachment 3, Delaware Riverkeeper Network Press Release, *Federal Court Rules FERC Violated Federal Law When Issued Approvals for NEUP Pipeline Project*, June 6, 2014.

Illegal Segmentation Attachment 4, Combined Transco Leidy Line Project Map.

Illegal Segmentation Attachment 5, Tennessee Gas's Orion, Triad, and Susquehanna West Map.

Illegal Segmentation Attachment 6, Northern Access Comment by Allegheny Defense Project

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<sup>4</sup> Illegal Segmentation Attachment 5, Tennessee Gas's Orion, Triad, and Susquehanna West Map.

<sup>5</sup> Illegal Segmentation Attachment 6, Northern Access Comment by Allegheny Defense Project and PA Alliance for Clean Water and Air, April 16, 2015.

<sup>6</sup> Illegal Segmentation Attachment 7, Michael R. Pincus, *FERC Pipeline Siting Program Deals with Legal Challenges*, American Bar Association, Spring 2016.



and PA Alliance for Clean Water and Air, April 16, 2015.

Illegal Segmentation Attachment 7, Michael R. Pincus, *FERC Pipeline Siting Program Deals with Legal Challenges*, American Bar Association, Spring 2016.

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## People's Dossier: FERC's Abuses of Power and Law →Lack of Public Assistance

### **FERC Minimizes Assistance to the Public While Providing Robust Access and Assistance to the Pipeline Industry**

While not legally required to do so, it is notable that FERC has never made any effort to fund a Congressionally authorized Office of Public Participation to help the public navigate the difficult, complex, and highly technical pipeline review and approval process that so dramatically impacts and harms their lives, communities, and the environment. In contrast to this refusal by the agency to assist the Public, FERC regularly holds educational seminars and events with industry allowing for easy access to FERC commissioners and staff.

Congress established an Office of Public Participation (“Office”) at FERC as part of the 1978 Public Utility Regulatory Policies Act. (*16 U.S.C. § 825q-1*). In creating this Office, Congress recognized that effectively participating in FERC proceedings is especially challenging for individuals, homeowners associations, non-profit organizations, local government bodies, and consumer protection organizations because the highly technical nature of FERC dockets requires significant specialization and costly resources often unavailable to non-industry related parties. Among the Office’s responsibilities would be to help “coordinate assistance to the public” on Commission dockets, and the Office may “provide compensation for reasonable attorney's fees, expert witness fees, and other costs of intervening” for the public. (*16 U.S.C. § 825q-1(b) (1-2)*). FERC has never created this Office.

The pipeline industry enjoys vast advantages and virtually open access in navigating FERC’s review and approval process in comparison to the public—not only are they able to communicate regularly with FERC staff regarding their projects from as early as the pre-filing stages, they enjoy the benefits of the employee revolving door and regular trainings offered by FERC for their benefit. FERC’s online calendar details various industry seminars, such as the one held March 7, 2017, described as a “three day interactive seminar [that] will include how to successfully navigate the FERC environmental review process and to prepare an Environmental Report, a brief introduction to pipeline construction for industry newcomers, a discussion of pre-construction preparation considerations, and a review of baseline mitigation measures for pipeline construction and restoration.”<sup>1</sup> In addition, the industry has far greater resources in order to engage with FERC and to use the process to their full power and advantage.

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<sup>1</sup> Lack of Public Assistance Attachment 1, *FERC Environmental Review and Compliance for Natural Gas Facilities Seminar*, from March 7, 2017 on FERC’s online calendar.

Not only does FERC fail to educate the general public regarding the pipeline permitting process, the Agency completely ignores the public's requests for help. For example, citizens interested in participating in the Mountain Valley Pipeline process (*FERC Docket No. PF15-3*) repeatedly, and formally, sought help on issues ranging from the Agency's definition of "public interest" to how the Agency resolves conflicting expert reports. Despite multiple requests for assistance, none was given.<sup>2</sup>

Despite the clear need for the Office of Public Participation, FERC has **never** requested nor allocated any funds for this Office, even though fully funding the office would constitute less than 2 percent of FERC's budget. As such, this Office exists only in theory; individuals, families, communities, and organizations faced with the significant impacts of a pipeline project and faced with the high complexity and cost of properly reviewing and/or challenging a project when the need arises have never received the appropriate, needed or congressionally envisioned assistance from FERC.

FERC's failure to fund the Office of Public Participation reflects FERC's lack of institutional interest in cultivating a balanced, fair, and impartial review and approval process for natural gas pipeline projects.

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**Attachments:**

Lack of Public Assistance Attachment 1, *FERC Environmental Review and Compliance for Natural Gas Facilities Seminar*, from March 7, 2017 on FERC's online calendar.

Lack of Public Assistance Attachment 2, Thomas Bourdain comment on FERC docket regarding the Mountain Valley Pipeline on FERC Docket No. PF15-3, September 28, 2015.

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<sup>2</sup> Lack of Public Assistance Attachment 2, Thomas Bourdain comment on FERC docket regarding the Mountain Valley Pipeline on FERC Docket No. PF15-3, September 28, 2015.

## People's Dossier: FERC's Abuses of Power and Law → Public Participation Undermined

### **FERC's Public Process Is Carefully Crafted to Frustrate Public Input and Deny Full and Fair Opportunity to Participate**

The National Environmental Policy Act (NEPA) requires that federal agencies take environmental considerations into account in their decision-making “to the fullest extent possible.” 42 U.S.C. § 4332. In addition, NEPA “guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience,” including the public, “that may also play a role in the decision-making process and the implementation of the decision.” *Robertson*, 490 U.S. at 349. As NEPA’s implementing regulations explicitly provide, “public scrutiny [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). The opportunity for public participation guaranteed by NEPA ensures that agencies will not take final action until after their analysis of the environmental impacts of their proposed actions has been subject to public scrutiny. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011)

And yet, FERC’s public meeting process is notorious for the many ways it disenfranchises the public and creates barriers to public participation. FERC ...

- frequently holds hearings at locations far from the impacted communities,
- fails to respond in a timely manner to requests for confidential information needed to inform public comment,
- ends public hearings prematurely, before all in attendance have been given the opportunity to speak
- fails to provide adequate notice of hearing venues and/or changes, and
- targets comment periods for major holidays, e.g. comment period over thanksgiving, new year’s or that end on labor day.

### **FERC routinely denies the public access to vital information regarding pipeline projects prior to comment deadlines**

Recently, FERC refused to provide Critical Energy Infrastructure Information (“CEII”) to an environmental organization until after the scoping period for the proposed Project had closed, despite the organization’s timely filing of the request for information and its repeated efforts to secure the documents requested.

- April 29, 2016, FERC posted Confidential CEII material relating to the Millennium Eastern System Upgrade to the FERC pre-filing docket (*FERC Docket No. PF16-3*). Delaware Riverkeeper Network (DRN) submitted its request for the information on the same day.
- May 11, 2016, FERC released a request for comments with a deadline of June 10, 2016.
- DRN submitted no less than five requests for a comment period extension, to allow time to receive, analyze and comment upon the CEII data before the deadline.
- The June 10th comment deadline passed without the Delaware Riverkeeper Network having received the CEII materials.
- On July 15, 2016, DRN received a letter from FERC acknowledging, that despite Millennium’s objections, the organization had demonstrated a legitimate need for the information—“to assess the need and true nature of the project being proposed.”

- DRN finally received responsive information from FERC on July 29th, nearly two months after the comment deadline and three months after the information was requested. The responsive materials did not include the Flow Diagrams that were needed to assess the true size and scope of the project. That same day, Millennium submitted an Abbreviated Application to FERC (*FERC Docket No. CP16-486*), which included more complete CEII information, including the Flow Diagrams.
- The following business day, August 1, DRN submitted a new CEII request for the latest CEII filing.
- On December 6, over four months later, FERC sought to deny release of the CEII Flow Diagrams and Flow Diagram Data required to assess the project. FERC's rejection of the request was in contrast with the agency's previous practice of providing such information - no explanation was provided for the change. Delaware Riverkeeper Network filed a challenge to the denial.
- In January 2017, Millennium finally agreed to release the information to DRN.
- The information was received in January 2017, a full 8 months after the close of the scoping period.

### **FERC undermines the entire purpose of public participation and fair notice by allowing for significant project alterations after public comment periods have ended**

It is not uncommon for FERC to allow a proposed pipeline route to change or to offer new viable alternatives after the filing of a formal FERC application, and after relevant comment periods have ended, but without giving the public a full and fair opportunity to comment.

New Hampshire residents struggled to understand the impacts of the Northeast Energy Direct Project (*FERC Docket No. PF14-22*) as the pipeline route was repeatedly changed during the project's scoping period. Members of the community attempted to identify and alert new landowners on ever-changing maps when Kinder Morgan and FERC failed to do so.<sup>1</sup> As a result, the public was unable to meaningfully comment on a pipeline's route, and impacted landowners were left unaware that a pipeline was slated to cross their property until the application process was well under way and public comment opportunities had passed.<sup>2</sup>

### **FERC creates unnecessary technological barriers to participation**

When residents participate in FERC's "public process" via written comment or intervention, they are often stymied by FERC's website which is, at best, convoluted, and often, non functioning at critical times.<sup>3</sup> FERC could remedy this barrier by participating in The eRulemaking Program and utilizing the far more accessible commenting and notification platform available through Regulations.gov, which was created to "increase public access to federal regulatory materials," "increase public

<sup>1</sup> Public Participation Undermined Attachment 3, Testimony of Stephanie Scherr, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>2</sup> Public Participation Undermined Attachment 20, Email from Susan Meacham regarding PennEast route changes, June 3, 2016.

<sup>3</sup> Public Participation Undermined Attachment 27, Letter from Kingwood Township to FERC, September 11, 2016; Public Participation Undermined Attachment 25, "Draft for Maya" describing the difficulty in navigating the FERC website and Public Participation Undermined Attachment 28, Jim Levulis, *Rosenberg: Gas Pipeline at Odds with State's Energy Goals*, WAMC Northeast Public Radio, January 5, 2016.

participation and their understanding of the federal rulemaking process,” and “improve federal agencies’ efficiency and effectiveness in rulemaking development.” FERC is a Non-Participating Agency in the program, despite regular complaints regarding their e-Filing system.<sup>4</sup>

### **FERC’s lack of notice for and poor timing of public comment periods and public hearings creates barriers to participation**

It is common practice for FERC to provide short notice of upcoming hearings and to offer limited windows within which to comment on significant project proposals.

- FERC provided a mere 3 weeks public notice for scoping hearings regarding the Atlantic Coast Pipeline -- FERC announced on February 27 that it would hold a scoping meeting on March 18 to receive public testimony. Given the high interest and significant volume of information that needed to be compiled, reviewed, and addressed, 3 weeks was highly deficient.
- FERC provided only 24 days before holding public hearings on a 1,174 page EIS document for the PennEast Pipeline project. In total only 45 days was given for those who wanted to submit written comment. Neither the 24 days for verbal comment nor the 45 days for written comment was enough for such a long and detailed proposal.

FERC is known to give even less notice when there is a change in the location of a public meeting.

- Notice of a change of hearing venue for the PennEast pipeline project’s August 16<sup>th</sup> and 17<sup>th</sup> Draft EIS hearings were postmarked August 11 and in fact did not arrive in mailboxes until on or about August 16, 2016, the same day as the hearing.<sup>5</sup> The delayed notification of the change denied many concerned members of the public the opportunity and ability to attend the hearings at the new locations. *(Note, the notice itself was dated August 5, but the postmark was August 11, indicating the agency waited a full 6 days before actually getting the notice into the postal system for delivery).*

### **FERC’s public meetings are designed to discourage participation and opposition through unnecessary time restrictions and inconvenient timing and locations**

FERC public meetings are often held at a limited set of locations along a proposed pipeline route, making it difficult for many impacted community members to travel the long distances necessary to participate, particularly those that have some sort of physical limitation or significant family obligations.

- Residents in Buckingham County, VA were not given the benefit of a public meeting or subsequent “listening session” in their community to discuss the Atlantic Coast Pipeline (FERC Docket No. CP15-554) despite the fact that the county would be the site of a large

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<sup>4</sup> Retrieved from website: <https://www.regulations.gov/aboutProgram>

<sup>5</sup> Public Participation Undermined Attachment 26, FERC Notice of Public Comment Meeting Location Change, PennEast Pipeline, LLC., August 5, 2016.



compressor station, the only one in the state, and the proposed pipeline would cut through the entire length of the 584-square mile county.<sup>6</sup>

- Residents had been told that there would be a FERC hearing in their county on the pipeline, as well as additional hearings specific to the compressor station. Instead, the public meeting was held in another county, 45 minutes to an hour's drive away. This drastically limited Buckingham residents, many of whom are elderly and do not normally drive on a winter's evening, from attending and expressing their concerns over the project.
- Local public officials requested that FERC hold a meeting in the county, as did Senators Kaine and Warner on their behalf. Senator Kaine summarized in his letter to FERC, "the opportunity [to comment] was not sufficiently given."<sup>7</sup> FERC did not respond to any of the requests.
- Residents who were able attend the meeting later found that their comments were not transcribed accurately and were so riddled with mistakes that their testimonies seemed nonsensical on the record.<sup>8</sup>

➔ Millennium held "open house" forums on the Eastern System Upgrade project (*FERC Docket No. PF16-3*) at inconvenient times and locations that were inaccessible for impacted community members, among other problems. The public meeting that was intended to focus on the proposed Highland compressor station was held 30 miles north of the proposed site, at a time that many indicated was inconvenient for the daily realities of those affected.<sup>9</sup>

FERC public meetings include strict time limits for testimony and turn testifiers away once arbitrary time limits are met:

- ➔ FERC public hearings traditionally allow only 2 to 3 minutes of time per person for testimony. This time limit is enforced even when the number present is so few that there is clearly the ability to provide more time without reaching the scheduled end time for the hearing.
  - For example, at PennEast project hearings, a three minute time limit was imposed for the stated purpose of ensuring that everyone had the opportunity to testify, despite the fact that the number of individuals signed up to testify did not warrant the time constraint. FERC's unnecessary time restriction was evident when all individuals had provided testimony by 8:30 pm and the scheduled close of the public hearing was 10 pm.

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<sup>6</sup> Public Participation Undermined Attachment 21, Email from Lakshmi Fjord to Maya K. van Rossum regarding Atlantic Coast Pipeline, January 28, 2017.

<sup>7</sup> Public Participation Undermined Attachment 24, Letter from Senator Kaine to FERC Asking to Revise Policies, April 7, 2015.

