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164 FERC ¶ 61,100
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee, and Robert F. Powelson.

Atlantic Coast Pipeline, LLC	Docket Nos. CP15-554-002
Dominion Transmission, Inc.	CP15-555-001
Atlantic Coast Pipeline, LLC Piedmont Natural Gas Company, Inc.	CP15-556-001

ORDER ON REHEARING

(Issued August 10, 2018)

1. On October 13, 2017, the Commission issued an order under section 7(c) of the Natural Gas Act (NGA),[1] authorizing: (1) Atlantic Coast Pipeline, LLC (Atlantic) to construct and operate its new Atlantic Coast Pipeline Project (ACP Project); (2) Dominion Transmission, Inc. (DETI)[2] to make modifications to its existing facilities (Supply Header Project); and (3) Atlantic to lease capacity on the Piedmont Natural Gas Company, Inc. (Piedmont) system.[3]

2. Timely requests for rehearing of the Certificate Order were filed by: (1) Atlantic; (2) Demian Jackson;[4] (3) the Fairway Woods Homeowners Condominium Association; (4) Friends of Buckingham;[5] (5) Friends of Nelson;[6] (6) the North Carolina Utilities

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[1] 15 U.S.C. § 717f(c) (2012).

[2] On May 12, 2017, Dominion Transmission, Inc. changed its name to Dominion Energy Transmission, Inc.

[3] *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2018) (Certificate Order).

[4] Demian Jackson and Bridget Hamre jointly sought rehearing individually and as owners of Nelson County Creekside, LLC.

[5] Friends of Buckingham include Heidi Dhivya Berthoud, Quin Robinson, Robert Day Jr., Carlos Arostegui, Mercedes Villamán, Jeffrey Fogel, Ruby Laury, John Laury, Irene Leech, and Swami Dayananda.

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Commission (NCUC); (7) Public Interest Groups;[7] (8) Satchidananda Ashram-Yogaville, Inc. (Ashram-Yogaville); (9) Shenandoah Valley Network;[8] (10) Sierra Club;

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[6] Friends of Nelson include Peter A. Agelasto III, Jonathan M. Ansell, Eleanor M. Amidon, Dawn Averitt, Richard G. Averitt III, Dr. Sandra Smith Averitt, Richard Averitt, Jill Averitt, Constance Brennan, James Bolton, Joyce D. Burton, Anne C. Buteau, Heidi Louise Cochran, R. Craig Cooper, Michael Craig, Lee M. Diehl, Pamela S. Farnham, Carolyn Fischer, Friends of Nelson, Charles R. Hickox, Dima Holmes, Horizons Village Property Owners Association, Inc., Emily Scruby Irvine, Demian K. Jackson, Bridget K. Hamre, Janice Jackson, Chapin Wilson Jr., Nancy Kassam-Adams, Shahir Kassam-Adams, James F. Kelly, Kathleen L. Kelly, Eric Lawson, Lisa Y. Lefferts, Elizabeth Leverone, Paul Leverone, Janet Lychock, David Drake Makel, Carolyn J. Maki, William S. Moore, Carol M. Moore, Beth Musick, Susan H Norton, Anne Norwood, Ken Norwood, James W. Raup, Jane W. Raup, Charlotte L. Rea, Ernest Reed, Randy Reed, Rockfish Valley Foundation, Victoria C. Sabin, Joanna Salidis, Alice Scruby, Timothy Mark Scruby, Marilyn Shifflett, Hershel Spears, Darlene Spears, Lawrence Stopper, Sharon Summers, Elizabeth Hunter Tabony, Lisa K. Tully, Carl Van Doren, Michelle Van Doren, Katherine P. Versluys, Vici Wheaton, the Wintergreen Country Store Land Trust, and Kenneth M. Wyner.

[7] The Public Interest Groups include: North Carolina Waste Awareness and Reduction Network (NC WARN); Clean Water for North Carolina; Concerned Citizens of Tillery; the NC Alliance to Protect the People and the Places we Live; Beyond Extreme Energy; Triangle Women's International League for Peace and Freedom; Haw River Assembly; Winyah Rivers Foundation, Inc.; River Guardian Foundation; 350.org Triangle; the Chatham Research Group; and the Blue Ridge Environmental Defense League and its chapters, Protect Our Water! (Faber, VA), Concern for the New Generation (Buckingham, VA), Halifax and Northampton Concerned Stewards (Halifax and Northampton, NC), No Pipeline Johnston County (Johnston, NC), Nash Stop the Pipeline (Spring Hope, NC), Wilson County No Pipeline (Kenly, NC), Sampson County Citizens for a Safe Environment (Faison, NC), No Fracking in Stokes (Walnut Cove, NC), and Cumberland County Caring Voices (Eastover, NC).

[8] Shenandoah Valley Network sought rehearing with Highlanders for Responsible Development; Virginia Wilderness Committee; Shenandoah Valley Battlefields Foundation; Natural Resources Defense Council; Cowpasture River Preservation Association; Friends of Buckingham; Chesapeake Bay Foundation; Appalachian Voices; Center for Biological Diversity; Chesapeake Climate Action Network; Friends of Nelson; Sierra Club; Wild Virginia; West Virginia Rivers Coalition; Richard Averitt; Louis Ravina; William Mcclain; Dawn Averitt; Judy Allen; Wade and Elizabeth Neely; William Limpert; Jackie Tan; Elfrieda McDaniel; Bold Alliance; Nelson Hilltop LLC; Rockfish Valley Foundation; and Rockfish Valley Investments.

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(11) William Limpert; and (12) Friends of Wintergreen and Wintergreen Property Owners Association, Inc. (Friends of Wintergreen).

3. On November 14, 2018, Anne Bryan and Lakshmi Fjord separately filed late requests for rehearing. On November 20, 2018, Friends of Nelson filed a corrected copy of their earlier request for rehearing.

4. All of the requests for rehearing with the exception of that filed by Atlantic, NCUC and Demian Jackson, also sought a stay of the Certificate Order.

5. For the reasons discussed below, the requests for rehearing are rejected, dismissed, denied, or granted, and the requests for stay are dismissed as moot.

I. Background

6. The ACP Project is a new pipeline system designed to provide up to 1.5 million dekatherms (Dth) per day of firm transportation service to the Southeast United States. The project includes approximately 600 miles of 16- to 42-inch-diameter pipeline running from Harrison County, West Virginia, to eastern portions of Virginia and North Carolina. The project also includes 130,345 horsepower (hp) of compression at three compressor stations, interconnection facilities, metering and regulation facilities, and other appurtenant facilities. Atlantic has executed precedent agreements with six shippers for 1.44 million Dth per day of firm transportation service on the project: (1) Duke Energy Progress, LLC (Duke Energy Progress);[9] (2) Duke Energy Carolinas, LLC (Duke Energy

[9] Duke Energy Progress, an electricity generator and provider, is a subsidiary of Duke Energy Corporation, which has a 47 percent ownership in Atlantic through its subsidiaries.

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Carolinas);[10] (3) Piedmont;[11] (4) Virginia Power Services Energy Corp., Inc.;[12] (5) Public Service Company of North Carolina, Inc.;[13] and (6) Virginia Natural Gas Company, Inc.[14]

7. The Supply Header Project is designed to provide up to approximately 1.5 million Dth per day of firm transportation service from supply areas on the existing DETI system to the ACP Project. DETI will add approximately 38 miles of 30-inch-diameter pipeline looping facilities, install four units totaling 69,200 hp of compression at three existing compressor stations, make upgrades to its system in Pennsylvania and West Virginia, and abandon two certificated gathering compressor units in Wetzel County, West Virginia. DETI executed a binding precedent agreement with Atlantic for 1,450,882 Dth per day of firm transportation service.

8. Atlantic will lease 100,000 Dth per day on Piedmont's system between its point of interconnection with the ACP Project in Johnson County, North Carolina, and a delivery point with the Public Service Company of North Carolina, Inc. near Clayton, North Carolina. Piedmont is a local distribution company and a public utility under Chapter 62 of the North Carolina General Statutes and its North Carolina rates and services are regulated by the North Carolina Utility Commission.

9. In the Certificate Order, the Commission agreed with the conclusions presented in the final Environmental Impact Statement (EIS) and adopted the EIS's recommended mitigation measures as modified in the order. The Certificate Order determined that the

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[10] Duke Energy Carolinas, an electricity generator and provider, is also a subsidiary of Duke Energy Corporation.

[11] On October 3, 2016, Duke Energy Corporation purchased Piedmont, a local distribution company.

[12] Virginia Power Services Energy Corp., Inc. is a subsidiary of Virginia Electric and Power Company, which is a subsidiary of Dominion Resources, Inc. Dominion Resources, Inc. has a 48 percent ownership interest in Atlantic through its subsidiaries. Virginia Power Services Energy Corp., Inc. provides fuel, including natural gas, to Dominion's affiliates.