<sup>8</sup> Public Participation Undermined Attachment 4, Testimony of Chad Oba, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016 and Public Participation Undermined Attachment 5, Testimony of Irene Leech, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>9</sup> Public Participation Undermined Attachment 29, Delaware Riverkeeper Network letter to FERC concerning Millennium, May 15, 2016.

- For meetings where there is significant turnout, when the scheduled end time of the meeting is reached, people are turned away without ever getting a chance to testify -- regardless of how long or far they travelled, or how long they waited to speak. Providing an opportunity for written comment does not serve the same function as an opportunity to verbally testify for the benefit of FERC and two to three minutes is simply not enough.

### **FERC separates and intimidates commenters at public hearings**

FERC recently began implementing a new hearing format designed to take the “public” out of the concept of public hearings and deny the ability of attendees to hear the testimony offered by others in attendance; commenters are escorted individually to rooms to state their testimony, in private, to a FERC-hired stenographer out of earshot of others in attendance. The press is prohibited from hearing comments given (even if testifiers request that press be allowed to hear their testimony) and are also prohibited from taking photos and/or video for their news reporting. The public is also told that they are prohibited from taking photos of the public meeting.

- At a summer 2017 public hearing for the PennEast Pipeline, individuals who took photos were quickly admonished by FERC representatives, told that photos were prohibited and suggested they would have to leave the event if they persisted.
  - During this same faux hearing, FERC sought to use state police to intimidate a community member from sharing information and free T-shirts regarding the pipeline in the hearing “waiting room”, where testifiers were awaiting their chance to speak to the FERC-hired stenographer.
  - At this same meeting FERC employees stated that they had neither made, nor were making, any special accommodations for members of the public with sight impairment.
  - At this series of faux hearings a parent had to argue with a FERC employee for the right to sit with her minor child during delivery of the child’s testimony to the stenographer. When challenged by the FERC employee as to the need to be present the mother stated her concerns, and had to forcibly assert her right as a parent to be present.
- At a November 3, 2016 FERC public meeting in Roanoke, Virginia for the Mountain Valley Pipeline (MVP) (*FERC Docket No. CP16-10*), FERC again replaced the public meeting with one-on-one three minute individual testimonies to a FERC stenographer. The FERC Project Manager Paul Friedman took it a step further by “badgering, speaking over people and refutation of citizens’ concerns” as they attempted to give their testimony. According to residents, “Friedman, who was present for many of these recording sessions, interrupted individuals, disrupting their carefully prepared statements, disputing their concerns, and thereby (once again) whitewashed the public record.”<sup>10</sup>
- At a FERC public hearing on the NEXUS Pipeline (*FERC Docket No. CP16-22*), Ohio residents attempting to voice their concerns, and to share with and gain insights from their neighbors, were instead taken into separate rooms to give their statements to FERC

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<sup>10</sup> Public Participation Undermined Attachment 8, Testimony of Russell Chisholm, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016 and also supported by Public Participation Undermined Attachment 9, Testimony of Richard Shingles, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

contractors. As a result, many people left that meeting without commenting because “they felt uneasy talking one-on-one and they wanted to hear what everyone else had to say.”<sup>11</sup>

As a result, the public is disenfranchised, confused, intimidated and angered by the wealth of hurdles and challenges they face from FERC employees and security.<sup>12</sup>

Some public participants have even been injured when exercising their rights at FERC meetings. Dr. Norris, a 73-year old man, had his shoulder severely injured when he was forcibly removed from a FERC hearing, even though Dr. Norris did not resist and force was absolutely unnecessary.<sup>13</sup>

### **FERC turns a blind eye when the public process is abused by the industry and expresses clear bias in the public process**

- For example, 347 letters were filed on the docket for the NEXUS pipeline-- supposedly on behalf of individuals by a group called the “Consumer Energy Alliance”. When FERC was informed that these letters of support were false; had been filed “on behalf of” people who had been dead for nearly 20 years, people with dementia whose and family said they could never have written such a letter, and others who stated they never filed such a letter, FERC’s response was simply that it is not the Agency’s job to investigate such issues and that they do not have the resources or a relevant protocol to investigate. One FERC staffer told concerned residents that “people who believe their signature was improperly used could file a letter in the docket to refute it, otherwise it would stay.” Even when provided with evidence of these misrepresentations on the record, FERC failed to take appropriate action.<sup>14</sup>
  
- At public scoping meetings for the Mountain Valley Pipeline in Elliston, Virginia on May 5, 2015, commenters complained that FERC Project Manager Paul Friedman “conducted the Elliston meeting in a highly unprofessional, partisan manner, allowing the few supporters of the MVP to exceed the three minute speaking limit, while strictly limiting opponents and ordering the stenographer to erase opponents comments that ran over or he ruled out of order.”<sup>15</sup>

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<sup>11</sup> Public Participation Undermined Attachment 7, Testimony of Renee Walker, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>12</sup> Public Participation Undermined Attachment 6, Testimony of Jacqueline Evans, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>13</sup> Public Participation Undermined Attachment 19, Email from Dr. Steven Norris to FERC Director of Safety and Security Mark Radlinski detailing shoulder injury from FERC security, Sept. 21, 2016.

<sup>14</sup> Public Participation Undermined Attachment 10, Testimony of Paul L. Gierosky, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016, Public Participation Undermined Attachment 1, Glenn Wojciak, *Protest Groups Claim Phony Supporters Flood FERC with Comments*, the Post, August 19, 2016 and Public Participation Undermined Attachment 2, Keith Metheny, *New Nexus Pipeline Great Idea, Says Man Who Died in 1998*, Detroit Free Press, September 12, 2016.

<sup>15</sup> Public Participation Undermined Attachment 8, Testimony of Russell Chisholm, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016 paraphrasing letter submitted to FERC by Elizabeth and Scott Malbon (20150506-5104-30556806).

Often, unexplained shenanigans occur at public meetings that further impede the ability of impacted landowners and community members to testify:

- For example, Virginia residents were not given a fair opportunity to voice their concerns over the Atlantic Coast Pipeline at FERC scoping meetings because members of the public arrived at the meetings' announced start time only to find that all speaking slots were claimed hours prior.
  - Pipeline proponents had been somehow notified that the sign up sheet for speaking slots would be available an hour prior to the official hearing start time, while pipeline opponents had not been similarly made aware.
  - In the end, 203 people signed up to speak and only 75 were allowed to do so. FERC declined to allow more time for public comment and declined to conduct additional public hearings.<sup>16</sup>

### **FERC does not fulfill its NEPA obligation to consider and address relevant issues raised in public comments**

When members of the public, and even elected representatives, participate in the public process, either in-person or in writing, their concerns and valid legal arguments fall on FERC's deaf ears.

- For example, 22,093 people and 37 elected state officials informed FERC of their opposition to the Marc-1 Pipeline in Northeast Pennsylvania; the EPA even questioned the need for yet another pipeline in the area, yet FERC rubberstamped the project and hastily granted eminent domain authority to the pipeline company.
- Residents impacted by the Spectra AIM pipeline (*FERC Docket No. CP14-96*) watched helplessly as the pipeline company and FERC ignored the questions and objections of community members and elected officials at every level of government in the four impacted States (NY, CT, RI, and MA), including Senators and members of Congress, the New York Governor and four New York state agencies, during the scoping period and through the Draft and Final Environmental Impact Statements.<sup>17</sup>

This behavior is not regionally-limited. FERC has acted similarly when approving two fiercely contested pipelines in Texas; Trans-Pecos and Comanche Trail, and in countless other situations across the nation.

Key-Log Economics has undergone a thorough analysis of all comments submitted to the FERC docket during key comment periods for the Atlantic Coast Pipeline, the PennEast Pipeline, and for

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<sup>16</sup> Public Participation Undermined Attachment 23, Andrew Cain, *US regulators reject request for more hearings on atlantic coast pipeline*, Richmond Times Dispatch, May 14, 2015; Public Participation Undermined Attachment 24, Letter from Senator Kaine to FERC Asking to Revise Policies, April 7, 2015 and Public Participation Undermined Attachment 22, Michael Martz, *Battle escalates over extending comment period for proposed pipeline*, Richmond Times Dispatch, April 22, 2015.

<sup>17</sup> Public Participation Undermined Attachment 11, Testimony of Nancy Vann, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016 and Public Participation Undermined Attachment 12, Testimony of Chris D. Gauthier, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

Millennium’s Eastern System Upgrade (ESU) project. Across the board, these analyses have found that the vast majority of comments submitted to FERC express negative opinions and serious concerns about the proposed pipelines. More so, these concerns are greatest among people who would be directly affected by the proposed pipelines. Under NEPA, FERC must consider and address relevant concerns raised in public comments. These comments are important to the process as they “provide direct and clear information about the issues of concern to the people living in communities through which the pipeline would pass as well as to people who, as visitors, downstream water users, business owners, and others, use and enjoy the affected landscape. The comment letters help FERC understand the nature and extent of the effects of the proposed pipeline.”<sup>18</sup> However, FERC regularly fails to meet its legal obligation to consider the full range of environmental effects raised on the record in their final EIS or EA.<sup>19</sup>

### **FERC misleads and discourages landowners from participating in the public process**

FERC has gone so far as to actively mislead and discourage landowners who stand to lose their property to eminent domain from participating in the public process.

- William F. Limpert, who, along with his wife, stands to have his retirement property cut in half by the Atlantic Coast Pipeline (ACP) (*FERC Docket no. CP15-554*), was discouraged from participating as an intervenor by FERC staff when he inquired about the process. He was told, falsely, that “being an intervenor is very difficult because [he] would have to send letters to hundreds of other intervenors.” The FERC employee made the process sound so daunting and time consuming that the Limperts decided not to intervene at the time. The ACP would cut a 3,000 foot by 125 foot path cut through the virgin forest on their property within several hundred feet of their home, taking down hundreds of old growth trees.<sup>20</sup>

### **FERC’s disregard for public concern is reckless, illegal, and appears intentional**

Members of the public have reported overhearing FERC employees disparage the public process and, when they thought they were not being overheard, laughing at the notion that the public believed that their input could have any impact on the pre-determined outcome of approval of a pipeline by FERC.

The public is denied any opportunity to testify before the FERC Commissioners directly before they render the final decision on a pipeline infrastructure project – and if they attempt to speak at a FERC Commissioners meeting they are forcibly removed or arrested.<sup>21</sup> And so people who are losing their

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<sup>18</sup> Public Participation Undermined Attachment 13, Testimony of Cara Bottorff, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>19</sup> Public Participation Undermined Attachment 16, Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, February 2016, Public Participation Undermined Attachment 17, Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016 and Public Participation Undermined Attachment 18, Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

<sup>20</sup> Public Participation Undermined Attachment 15, Testimony of William Limpert, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>21</sup> Public Participation Undermined Attachment 11, Testimony of Nancy Vann, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016 and Public Participation Undermined

lives, livelihoods, properties, protected lands and healthy environments are never even given the opportunity to be heard by the very decisionmakers who are making the decision to inflict the harm.

The steps taken by FERC to deny people their right to be heard and to participate in the public review process are particularly egregious in light of the fact that these proposed projects take their private property rights, irreparably damage natural resources and lands communities have worked hard to preserve and restore, take jobs and harm small businesses, impede farmers from being able to most successfully grow their crops, and put communities in a literal blast zone that could take their lives. This clearly frustrates provisions of the National Environmental Policy Act, the Clean Water Act, and the Natural Gas Act.

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**Attachments:**

Public Participation Undermined Attachment 1, Glenn Wojciak, *Protest Groups Claim Phony Supporters Flood FERC with Comments*, the Post, August 19, 2016

Public Participation Undermined Attachment 2, Keith Metheny, *New Nexus Pipeline Great Idea, Says Man Who Died in 1998*, Detroit Free Press, September 12, 2016.

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Public Participation Undermined Attachment 10, Testimony of Paul L. Gierosky, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

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Attachment 14, Testimony of Ted Glick, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

Public Participation Undermined Attachment 11, Testimony of Nancy Vann, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

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Public Participation Undermined Attachment 29, Delaware Riverkeeper Network letter to FERC concerning Millennium, May 15, 2016.

***Complete People's Dossier: FERC's Abuses of Power and Law***

*available at <http://bit.ly/DossierofFERCAbuse>*

People's Dossier: FERC's Abuses of Power and Law  
→ **Safety Threats Ignored**

**FERC Ignores Critical, Even Catastrophic, Safety Concerns**

FERC routinely overlooks critical safety issues. For example, FERC has approved construction of the Algonquin Incremental Market (AIM) pipeline (*FERC Docket CP14-96*) adjacent to the Indian Point nuclear facility on the Hudson River, bringing the total number of neighboring pipelines to three. Nuclear safety experts have warned FERC that a rupture in the AIM pipeline at Indian Point could result in a radioactive release greater than that at Fukushima, rendering the region and likely New York City uninhabitable. FERC has approved the project despite its knowledge of the unique national security risk that the pipelines sited at the Indian Point nuclear facility pose to the 20 million people within the 50-mile impact radius of the plant.

According to Richard Kuprewicz, pipeline safety expert, the mitigation measures proposed (such as burying the pipe two feet deeper and adding concrete slabs above the pipe) are unlikely to offer protection. In addition, a former chief consultant for the Indian Point power plant put the probability of a nuclear failure at Indian Point due to a pipeline incident in the range of 1 in 1,000 to 1 in 10,000 per year--a very dangerous level that not only shocks the public conscience, but is not in keeping with regulatory goals according to expert testimony.<sup>1</sup>

FERC also fails to adequately consider the safety record of pipeline companies in its reviews. For example, in considering the Pacific Connector Gas Pipeline (*FERC Docket CP13-492*) being proposed by the Williams Company, FERC did not give due consideration to the massive gas leak and explosion at its liquid natural gas facility in Washington state. Workers were injured and hundreds were forced to evacuate their homes when 599,340 gallons of liquid natural gas leaked or exploded.<sup>2</sup>

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**Attachments:**

Safety Threats Ignored Attachment 1, Testimony of Amy Rosmarin, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016.

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<sup>1</sup> Safety Threats Ignored Attachment 1, Testimony of Amy Rosmarin, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016, Safety Threats Ignored Attachment 2, Declaration of Paul Blanch, *Town of Dedham v. FERC*, (D.C. Cir., Docket No. 16-1081), September 21, 2016, and Safety Threats Ignored Attachment 3, Declaration of Richard Kuprewicz, *Town of Dedham v. FERC*, (D.C. Cir., Docket No. 16-1081) September 21, 2016.

<sup>2</sup> Safety Threats Ignored Attachment 4, Letter from Stacey McLaughlin to FERC enclosing Tarika Powell, How Industry and Regulators Kept Public in the Dark after 2014 LNG Explosion in Washington, February 8, 2016.

Safety Threats Ignored Attachment 2, Declaration of Paul Blanch, *Town of Dedham v. FERC*, (D.C. Cir., Docket No. 16-1081), September 21, 2016.

Safety Threats Ignored Attachment 3, Declaration of Richard Kuprewicz, *Town of Dedham v. FERC*, (D.C. Cir., Docket No. 16-1081) September 21, 2016.

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## People's Dossier: FERC's Abuses of Power and Law → **Staff Conflicts of Interest**

### **Conflicts of Interest Color, Undermine, and Invalidate FERC Pipeline Decision-Making**

#### **There Exists an Employee Revolving Door Between FERC and the Fracking Industry**

The revolving door between FERC employees and industry includes agency staff up to the Commissioner level. This revolving door shapes how FERC employees view issues generally, affects the overall mindset of the agency, and creates bias. In 2014, according to press reports there were over forty instances of FERC employees, including its Commissioners, seeking multiple opportunities with grid operators, law firms and utilities that the agency regulates.<sup>1</sup>

Current FERC employees are able to begin negotiations with the industry for employment while still on the FERC payroll. This clearly enhances the incentive to engage in favorable agency decision-making biased towards the industry and against the public as employees try to advance their chances of securing a more lucrative and powerful position. Examples of conflict arising from this scenario include:

- Former FERC Commissioner Philip Moeller left his post at FERC to work in Washington D.C. as the Senior Vice President of Edison Electric Institute, one of the top lobbying firms for electric utilities,<sup>2</sup> and as the Non-Executive Director of Liquefied Natural Gas Limited.<sup>3</sup>
- Larry Gasteiger, former chief of staff at FERC, left the agency to work as the chief of federal regulatory policy at Public Service Enterprise Group, a major New Jersey utility company.<sup>4</sup>
- Pat Wood, a former FERC Chairman, became chairman of the board at Dynegy, a natural gas and coal power generating firm.<sup>5</sup>
- Michael Yuffee, a former attorney-advisor in FERC's Office of Administrative Law Judges, left the Agency for the law firm representing developers of the Dakota Access oil pipeline, Norton Rose Fulbright LLP.<sup>6</sup>
- Mason Emmett, deputy director of FERC's Office of Energy Policy and Innovation, "left the

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<sup>1</sup> Staff Conflicts of Interest Attachment 6, Hannah Northey and Kevin Bogardus, E&E News, *Employees Negotiate for Industry Jobs Under Agency's Eye*, April 7, 2015.

<sup>2</sup> Staff Conflicts of Interest Attachment 7, Jonathan Crawford, Bloomberg News, *Ex-Regulator Joining Lobby Skirts Revolving-Door Ban, Group Says*, January 12, 2016.

<sup>3</sup> Staff Conflicts of Interest Attachment 8, LNGL Media Release: Appointment of Third US-Based Non-Executive Director, December 7, 2015.

<sup>4</sup> Staff Conflicts of Interest Attachment 5, Jonathan Crawford, Bloomberg News, *Another U.S. Regulator Joining Utility Revives Watchdog Concerns*, October 21, 2016.

<sup>5</sup> Staff Conflicts of Interest Attachment 15, Dynegy Energy Bio of Pat Wood, retrieved March 10, 2017.

<sup>6</sup> Staff Conflicts of Interest Attachment 4, Hannah Northey, E&E News, *Former FERC Advisor Joins Firm Representing Dakota Access*, October 25, 2016.

agency after almost eight years ... to take a position as a senior attorney for NextEra Energy Inc.”<sup>7</sup>

The increased access resulting from the revolving door benefits the industry within the halls of FERC – the only question is what form, and to what degree, this bias manifests itself.

Several documents demonstrate the ease with which former FERC Commissioners, former attorneys, the former Director of Pipeline Certificates, and other former employees arrange meetings with and otherwise access current FERC Commissioners and employees. For example, Former Commissioner Suede Kelly frequently and colloquially communicates with current FERC Commissioners on behalf of her client, Spectra Energy,<sup>8</sup> and former Deputy Director of the Office of Energy Projects and former Director of Pipeline Certificates Berne Mosley does the same regarding the Atlantic Coast Pipeline Project.<sup>9</sup>

### **Self-Interest Compounds Concerns Regarding FERC’s Decision-Making Process**

FERC employees, including Commissioners, are known to decide on projects that serve their own financial self-interest.

For example, as reported by Desmog Blog;

During former Commissioner Philip Moeller’s nearly ten-year tenure with FERC, “Moeller’s wife was employed as a lawyer and lobbyist for the Washington, DC-based firm Pillsbury, Winthrop, Shaw & Pittman LLP...the Commission’s counsel repeatedly authorized Moeller to rule on matters *concerning companies represented by his wife* or others at Pillsbury Winthrop” (*emphasis added*). While Philip Moeller had secured a waiver from a FERC Ethics Official, the inappropriate bias and self-dealing cannot be said to have been remedied by those steps. One such example of how this benefit played out is as follows: In 2010, Ms. Moeller began lobbying for a company that held agreements to drill for natural gas in Pennsylvania’s Marcellus Shale. Soon thereafter, her husband and the Commission approved a number of new natural gas projects in the Northeast that would carry fracked gas from the Marcellus Shale, such as Spectra’s Texas Eastern Appalachia to Market project and New Jersey-New York Expansion project.<sup>10</sup>

Other examples of self-dealing by FERC officials include:

The hiring of former FERC Outreach Manager of the Office of Energy Projects, Douglas Sipe, by an engineering firm with a \$1.8 million stake in the Spectra Energy Pipeline Project.

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<sup>7</sup> Staff Conflicts of Interest Attachment 6, Hannah Northey and Kevin Bogardus, E&E News, *Employees Negotiate for Industry Jobs Under Agency’s Eye*, April 7, 2015.

<sup>8</sup> Staff Conflicts of Interest Attachment 13, DeSmog Blog, *Exposed: Husband of FERC Official Responsible for Reviewing New Spectra Energy Pipelines Consults on Related Spectra Project*, November 1, 2016.

<sup>9</sup> Staff Conflicts of Interest Attachment 12, Commissioner Honorable Enclosures 13-26, emails from August 17, 2015 and September 10, 2015.

<sup>10</sup> Staff Conflicts of Interest Attachment 14, DeSmog Blog, *Revealed: Ex-FERC Commissioner’s Multiple Rulings Favored Energy Companies His Wife Lobbied For*, August 22, 2016.

Mr. Sipe served as the Environmental Project Manager for the project while at FERC.<sup>11</sup>

Maggie Suter, a FERC official tasked with reviewing the Cove Point and Atlantic Bridge projects, is married to Phil Suter, a paid consultant for a related project, Access Northeast. When Mrs. Suter told her supervisors at FERC of the potential conflict, she was allowed to remain in her role of reviewing the two projects.<sup>12</sup>

It is clear from these examples that FERC and its employees are not acting as unbiased professionals during the fracking infrastructure approval process, but instead are making licensing and approval decisions based on existing industry relationships and their own personal and/or financial self-interests.

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**Attachments:**

Staff Conflicts of Interest Attachment 1, DeSmog Blog, *FERC Chairman Used Not-Yet-Published Guidelines to Deny Wrongdoing in Hiring of Contractor for Spectra Pipeline*, October 19, 2016.

Staff Conflicts of Interest Attachment 2, DeSmog Blog, *Former FERC Official Hired By Company With \$1.8 Million Stake in Spectra Energy Pipeline Project He Had Reviewed*, June 6, 2016.

Staff Conflicts of Interest Attachment 3, Letter from Senator Elizabeth Warren to FERC regarding Atlantic Bridge Conflict of Interest, June 9, 2016.

Staff Conflicts of Interest Attachment 4, Hannah Northey, E&E News, *Former FERC Advisor Joins Firm Representing Dakota Access*, October 25, 2016.

Staff Conflicts of Interest Attachment 5, Jonathan Crawford, Bloomberg News, *Another U.S. Regulator Joining Utility Revives Watchdog Concerns*, October 21, 2016.

Staff Conflicts of Interest Attachment 6, Hannah Northey and Kevin Bogardus, E&E News, *Employees Negotiate for Industry Jobs Under Agency's Eye*, April 7, 2015.

Staff Conflicts of Interest Attachment 7, Jonathan Crawford, Bloomberg News, *Ex-Regulator Joining Lobby Skirts Revolving-Door Ban, Group Says*, January 12, 2016.

Staff Conflicts of Interest Attachment 8, LNGL Media Release: Appointment of Third US-Based Non-Executive Director, December 7, 2015.

Staff Conflicts of Interest Attachment 9, Meeting with Larry Gasteiger, Norman Bay, and Joe Kelliher regarding NextEra Energy, July 8, 2015:

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<sup>11</sup> Staff Conflicts of Interest Attachment 2, DeSmog Blog, *Former FERC Official Hired By Company With \$1.8 Million Stake in Spectra Energy Pipeline Project He Had Reviewed*, June 6, 2016.

<sup>12</sup> Staff Conflicts of Interest Attachment 13, DeSmog Blog, *Exposed: Husband of FERC Official Responsible for Reviewing New Spectra Energy Pipelines Consults on Related Spectra Project*, November 1, 2016.

Meeting with Larry Gasteiger, Norman Bay, Andy Black, among others, regarding the Association of Oil Pipelines October 22, 2015

Meeting with Norman Bay, Larry Gasteiger, and Suede Kelly, among others, regarding the Northeast Energy Direct Project, November 13, 2015

Staff Conflicts of Interest Attachment 10, Meeting with Norman Bay and Mustafa P. Ostrander, among others, regarding Tallgrass Energy meet and greet, January 4, 2016.

Staff Conflicts of Interest Attachment 11, Email from Suede Kelly to Andrew Holleman regarding phone call with Commissioner LaFleur, August 3, 2015.

Staff Conflicts of Interest Attachment 12, Commissioner Honorable Enclosures 13-26, emails from August 17, 2015 and September 10, 2015:

Email from webform@ferc.gov to Robert Thormeyer, among others, requesting a meeting between FERC Commissioner Honorable and Berne Mosley, Dominion Consultant, to discuss the Atlantic Coast Pipeline and Supply Header Project, August 17, 2015

Email from Suede Kelly to FERC Commissioner Honorable, among others, regarding Northeast Energy Direct pipeline expansion, September 10, 2015

Email from Suede Kelly CC'ing Robert Thormeyer regarding meeting Commissioner Honorable, November 5, 2015

Staff Conflicts of Interest Attachment 13, DeSmog Blog, *Exposed: Husband of FERC Official Responsible for Reviewing New Spectra Energy Pipelines Consults on Related Spectra Project*, November 1, 2016.

Staff Conflicts of Interest Attachment 14, DeSmog Blog, *Revealed: Ex-FERC Commissioner's Multiple Rulings Favored Energy Companies His Wife Lobbied For*, August 22, 2016.

Staff Conflicts of Interest Attachment 15, Dynegy Energy Bio of Pat Wood, retrieved March 10, 2017.

***Complete People's Dossier: FERC's Abuses of Power and Law***

***available at <http://bit.ly/DossierofFERCAbuse>***

## People's Dossier: FERC's Abuses of Power and Law → Stripping People's Rights

### **FERC Denies the Public their Right to Due Process Before Property Rights are Taken, and Irreparable Environmental and Community Harm is Approved.**

FERC routinely uses a legal loophole (a tool called a tolling order) to deny the public the right to challenge approval of a pipeline project before it allows private companies to seize property rights via eminent domain and before FERC approves pipeline construction to begin in ways that inflict irreparable environmental and community harm.

#### **How FERC Forces Communities Into Legal Limbo**

Under federal law, a private party is not allowed to legally challenge FERC approval of a pipeline project until they have first submitted a rehearing request to FERC, and FERC has affirmatively granted or denied that request. Rather than do one or the other, FERC's practice is to issue a "tolling order" in response to such requests, which temporarily grants the request but only "for further consideration". As a result, the public's ability to challenge the FERC decision is put into legal limbo until such time as FERC renders and issues its final decision regarding the rehearing request. It is common for FERC to place people in this legal limbo for up to a year or more, while allowing the pipeline company to advance its project, take property, cut through forests, and begin construction.

There does not appear to be a single instance when FERC has granted a rehearing request submitted by the public -- as such, the denial is a foregone conclusion and the use of tolling orders is an obvious ploy to allow pipeline projects to advance unfettered by any legal challenge. The harms inflicted by the delay in responding to the rehearing requests cannot be undone or fully remedied later – forests cut cannot be instantly regrown; property rights, once taken, are not returned.

The New York Attorney General condemned FERC's use of tolling orders "to extend the pendency of rehearing petitions in order to avoid judicial review of FERC orders. FERC's use of tolling orders undermines congressional intent, infringes upon property rights of landowners, and renders judicial review meaningless."<sup>1</sup> FERC Commissioner Glick has joined the impacted public (i.e the focus of this Dossier) in urging Congress to enact reforms to end this harmful practice:

This situation highlights the need for Congress to enact legislation amending the judicial review provisions of the Natural Gas Act and the Federal Power Act to account for the ability of an aggrieved party to seek redress in the courts of appeal. It is fundamentally unfair to deprive parties of an opportunity to pursue their claims in court, especially while pipeline construction is ongoing.<sup>2</sup>

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<sup>1</sup> Stripping People's Rights Attachment 1, Comments of the New York Attorney General, Docket No. PL18-1, July 2018.

<sup>2</sup> Stripping People's Rights Attachment 2, Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC, Docket Nos. CP15-554-002; CP15-555-001; and CP15-556-001, August 10, 2018.



### **Tennessee Gas Pipeline Company's Northeast Upgrade Project (TGP NEUP)**

In the case of Delaware Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014), FERC's use of a tolling order prevented any sort of real remedy even where a court ruled that FERC had violated the National Environmental Policy Act in allowing the use of segmentation and failing to consider cumulative impacts in its review and approval of the pipeline project. Specifically:

- May 29, 2012: FERC issued a Certificate of Public Convenience and Necessity for the TGP NEUP. (FERC Docket No. CP11-161) The NEUP would devastate 810 acres of land and convert 120.6 acres, including forest, into permanent pipeline right of way. The pipeline would cut through PA's Delaware State Forest, NJ's Highpoint State Park, the Appalachian Trail, and cross the Wild & Scenic Delaware River. Seven miles of prime farmland and dozens of creeks and wetlands all fell within the pipeline's proposed boot print.
- June 28, 2012: the Delaware Riverkeeper Network filed its rehearing request.
- July 9, 2012: FERC issued its tolling order.<sup>3</sup>
- January 11, 2013: nearly 7 months after the original rehearing request was filed, FERC finally denied the rehearing request.
- Delaware Riverkeeper Network filed its legal challenge within 2 weeks.