[13] Public Service Company of North Carolina, Inc., a local distribution company, is a subsidiary of SCANA Corporation and has no affiliation with the ACP Project's sponsors.

[14] Virginia Natural Gas Company, Inc., a local distribution company, is a subsidiary of The Southern Company, which has a five percent ownership interest in Atlantic through Maple Enterprise Holdings, Inc.

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ACP and Supply Header Projects, if constructed and operated as described in the Final EIS, are environmentally acceptable actions and required by the public convenience and necessity. The Certificate Order also granted Piedmont an NGA section 7 limited jurisdiction certificate to carry out its responsibilities under the lease agreement.

II. Procedural Matters

A. Party Status

10. Under section 19(a) of the NGA and Rule 713(b) of the Commission's regulations, only a party to a proceeding may request rehearing of a final Commission decision.[15] Any person seeking to intervene to become a party must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.[16]

11. Clean Water for North Carolina, Concerned Citizens of Tillery, the NC Alliance to Protect the People and the Places We Live, Beyond Extreme Energy, Triangle Women's International League for Peace and Freedom, Haw River Assembly, River Guardian Foundation, 350.org Triangle, and the Chatham Research Group never sought to intervene in these proceeding, but joined the rehearing request of NC WARN and the Blue Ridge Environmental Defense League, who are parties to this proceeding. Because the aforementioned groups are not parties to this proceeding, they may not seek rehearing of the Certificate Order, and we therefore dismiss the pertinent rehearing requests as to them. We nonetheless note that by answering issues raised by parties below, we also address non-party commenters' concerns.

B. Untimely Requests for Rehearing

12. Pursuant to section 19(a) of the NGA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order.[17] Under the Commission's regulations, read in conjunction with section 19(a), the deadline to seek

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[15] 15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713(b) (2017).

[16] 18 C.F.R. § 385.214(a)(3) (2017).

[17] 15 U.S.C. § 717r(a) (2012) ("Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order"). The Commission has no discretion to extend this deadline. *See, e.g., Transcontinental Gas Pipe Line Co.*, 161 FERC ¶ 61,250, at P 10 n.13 (2017) (*Transco*) (collecting cases).

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rehearing was 5:00 p.m. U.S. Eastern Time, November 13, 2017.[18] Ms. Bryan[19] and Ms. Fjord[20] failed to meet this deadline. Because the 30-day rehearing deadline is statutorily based, it cannot be waived or extended, and their requests must be rejected as untimely.[21] For this same reason, we reject Friends of Nelson's[22] corrected request for rehearing filed on November 20, 2017.

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[18] Rule 2007 of the Commission's Rules of Practice and Procedure provides that when the time period prescribed by statute falls on a weekend, the statutory time period does not end until the close of the next business day. *See* 18 C.F.R. § 385.2007(a)(2) (2017). The Commission's business hours are "from 8:30 a.m. to 5:00 p.m.," and filings – paper or electronic – made after 5:00 p.m. will be considered filed on the next regular business day. *See* 18 C.F.R. §§ 375.101(c), 385.2001(a)(2) (2017).

[19] Ms. Bryan filed her request at 10:19 p.m. on November 13, 2017.

[20] Ms. Fjord filed her request at 5:02 p.m. on November 13, 2017.

[21] *See, e.g.*, *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1005 (D.C. Cir. 1987) (stating that "the Commission cannot waive the jurisdictional bar of [section] 19" of the Natural Gas Act); *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (holding that an identical 30-day time requirement to file a request for rehearing in the Federal Power Act (FPA) "is as much a part of the jurisdictional threshold as the mandate to file for a rehearing"); *Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1st Cir. 1978) (holding that the rehearing provision of the NGA is "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion"); *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,160, at P 3 (2012); *La. Energy and Power Auth.*, 117 FERC ¶ 61,258, at 62,301 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 10 (2005); *Texas-New Mexico Power Co. v. El Paso Elec. Co.*, 107 FERC ¶ 61,316, at P 22 (2004); *California Independent System Operator Corp.*, 105 FERC ¶ 61,322, at P 9 (2003); *Tennessee Gas Pipeline Co.*, 95 FERC ¶ 61,169, at 61,546-47 (2001); *Columbia Gas Transmission Corp.*, 40 FERC ¶ 61,195, at 61,655 (1987). The rehearing provisions in the FPA and the NGA are identical and read *in pari materia*. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (because relevant provisions of the Natural Gas Act and Federal Power Act "are in all material respects substantially identical," it is "established practice" to cite "interchangeably decisions interpreting the pertinent sections of the two statutes").

[22] Friends of Nelson filed two requests for rehearing on November 13, 2017, and November 20, 2017. We only reject its November 20, 2017 filing as untimely and will address its timely November 13, 2017 request in this order.

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C. Answers

13. On December 12, 2017, Atlantic filed a motion for leave to answer and answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure[23] prohibits answers to a request for rehearing. Accordingly, we reject Atlantic's filing.

D. Motions for Stay

14. The Fairway Woods Homeowners Condominium Association, Friends of Buckingham, Friends of Nelson, Public Interest Groups, Ashram-Yogaville, Shenandoah Valley Network, Sierra Club, William Limpert, and Friends of Wintergreen request that the Commission stay the Certificate Order pending issuance of an order on rehearing. This order addresses and denies or dismisses their requests for rehearing; accordingly, we dismiss the requests for stay as moot.

E. Evidentiary Hearings

1. The Commission Appropriately Denied an Evidentiary Hearing

15. Shenandoah Valley Network contends that the Certificate Order erred by denying its June 21, 2017 Motion for an Evidentiary Hearing.[24] Shenandoah Valley Network argues that an evidentiary hearing must be set to resolve substantial disputed issues regarding the market demand for natural gas in the regions to be served by the ACP Project and the ability of Atlantic's precedent agreements with affiliated shippers to demonstrate need for the project sufficient to support a finding of public convenience and necessity.[25] Shenandoah Valley Network contends that the Commission's failure to hold an evidentiary hearing prevented it from adequately assessing the parties' conflicting contentions and rendered the Certificate Order arbitrary and capricious.[26]

16. The Certificate Order appropriately denied Shenandoah Valley Network's request.[27] An evidentiary, trial-type hearing is necessary only where there are material

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[23] 18 C.F.R. § 385.713(d)(1) (2017).

[24] Shenandoah Valley Network Rehearing Request at 7, 41.

[25] *Id.* at 41-42.

[26] *Id*. at 26.

[27] Certificate Order, 161 FERC ¶ 61,042 at P 23.

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issues of fact in dispute that cannot be resolved on the basis of the written record.[28] No party has raised a material issue of fact that the Commission cannot resolve on the basis of the written record. As demonstrated by the discussion below, the existing written record provides a sufficient basis to resolve the issues relevant to this proceeding. The Commission has done all that is required by giving interested parties an opportunity to participate through evidentiary submission in written form.[29] Therefore, we will deny the request for a trial-type evidentiary hearing.

2. The Commission Will Not Reopen the Record to Allow Petitioners to Submit New Evidence

17. On rehearing, Shenandoah Valley Network attempts to submit new evidence from proceedings before the Virginia State Corporation Commission to support its claim that the ACP Project is not needed.[30] Specifically, the Shenandoah Valley Network contends that the evidence includes a statement that the project would serve existing generation facilities in Virginia, contrary to Atlantic Coast's statements in its application for a certificate of public convenience and necessity.[31] The Shenandoah Valley Network also contends there is evidence that the existing Transco system can serve Dominion Energy Virginia's needs, thus negating the need for the ACP Project.[32] Further, the Shenandoah Valley Network argues that contrary to Atlantic's claims of customer savings, there would actually be a net cost to ratepayers.[33] Shenandoah Valley Network also argues that Dominion Energy Virginia overstated the demand for electricity in its service territory, thereby suggesting that there is no true market demand for the project.[34]

18. As the Commission previously has explained, the Commission's procedures encourage the timely submission of evidence and, consequently, the Commission adheres

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[28] *See, e.g.*, *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, at P 15 (2012).

[29] *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

[30] Rehearing Request of Shenandoah Valley Network at 17, 25-37.

[31] *Id.* at 25.

[32] *Id.* at 27.

[33] *Id.*

[34] *Id.* at 29.

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to the general rule that the record once closed will not be reopened.[35] Because Rule 713(d)(1) of the Commission's Rules of Practice and Procedure[36] prohibits answers to requests for rehearing, "allowing parties to introduce new evidence at the rehearing stage would raise concerns of fairness and due process for other parties to the proceeding"[37] and "would frustrate needed administrative finality."[38] We thus dismiss Shenandoah Valley Network's argument,[39] and reject the Shenandoah Valley Network's request to supplement or reopen the record.