The seven months of legal limbo meant that by the time the Delaware Riverkeeper Network secured the court ruling that FERC had in fact violated federal law in their review and approval of the TGP NEUP pipeline, the project was fully constructed and in operation.

### **Transco Southeast Leidy**

While issuing a tolling order to leave communities in Pennsylvania in legal limbo for 15 months for the Transco Southeast Leidy pipeline project (FERC Docket No. CP13-551), FERC issued over 20 Notices to Proceed that allowed the project to advance through various stages of construction and operation. Specifically:

- Transco filed an application with FERC on September 30, 2013 to construct and operate the Leidy Southeast Pipeline, and received its Certificate of Public Convenience and Necessity from FERC on December 18, 2014.
- The Delaware Riverkeeper Network submitted a rehearing request to FERC on January 16, 2015.
- Already, on January 30, 2015 – prior to the deadline for the submission of rehearing requests – FERC issued Transco its first Notice to Proceed with the project.
- On February 4, 2015 Transco requested that FERC approve its request for a Notice to Proceed with additional construction activity. FERC again granted Transco's request on February 5, 2015.
- On February 18, 2015 FERC issued its "tolling order" in response to DRN's rehearing request, thereby putting the organization and its membership into a legal limbo that prevented

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<sup>3</sup> Stripping People's Rights Attachment 11, FERC Order Granting Rehearing for Further Consideration, Tennessee Gas Pipeline, Docket No. CP11-161, July 9, 2012; and FERC Order On Rehearing, Tennessee Gas Pipeline, Docket No. CP11-161, January 11, 2013.



them from taking any further legal action to challenge the pipeline's approval.

- On March 9, 2015, FERC again authorized Transco to begin tree felling and other construction activities, allowing the company to permanently destroy more than 140 forested acres adjacent to valuable streams and wetland resources. All of this occurred before the public had any chance for court review.
- In total, FERC issued twenty Notices to Proceed for the project, including allowing certain portions of the project to begin operation, before it finally denied the Delaware Riverkeeper Network's rehearing request on March 3, 2016 – 15 months later – thereby freeing the organization to file its legal challenge to the project.

Delaware Riverkeeper Network filed a legal challenge to the project on March 9; however, much of the irreparable harm to the environment that the Delaware Riverkeeper Network and its members had sought to avoid had already occurred. By the time the Delaware Riverkeeper Network was allowed to proceed with its challenge, FERC had allowed the pipeline company to cut trees along 21 miles of right of way on 209 acres of land, and inflicted irreparable harm to at least 8 ½ acres of pristine forested wetlands.<sup>4</sup>

### **Constitution Pipeline**

In the case of the Constitution Pipeline (FERC Docket CP 13-499), FERC tolled the rehearing request for nearly a year. In this case:

- On December 2, 2014, FERC issued Certification for the Project.
- On January 2, 2015, concerned communities filed their Rehearing Request.
- January 27, 2015, FERC issued its tolling order leaving communities without a legal remedy as the project proceeded with eminent domain and elements of construction.
- It wasn't until one year later, January 28, 2016, when FERC finally denied the rehearing request, that concerned communities got the opportunity to challenge FERC's approval of the Constitution Pipeline.

During the one year communities were in legal limbo, the project continued to advance towards construction:

- By December of 2014, the Constitution Pipeline Company had filed 125 Complaints in Condemnation in the Northern District of New York alone, seeking to take private property rights away from landowners in its path.<sup>5</sup>
- By the end of 2015 homeowners who had refused access to their property had their property rights overridden through forced condemnation, and the Constitution Pipeline Company secured access to the properties to finish surveying work and to tag trees for clearing.
- On January 29, 2016, FERC approved tree cutting on 25 miles of the Pennsylvania portion of the pipeline, despite lacking multiple state and federal approvals, including New York Clean

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<sup>4</sup> Stripping People's Rights Attachment 3, People's Hearing Testimony of Maya van Rossum, the Delaware Riverkeeper, on behalf of the Delaware Riverkeeper Network, December 2, 2016.

<sup>5</sup> Stripping People's Rights Attachment 5, Earthjustice Motion for Stay, Docket Nos. CP13-499 and 13-502, January 11, 2016.



## Water Act Certification.<sup>6</sup>

On March 1, 2016, the Constitution Pipeline Company began to cut the forest that has belonged to the Holleran family since the 1950s—they live on the property, enjoy its natural beauty, and operated a growing maple syrup business (North Harford Maple).<sup>7</sup> In total Constitution chopped down over 500 ash and sugar maple trees on the Holleran property alone, devastating their scenic beauty and their maple syrup operation.<sup>8</sup>

Ultimately New York would deny Clean Water Act Certification, stopping the project in its tracks. As a result, property rights were taken, businesses harmed, forests cut, and the environment irreparably harmed for a pipeline that is unlikely to ever be built. Property owners who were forced to spend their hard earned money to try to protect their property and property rights, are now forced to expend resources on legal actions in order to try to secure return of the property rights that were taken by eminent domain as a direct result of the actions and decisions of FERC.

The Holleran family has had pipeline construction stalled on their property for two years, with no compensation for the taking of their maple trees nor for the harm forced upon them of hosting a construction site on their land.<sup>9</sup> Where is the justice?

### **The Sabal Trail Project**

The Sabal Trail Project (FERC Docket CP15-17-001) is part of a broader pipeline network known as the Southeast Market Pipelines Project, crossing through Alabama and Georgia to Florida. Sabal Trail was challenged in *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017), in which the court ultimately ruled that FERC had violated the National Environmental Policy Act in its failure to analyze greenhouse gas (GHG) emissions resulting from the Project. However, FERC's use of a tolling order prevented any sort of timely remedy, with much of the pipeline in service before the decision was made. Specifically:

- On February 2, 2016, FERC granted a Certificate of Public Convenience and Necessity to

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<sup>6</sup> Stripping People's Rights Attachment 6, Earthjustice Response to Supplemental Information, Docket No. CP13-499, January 15, 2016; Stripping People's Rights Attachment 7, Catskill Mountainkeeper et al., Press Release, February 18, 2016; and Stripping People's Rights Attachment 8, Stop the Pipeline, Statement in Opposition to Request for Partial Notice to Proceed, Docket No. 13-499, January 12, 2016. See also Stripping People's Rights Attachment 9, Petitioner Stop the Pipeline Brief in Docket Nos. 16-345 and 16-361, (2nd Cir.) July 12, 2016.

<sup>7</sup> See <https://www.northharfordmaple.com/>.

<sup>8</sup> See Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458 and Stripping People's Rights Attachment 16, Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, State Impact, July 12, 2018.

<sup>9</sup> See Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458 and Stripping People's Rights Attachment 16, Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, State Impact, July 12, 2018.



construct and operate the Sabal Trail Project.

- On March 3, 2016, Sierra Club and other environmental petitioners filed a timely request for rehearing, rescission of the certificates, and a stay. Petitioners argued, among other things, that FERC had failed to estimate the downstream GHG emissions from the gas that would be transported by the project and had failed to consider the effects that those emissions will have on climate change, as required by NEPA.
- On March 29, 2016, FERC issued its tolling order and on March 30, FERC denied the request for a stay.<sup>10</sup>
- While the tolling order was in place and FERC was still considering Sierra Club's rehearing request, FERC authorized the construction of the projects in August and early September 2016.
- On September 7, 2016, FERC denied the rehearing request, finding that the FEIS sufficiently assessed GHG emissions.
- In September 2016, Sierra Club, among other parties, appealed FERC's Decision to the U.S. Court of Appeals for the District of Columbia Circuit.
- In June and July 2017, while the court case was pending, Commission staff authorized the pipelines to commence service on completed facilities.
- On August 22, 2017, the D.C. Circuit Court sided with the Sierra Club and other environmental groups, concluding that FERC had inadequately analyzed the impacts of GHG emissions that may result from the pipeline in violation of NEPA. See *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329).

The six months of legal limbo meant that by the time the Sierra Club and other environmental petitioners secured the court ruling that FERC had in fact violated federal law in their review and approval of the project by failing to adequately consider climate impacts, the pipeline project at issue was fully constructed and in operation. The court decision vacated FERC's previous approval of the Project and mandated that FERC either quantify and consider the Project's downstream carbon emissions, or explain in more detail why it failed to do so. Had FERC followed the direction of the court, a full and fair analysis of the climate change impacts of the project could have very well changed the outcome of the Project.<sup>11</sup>

### **New Market Project**

Recently, FERC tolled the New Market project (FERC Docket No. CP14-497) for 24 months. In this case:

- On April 28, 2016, FERC issued Dominion Transmission, Inc. (Dominion) a certificate of public convenience and necessity for the New Market Project.
- On May 31 2016 Otsego 2000, Inc. filed a timely request for rehearing.

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<sup>10</sup> Stripping People's Rights Attachment 17, FERC Order Denying Rehearing, Sabal Trail, Docket No. CP15-17-001, March 29, 2016.

<sup>11</sup> See Statement of FERC Commissioner Richard Glick, Order on Remand Reinstating Certificate and Abandonment Authorization, Docket Nos. CP14-554-002, CP15-16-003, and CP15-17-002, March 14, 2018.



- On June 27, 2016, FERC issued a tolling order.<sup>12</sup>
- In March of 2017, while petitioners were held in legal limbo, FERC gave Dominion permission to begin construction in upstate New York; the Project was placed in-service November 21, 2017.
- On May 18, 2018, FERC issued an order denying rehearing.

On July 16, 2018, after two years in legal limbo, Otsego 2000 challenged FERC’s May 18 order—which rejected their complaints and set new policy for the Commission’s consideration of greenhouse gas emissions from proposed projects—in the U.S. Court of Appeals for the District of Columbia Circuit. Attorneys General of New York, Maryland, New Jersey, Oregon, Washington, Massachusetts, and the District of Columbia filed amicus briefs in the case, arguing that FERC should have considered upstream and downstream greenhouse gas emissions. While the project has been constructed in-service for over a year, the case is still pending in federal court. FERC’s tolling order clearly prevented timely legal challenge – and so even if the challengers are victorious in court, it will have **no affect** on construction or operation of this pipeline.

### **Mountain Valley Pipeline**

While petitioners were held in legal limbo for 6 months, FERC authorized Mountain Valley Pipeline (MVP) Project (FERC Docket No. CP16-10) to proceed with construction and tree felling. Shortly after rehearing requests were finally denied and much of the construction was complete, a series of court decisions called into question the legitimacy of several of the Project’s state and federal approvals. FERC temporarily halted construction activity—before determining that the tree clearing already completed necessitated continued construction to “mitigate further environmental impacts”<sup>13</sup>—a decision that could have been avoided had FERC not allowed the company to proceed with construction prematurely. Major questions about the project’s viability remain. In this case:

- On October 13, 2017, the Commission issued an order authorizing Mountain Valley Pipeline, LLC (Mountain Valley) to construct and operate its proposed MVP in West Virginia and Virginia. Commissioner LaFleur dissented from the certificate order, questioning whether the Project is in the public’s interest given the lack of demonstrated need for the Project and the considerable environmental impact it would have.<sup>14</sup>
- Several legal challenges against other Project permits, including the CWA Section 401 and 404 permits, were already ongoing at the time,<sup>15</sup> and the issuance of the FERC certificate prompted additional legal action. Two weeks after the Certificate Order issued, MVP initiated condemnation actions in three federal district courts against nearly 300 property

<sup>12</sup> Stripping People’s Rights Attachment 18, FERC Order Granting Rehearing for Further Consideration, Dominion Transmission, Docket No. CP14-497-001, June 27, 2016.

<sup>13</sup> See Partial Authorization to Resume Construction, Docket No. CP16-10, August 29, 2018.

<sup>14</sup> See Statement of FERC Commissioner Cheryl LaFleur, Dissent on Order Issuing Certificates and Granting Abandonment Authority, Docket Nos. CP15-554 and CP16-10, October 13, 2017.

<sup>15</sup> See Ken Ward, *Mountain Valley Pipeline approval faces new federal court challenge*, Charleston Gazette-Mail, December 8, 2017.



owners.<sup>16</sup>

- On November 13, 2017 petitioners, including Appalachian Voices and the Sierra Club, filed a timely request for rehearing of the order.
- On December 13 2017, FERC issued a tolling order.<sup>17</sup>
- Meanwhile, FERC authorized the pipeline company to proceed with construction—issuing notices to proceed with construction of facilities associated with the Project on January 22 and 29, and February 8, 9, 12, 13, 14, 15, and 16, 2018.
- On June 15, 2018, FERC rejected, dismissed, or denied all pending requests for rehearing.<sup>18</sup>
- On July 27, 2018, the United States Court of Appeals for the Fourth Circuit issued an order vacating decisions by the Department of Interior’s Bureau of Land Management and the Department of Agriculture’s Forest Service authorizing the construction of the MVP Project across federal lands.
- In response, on August 3, FERC issued a Stop Work Order halting construction activity along all portions of the MVP Project, acknowledging that it “has not obtained the rights-of-way and temporary use permits from the federal government needed for the Project to cross federally owned lands.”<sup>19</sup>
- August 29, 2018, FERC lifted the Stop Work Order in all Project areas except for federal lands, stating that “protection of the environment along the Project’s right-of-way across non-federal land is best served by completing construction and restoration activities as quickly as possible.” Because MVP had already cleared, graded, and installed temporary erosion control devices within “sixty-five percent of the right-of-way between Mileposts 77 and 303”, FERC argued that “maintaining the status quo” would likely pose threats to plant and wildlife habitat and adjacent waterbodies as long-term employment of temporary erosion control measures would subject significant portions of the route to erosion and soil movement” and that requiring “restoration of the entire right-of-way to pre-construction conditions would require significant additional construction activity” resulting in “further environmental impacts.”<sup>20</sup>
- In December 2018, the Virginia DEQ and Attorney General filed a lawsuit against MVP, documenting more than 300 violations between June 2018 and November 2018. The case is still pending.<sup>21</sup>

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<sup>16</sup> See *Mountain Valley Pipeline v. An Easement to Construct, Operate and Maintain An Easement*, Case No. 7:17-cv-00492 (W.D. Va. 2017); *Mountain Valley Pipeline, LLC, v. Simmons*, 307 F.Supp.3d 506 (N.D.W. Va. 2018); and *MVP v. Mc Million et al.*, Case No. 2:17-04214 (S.D. W. Va. 2017).

<sup>17</sup> See FERC Order Granting Rehearings for Further Consideration, Mountain Valley Pipeline, Docket No. CP16-10 and CP16-13, December 13, 2017.

<sup>18</sup> See FERC Order on Rehearing, Mountain Valley Pipeline, Docket No. CP16-10 and CP16-13, June 15, 2018.

<sup>19</sup> See Notification of Stop Work Order, Mountain Valley Pipeline, Docket No. CP16-10, August 3, 2018.

<sup>20</sup> See Partial Authorization to Resume Construction, Mountain Valley Pipeline, Docket No. CP16-10, August 29, 2018.

<sup>21</sup> See Press Release, *Attorney General Herring and DEQ File Lawsuit over Repeated Environmental Violations During Construction of Mountain Valley Pipeline*, Commonwealth of Virginia Office of the Attorney General, December 7, 2018.



- On October 2, 2018 federal court vacated the Army Corps of Engineer’s Nationwide 12 permit, finding that the Corps did not have the authority to approve stream crossing methods that were in violation of West Virginia Law.<sup>22</sup>

MVP continues to face serious legal challenges to its state and federal approvals and the future of the Project is very much in question. Had FERC not strategically used tolling to allow eminent domain and construction to prematurely advance, the environmental harms and violations of law already demonstrated could have been avoided.

### **Atlantic Coast Pipeline**

In the case of the Atlantic Coast Pipeline (ACP) Project (FERC Docket No. CP15-554), a new pipeline system consisting of approximately 600 miles of pipeline and other facilities running from West Virginia through eastern portions of Virginia and North Carolina, petitioners were held in legal limbo for 8 months while the pipeline company exercised eminent domain and FERC authorized notices to proceed with tree felling and construction.

- On October 13, 2017 FERC issued a certificate of public convenience and necessity for the ACP. Several parties filed timely requests for rehearing and motions to stay the Certificate Order.
- On December 11, 2017, FERC issued a tolling order of the requests for rehearing.<sup>23</sup>
- On January 19, February 12 and 16, 2018, while petitioners were held in legal limbo, FERC granted the company the first of many notices to proceed with construction of facilities associated with the Project.
- February 28, 2018, a Virginia court granted Atlantic Coast “immediate access” for tree-felling on 16 properties in Buckingham, Bath, Augusta and Highland counties.
- March 16 2018, the Virginia Department of Environmental Quality (VA DEQ) issued a violation notice for tree felling that occurred within wetland buffer zones and stream crossings that were supposed to be protected. The violation notice covered 15 separate incidents.<sup>24</sup>
- On August 10, 2018, FERC issued an order denying rehearing requests.

By the time FERC denied petitioners’ rehearing requests, the pipeline company had already taken private property through eminent domain and begun extensive work tree clearing, ground moving, trenching, and laying pipe in North Carolina and West Virginia. In West Virginia alone, ACP construction activity during the tolling order consisted of 30 miles of right-of-way clearing and excavation, extensive trenching, and deployment of over 30,000 feet of pipe in the construction corridor.<sup>25</sup>

<sup>22</sup> See Juan Carlos Rodriguez, *4<sup>th</sup> Circ. Nixes Army Corps Permit for \$3.5B Pipeline*, Law360, October 2, 2018.

<sup>23</sup> See Order for Rehearing, Atlantic Coast Pipeline, Docket No. CP15-554-003, December 11, 2017.

<sup>24</sup> See Commonwealth of Virginia Department of Environmental Quality Notice of Violation, Atlantic Coast Pipeline, Docket No. CP15-554-003, March 16, 2018.

<sup>25</sup> See *Atlantic Coast Pipeline: Timeline of Defiance*, Dominion Pipeline Monitoring Coalition, August 31, 2018.



Due to a series of legal decisions vacating critical permits for the project—including U.S. Fish and Wildlife Service (FWS) Incidental Take Statement, which authorized the ACP project to take certain species protected by the Endangered Species Act; an Army Corp’s Nationwide Permit 12; a National Park Service (NPS) right-of-way permit; and a Special Use Permit for national forest land from the US Forest Service (USFS) required to allow ACP to cross the Appalachian Trail and national forests—it is possible that the pipeline will never be built and that the harms inflicted on the public through eminent domain and construction have been completely unnecessary. Additionally, challenges to FERC’s certificate brought after the tolling order was lifted are still pending, and also may prevent the project from being built.<sup>26</sup>

### **Algonquin Pipeline Expansion - Algonquin Incremental Market (AIM)**

In response to a rehearing request submitted by Stop the Algonquin Pipeline Expansion (SAPE) on April 2, 2015, FERC issued a tolling order on May 1, 2015. As a result, SAPE was left without access to a legal remedy until FERC issued its Order Denying Rehearing on January 28, 2016. The Spectra AIM pipeline (FERC Docket No. CP14-96), which cuts through New York, Connecticut, Rhode Island, and Massachusetts, was largely constructed in the 10 months since SAPE issued its rehearing request and was then placed in legal limbo by FERC’s tolling order.

While FERC was “considering” the rehearing request, it allowed the pipeline company to seize private property and destroy homes, roads, and parklands.<sup>27</sup>

### **Atlantic Sunrise**

FERC tolled rehearing requests in the case of the Transco’s Atlantic Sunrise Pipeline (Docket No. CP15-138) for 9 months, allowing eminent domain and other significant construction activity to take place during tolling.<sup>28</sup> Legal challenges to the project are still pending before the courts.

### **Orion Pipeline Project**

The Tennessee Gas Pipeline Company, L.L.C (TGP), a subsidiary of Kinder Morgan Inc, filed an application with FERC for its proposed Orion Project on October 9, 2015 (FERC Docket No. CP16-4). In February 2017, DRN submitted a rehearing request, on the grounds that FERC was required to consider the cumulative effects of Orion and two other Tennessee projects because they are connected and clearly part of the same expansion project. On March 13, 2017, FERC issued a tolling order in response. On February 27, 2018, one year after the request was submitted, FERC denied DRN’s Rehearing Request.

### **NEXUS Project**

In an August 25, 2017 order, FERC granted NEXUS Gas Transmission, LLC (NEXUS) a certificate to construct and operate the NEXUS Project (FERC Docket No. CP16-22) in Ohio and Michigan. Multiple timely requests for rehearing were filed, challenging most aspects of the FERC’s review of the NEXUS Project, including the need for the project and the use of eminent domain. On July 25,

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<sup>26</sup> See *Atlantic Coast Pipeline- Risk Upon Risk*, Oil Change International, March 2019.

<sup>27</sup> Stripping People’s Rights Attachment 4, Akiko Matsuda, *FERC Denies Rehearing Request on Algonquin Pipeline Expansion*, the Journal News, January 29, 2016.

<sup>28</sup> Stripping People’s Rights Attachment 15, FERC Order Granting Rehearing for Further Consideration, Atlantic Sunrise Pipeline, Docket No. CP15-138, March 13, 2017.



2018, FERC issued an order denying all rehearing requests, excluding a request from the pipeline company.<sup>29</sup> During the 10 months that communities were held in legal limbo, NEXUS had exercised eminent domain and nearly completed construction of the pipeline.

### **Connecticut Expansion Project**

On March 11, 2016, FERC issued a certificate of public convenience and necessity authorizing Tennessee Gas Pipeline Company, L.L.C.'s request for construction and operation of the Connecticut Expansion Project. Petitioners filed timely requests for rehearing of the Order, which FERC tolled until August 25, 2017.<sup>30</sup> FERC's tolling order delayed a rehearing decision regarding the Project for over sixteen months, during which time it authorized tree clearing and construction for the project, including through a two-mile stretch of conservation land protected under the Massachusetts Constitution in Otis State Forest.

### **PennEast Pipeline Project**

FERC continues its use of tolling of tolling orders unabated. The PennEast Pipeline (FERC Docket No. CP15-558) was tolled for 6 months, and prompted the filing of rehearing requests on the tolling orders issued which then themselves became the subject of tolling orders that had to be challenged with rehearing requests, demonstrating the never-end cycle of rehearing and tolling that this tolling order strategy inspires.

- On January 19, 2018, the Commission issued an order under section 7(c) of the Natural Gas Act authorizing PennEast Pipeline Company, LLC (PennEast).
- The Delaware Riverkeeper Network filed a rehearing request on January 24, 2018 with others, including the state of New Jersey following suit.
- On February 22, 2018, FERC issued a tolling order.<sup>31</sup>
- On March 16, 2018, the Delaware Riverkeeper Network sought rehearing of the February 22 tolling order.
- On April 13, 2018, FERC issued a second order tolling the rehearing request for the February tolling order
- On May 8, 2018, Delaware Riverkeeper Network sought rehearing of the April Tolling Order.
- On May 30, FERC denied the Delaware Riverkeeper Networks request for rehearing of the April tolling order, but the original February 22 tolling order requesting rehearing on the FERC Certificate remained in place.
- August 13, 2018 FERC denied the Certificate rehearing requests submitted by the Delaware Riverkeeper Network, the state of New Jersey and others.
- The case was immediately challenged in court with challenges by multiple parties pending.

As FERC Commissioner Glick points out, the tolling of this project is especially concerning given the unusual level of uncertainty and fundamental concerns regarding the project. Two of the five

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<sup>29</sup> See Order on Rehearing, Docket Nos. CP16-22-001; CP16-23-001; CP1624-001; and CP16-102-001, July 25, 2018.

<sup>30</sup> See Order on Rehearing, Tennessee Gas Pipeline, Docket No. CP14-529-001, August 25, 2017.

<sup>31</sup> Stripping People's Rights Attachment 19, Statement of FERC Commissioner Richard Glick on PennEast Pipeline, Docket No. CP15-558-002, May 30, 2018.



Commissioners issued concurrences to the Certificate Order in order to highlight serious concerns they had. In addition, one Commissioner dissented. Immediately following FERC's certificate approval, PennEast filed nearly 200 eminent domain cases in PA and NJ and has been granted access to survey and construct in both states.

As Commissioner Glick explains:

“...It is nonetheless critical that the Commission respond to rehearing requests as quickly as possible, especially where—as here—parties have raised serious questions regarding the Commission's conclusion that a new natural gas pipeline facilities needed and in the public interest.

Until the Commission issues its ultimate order on rehearing, the NGA precludes parties from challenging the Commission's decision in federal court. However, the pipeline developer has the right to pursue eminent domain and, in many cases, to begin construction on the new pipeline facility while the Commission addresses the rehearing requests. As a result, **landowners, communities, and the environment may suffer needless and avoidable harm while the parties await their opportunity to challenge the Commission's certificate decision in court.**

This proceeding, in particular, illustrates the need for prompt action on rehearing requests. As I explained in my dissent from the underlying order, I disagree with the Commission's finding that the PennEast Project is needed and in the public interest. I believe that the Commission's reliance on affiliate precedent agreements is, without more, insufficient to demonstrate that a new natural gas pipeline is needed. I also have serious concerns regarding the Commission's practice of issuing conditional certificates—which, notwithstanding their name, vest the pipeline developer with full eminent domain authority—in cases where the record does not contain adequate evidence to conclude definitively that the pipeline is in the public interest.

In short, when the Commission issues a tolling order, it is critical that the Commission issue a subsequent order addressing the merits of the rehearing request as expeditiously as reasonably possible in order to both protect the public from unnecessary harm and permit the parties to timely seek their day in court. (emphasis added and citations removed).<sup>32</sup>

### **Legal Limbo is a Strategy**

Delaware Riverkeeper Network is unaware of any non-industry aggrieved party who has actually been granted a request for rehearing in the history of FERC's existence. As a result, the denial of the rehearing request is a foregone conclusion. The only rationale for FERC to delay issuing its denial response is to allow the pipeline project to advance through eminent domain and construction without being impeded by successful legal challenges. The only other possible justification for tolling may be to grant FERC more time to attempt to justify its Certificate decisions after-the-fact, thereby increasing its chances of defeating a later legal action by the public. Other than these two options of benefit to the pipeline companies and FERC, there is no good reason for tolling orders.

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<sup>32</sup> Stripping People's Rights Attachment 19, Statement of FERC Commissioner Richard Glick on PennEast Pipeline, Docket No. CP15-558-002, May 30, 2018.



## **FERC Indiscriminately and Inconsistently Interprets Legislative Language to Support Pipeline Approval**

The New York Attorney General's office has noted that while FERC is generous with itself in interpreting the timeline mandates on rehearing requests, it gives no such leniency to the States – this obvious difference in how FERC applies the law to itself and others is noteworthy. Here is how the NY Attorney General describes it:<sup>33</sup>

*“Congress gave FERC 30 days to “act” on a rehearing request, or the request would be “deemed to have been denied.” 15 U.S.C. § 717r(a). This Congressional language clearly requires that FERC either grant or deny a rehearing request with 30 days, so that judicial review of the underlying order can proceed in a timely way. Yet FERC regularly uses tolling orders to unilaterally delay judicial review by months, without applicant or party consultation, allowing natural gas infrastructure to be substantially completed before a Court can even review the FERC order authorizing such construction.”*

*“In the context of the Clean Water Act, FERC has concluded that similar language imposes a hard limit on a state’s consideration of an application. Specifically, Clean Water Act § 401(a) requires a State to “act” on an application for a certification with “a reasonable period of time (which shall not exceed one year)” or the certification requirements are deemed waived. 33 U.S.C. § 1341(a)(1). FERC has described this waiver language of section 401(a)(1) as “unambiguous.” Order Denying Rehearings and Motions to Stay, 161 FERC ¶ 61,186, at ¶38, Docket No. CP16-17-003, Millennium Pipeline Co., LLC (Nov. 15, 2017). Moreover, FERC has stated that “the length of the section 401 waiver period is one year” and “that the deadlines prescribed by federal law . . . are binding,” Order on Petition for Declaratory Order, 162 FERC ¶61,014, at ¶ 20, Docket No. CP18-5-000, Constitution Pipeline Co., LLC (Jan. 11, 2018). And yet when interpreting the Natural Gas Act’s similar mandate to “act” on a rehearing request within 30 days, FERC condones its own indefinite delay of judicial review, and harm from that delay, through the use of tolling orders.”*

### **Attachments:**

Stripping People’s Rights Attachment 1, Comments of the New York Attorney General, Docket No. PL18-1, July 2018.

Stripping People’s Rights Attachment 2, Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC, Docket Nos. CP15-554-002; CP15-555-001; and CP15-556-001, August 10,

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<sup>33</sup> Stripping People’s Rights Attachment 1, Comments of the New York Attorney General, Docket No. PL18-1, July 2018.

2018.

Stripping People's Rights Attachment 3, People's Hearing Testimony of Maya van Rossum, the Delaware Riverkeeper, on behalf of the Delaware Riverkeeper Network, December 2, 2016.