19. As we stated above, and in the Certificate Order, the issues raised in this proceeding, including those concerning the need for the proposed projects, have been adequately argued, and a determination can be made on the basis of the existing record in this proceeding. All interested parties have been afforded a complete opportunity to present their views to the Commission through numerous written submissions. We find that there is no material issue of fact that we cannot resolve on the basis of the written record in the proceeding. Therefore, we will reject Shenandoah Valley Network's attempt to submit new evidence at the rehearing stage.

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[35] *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,014, at P 24 (2010) (citing *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh'g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986)).

[36] 18 C.F.R. § 385.713(d) (2017).

[37] *Kinetica Deepwater Express*, 155 FERC ¶ 61,183, at P 20 (2016).

[38] *PaTu Wind Farm, LLC v. Portland General Electric Company, LLC*, 151 FERC ¶ 61,223, at P 42 (2015). *See also Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010).

[39] *Northeast Utilities Serv. Co.*, 136 FERC ¶ 61,123, at P 9 (2011) ("We will deny rehearing. CRS' attempt to introduce new evidence and new claims at the rehearing stage is procedurally improper"); *Commonwealth Edison Co.*, 127 FERC ¶ 61,301, at P 14 (2011) ("We reject as untimely the new affidavit which ComEd includes in its request for rehearing. Parties are not permitted to introduce new evidence for the first time on rehearing."); *New York Indep. Sys. Operator*, 112 FERC ¶ 61,283, at P 35 n.20 (2005) ("parties are not permitted to raise new evidence on rehearing. To allow such evidence would allow impermissible moving targets").

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F. Due Process

1. Access to Documents

20. Shenandoah Valley Network argues the Commission violated its due process obligations when it issued the Certificate Order without granting participants access to precedent agreements filed as privileged pursuant to 18 C.F.R. § 388.112 (2017) and Exhibit G diagrams filed as Critical Energy Infrastructure Information (CEII) pursuant to 18 C.F.R. § 388.113 (2017).[40] Shenandoah Valley Network explains that denying it access to the precedent agreements and Exhibit G flow diagrams deprived it and the public at large an opportunity to challenge Atlantic's assertions about need for the project.[41]

21. The Commission's regulations provide avenues specifically intended for parties to a proceeding who desire access to privileged documents and CEII. Parties to a proceeding, like Bold Alliance, an intervenor and co-filer to Shenandoah Valley Network's request for rehearing, may seek access to the documents directly from the applicant.[42] To the Commission's knowledge, Bold Alliance did not avail itself of these opportunities. Rather, Bold Alliance sought access to the Exhibit G flow diagrams using a process outside of these proceedings. On May 26, 2017, Bold Alliance requested access to the Exhibit G flow diagrams through the Commission's CEII process, pursuant to the provisions of 18 C.F.R § 388.113(g)(5).[43] On November 17, 2017, four days after the deadline to file requests for rehearing, the Commission produced these documents to Bold Alliance. Bold Alliance did not challenge the CEII decision.

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[40] Rehearing Request of Shenandoah Valley Network at 175-178.

[41] *Id*.

[42] Section 388.112(b)(2) of the Commission's regulations provides a process for parties to gain access to privileged material directly from the applicants. Section 388.113(g)(4) provides a process for parties to gain access to CEII material directly from the applicants. Section 388.113(g)(4) provides that "[a]ny person who is a participant in a proceeding or has filed a motion to intervene or notice of intervention in a proceeding may make a written request *to the filer* for a copy of the complete CEII version of the document without following the procedures outlined in paragraph (g)(5) of this section." 18 C.F.R. 388.113(d)(4) (2017) (emphasis added).

[43] 18 C.F.R. § 388.113(g) (2017). The process outlined at section 388.113(g)(5) is reserved for "any requester not described above in paragraphs (g)(1) through (4) of this section." As the Bold Alliance is a "participant in a proceeding" as described in section 388.113(g)(4), the section 388.113(g)(5) process, pursued outside these proceedings by Bold Alliance, was not applicable or required.

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22. Section 388.113 (pertaining to CEII documents) is crafted to strike a balance between preventing the risk of harm if sensitive materials are disclosed to bad actors and allowing parties to fully participate in Commission proceedings.[44] The availability of these procedures assures parties the opportunity to access materials, consistent with this balance. Where the parties did not attempt to avail themselves of the full extent of the Commission's available procedures, there can be no demonstration that the procedures themselves, or the Commission's implementation of them, violates due process.

23. Bold Alliance also sought access to the precedent agreements.[45] Because the precedent agreements themselves were not filed with the Commission in Docket No. CP15-554, the Commission did not prevent access to those documents.[46] Atlantic, as part of its publicly-filed application, included a summary of the relevant terms of the precedent agreements, on which the Commission relied.[47]

24. The Commission's action here is consistent with *Myersville Citizens for a Rural Community, Inc. v. FERC*[48] and *Minisink Residents for Environmental Preservation and*

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[44] *See, e.g., Regulations Implementing FAST Act Section 610030 - Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information*, Order No. 833, FERC Stats. & Regs. ¶ 31,389, at P 26 (2016) (cross-referenced at 157 FERC ¶ 61,123) (observing that, with respect to a party's concerns over due process, "under the amended CEII regulations the Commission will balance the need to protect critical information with the potential need of parties participating in Commission proceedings to access CEII"). *See* Final EIS at 4-590 ("The Commission, like other federal agencies, is faced with a dilemma in how much information can be offered to the public while still providing a significant level of protection to the facility. Consequently, the Commission has taken measures to limit the distribution of information to the public regarding facility design and layout location information to minimize the risk of sabotage. Facility design and location information has been removed from the Commission's website to ensure that sensitive information filed as Critical Energy Infrastructure Information is not readily available to the public ….").

[45] The FOIA request for precedent agreements was submitted by Carolyn Elefant. Letter to Carolyn Elefant, FOIA No. FY17-102, Second Rolling Response, June 2, 2018. Her submissions contained no indication of whether she was requesting these documents in her individual capacity or on behalf of an organization, but Ms. Elefant is the attorney on record for Bold Alliance.

[46] *See* FOIA No. FY17-102, Third Rolling Response, June 2, 2018 at n.2.

[47] Atlantic Application at 8, 12, Exhibit I (Sept. 18, 2015).

[48] 783 F.3d 1301, 1327 (D.C. Cir. 2015) (*Myersville*).

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Safety v. FERC.[49] There the court explained that "[d]ue process requires only a 'meaningful opportunity' to challenge new evidence."[50] In those cases, the court found no due-process violations because the parties had access to all record evidence filed by the applicants and relied on by the Commission, including confidential filings, prior to the filing due dates for requests for rehearing. The parties in *Minisink Residents* and *Myersville* properly sought access to CEII material from the applicant through a non-disclosure agreement in compliance with Commission regulations.[51] Shenandoah Valley Network and Bold Alliance likewise had access to the precedent agreement information on which the Commission relied, and had the opportunity to obtain the CEII materials, but did not follow the prescribed procedures.

25. In any event, the court in *Minisink Residents* held that "to the extent Petitioners assert that other potentially relevant documents were improperly withheld as confidential, the contention that such documents might support [their] position [is] far too speculative to provide a basis for setting aside [the Commission's] judgment."[52] Likewise here, Shenandoah Valley Network has not adequately explained how the documents it seeks would have affected its rehearing request or otherwise altered the outcome here. With respect to the CEII Exhibit G flow diagrams, Shenandoah Valley Network states that this information would have helped it independently verify need for the ACP Project and can be used to show that a pipeline has been segmented, is overbuilt, has feasible alternatives, or shows that the gas is bound for export. However, Shenandoah Valley Network does not explain why the information in the record and available to the public was insufficient for this purpose or how it would have used the engineering data they believed would be provided by the flow diagrams to aid their assessment. Thus, the Shenandoah Valley Network has not established, in light of its decision not to use the defined procedures for obtaining the Exhibit G flow diagrams, any violation of their due process rights.

2. <u>Missing Information</u>

26. Sierra Club asserts that the order violates due process guaranteed by the Fifth Amendment of the U.S. Constitution by relying on environmental information and reasoning not presented in the applications, Draft EIS, or other documents available for

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[49] 762 F.3d 97, 115 (D.C. Cir. 2014) (*Minisink Residents*).

[50] *Myersville*, 783 F.3d at 1327; *see also Minisink Residents*, 762 F.3d at 115.

[51] *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at PP 50-52 (2013); *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,198, at PP 71-73 (2012).

[52] *Minisink Residents*, 762 F.3d at 115 (quoting *B & J Oil*, 353 F.3d at 78) (internal quotations omitted).