Stripping People's Rights Attachment 4, Akiko Matsuda, *FERC Denies Rehearing Request on Algonquin Pipeline Expansion*, the Journal News, January 29, 2016.

Stripping People's Rights Attachment 5, Earthjustice Motion for Stay, Constitution Pipeline, Docket Nos. CP13-499 and 13-502, January 11, 2016.

Stripping People's Rights Attachment 6, Earthjustice Response to Supplemental Information, Constitution Pipeline, Docket No. CP13-499, January 15, 2016.

Stripping People's Rights Attachment 7, Catskill Mountainkeeper *et al.*, Press Release, February 18, 2016.

Stripping People's Rights Attachment 8, Stop the Pipeline, Statement in Opposition to Request for Partial Notice to Proceed, Docket No. 13-499, January 12, 2016.

Stripping People's Rights Attachment 9, Brief of Petitioner Stop the Pipeline, Docket Nos. 16-345 and 16-361, (2nd Cir.) July 12, 2016.

Stripping People's Rights Attachment 10, FERC Order Granting Rehearing for Further Consideration, Transcontinental Gas Pipeline, Docket No. CP13-551, February 18, 2015; and FERC Order Denying Rehearing, Transcontinental Gas Pipeline, Docket No. CP13-551, March 3, 2016.

Stripping People's Rights Attachment 11, FERC Order Granting Rehearing for Further Consideration, Tennessee Gas Pipeline, Docket No. CP11-161, July 9, 2012; and FERC Order On Rehearing, Tennessee Gas Pipeline, Docket No. CP11-161, January 11, 2013.

Stripping People's Rights Attachment 12, FERC Order Denying Rehearing, Algonquin Gas Transmission, Docket No. CP14-96, January 28, 2016.

Stripping People's Rights Attachment 13, Candy Woodall, *Constitution Pipeline delayed, but hundreds of trees already cut down*, Pennlive, March 10, 2016.

Stripping People's Rights Attachment 14, Jon Hurdle, *Maple syrup trees cut to make way for Constitution Pipeline*, State Impact March 2, 2016.



Stripping People's Rights Attachment 15, FERC Order Granting Rehearing for Further Consideration, Atlantic Sunrise Pipeline, Docket No. CP15-138, March 13, 2017.

Stripping People's Rights Attachment 16, Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, State Impact, July 12, 2018.

Stripping People's Rights Attachment 17, FERC Order Denying Rehearing, Sabal Trail, Docket No. CP15-17-001, March 29, 2016.

Stripping People's Rights Attachment 18, FERC Order Granting Rehearing for Further Consideration, Dominion Transmission, Docket No. CP14-497-001, June 27, 2016.

Stripping People's Rights Attachment 19, Statement of FERC Commissioner Richard Glick on PennEast Pipeline, Docket No. CP15-558-002, May 30, 2018.

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People's Dossier: FERC's Abuses of Power and Law  
→ Undermining Federal Authority

**FERC undermines the regulatory authority of sister federal agencies by granting permission for pipeline construction activity prior to the issuance of all required federal permits.**

While FERC suggests it will not advance pipeline projects to construction prior to the issuance of all required permits, in reality FERC routinely approves pipeline construction regardless of whether or not all required permits have been secured.

In other portions of this dossier, we have discussed how FERC undermines state Clean Water Act authority by issuing Certificates of Public Convenience and Necessity prior to receiving state Section 401 Certificates. FERC similarly undermines the authority of other federal agencies by issuing premature approvals.

In its Certificates issued to natural gas infrastructure companies, FERC routinely includes the provision:

**Prior to receiving written authorization from the Director of OEP [Office of Energy Projects] to commence construction of any project facilities, [pipeline company] shall file with the Secretary documentation that it has received all applicable authorizations required under federal law or evidence of waiver thereof.<sup>1</sup>**

While this provision gives the impression that a project will not commence until such time as it has fully secured all applicable agency review and approvals, has complied with all applicable laws, and has received all necessary permits and Clean Water Act Certifications, that is not in fact the case. Projects are routinely allowed to commence, with significant environmental impacts, prior to receiving all necessary approvals.

Tennessee Gas Pipeline Northeast Upgrade Project (FERC Docket No. CP11- 161):

The Tennessee Gas Pipeline Northeast Upgrade Project, which cut through significant areas of mature forest and forested wetlands on both public and private lands, was allowed to initiate tree felling prior to receiving Clean Water Act permits, including US Army Corps of Engineers Section 404 wetlands permits. The tree cutting significantly impacted water quality and was among the major causes of environmental harm and community impacts resulting from pipeline

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<sup>1</sup> Federal Authority Undermined Attachment 1,139 FERC ¶ 61,161, Tennessee Gas Pipeline Company, L.L.C., FERC Docket No. CP11-161, Order Issuing Certificate and Approving Abandonment, May 29, 2012, Appendix B, Environmental Conditions, ¶ 8 (emphasis in original).



construction. The project was challenged in *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014). The court ultimately ruled that FERC had violated federal law in its approval of the project. However, given FERC's incremental and premature approvals for the project to proceed with eminent domain and construction, by the time this legal victory was secured, FERC had already ensured the project was fully constructed and in service.

Sabal Trail (FERC Docket No. CP15-17)

FERC issued a Certificate for Sabal Trail in February 2016, before either an Army Corps CWA Section 404 permit or a Rivers and Harbors Act Section 408 permit were issued. FERC began approving construction in summer 2016, including through private lands for which no court date had yet been set to settle eminent domain claims.<sup>2</sup> Sabal Trail was later challenged in *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017). The court ultimately ruled that FERC had violated federal law in its approval of the project. However, given FERC's incremental and premature approvals for the project to proceed with eminent domain and construction, by the time this legal victory was secured, FERC had already ensured the project was fully constructed and in service. Had FERC honored the authority of its sister agency, it is likely that the legal victory, and the obligation to comply with federal law prior to final decisionmaking, would have had an affect on the outcome of whether, how, when, and/or where this pipeline was constructed.

Constitution Pipeline (FERC Docket CP13-499):

On December 2, 2014, FERC granted a Certificate to the Constitution Pipeline despite the fact that the US Army Corps of Engineers had not issued a Section 404 wetlands permits. Thereafter, FERC granted the company the power of eminent domain, a power that the company began to exercise that same month, with the filing of 125 complaints in condemnation against NY and PA landowners. FERC then expressly permitted the Constitution Pipeline to begin elements of construction. For example, on January 8, 2016, the Constitution pipeline submitted a request to proceed which was quickly granted by FERC.<sup>3</sup>

Amongst other actions, FERC authorized the Constitution Pipeline company to seize and cut eighty percent of the trees in a forest in New Milford Township, Pennsylvania. On March 1, 2016, the Constitution Pipeline company began to cut the forest that has belonged to the Holleran family since the 1950s -- they live on the property, enjoy its natural beauty, and operated a growing maple syrup business that was irreparably harmed by the pipeline company's FERC approved tree cutting and other actions. ([North Harford Maple](#)).

On April 22, 2016, New York denied CWA 401 Certification for the pipeline, and as a result, the project is permanently stalled. Without this approval, the project cannot be built and the devastation

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<sup>2</sup> Federal Authority Undermined Attachment 2, FERC Order Issuing Certificates to Sabal Trail Transmission, LLC; Docket No. CP15-17, Feb. 2 2016, pages 1-30 of 110.

<sup>3</sup> See FERC Partial Notice to Proceed with Tree Felling and Variance Requests, Docket No. CP13-499, January 29, 2016.



inflicted on the Hollerans and other Pennsylvania environments, communities, and homeowners—all inflicted without CWA 404 Certification—was for naught.

Atlantic Sunrise (FERC Docket No. CP15-138)

FERC issued a Certificate to Transcontinental Gas Pipeline Company, LLC (Transco) for the Atlantic Sunrise Project on February 3, 2017, before an Army Corps section 404 permit was issued. On February 22, 2017, Transco filed 13 eminent domain cases in Pennsylvania. FERC granted Transco a partial Notice to Proceed on March 24, 2017, authorizing construction activities in Maryland, Virginia, North Carolina, and South Carolina.

On March 31, the Army Corps informed Transco that they would not be able to authorize Section 10 and/or 404 authorizations for the project within 90 days of FERC's certificate. Transco had proposed alternative pipeline alignments just that month but had not provided the Corps with a delineation of all waters and wetlands within the newly proposed alternative or with updated information on impacts of mitigation. The Army Corps was also still in the process of collecting public comments on the proposed alternative, and was awaiting a review of the project's mitigation plans and wetland assessments from the U.S. Environmental Protection Agency.<sup>4</sup>

Despite the new alternative route and missing information on the project, eminent domain proceedings and construction continued at full force throughout the summer. On August 28, 2017, FERC authorized Transco to commence partial service of the project. It was not until portions of the project were nearly in service, on August 29, 2017, that the Army Corps granted Transco Section 10/404 Clean Water Act approvals. The ramification is to prevent full and fair decisionmaking by sister agencies and to prevent the opportunity for adjustments to the route and/or construction practices that would avoid environmental harms.

Atlantic Coast Pipelines (FERC Docket No. CP15-554): FERC issued a certificate of public convenience and necessity for the Atlantic Coast Pipeline (ACP) on October 13, 2017 before an Army Corps section 404 permit had been issued. The company had taken private properties through eminent domain and on January 19, 2018 FERC issued its first Partial Notice to Proceed with Tree Felling. On February 9, 2018, the Army Corps issued Nationwide Permit 12 under Section 404 of the Clean Water, however, the permits have since been suspended or vacated by the Corps.<sup>5</sup>

Mountain Valley Pipeline (FERC Docket No. CP16-13): On October 13, 2017, the Commission issued an order authorizing Mountain Valley Pipeline, LLC to construct and operate its proposed Mountain Valley Pipeline project (MVP) in West Virginia and Virginia without an Army Corps section 404 permit. Just two weeks after the FERC Certificate Order issued, MVP initiated condemnation actions in three federal district courts against nearly 300 property owners.<sup>6</sup> FERC

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<sup>4</sup> See Letter from the Army to Transcontinental Pipeline Company, Docket No. CP15-138, March 31, 2017.

<sup>5</sup> Federal Authority Undermined Attachment 3, Order Issuing Certificates, Atlantic Coast Pipeline, Docket Nos. CP15-554-000 and CP15-554-001, October 13, 2017.

<sup>6</sup> See *Mountain Valley Pipeline v. An Easement to Construct, Operate and Maintain An Easement*, Case No. 7:17-cv-00492 (W.D. Va. 2017); *Mountain Valley Pipeline, LLC, v. Simmons*, 307 F.Supp.3d 506 (N.D.W.

then authorized the pipeline company to proceed with construction—issuing notices to proceed with construction of certain facilities associated with the Project on January 22 and 29, and February 8, 9, 12, 13, 14, 15, and 16, 2018. While the Army Corps did issue Mountain Valley a Nationwide Permit 12 under Section 404 of the Clean Water on January 23, 2018, the permit has since been suspended.<sup>7</sup>

PennEast Pipeline Project (FERC Docket No. CP15-558): FERC issued a Certificate of Public Convenience and Necessity for the PennEast Pipeline Project on January 19, 2018, before the Delaware River Basin Commission (DRBC) has issued a docket, and before an Army Corps section 404 permit has been issued, and before New Jersey Clean Water Act 401 Certification and Clean Water Act 404 permitting (in NJ the state has 404 authority) have been granted. Immediately following FERC’s certificate approval, PennEast filed nearly 200 eminent domain cases in PA and NJ, and has been granted access to survey and construct in both states. Although PennEast has yet to request approval to proceed with tree felling—landowners have already suffered property losses for a project that is far from approved.

Further, FERC has undermined the authority of the DRBC, a cooperating agency on the PennEast Pipeline Project with jurisdiction, under federal law, over the project. On April 3, 2018, recognizing the pending threat of tree felling, the DRBC sent a letter to FERC requesting “that FERC amend its PennEast approval and condition future approvals of similar projects by prohibiting the project sponsors from felling trees within the Delaware River Basin ... until such time as the DRBC issues an approval for the project or activity.” The letter states:

The DRBC is concerned that the felling of trees for such projects months or years before essential DRBC and state approvals have been issued can cause unnecessary or long-term and potentially substantial impacts to water resources, particularly in the context of very large projects involving hundreds of river, stream and wetland crossings.

DRBC also offered “to coordinate a meeting among representatives of FERC and ... other resource agencies with jurisdictions overlapping DRBC’s to discuss a mutually agreeable approach to this concern.”

The Delaware Riverkeeper Network (DRN) discovered the letter through a Freedom of Information Act (FOIA) filed with the DRBC in September 2018. Upon finding that the letter had never been made available to the public through FERC’s docket for the project and that it had been ignored completely by FERC, DRN released the letter to the press. While FERC did not reply to the DRBC directly, a FERC spokesperson replied to press inquiries about the letter, claiming that it did “not adher[e] to our Rules of Practice and Procedure”, because of how it was addressed, and that “If the DRBC resends the letter in accordance with the Commission’s Rules of Practice and Procedure, their request ... will be taken into consideration.”

The DRBC learned that FERC had refused to consider their request for procedural reasons through

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Va. 2018); and *MVP v. Mc Million et al.*, Case No. 2:17-04214 (S.D. W. Va. 2017).

<sup>7</sup> Federal Authority Undermined Attachment 4, Order Issuing Certificates and Granting Abandonment Authority, Docket Nos. CP16-10-000 and CP16-13-000, October 13, 2017.

FERC's statements to the press, and promptly resubmitted their request to FERC on September 27, 2018<sup>8</sup> (noting that per their own Rules of Practice and Procedure, FERC should have notified DRBC directly that their letter was rejected). FERC has yet to respond to the DRBC request.

### **Partial Construction is a Strategy**

FERC permission to proceed with tree felling enables pipeline companies to argue that they have already made major investments in the construction of a project and the agencies reviewing the approvals are now compelled to issue permits regardless of potential agency concerns. And so premature approval and initiation of construction becomes an incentive for other agencies to truncate their reviews, as stopping a project that has already started and the remediation of harm already inflicted are both highly unlikely.

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#### **Attachments:**

Federal Authority Undermined Attachment 1, 139 FERC ¶ 61,161, Tennessee Gas Pipeline Company, L.L.C., FERC Docket No. CP11-161, Order Issuing Certificate and Approving Abandonment, May 29, 2012, Appendix B, Environmental Conditions, ¶ 8 (emphasis in original).

Federal Authority Undermined Attachment 2, FERC Order Issuing Certificates to Sabal Trail Transmission, LLC; FERC Docket No. CP15-17, Feb. 2 2016, pages 1-30 of 110.