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public comment.[53] Sierra Club states that the Commission should have made any additional environmental information available for public review either through a supplemental EIS or through a formal evidentiary hearing.[54]

27. We dismiss Sierra Club's due process claims. Sierra Club states that the "order relies on extensive evidence" not made available to the public for comment. In support, it offers nothing more than a bare list of paragraphs in the Certificate Order, and an attempt to incorporate by reference comments from another pleading.[55] We reject Sierra Club's attempt to "incorporate by reference arguments from a prior pleading" because "such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant."[56] Moreover, Sierra Club is obligated to "set forth specifically the ground or grounds upon which" its request for rehearing is based.[57] Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not meet this requirement.

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[53] Rehearing Request of Sierra Club at 1-2.

[54] *Id*. at 3-6.

[55] *Id*. at 1, 2, 5 (citing Rehearing Request of Shenandoah Valley Network at 45-49, 58-61).

[56] *San Diego Gas and Electric Co. v. Sellers of Market Energy*, 127 FERC ¶ 61,269, at P 295 (2009). *See Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 (2016) ("the Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent. Bootstrapping of arguments is not permitted."). *See also ISO New England, Inc*., 157 FERC ¶ 61,060 (2016) (explaining that the identical provision governing requests for rehearing under the Federal Power Act "requires an application for rehearing to 'set forth specifically the ground or grounds upon which such application is based,' and the Commission has rejected attempts to incorporate by reference grounds for rehearing from prior pleadings"); *Alcoa Power Generating, Inc*., 144 FERC ¶ 61,218, at P 10 (2013) ("The Commission, however, expects all grounds to be set forth in the rehearing request, and will dismiss any ground only incorporated by reference.") (citations omitted).

[57] 15 U.S.C. § 717r(a) (2012). *See also Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22 (D.C. Cir. 2006) ("Each quoted passage states a conclusion; neither makes an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows 'specifically . . . the ground on which rehearing [i]s being sought'").

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28. In any event, all of the environmental documents discussed in Sierra Club's citations were publicly available, and Sierra Club does not dispute that it had access to those documents, including the opportunity to present argument based on those documents on rehearing. Moreover, as discussed below,[58] any additional environmental information submitted to the record between the issuance of the Draft EIS and the Final EIS did not cause the Commission to make "substantial changes in the proposed action," nor did it present "significant new circumstances or information relevant to environmental concerns."[59] Further, to the extent the Commission relied on additional environmental information in the Certificate Order, this information was disclosed and available for comment on rehearing. Thus, we find that Sierra Club had an opportunity to comment on additional environmental information and there was no violation of its due process rights.

G. <u>The Commission's Use of a Tolling Order is Lawful</u>

29. Friends of Nelson and Sierra Club argue that under the NGA, the Commission must act upon a request for rehearing in 30 days after it is filed. Friends of Nelson argues that while the Commission has typically issued tolling orders to grant the Commission additional time beyond the 30-day requirement, in this instance, the issuance of a tolling order will be considered a denial of rehearing because their members will suffer irreparable harm from the implementation of the ACP Project.[60] Friends of Nelson and Sierra Club state that if the Commission issues a tolling order in response to its request for rehearing it will seek immediate review of the Certificate Order in the Court of Appeals.[61]

30. We disagree with Friends of Nelson and Sierra Club. Petitioners do not argue that they have been deprived of the opportunity to seek review of the Certificate Order; rather, they assert that the potential delay in receiving a substantive order on rehearing will deprive them of their right to seek judicial review of the public use determination.[62]

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[58] *See infra* PP 108-109.

[59] 40 C.F.R. § 1502.9(c)(1) (2017).

[60] Rehearing Request of Friends of Nelson at 56; Rehearing Request of Sierra Club at 6-7.

[61] Rehearing Request of Friends of Nelson at 56-57; Rehearing Request of Sierra Club at 6-7.

[62] Rehearing Request of Friends of Nelson at 56-57; Rehearing Request of Sierra Club at 7.

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31. As the Supreme Court has recognized, "due process is flexible and calls for such procedural protections as the particular situation demands."[63] We have found that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[64] Petitioners fail to show that they have been substantially prejudiced by the Commission following its longstanding practice of issuing a tolling order while affording the multiple rehearing requests in this proceeding the careful consideration they are due.[65] The District of Columbia Circuit Court of Appeals (D.C. Circuit) recently reaffirmed its finding that the Commission's use of tolling orders is permissible under the Natural Gas Act, which requires only that the Commission "act upon" a rehearing request within 30 days, 15 U.S.C. § 717r(a), not that it finally dispose of it.[66]

H. Public Participation

32. Mr. Limpert contends that the Commission did not encourage public participation and was actively biased.[67] Mr. Limpert states that the Commission did not expedite the National Environmental Policy Act (NEPA) process, or designate a person to expedite the NEPA process, contrary to its obligations.[68] Mr. Limpert states that the Commission's

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[63] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[64] *Transco, LLC*, 161 FERC ¶ 61,250 (citing *Phillips v. Internal Revenue Comm'r*, 283 U.S. 589, 596-97 (1931)). *See also Council of & for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533-34 (D.C. Cir. 1983) ("In order to state a legally cognizable constitutional claim, appellants must allege more than the deprivation of the *expectation* that the agency will carry out its duties.") (emphasis in original); *Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983) (holding that plaintiff's property right, while delayed, was not extinguished, and that no deprivation of property interest occurred).

[65] *Arthur Murray Studio of Wash. Inc. v. FTC*, 458 F.2d 622 (5th Cir. 1972) (showing of substantial prejudice is required to make a case of denial of procedural due process in administrative proceedings).

[66] *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir., 2018) (citing *Cal. Co. v. FPC*, 411 F.2d 720, 722 (D.C. Cir. 1969) (per curiam); *accord Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969)).

[67] Rehearing Request of Mr. Limpert at 6.

[68] *Id.*

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public relations staff made public participation more difficult, and informed Mr. Limpert that he would have to send hundreds of letters to other intervenors, but only later did Mr. Limpert understand that this meant he would simply have to email copies of his comments made in the docket to the list of other intervenors in this proceeding. Mr. Limpert further contends, when he asked Commission staff to explain an issue in one of Atlantic's technical filings, staff responded that it is not its responsibility to interpret the filing.[69] Mr. Limpert argues that the Commission must interpret these filings as part of the Commission's review for the project.[70]

33. We disagree with Mr. Limpert's characterizations. The Commission's rules and processes actively encourage public participation.[71] This includes hosting public forums and offering the public the opportunity to intervene and submit comments. That Mr. Limpert misunderstood the requirements associated with being an intervenor does not mean that the Commission actively prohibited his participation. Mr. Limpert had as much of an opportunity to participate as other intervenors. There is no evidence Mr. Limpert has been prejudiced. He successfully intervened in, and is a party to, this proceeding, participated actively in the proceedings by filing numerous comments, and is currently seeking rehearing.

34. Moreover, it is the Commission's role to analyze and access independent filings by private entities, but not to interpret them for the public outside of our formal documents. The applicant is in the best position to explain the contents of its application, and Mr. Limpert had the opportunity to contact Atlantic directly to obtain the requested clarification and explanations. Although Mr. Limpert argues the Commission should inform the public of its interpretation of such filings, the Commission did so, in its detailed Draft EIS, Final EIS, and Certificate Order.

35. Further, Mr. Limpert argues the Commission violated NEPA requirements for public participation.[72] Mr. Limpert argues that the Commission's regulations[73] permit the Commission to designate a person to expedite the NEPA process, and the regulation lists instances in which designation may occur, such as when a project has great public interest, and thus, the ACP Project falls into this category. Mr. Limpert argues that despite the fact

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[69] *Id.*

[70] *Id.*

[71] 18 C.F.R. § 157.21(b)(11) (2017); 18 C.F.R. § 380.9 (2017).

[72] Rehearing Request of Mr. Limpert at 6.

[73] *Id.* (citing 40 C.F.R. § 1501.8(b)(3) (2017)).

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that the ACP Project meets this criteria, the Commission did not appoint a person to expedite the NEPA process.

36. Section 1501.8 of the Council on Environmental Quality's regulations encourages agencies to set time limits "appropriate to individual actions."[74] While not invoking the non-mandatory provisions of section 1501.8, we note that the Commission's procedures for processing certificate applications, including our pre-filing process in which the applicants here participated, are designed with the intent that applications be processed in as timely a manner as practical and appropriate. In light of the quantity and range of issues raised by commenters, no additional actions by the Commission were necessary.

I. The Certificate Order Was Issued With a Requisite Quorum

37. Mr. Limpert argues that the Commission did not have the authority to issue a certificate of public convenience and necessity to the Atlantic because the Commission only had three Commissioners at that time, two of which were newly appointed to the Commission.[75] Mr. Limpert states the decision regarding the project must be investigated to determine if illegal actions were taken to manipulate the vote.[76]

38. We disagree. Pursuant to section 401(b) of the Department of Energy Organization Act,[77] a full Commission comprises five members, and a quorum for the transaction of business shall consist of at least three members present.[78] All three Commissioners were properly appointed by the President, with the advice and consent of the Senate, and had taken the oath of Office at the time the Certificate Order was approved and issued.[79] The Commission's quorum was satisfied, and the votes for the order were legally cast; there is no evidence of illegal manipulation.

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[74] 40 C.F.R. § 1501.8.

[75] Rehearing Request of Mr. Limpert at 6-7.

[76] *Id*.

[77] 42 U.S.C. § 7171(b) (2012).

[78] *Id.* § 7171(e); *accord* 18 C.F.R. § 375.101(e) (2017).

[79] *Id.*. § 7171(e).

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III. Discussion

A. The Natural Gas Act

1. The Certificate Order Complied With The Certificate Policy Statement

39. Several petitioners argue that the Commission violated the NGA by failing to establish that the ACP Project is required by present or future public convenience and necessity.[80] Specifically, petitioners assert that the Commission: (1) inappropriately relied on precedent agreements between Atlantic and its corporate affiliates to establish need;[81] (2) failed to consider market studies showing that there is sufficient infrastructure to meet current demand;[82] (3) did not appropriately evaluate whether renewable resources and existing infrastructure could meet demand;[83] and (4) did not balance the public need for the project with the harm to landowners and communities.[84]

a. Atlantic Appropriately Demonstrated Project Need

40. Petitioners state that the precedent agreements between Atlantic and its affiliated shippers were insufficient to demonstrate need under the Certificate Policy Statement.[85]

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[80] Rehearing Request of Shenandoah Valley Network at 12-37; Rehearing Request of Fairway Woods Condominium Association at 8-16; Rehearing Request of Public Interest Groups at 13-16; Rehearing Request of Ashram-Yogaville at 8-9; Rehearing Request of Friends of Nelson at 14-16, 38-40; Rehearing Request of Mr. Limpert at 2.

[81] Rehearing Request of Shenandoah Valley Network at 13-16; Rehearing Request of Fairway Woods Condominium Association at 10; Rehearing Request of Public Interest Groups at 13-14; Rehearing Request of Ashram-Yogaville at 8; Rehearing Request of Mr. Limpert at 2.

[82] Rehearing Request of Shenandoah Valley Network at 17-25; Rehearing Request of Fairway Woods Condominium Association at 10, 12; Rehearing Request of Mr. Limpert at 2.

[83] Rehearing Request of Shenandoah Valley Network at 22-23; Rehearing Request of Public Interest Groups at 15; Rehearing Request of Mr. Limpert at 2.

[84] Rehearing Request of Fairway Woods Condominium Association at 9, 15-16; Rehearing Request of Ashram-Yogaville at 12-13; Rehearing Request of Friends of Nelson at 39-40.

[85] Rehearing Request of Shenandoah Valley Network at 14 (citing *Certification of*

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Petitioners argue that the Certificate Policy Statement recognized that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project . . . raises additional questions when the contracts are held by pipeline affiliates."[86] Further, Fairway Woods Condominium Association states that Atlantic is building the project for purely speculative purposes.[87] Shenandoah Valley Network argues that a goal of the Certificate Policy Statement was to reduce the Commission's sole reliance on precedent agreements, but the Commission continues to adhere to that "outdated" approach.[88]

41. We disagree and affirm the Certificate Order's finding that even though all but one of the ACP Project's shippers are affiliated with Atlantic, the Commission is not required to look behind precedent agreements to evaluate project need.[89] The Certificate Policy Statement established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than

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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) (Order Clarifying Policy Statement); Rehearing Request of Fairway Woods Condominium Association at 10; Rehearing Request of Public Interest Groups at 13-14; Rehearing Request of Ashram-Yogaville at 8; Rehearing Request of Mr. Limpert at 2.

[86] Rehearing Request of Shenandoah Valley Network at 20 (quoting Certificate Policy Statement, 88 FERC at 61,747); Rehearing Request of Fairway Woods Condominium Association at 12-13.

[87] Rehearing Request of Fairway Woods Condominium Association at 15.

[88] Rehearing Request of Shenandoah Valley Network at 14-15.

[89] Certificate Order, 161 FERC ¶ 61,042 at P 54. *See* Certificate Policy Statement, 88 FERC at 61,748 (explaining that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project); *see also id.* at 61,744 (the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts) (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)). *See also Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158, at P 23 (2018) ("The mere fact that Florida Power & Light is an affiliate of Florida Southeast does not call into question the need for the project or otherwise diminish the showing of market support."); *Millennium Pipeline Co. L.P.*, 100 FERC ¶ 61,277, at P 57 (2002) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project.").

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continuing to require that a percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[90] These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to customers, or a comparison of projected demand with the amount of capacity currently serving the market.[91] The Commission stated that it would consider all such evidence submitted by the applicant regarding project need. Nonetheless, the policy statement made clear that, although companies are no longer required to submit precedent agreements for Commission review, these agreements are still significant evidence of project need or demand.[92] As the court held in *Minisink Residents*,[93] the Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers.[94] Moreover, it is current Commission policy not to look behind precedent or service agreements to make judgments about the needs of individual shippers.[95] Likewise, *Minisink Residents* confirms that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers.[96]

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[90] Certificate Policy Statement, 88 FERC at 61,747. As we explained in the Certificate Order, prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. The 96-percent subscribed ACP Project would have satisfied this prior, more stringent, requirement. Certificate Order, 161 FERC ¶ 61,042 at n.83.

[91] Certificate Policy Statement, 88 FERC at 61,747.

[92] *Id*. at 61,747.

[93] 762 F.3d 97.

[94] *Minisink Residents*, 762 F.3d at 110 n.10; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*) (finding that pipeline project proponent satisfied Commission's "market need" requirement where 93 percent of the pipeline project's capacity had already been contracted for).

[95] Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC at 61,316). *See Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at P 57 ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project").

[96] *Minisink Residents*, 762 F.3d at 112 n.10; *see also Myersville*, 783 F.3d at 1311 (rejecting argument that precedent agreements are inadequate to demonstrate market need).

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42. A shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor.[97] When considering applications for new certificates, the Commission's sole concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.[98] We affirm the Certificate Order's determination that in this proceeding no such allegations have been made, nor have we found that the project sponsors have engaged in any anticompetitive behavior.[99] Atlantic held both non-binding and binding open seasons for capacity on the ACP Project and all potential shippers had the opportunity to contract for service.

43. As a result of the open season, Atlantic entered into long-term, firm precedent agreements with six shippers[100] for 1.44 million Dth per day of firm transportation service[101] – 96 percent of the ACP Project's total design capacity of 1.5 million Dth per day. This information was publicly available in the record.[102] The Certificate Order found, and we agree, that evidence of contracts entered into by the shippers are the best evidence that additional gas will be needed in the markets served by the ACP Project.[103]

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[97] *See, e.g., Greenbrier Pipeline Co., LLC*, 101 FERC ¶ 61,122, at P 59 (2002), *reh'g denied*, 103 FERC ¶ 61,024 (2003).

[98] *See* 18 C.F.R. § 284.7(b) (2017) (requiring transportation service to be provided on a non-discriminatory basis).

[99] Certificate Order, 161 FERC ¶ 61,042 at P 59.

[100] Duke Progress, Duke Energy Carolinas, Piedmont, Virginia Power Services Energy Corp., Inc.; Public Service Company of North Carolina, Inc.; and Virginia Natural Gas Company, Inc.

[101] Firm transportation service is given the highest priority on the pipeline. Customers holding firm transportation service contracts pay a monthly rate to reserve capacity on the pipeline, whether or not the customer uses this capacity, for a defined contract term. The firm transportation rate is generally not subject to reduction or interruption.

[102] *See* Atlantic's Application at 8, 12, Exhibit I, Exhibit 2.1. *See also Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (observing that an affidavit attesting that the project was subscribed and customers' motions to intervene constituted substantial evidence of market need).