Federal Authority Undermined Attachment 3, Order Issuing Certificates, Atlantic Coast Pipeline, Docket Nos. CP15-554-000 and CP15-554-001, October 13, 2017.

Federal Authority Undermined Attachment 4, Order Issuing Certificates and Granting Abandonment Authority, Docket Nos. CP16-10-000 and CP16-13-000, October 13, 2017.

Federal Authority Undermined Attachment 4, Order Issuing Certificates and Granting Abandonment Authority, Docket Nos. CP16-10-000 and CP16-13-000, October 13, 2017.

Federal Authority Undermined Attachment 5, Letter from the Delaware River Basin Commission to FERC, Docket No. CP15-558, September 27, 2018.

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<sup>8</sup> Federal Authority Undermined Attachment 5, Letter from the Delaware River Basin Commission to FERC, Docket No. CP15-558, September 27, 2018.

## People's Dossier: FERC's Abuses of Power and Law → **Undermining State Authority**

### **FERC Improperly Strips States of Their Legal Authority in the Certification Process**

The Clean Water Act (CWA) prohibits FERC from issuing a Certificate of Public Convenience and Necessity (Certificates) prior to receiving a Clean Water Act Section 401 Certification from states impacted by a proposed project.

- Section 401 of the CWA states: “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.” 33 U.S.C. § 1341(a)(1).
- Several courts, including the Supreme Court, have elaborated on the CWA’s authority, stating:
  - “without [Section 401] certification, FERC lacks authority to issue a license.”<sup>1</sup> and
  - Section 401 “requires States to provide a water quality certification *before* a federal license or permit can be issued....”<sup>2</sup>

In addition, this legal authority preserved by the terms of the Clean Water Act, is specifically referenced and preserved in the federal Natural Gas Act.

Despite the clear legal mandate that State Section 401 Certification should precede federal approvals, FERC, with court acquiescence, circumvents the requirement by issuing conditional Certificates -- including language that the FERC Certificate is conditional on a company securing state CWA 401 Certification. While this “conditional” language is used to rationalize FERC’s advance approvals, FERC’s failure to fully enforce the condition undermines the truthfulness of the rationalization. In fact, FERC does not fully enforce the conditional mandate before allowing pipeline companies to exercise the power of eminent domain, to engage in preliminary construction activities such as tree felling, or to undertake full construction on some segments of the project prior to securing CWA 401 Certifications from all impacted states. In fact, FERC often wastes no time in authorizing the use of eminent domain and irreparable aspects of construction such as tree clearing, once the FERC Certificate has been issued, but prior to state CWA 401 Certification from all affected states,<sup>3</sup> sometimes issuing them just hours after receiving a request.<sup>4</sup>

As a result, FERC undermines the rights of states to prevent pipeline construction activities that will result in violation of state water quality standards by using their CWA 401 Certification authority to reject a project outright or to mandate modifications regarding the route, construction practices

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<sup>1</sup> *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

<sup>2</sup> *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 707 (1994) (emphasis added).

<sup>3</sup> State Authority Undermined Attachment 1, FERC Partial Notice to Proceed with Construction Activities, FERC Docket No. CP14-17, January 9, 2015, and State Authority Undermined Attachment 2, FERC Authorization to Commence Construction, Tree Clearing, and Use of Variances, FERC Docket No. CP11-161, December 14, 2012.

<sup>4</sup> State Authority Undermined Attachment 3, Rover’s Request to Fell Trees, FERC Docket Nos. CP15-93, CP15-94, and CP15-96, and FERC Partial Notice to Proceed with Tree Felling, February 13, 2017.



and/or mitigation obligations. More recently, FERC has overtly stripped a state of its CWA 401 Certification authority by rejecting the state's denial of such a certification.

***By way of explicit examples and the resulting harms:***

Northern Access 2016 Project (FERC Docket No. CP15-115):

- ⇒ In early 2016, National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively National Fuel) submitted 401 Water Quality Certification application materials to NYSDEC, seeking the state's approval under the CWA to construct and operate the Northern Access 2016 Project, which would carry fracked gas from Pennsylvania to Canada via New York. National Fuel supplemented the application multiple times.
- ⇒ On January 20, 2017, the NYSDEC and National Fuel entered into a written agreement that for the purposes of CWA decisionmaking, both parties agreed that the date of application submission would be deemed to be April 8, 2016, "[t]hereby extending the date the NYSDEC has to make a final determination on the application until April 7, 2017".<sup>5</sup>
- ⇒ On January 25, 2017 NYSDEC published noticed that the application was finally deemed complete.<sup>6</sup>
- ⇒ On February 3, 2017, FERC issued Certificates of Public Convenience and Necessity to National Fuel.<sup>7</sup>
- ⇒ On April 7, 2017, within one year from the agreed upon date for application submission, NYSDEC denied National Fuel's application for 401 Certification and for stream and wetlands disturbance permits after finding that "the Application fails to demonstrate compliance with New York State water quality standards" and "fails to avoid or adequately mitigate adverse impacts to water quality and associated resources."<sup>8</sup>

National Fuel and Empire appealed the NYSDEC denial of the 401 Certification. But inexplicably, while the court case was ongoing, FERC in August of 2018 overturned NYSDEC's denial, falsely asserting that the state had not met the one year time frame established for review and either approval or denial, totally ignoring the legally arrived at agreement between the state and National Fuel. August 14, 2018, the state urged FERC to reconsider its overturning of the state denial by file a rehearing request. Thereafter, in February 2019 the Second Circuit vacated the state 401 Certification denial, stating that "Although this is a close case, the denial letter here insufficiently explains any rational connection between facts found and choices made," and remanded the NYSDEC "to more clearly articulate its basis for the denial."<sup>9</sup> The court did not rule upon the one

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<sup>5</sup> State Authority Undermined Attachment 16, Water Quality Certification Application Receipt Date Agreement, New York State Department of Environmental Conservation and National Fuel Gas Corporation, Northern Access Pipeline, FERC Docket No. CP15-115, dated January 20, 2017.

<sup>6</sup> New York State Department of Environmental Conservation's Notice of Complete Application and Notice of Legislative Public Hearings, January 25, 2017, retrieved from: [https://www.dec.ny.gov/enb/20170125\\_not9.html](https://www.dec.ny.gov/enb/20170125_not9.html)

<sup>7</sup> FERC Order Granting Abandonment and Issuing Certificates, Northern Access 2016 Project, (FERC Docket No. CP15-115), August 3, 2018.

<sup>8</sup> State Authority Undermined Attachment 16, Letter from NYSDEC to National Fuel Gas Supply Corporation and Empire Pipeline, Inc., Water Quality Certification/Notice of Denial, April 7, 2017.

<sup>9</sup> See *National Fuel Gas Supply Corporation v. N.Y. State Department of Environmental Conservation*,

year issue.

Instead of providing the state with the opportunity to respond to the Court's request that NY state better explain how the pipeline would violate state environmental standards, on April 2, 2019 FERC issued an order denying the state rehearing.<sup>10</sup> NYSDEC responded that it "vehemently disagrees with FERC's decision" and that they are "reviewing FERC's misguided decision," and "will continue to vigorously defend our decision and our authority to protect New York State's water quality resources."<sup>11</sup>

The portrait painted by this case is that at every turn FERC sought to override the state's authority, even to the point of misrepresenting the truth in order to deny the state of NY its rightful legal authority pursuant to the federal Clean Water Act.

Sabal Trail (FERC Docket No. CP15-17): FERC issued a Certificate of Public Convenience and Necessity for Sabal Trail in February 2016, before CWA 401 Certifications were issued by Alabama and Georgia, and before an Army Corps section 404 permit was issued. FERC began approving construction in summer 2016, including through private lands for which no court date had yet been set to settle eminent domain claims.<sup>12</sup> Sabal Trail was later challenged in *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017). The court ultimately ruled that FERC had violated federal law in its approval of the project. However, given FERC's approvals that the project proceed with eminent domain and construction, by the time this legal victory was secured, FERC had already ensured the project was fully constructed and in service. Had FERC honored the rights of the states, it is likely that the legal victory, and the obligation to comply with federal law prior to final decisionmaking, would have had an affect on the outcome of whether, how, when, and/or where this pipeline was constructed.

PennEast Pipeline Project (FERC Docket No. CP15-558): FERC issued a Certificate of Public Convenience and Necessity for the PennEast Pipeline Project on January 19, 2018, before a CWA 401 Certification has been issued or denied by the state of New Jersey, before Pennsylvania has issued Chapter 105 Water Obstruction and Encroachment or Chapter 102 Erosion & Sediment Control permits that are a necessary condition for the legal viability of the PA 401 Certification, before the Delaware River Basin Commission has issued a docket for the project, and before section 404 permits have been issued. Immediately following FERC's certificate approval, PennEast filed nearly 200 eminent domain cases in PA and NJ, and has been granted access to survey in both states. The state of New Jersey has appealed all eminent domain decisions that impact preserved state lands, which is close to 100 properties, and the U.S. Court of Appeals for the Third Circuit has issued a stay on construction for those properties until the case is resolved. Private eminent domain

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No. 17-1164-cv (2d Cir. 2019).

<sup>10</sup> FERC Order Denying Rehearing, Northern Access 2016 Project, FERC Docket No. CP15-115, April 2, 2019

<sup>11</sup>As reported by Keith Goldberg, *FERC Won't Reconsider NY Pipeline Authority Ruling*, Law360, April 3, 2019, retrieved from: <https://www.law360.com/articles/1146011/ferc-won-t-reconsider-ny-pipeline-authority-ruling?copied=1>

<sup>12</sup> State Authority Undermined Attachment 7, FERC Order Issuing Certificates to Sabal Trail Transmission, LLC, FERC Docket No. CP15-17, pages 1-30 of 110, Feb. 2 2016.

challenges are still outstanding. The PennEast project is a major greenfields project currently under consideration by multiple regulatory agencies, Congressional action immediately on the issue of state's rights could have huge repercussions for the outcome of this project.

Constitution Pipeline (FERC Docket CP13-499):

On December 2, 2014, FERC granted a Certificate to the Constitution Pipeline despite the fact that New York State had not issued a CWA 401 Certification. Thereafter, FERC granted the company the power of eminent domain, a power that the company began to exercise that same month, with the filing of 125 complaints in condemnation against NY and PA landowners. FERC then expressly permitted the Constitution Pipeline to begin elements of construction. For example, on January 8, 2016, the Constitution pipeline submitted a request to proceed which was quickly granted by FERC.<sup>13</sup>

Amongst other actions, FERC authorized the Constitution Pipeline company to seize and cut eighty percent of the trees in a forest in New Milford Township, Pennsylvania. On March 1, 2016, the Constitution Pipeline company began to cut the forest that has belonged to the Holleran family since the 1950s -- they live on the property, enjoy its natural beauty, and operated a growing maple syrup business that was irreparably harmed by the pipeline company's FERC approved tree cutting and other actions. ([North Harford Maple](#)).

On April 22, 2016, New York denied CWA 401 Certification for the pipeline, and as a result, the project is permanently stalled.<sup>14</sup> Without CWA 401 Certification from New York State, the project cannot be built and the devastation inflicted on the Hollerans and other Pennsylvania environments, communities, and homeowners was for naught. The associated exercise of eminent domain on New York residents could also have been avoided. Even if New York approval were to be granted at some future time, the Hollerans and other Pennsylvanians had to prematurely suffer the environmental, economic and personal loss inflicted.

Despite New York's denials of Constitution's January 14 and February 25, 2016 requests to clear cut and start earth moving activities, and despite Constitution's lack of a New York CWA Section 401 Certification, the company started illegally clearing trees in New York.<sup>15</sup> Constitution went ahead with these activities in 2015 and 2016 in multiple towns and counties in New York, and when concerned residents and the New York Attorney General's Office made FERC aware of these activities, FERC did little to stop Constitution's illegal acts, resulting in the permanent loss of vast amounts of trees and devastating impacts to water quality.<sup>16</sup>

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<sup>13</sup> State Authority Undermined Attachment 4, FERC Partial Notice to Proceed with Tree Felling and Variance Requests, FERC Docket No. CP13-499, January 29, 2016.

<sup>14</sup> State Authority Undermined Attachment 5, Letter from NYSDEC to Constitution Pipeline Company, Water Quality Certification/Notice of Denial, April 22, 2016.

<sup>15</sup> State Authority Undermined Attachment 6, NY AG Notice of Complaint for Violations of Law and the Order Issuing Certificates of Public Convenience and Necessity, FERC Docket No. CP13-499, May 13, 2016.

<sup>16</sup> State Authority Undermined Attachment 6, NY AG Notice of Complaint for Violations of Law and the Order Issuing Certificates of Public Convenience and Necessity, FERC Docket No. CP13-499, May 13, 2016 and State Authority Undermined Attachment 11, Letter from Stop the Constitution Pipeline to NY Attorney General Eric Schneiderman, January 11, 2016.

The Constitution Pipeline Company challenged NY's CWA 401 Certification denial, but lost the case in the Second Circuit in 2017. The company's petition to appeal the decision was then rejected by the Supreme Court in May of 2018. Despite this clear confirmation of the state's power, FERC asked the court to remand the Constitution case to the agency so it could reconsider its decision to uphold the State denial of 401 Certification – it seems clear that FERC is seeking another bite at the apple and a new opportunity to consider stripping NY of its CWA legal authority and rights by waiving the state's denial of CWA 401 to the Constitution Pipeline. This action came after a separate unrelated case in the hydro-electric context yielded a court determination that when applications are withdrawn and then resubmitted the one year clock for state decisionmaking does not necessarily restart. In reaction to that unrelated case, FERC requested that the U.S. Court of Appeals for the D.C. Circuit to remand the case to FERC in order to allow it to reconsider whether NY waived its right to approve or deny the CWA 401 certification because the determination came within a year after an application re-submission rather than the original, flawed and deficient submission which was twice withdrawn and re-submitted by the applicant because of the many state-identified failings.

Valley Lateral Project, Millennium Pipeline Company (FERC Docket CP16-17):

In a recent and aggressive stripping of states' rights, FERC rejected New York's denial of a CWA 401 Certification for Millennium's Valley Lateral Pipeline project. Rather than honor New York's decision to deny the CWA 401 Certification, FERC rendered a determination that the state had waived its authority and therefore the denial was null and void.