[103] Certificate Order, 161 FERC ¶ 61,042 at P 55. We affirm the Certificate Order's finding that the information Atlantic filed about the precedent agreements

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44. Additionally, we find no merit in Shenandoah Valley Network's argument that the three-year-old precedent agreements were irrelevant to demonstrate need particularly in light of changing market demand for natural gas in Virginia and North Carolina.[104] In accordance with Ordering Paragraph (K) of the Certificate Order, Atlantic filed a written statement affirming that it executed binding final contracts for service at the levels provided for in its precedent agreements prior to commencing construction.[105] Thus, the age of the agreements at the time of the Certificate Order issuance is not relevant here. As confirmed by the execution of the service contracts, the shippers on the ACP Project – who will supply gas to end users and electric generators – determined that natural gas will be needed and the ACP Project is the preferred means of obtaining that gas. Based on this, we find that additional gas will be needed in the markets that the ACP Project intends to serve. We affirm the Certificate Order's finding that end users will generally benefit from the project because it would develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets in Virginia and North Carolina.[106]

45. Shenandoah Valley Network disagrees with the Commission's policy not to "look behind precedent agreements to question individual shippers' business decisions to enter into contracts."[107] Petitioners assert that the Commission placed too much weight on the fact that Atlantic secured long-term commitments from shippers as evidence of public need for the project, citing to former Commissioner Bay's statement in *National Fuel Gas Supply Corp*.[108]

(shipper's name, contracted capacity, and term of service) was sufficient to demonstrate market support for the project.

[104] Rehearing Request of Shenandoah Valley Network at 19-20.

[105] Atlantic's February 7, 2018 Supplemental Information and Limited Notice to Proceed at 2 (Accession No. 20180207-5151). *See* Certificate Order, 161 FERC ¶ 61,042 at ordering para. (K).

[106] Certificate Order, 161 FERC ¶ 61,042 at P 55 (citing *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010, at P 20 (2010)).

[107] Rehearing Request of Shenandoah Valley Network at 15, 18 (quoting Certificate Order, 161 FERC ¶ 61,042 at P 54).

[108] 158 FERC ¶ 61,145 (2017) (Commissioner Bay, Separate Statement). *See* Rehearing Request of Ashram-Yogaville at 12; Rehearing Request of Friends of Nelson at 38.

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46. It is well-established that long-term commitments serve as "significant evidence of market demand for the project."[109] And the Commission typically does not look behind such agreements to assess shippers' business decisions.[110] The United States Court of Appeals for the D.C. Circuit has confirmed that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers.[111] Here, all of the project's proposed capacity has been subscribed under long-term precedent agreements with six shippers.

47. Shenandoah Valley Network states that precedent agreements between affiliates are not a suitable proxy for market need.[112] Specifically, Shenandoah Valley Network asserts that affiliate contracts do not reflect true demand for new capacity, particularly where Atlantic and the affiliated shippers are owned by parent companies (Dominion Energy, Duke Energy, or Southern Company) whose shareholders would profit from the pipeline while the pipeline's costs will be passed along to captive ratepayers.[113]

48. As the Certificate Order explained, issues related to a utility's ability to recover costs associated with its decision to subscribe for service on the ACP Project involve matters to be determined by the relevant state utility commissions; those concerns are beyond the Commission's jurisdiction.[114] The review that Shenandoah Valley Network seeks in this proceeding,[115] looking behind the precedent agreements entered into by state-regulated utilities, would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate. For those shippers that are not

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[109] Certificate Policy Statement, 88 FERC at 61,748.

[110] *See, e.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 157 FERC ¶ 61,095, at P 5 (2016); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 39 (2016); *Paiute Pipeline Co.*, 151 FERC ¶ 61,132, at P 33 (2015).

[111] *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting argument that precedent agreements are inadequate to demonstrate market need).

[112] Rehearing Request of Shenandoah Valley Network at 14, 16, 18, 20.

[113] *Id.* at 18-19.

[114] Certificate Order, 161 FERC ¶ 61,042 at P 60.

[115] Rehearing Request of Shenandoah Valley Network at 18-21.

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state-regulated utilities, such as producers or marketers, the Commission has chosen not to look behind the precedent agreements as these parties are fully at-risk for the cost of the capacity and would not have entered into the agreements had they not determined there was a need for the capacity to move their product to market.

49. Further, we find no merit in Shenandoah Valley Network's argument that the project will be subsidized by the affiliated shippers' captive ratepayers. To the extent a ratepayer receives a beneficial service, paying for that service does not constitute a "subsidy."[116] Further, state regulatory commissions are responsible for approving any expenditures by state-regulated utilities. Atlantic is responsible for calculating its recourse rate based on the design capacity of the pipeline, placing Atlantic at risk for costs associated with any unsubscribed capacity. The recourse rates are derived using billing determinants based on the design capacity of the project, not subscribed capacity, meaning any particular customer paying the recourse rate is responsible for paying its share of the design capacity, not the subscribed capacity.[117]

50. Petitioners contend that that the specific end use of the delivered gas within the context of regional needs should be considered in the overall needs determination.[118] Atlantic provided estimates of the likely end uses for the ACP Project, estimating that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes, 8.9 percent will serve industrial purposes, and 2.8 percent will serve other purposes such as vehicle fuel.[119]

51. However, we do not require companies to provide a specific end use of the natural gas to satisfy the demand determination. The Certificate Policy Statement "does not require that shippers be end-use customers of natural gas. Shippers may be marketers, local distribution companies, producers, or end users."[120] As we have stated in other

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[116] *See* Order Clarifying Policy Statement, 90 FERC at 61,393.

[117] *See Cameron Interstate Pipeline, LLC*, 160 FERC ¶ 61,009, at P 11 (2017); *Alliance Pipeline L.P.*, 142 FERC ¶ 62,048, at 64,099 (2013); *Kinder Morgan Interstate Gas Transmission LLC*, 122 FERC ¶ 61,154, at P 28 (2008).

[118] Rehearing Request of Ashram-Yogaville at 8-9; Rehearing Request of Public Interest Groups at 14; Rehearing Request of Friends of Nelson at 15.

[119] Final EIS at 1-3.

[120] *Transcontinental Gas Pipeline Co., LLC*, 158 FERC ¶ 61,125, at P 29 (2017); *see also Transco*, 161 FERC ¶ 61,250 at P 29 (rejecting challenge to need for project based on allegation that some of the gas appeared destined for export).

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cases, a project driven primarily by marketers and producers does not render it speculative.[121] Marketers or producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for selling gas to end-use consumers in downstream markets served by the pipeline or through markets accessible through interconnects with other pipelines and have made a business decision to subscribe to the capacity on the basis of that assessment.[122]

52. We affirm that the ACP Project will provide needed natural gas transportation service to both end use customers and natural gas producers and that the precedent agreements signed by Atlantic, for 96 percent of the project's design capacity, adequately demonstrate project need.

b. <u>The Commission Did Not Ignore Evidence of Lack of Market Demand</u>

53. Petitioners argue that the Commission ignored evidence in the record showing that market demand in Virginia and North Carolina has leveled off since 2014.[123] Petitioners contend that the Certificate Policy Statement "sought to remedy problems caused by the Commission's long-standing sole reliance on precedent agreements"[124] and thus established other indicators of need, such as reports by the U.S. Energy Information Administration (EIA) or other studies assessing market demand or available pipeline capacity.[125] Petitioners state that precedent agreements are not dispositive of market demand and the Commission should have evaluated other evidence.[126] Specifically, Shenandoah Valley Network cites to: (1) a 2015 Synapse Energy Economic, Inc. report (2015 Synapse Report) stating that the ACP Project will likely cost, rather than save, consumers money;[127] (2) a 2016 Synapse Energy Economics, Inc. study (2016 Synapse

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[121] *Transcontinental Gas Pipeline Co., LLC*, 158 FERC ¶ 61,125 at P 29 (citing *Maritimes & Northeast Pipeline, L.L.C.*, 87 FERC ¶ 61,061, at 61,241 (1999)).

[122] *Id.*

[123] Rehearing Request of Shenandoah Valley Network at 21-22; Rehearing Request of Fairway Woods Condominium Association at 10, 12; Rehearing Request of Mr. Limpert at 2.

[124] Rehearing Request of Shenandoah Valley Network at 14.

[125] *Id.* at 17, 21-22; Rehearing Request of Mr. Limpert at 2.

[126] Rehearing Request of Shenandoah Valley Network at 17, 21-22.

[127] Synapse Energy Economics Inc., Atlantic Coast Pipeline Benefits Review:

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Study), asserting that existing gas pipeline capacity, existing storage in Virginia and the Carolinas, and the future operation of Transco's Atlantic Sunrise Project and Columbia's WB Xpress Project can satisfy the growing peak demand in that region;[128] (3) PJM Interconnection's (PJM)[129] 2017 demand projection forecasting approximately 3,500 megawatts (MW) less demand in 2027 than Dominion Virginia Power's 2016 projection for the same year;[130] and (4) an EIA analysis suggesting that demand for natural gas for power generation will remain at, or below, 2015 levels until 2034.[131] Shenandoah Valley Network asserts that these studies show that the demand for natural gas in the regions served by the ACP Project is leveling off at the same time that overall pipeline capacity is rapidly expanding, which will lead to significant unused capacity at the expense of ratepayers.[132]

54. Commission policy is to examine the merits of individual projects and each project must demonstrate a specific need.[133] Although the Certificate Policy Statement permits

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Chmura and ICF Economic Benefits Reports (2015) (filed in Shenandoah Valley Network's Comments in Support of Initial Protest at 44-56) (Accession No. 20161220-5146) (2015 Synapse Report).

[128] Synapse Energy Economics, Inc., Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? An Examination of the Need for Additional Pipeline Capacity into Virginia and Carolinas (2016) (filed in Shenandoah Valley Network's December 20, 2016 Comments in Support of Initial Protest at 5-43) (Accession No. 20161220-5146) (2016 Synapse Study).

[129] PJM is a regional transmission organization (RTO) that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

[130] *See, e.g.*, Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing (citing Direct Testimony of James F. Wilson, Va. State Corp. Comm., Case No. PUE-2016-00049 at 15-17 (Aug. 17, 2016)) (Accession No. 20170621-5160).

[131] U.S. Energy Information Admin., *Annual Energy Outlook 2017*, Reference Case Table A2, (Jan. 2017), https://www.eia.gov/outlooks/aeo/.

[132] Rehearing Request of Shenandoah Valley Network at 17, 21-22.

[133] With respect to comments requesting the Commission to assess the market demand for gas to be transported by other proposed interstate pipeline projects, we note that the Commission will evaluate the proposals in those proceedings in accordance with the criteria established in the Certificate Policy Statement.

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the applicant to show need in a variety ways, it does not suggest that the Commission should undertake an independent examination of future regional demand and design a system to best serve it. We are unpersuaded by the studies submitted by Shenandoah Valley Network in its attempt to show that there is insufficient demand for the project, particularly general forecasts for load growth in Virginia and North Carolina or certain utility supply forecasts projections made to state utility commissions. To the extent petitioners would have the Commission look at information beyond precedent agreements, we would note that countering the position advanced by the studies they urge, the record also contains evidence of growing demand for natural gas pipeline transportation capacity.[134] Projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Given the uncertainty associated with long-term demand projections, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements, which represent actual, rather than theoretical evidence regarding demand, to be the better evidence of demand. Thus, the Commission evaluates individual projects based on the evidence of need presented in each proceeding. Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service and subsequently executed those service contracts, [135] the Commission places substantial reliance on those agreements to find that the project is needed.

c. <u>Use of Renewable Energy and Existing Infrastructure Is Not Sufficient to Meet Demand</u>

55. We disagree with petitioners' contention that we did not evaluate the growth of renewable energy infrastructure and its effects on the need for the ACP Project.[136]

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[134] *See* ICF International, The Economic Impacts of the Atlantic Coast Pipeline (filed in Atlantic's September 18, 2015 Application, Resource Report 5 at 5-37) (Accession No. 20150918-5212); Chmura Economics and Analytics, The Economic Impact of the Atlantic Coast Pipeline in West Virginia, Virginia, and North Carolina (2014) (filed in Atlantic's September 18, 2015 Application, Resource Report 5 at 5-35 – 5-37) (accession No. 20150918-5212).

[135] Shenandoah Valley Network attempts to introduce evidence of proceedings with state utility regulators to show that Atlantic's precedent agreements with its shippers are on shaky ground. Rehearing Request of Shenandoah Valley Network at 25-37. As stated above, Atlantic executed the precedent agreements (and has subsequently executed service agreements) with its shippers and this is the best evidence of demand for the project.

[136] Rehearing Request of Shenandoah Valley Network at 22; Rehearing Request of Public Interest Groups at 15.

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Petitioners assert that by failing to perform this analysis, the Commission permits pipeline infrastructure overbuilding.[137] The Certificate Order explained that the Final EIS evaluated whether new renewable generation or use of existing infrastructure could meet the demand to be served by the projects.[138] Additionally, the Final EIS considered the potential for energy conservation and renewable energy sources, and the availability of capacity on other pipelines, to serve as alternatives to the ACP Project and concluded that they do not presently serve as practical alternatives to the project.[139]

56. Petitioners also argue that existing infrastructure is sufficient to meet natural gas demand in the regions served by the ACP Project.[140] In support, Shenandoah Valley Network cites to the 2016 Synapse Study, which states that even under a "high demand" scenario, the capacity of the existing infrastructure is adequate.[141] We disagree. The 2016 Synapse Study makes an unlikely assumption that all gas is flowed by primary customers along their contracted paths. However, the study fails to consider the use of regional pipeline capacity by shippers outside of Virginia and the Carolinas through interruptible service or capacity release.[142]

57. Further, we disagree with petitioners' argument that the ACP Project is not needed because the Greensville and Brunswick Power Stations are already served by Transco's pipeline.[143] The Certificate Order explained that the ACP Project will supply an alternate

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[137] Rehearing Request of Shenandoah Valley Network at 22; Rehearing Request of Public Interest Groups at 15.

[138] Certificate Order, 161 FERC ¶ 61,042 at P 57 (citing Final EIS at 5-38).

[139] *See* Final EIS at 5-38 (concluding that existing pipelines do not have the capacity to transport the required volumes of gas and that generation of electricity from renewable energy sources or the gains realized from increased energy efficiency and conservation are not transportation alternatives and cannot function as a substitute for the proposed projects).

[140] Rehearing Request of Shenandoah Valley Network at 23; Rehearing Request of Public Interest Groups at 15.

[141] Rehearing Request of Shenandoah Valley Network at 23.

[142] *See Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 47 (2018).

[143] Rehearing Request of Shenandoah Valley Network at 23; Rehearing Request of Fairway Woods Condominium Association at 10-11.

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source of natural gas to the generating facilities in case of a supply disruption.[144] Further, the ACP Project will be able to supply additional existing generation units through interconnections with existing pipelines (e.g., fourteen Dominion Virginia Power and five Duke Energy Progress facilities).[145]

58. Finally, we find unpersuasive Mr. Limpert's allegations that the ACP Project's capacity will be exported through Kinder Morgan's Savannah liquefied natural gas facility.[146] As the Certificate Order explained, the ACP Project shippers are domestic end users of natural gas and there is no evidence in the record that these end users intend to use their capacity to provide gas to an export terminal.[147]

59. We affirm the Certificate Order's finding that authorization of the ACP Project will not lead to the overbuilding of pipeline infrastructure and will provide needed natural gas transportation service.[148]

d. <u>The Commission Appropriately Balanced the Need for the Project Against Harm to Landowners and Communities</u>

60. Fairway Woods Condominium Association states that the Certificate Policy Statement requires the Commission to balance the public need for the project with the harm to landowners and the environment, and claims that if the Commission appropriately balanced these interests, it would have denied the project.[149] Specifically, Fairway Woods Condominium Association asserts that the project will have adverse landowner impacts by permitting compulsory taking of private property through eminent domain.[150]

61. Consistent with the Certificate Policy Statement,[151] the Commission balanced the need for and benefits to be derived from the ACP Project against the adverse impacts on

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[144] Certificate Order, 161 FERC ¶ 61,042 at P 61.

[145] *Id*. (citing Atlantic's December 8, 2016 Data Response at Question 3).

[146] Rehearing Request of Mr. Limpert at 2.

[147] Certificate Order, 161 FERC ¶ 61,042 at P 62; Final EIS at 1-5.

[148] Certificate Order, 161 FERC ¶ 61,042 at P 57.

[149] Rehearing Request of Fairway Woods Condominium Association at 9, 15-16.

[150] *Id*. at 15-16.

[151] Certificate Policy Statement, 88 FERC at 61,745-46. *See also National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012) (*National Fuel*).

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landowners. The policy statement discusses application of a sliding scale approach, where the benefits needed to be shown for a project would vary depending on the project sponsor's ability to negotiate acquisition of property rights.[152] Here, Atlantic has demonstrated public benefits for the proposed project by executing firm service contracts for approximately 96 percent of the project; thus providing a strong showing of need.[153] Further, the Commission found that Atlantic incorporated over 201 route variations, totaling 199 miles, into its proposed route for a various reasons, including landowner requests.[154] Accordingly, although we are mindful that Atlantic has been unable to reach easement agreements with many landowners, for purposes of consideration under the Certificate Policy Statement, we find that Atlantic has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.