FERC stripped the state of its legal rights by asserting that the applicable one year time period provided for CWA 401 decisionmaking began when Millennium first submitted its application to the state, rejecting the state's reasonable legal position that the clock only began ticking when the state issued a determination that the application was complete and complied with the state mandates regarding application information.<sup>17</sup>

At each stage of the legal battle between state and federal powers that ensued, FERC aggressively sought to subvert the states' rights—by unilaterally determining that NY, despite its ongoing vigilance with regards to the project, had waived its 401 Certification authority<sup>18</sup>—and to ensure its desired outcome, regardless of the legal outcome—by tolling the state's request for rehearing while pushing ahead with construction. FERC quickly granted the pipeline company authorization to begin construction before the state had the opportunity to make its case in court—thereby ensuring that even if the state was victorious in its legal position before the court, the decision would come too late to stop the pipeline's construction.

During the public comment period related to the 401 Certification proposal, NYSDEC received over 6,000 responses which informed the state's ultimate decision. FERC's efforts to undermine the state's rejection of 401 Certification has the very real and practical effect of also undermining the

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<sup>17</sup> State Authority Undermined Attachment 12, Denial of Section 401 Permit, New York State Department of Environmental Conservation, August 30, 2017.

<sup>18</sup> State Authority Undermined Attachment 13, Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act, Federal Energy Regulatory Commission, September 15, 2017.

right of community's to comment and be heard in the 401 Certification process. FERC's waiver of New York's Section 401 authority not only undermines the State's rights, but it has also taken from the people of New York their voice in this process.

Additionally, NY has chosen to ban shale gas fracking within the state and, as the NY Attorney General later commented, FERC "fails to appropriately consider state policies, such as state choices regarding our energy resource portfolios"<sup>19</sup> when approving pipelines.

Ultimately, on March 12, 2018, the Second Circuit determined that the clock on the CWA 401 review process begins when a state receives an application, regardless of its completeness, and that NY did, inadvertently, waive its CWA authority in this case. However, while this uncharted territory in CWA implementation was pending before the court, FERC, through its actions, made clear that it was siding with the pipeline company in seeking to undermine the rights of states to receive complete and accurate information so that it could engage in full and fair decisionmaking regarding CWA 401 Certification. And FERC, through its actions, also made clear that it intended to do everything within its power to allow Millennium to usurp New York State's right and responsibility to protect water quality, and to proceed with construction as quickly as possible so that even if the state was victorious in the courts, it wouldn't matter as the project would already be fully or significantly constructed.

In the end, with FERC leading the charge, the State of NY lost its legal ability to protect the natural resources, water quality standards, and residents of its state. This case helps to demonstrate why Congressional reforms that restore, honor and protect states' rights pursuant to Section 401 of the CWA are so essential.

Connecticut Expansion Project (FERC Docket No. CP14-529): On March 11, 2016, FERC issued a Certificate to the Tennessee Gas Pipeline company for the Connecticut Expansion Project before the state of Massachusetts issued or waived its CWA 401 Certification.<sup>20</sup>

Leidy Southeast project (FERC Docket No. 16-416): On December 18, 2014, FERC issued a Certificate to Transco Pipeline Company for its Leidy Southeast project before the state of Pennsylvania issued or waived CWA 401 Certification.<sup>21</sup>

Atlantic Coast Pipelines (FERC Docket No. CP15-554): FERC issued a certificate of public convenience and necessity for the Atlantic Coast Pipeline (ACP) on October 13, 2017 before CWA 401 Certifications were issued or waived by Virginia, North Carolina, or West Virginia; and before an Army Corps section 404 permit had been issued. The company has begun to take private

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<sup>19</sup> State Authority Undermined Attachment 17, Comments of the Attorney General of New York, FERC Docket No. PL18-1, July 25, 2018.

<sup>20</sup> State Authority Undermined Attachment 8, Carolyn Elefant, Press Release, *Notice of Intent to Sue FERC for Violating the Clean Water Act Filed by the Sandisfield Taxpayers Opposing the Pipeline*, March 21, 2016, and State Authority Undermined Attachment 9, Clarence Fanto, Berkshire Eagle, *Tennessee Gas Co. Wants Court's OK to Start Cutting Trees for Sandisfield Spur of Pipeline*, March 18, 2016.

<sup>21</sup> State Authority Undermined Attachment 10, Merits Brief of Delaware Riverkeeper Network and the Delaware Riverkeeper (D.C. Cir. 2016).

properties through eminent domain and FERC has continued to issue partial notices to proceed with tree felling for separate segments of the project without having received or maintained all approvals.

Mountain Valley Pipeline (FERC Docket No. CP16-13): On October 13, 2017, the Commission issued an order authorizing Mountain Valley Pipeline, LLC to construct and operate its proposed Mountain Valley Pipeline project (MVP) in West Virginia and Virginia without CWA 401 Certification approval in either state. West Virginia Department of Environmental Protection (WVDEP) had previously approved a 401 Certification for the Project on March 23, 2017, but on September 13, 2017, WVDEP filed a motion to vacate their previous approval, stating that “the information used to issue the Section 401 Certification needs to be further evaluated and possibly enhanced.” The MVP had also not yet obtained an Army Corps section 404 permit. Just two weeks after the FERC Certificate Order issued, and prior to receiving state 401 certifications, MVP initiated condemnation actions in three federal district courts against nearly 300 property owners.<sup>22</sup> While Virginia did grant a CWA 401 certification in December 2017, the Virginia DEQ and Attorney General filed a lawsuit against MVP in December 2018, after documenting more than 300 violations between June 2018 and November 2018 – a demonstration that even when there has been final state action pipeline companies can inflict significant environmental harm, making it all the more important for FERC to respect the CWA authority of states prior to FERC action.

**Attachments:**

State Authority Undermined Attachment 1, FERC Partial Notice to Proceed with Construction Activities, FERC Docket No. CP14-17, January 9, 2015.

State Authority Undermined Attachment 2, FERC Authorization to Commence Construction, Tree Clearing, and Use of Variances, FERC Docket No. CP11-161, December 14, 2012.

State Authority Undermined Attachment 3, Rover’s Request to Fell Trees, FERC Docket Nos. CP15-93, CP15-94, and CP15-96, and FERC Partial Notice to Proceed with Tree Felling, February 13, 2017.

State Authority Undermined Attachment 4, FERC Partial Notice to Proceed with Tree Felling and Variance Requests, FERC Docket No. CP13-499, January 29, 2016.

State Authority Undermined Attachment 5, Letter from NYSDEC to Constitution Pipeline Company, Water Quality Certification/Notice of Denial, April 22, 2016.

State Authority Undermined Attachment 6, NY AG Notice of Complaint for Violations of Law and the Order Issuing Certificates of Public Convenience and Necessity, FERC Docket No. CP13-499, May 13, 2016.

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<sup>22</sup> See *Mountain Valley Pipeline v. An Easement to Construct, Operate and Maintain An Easement*, Case No. 7:17-cv-00492 (W.D. Va. 2017), *Mountain Valley Pipeline, LLC, v. Simmons*, — F. Supp. 3d —, No. 1:17CV211, 2018 WL 701297 (N.D.W. Va. 2018) and *MVP v. Mc Million et. al*, CA 2:17-04214 (S.D. W. Va. 2017).



State Authority Undermined Attachment 7, FERC Order Issuing Certificates to Sabal Trail Transmission, LLC, FERC Docket No. CP15-17, pages 1-30 of 110, Feb. 2 2016.

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State Authority Undermined Attachment 10, Merits Brief of Delaware Riverkeeper Network and the Delaware Riverkeeper (D.C. Cir. 2016).

State Authority Undermined Attachment 11, Letter from Stop the Constitution Pipeline to NY Attorney General Eric Schneiderman, January 11, 2016.

State Authority Undermined Attachment 12, Denial of Section 401 Permit, New York State Department of Environmental Conservation, August 30, 2017.

State Authority Undermined Attachment 13, Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act, Federal Energy Regulatory Commission, September 15, 2017.

State Authority Undermined Attachment 14, Order Denying Rehearings and Motions to Stay, Federal Energy Regulatory Commission, November 15, 2017.

State Authority Undermined Attachment 15, New York State Department of Environmental Conservation Petition for Review of Waiver Order and Rehearing Denial, Second Circuit Court, November 20, 2017.

State Authority Undermined Attachment 16, Water Quality Certification Application Receipt Date Agreement, New York State Department of Environmental Conservation and National Fuel Gas Corporation, Northern Access Pipeline, FERC Docket No. CP15-115, dated January 20, 2017.

State Authority Undermined Attachment 16, Letter from NYSDEC to National Fuel Gas Supply Corporation and Empire Pipeline, Inc., Water Quality Certification/Notice of Denial, April 7, 2017.

State Authority Undermined Attachment 17, Comments of the Attorney General of New York, FERC Docket No. PL18-1, July 25, 2018.

***Complete People's Dossier: FERC's Abuses of Power and Law***

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## **FERC Fails to Hold Pipeline Companies Accountable for Violations of Environmental Protection Laws**

### **FERC consistently overlooks violations of law and/or degradation of the environment during pipeline construction**

Research by the Delaware Riverkeeper Network shows that FERC has only ever issued *one* civil penalty<sup>1</sup> for violations related to construction activity of a pipeline project, despite the fact that the applicable water protection laws and regulations are routinely violated during pipeline construction. In addition, when violations are identified, FERC does not issue stop work orders or mandate the company remedy the environmental harm and come into compliance with the law prior to continuing construction; instead, the pipeline company is allowed to simply continue with construction on the rest of the line.

It is not that FERC is not aware of the multitude of violations that take place during pipeline construction, it is that FERC fails to act upon, and often fails to even investigate, credible complaints of violation reported by local and state regulatory employees, as well as individuals, who often accompany their reports with photographic evidence.

FERC's inadequate response to violations not only results in continuing damage from the violations that take place, but there is no incentive for pipeline companies to ensure violations are avoided, or that the company self-identify, remedy, and remediate violations and damage as soon as a violation occurs.

A typical example of FERC's inexplicable reluctance to issue civil penalties for violations of environmental protection laws involves the construction of Tennessee Gas Pipeline Company's ("Tennessee") 300 Line Upgrade Project (*FERC Docket No. CP09-444*). By the end of the project, among other violations, FERC had recorded:

- 43 instances of silt laden water entering resources/depositing sediment off of the pipeline right-of-way,
- 15 instances of failures to properly install erosion controls or use best management practices to adequately protect resources,
- 9 instances of failures to properly install/maintain erosion controls resulting in impacts to resources,
- 6 instances of erosion/disturbance resulting from stormwater discharges off of the right-of-way, and
- at least 2 instances of in-stream work conducted in violation of fishery restrictions.

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<sup>1</sup> The one civil penalty levied for violations of law during pipeline construction was in 2019 for violation of wetlands protections by Algonquin Gas Transmission, LLC during construction of the Algonquin Incremental Market (AIM) pipeline project. See Algonquin Gas Transmission, LLC, Docket No. IN19-2-000, Order Approving Stipulation and Consent Agreement, 166 FERC ¶ 61,012 PDF (January 7, 2019)

FERC not only failed to issue any civil penalties relating to the multitude of recorded violations, FERC did not even issue a stop-work order that would require TGP to remedy the violations and environmental harm before allowing the pipeline company to proceed with ongoing construction activities. FERC did nothing to rectify the violations or the harms caused thereby, and in effect condoned and incentivized this behavior by the company.

### **FERC's failure to enforce against environmental violations is routine**

Examples of significant violations reported to, and ignored by FERC include items such as the following:

On June 25, 2013, Delaware Riverkeeper Network reported a pipeline company crew with two blue water hoses ... bypassing wetland protection measures ..., and discharging sediment-laden water directly into the wetland outside of the ROW footprint. Delaware Riverkeeper Network representatives approached (with pipeline security following) to videotape the violations and found the high-pressure hoses discharging sediment-laden water were flowing directly into the wetland, contrary to required best management practices (BMP). A contractor was then observed frantically trying to cut holes and insert hoses into the BMP device .... as required.... To Delaware Riverkeeper Network's knowledge, despite reports and evidence being given to FERC, no action was taken by FERC on this flagrant violation.

In addition to the obvious concerns this raises about a government agency's failures to appropriately act in the face of illegal activity it is responsible for overseeing, states often rely on FERC to ensure environmental compliance and count on FERC regulatory mandates to ensure protection of water resources and the environment – in both instances this reliance is misplaced.

FERC's compliance reports for the TGP 300 line and the Columbia 1278 line rarely listed non-compliance concerns, despite the fact that there had been dozens of documented instances of noncompliance, including photo and/or video proof, by either County Conservation District employees or the public. FERC's failure to enforce its own laws and regulations is particularly concerning given that violations of environmental laws and permitting are routine for the pipeline industry. For example:

- The Pike County (PA) Conservation District issued 21 notices of violation (NOV) from July 26, 2011 to June 21, 2013 for the Tennessee Gas 300 Line Upgrade. Of these 21 NOVs, 14 violations were for failure to maintain effective erosion and sediment controls (E&SCs); 14 violations were for presenting a potential for pollution to waters of the Commonwealth; 14 violations were for discharging sediment or other pollutants into waters; 17 violations were for failure to implement effective E&SC BMPs; 2 violations were for failure to provide temporary stabilization to earth disturbance; 2 violations were for failure to provide permanent stabilization to earth disturbance; and 21 violations of the Clean Streams Law. Altogether, there were a total of 84 violations.<sup>2</sup>

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<sup>2</sup> Violations Overlooked Attachment 1, Delaware Riverkeeper Network, *Field Monitoring Report: Pipeline Construction & Maintenance Irreparably Harms Rivers, Wetlands and Streams*, pgs.1-17

- From June 17, 2011 to April 27, 2012 there were 15 NOVs issued for the Columbia Line 1278 K pipeline. Of these 15 NOVs, there were 9 violations for failure to maintain effective E&SCs; 15 violations for presenting a potential for pollution to waters of the Commonwealth; 9 violations for discharging sediment or other pollutants into waters; 3 violations for failure to implement effective E&SCs; 9 violations for failure to provide temporary stabilization to earth disturbance; 6 violations for failure to comply with permit conditions; 7 violations for failure to implement effective post-construction stormwater management; and 15 violations of the Clean Streams Law. Altogether, there were a total of 73 violations.<sup>3</sup>

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**Attachments:**

Violations Overlooked Attachment 1, Delaware Riverkeeper Network, *Field Monitoring Report: Pipeline Construction & Maintenance Irreparably Harms Rivers, Wetlands and Streams*, pgs.1- 17 included of 350.

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included of 350.

<sup>3</sup> Violations Overlooked Attachment 1, Delaware Riverkeeper Network, *Field Monitoring Report: Pipeline Construction & Maintenance Irreparably Harms Rivers, Wetlands and Streams*, pgs.1-17 included of 350.