62. Petitioners contend that the Commission should have balanced the project's need against adverse environmental effects, such as the project's impacts on karst terrain, waterbodies, the Appalachian National Scenic Trail, the Blue Ridge Parkway, and many agricultural, residential, and commercial areas.[155] These issues were analyzed in the Final EIS and are addressed below. The Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic, not an environmental analysis.[156] Only when the benefits outweigh the adverse effects on the economic interests will the Commission proceed to consider the environmental analysis where other interests are addressed. In addition, we ensured avoidance of unnecessary environmental impacts by including a certificate condition providing that authorization for the commencement of construction

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[152] Certificate Policy Statement, 88 FERC at 61,749. The Commission has indeed denied applications where project sponsors were unable to sufficiently demonstrate need. *See Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, *reh'g denied*, 157 FERC ¶ 61,194 (2016); and *Turtle Bayou Gas Storage Company, LLC*, 135 FERC ¶ 61,233 (2011).

[153] Certificate Policy Statement, 88 FERC at 61,749 ("if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits").

[154] Final EIS at 3-51.

[155] Rehearing Request of Ashram-Yogaville at 12-13; Rehearing Request of Friends of Nelson at 39-40.

[156] *National Fuel*, 139 FERC ¶ 61,037 at P 12.

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would not be granted until Atlantic successfully executed contracts for volumes and service terms equivalent to those in their precedent agreements.[157]

63. Based on the foregoing, we affirm the Certificate Order's conclusion that Atlantic has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities, and that the benefits of the ACP Project outweigh the identified impacts on landowners and surrounding communities.

2. Rates

a. 14 Percent Return on Equity

64. As part of an NGA section 7 proceeding, the Commission reviews initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard.[158] Unlike NGA sections 4 and 5, NGA section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certificates new facilities, expansion capacity, and/or services.[159] Recognizing that full evidentiary rate proceedings can take a significant amount of time, Congress gave the Commission the discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-consuming ratemaking sections of the NGA.[160] The Certificate Order applied the Commission's established policy, which balances both consumer and investor interests, in establishing Atlantic's initial rates. Specifically, the Commission approved Atlantic's proposed 14 percent return on equity, based on a capital structure of 50 percent equity and 50 percent debt.[161]

65. On rehearing, NCUC and the Shenandoah Valley Network argue that the 14 percent return on equity (ROE) that the Commission permits for a new pipeline's initial recourse rates is unsupported by substantial evidence.[162] Both NCUC and Shenandoah

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[157] Certificate Order, 161 FERC ¶ 61,042 at ordering para. (K).

[158] *Id.* P 101.

[159] *See Atl. Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 390 (1959) (*CATCO*).

[160] *See id.* at 392.

[161] Certificate Order, 160 FERC ¶ 61,022 at P 102.

[162] Rehearing Request of Shenandoah Valley Network at 37; Rehearing Request of

(continued ...)

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Valley Network argue that the Commission should calculate a project-specific ROE. Shenandoah Valley Network points out that a 14 percent ROE is inflated, relative to other investments, and could lead to overbuilding.[163] By failing to calculate a project-specific ROE, NCUC argues that the Commission has failed to provide a recourse rate that provides a check on the pipeline's market power when the pipeline enters into negotiated rates.[164]

66. We disagree that the treatment of ROE or the resulting recourse rates in these proceedings are flawed. Because the establishment of recourse rates is based on estimates, the Commission's general policy is to accept the pipeline's cost components if they are reasonable and are consistent with Commission policy.[165] For new pipelines, the Commission has determined that equity returns of up to 14 percent are acceptable as long as the equity component of the capitalization is no more than 50 percent.[166]

67. NCUC and Shenandoah Valley Network argue that we have not supported the finding that new greenfield pipelines face higher risks than established pipelines.[167] NCUC and Shenandoah Valley Network claim that the precedent cited by the Commission is not substantial evidence because the cited cases provide inadequate supporting analysis for such a 14 percent ROE.

68. The Commission cited precedent to show that the Commission has accepted a 14 percent ROE for new, greenfield pipelines with a 50 percent debt and 50 percent equity capital structure. The Certificate Order explained that the Commission's policy of

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NCUC at 6-11.

[163] Rehearing Request of Shenandoah Valley Network at 37-38.

[164] Rehearing Request of NCUC at 16.

[165] *See Transcontinental Gas Pipe Line Corp.*, 82 FERC at 61,315; *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, at 61,637 (1996).

[166] *See, e.g., Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080, *reh'g denied*, 156 FERC ¶ 61,160 (2016), *aff'd in relevant part sub nom. Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (finding that the Commission "adequately explained its decision to allow Sabal Trail to employ a hypothetical capital structure" of 50 percent debt and 50 percent equity, with a 14 percent return on equity).

[167] Rehearing Request of NCUC at 9-10; Rehearing Request of Shenandoah Valley Network at 39.

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accepting a 14 percent ROE in these circumstances reflects the increased business risks that new pipeline companies like Atlantic face.[168]

69. The Certificate Order also cited Order No. 678 for this proposition, but NCUC contends that this evidence is inapposite. According to NCUC, Order No. 678 only involved rate regulation of certain natural gas storage facilities, not new natural gas pipelines and is therefore inapplicable in this context.[169] We disagree. Order No. 678 explained that new entrants to the natural gas transportation sector face greater risks than established pipeline companies.[170] Because new entrants building greenfield natural gas pipelines do not have an existing revenue base, they face greater risks constructing a new pipeline system and servicing new routes than established pipeline companies do when adding incremental capacity to their systems.[171] This is the reason why Commission policy requires existing pipelines that provide incremental services through an expansion to use the ROE underlying their existing system rates and last approved in a section 4 rate case proceeding when designing the incremental rates. This tends to yield a return lower than 14 percent, reflecting the lower risk existing pipelines face when building incremental capacity.[172]

70. Nonetheless, petitioners contend that it is arbitrary and capricious to rely on this approach when market conditions have changed.[173] Both argue that the Commission must use current market data given the current low cost of capital.[174] Shenandoah Valley Network argues that the Commission first granted a 14 percent ROE in 1997, but in 1997

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[168] Certificate Order, 161 FERC ¶ 61,042 at P 102

[169] Rehearing Request of NCUC at 9-10.

[170] *Rate Regulation of Certain Nat. Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, at 62,345 (2006) (cross-referenced at 115 FERC ¶ 61,343).

[171] Certificate Order, 161 FERC ¶ 61,042 at P 102 n.150 (citing Order No. 678, FERC Stats. & Regs. ¶ 31,220 at 62,345).

[172] *See, e.g., Gas Transmission Northwest, LLC,* 142 FERC ¶ 61,186, at P 18 (2013) (requiring use of 12.2 percent ROE from recent settlement, not the proposed 13.0 percent).

[173] Rehearing Request of NCUC at 8.

[174] Rehearing Request of NCUC at 8-9; Rehearing Request of Shenandoah Valley Network at 38, 40.

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Moody's AAA bonds yielded 7.26 percent and BAA bonds yielded 7.85 percent. [175] In 2015, these bond ratings yielded 3.89 percent and 5 percent, respectively, and therefore the project ROE should be lower.[176] But debt financing rates are not a proxy for ROE and petitioners have offered no support for their contrary assertion. Shenandoah Valley Network also argues that ACP's proposed ROE is inflated relative to other investments, such as the return for state-regulated investor-owned electric utilities. As discussed in the Certificate Order, the returns approved at the state level for electric utilities and local distribution companies are not relevant because these companies are inherently less risky than greenfield interstate transmission projects proposed by a new natural gas company.[177]

71. NCUC and Shenandoah Valley Network allege that the Commission's justification for its ROE based on the business risk to similarly situated pipeline companies is flawed.[178] NCUC points out that rates of return approved in recent decisions were well below 14 percent; further, suggesting that those decisions were applied to established pipelines rather than new companies matters less when some of the companies in those cases have a higher risk profile than ACP.[179] Shenandoah Valley Network contends that that ACP faces less risk because it is structured on affiliate agreements.[180]

72. We are not persuaded that we should reconsider Atlantic's proposed ROE. In the case cited by NCUC, *Portland Natural Gas Transmission System*,[181] the Commission decided that Portland Natural Gas Transmission System was riskier than other established pipeline companies, not new entrants.[182] Even if ACP has contracted with affiliates,

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[175] Shenandoah Valley Network also argues that the projected rate of return for investors in U.S. stocks over the next five years is projected to be 4 to 7 percent, but provides only the 2015 bond data discussed in the text as support. Rehearing Request of Shenandoah Valley Network at 38, n. 94.

[176] Rehearing Request of Shenandoah Valley Network at 38, n. 94.

[177] Certificate Order, 161 FERC ¶ 61,042 at P 102.

[178] Rehearing Request of NCUC at 11; Rehearing Request of Shenandoah Valley Network at 40.

[179] Rehearing Request of NCUC at 10-11.

[180] Rehearing Request of Shenandoah Valley Network at 40.

[181] 150 FERC ¶ 61,107 (2015).

[182] Rehearing Request of NCUC at 11, n.30 (citing *Portland Nat. Gas Transmission Sys*., 150 FERC ¶ 61,107 at P 231).

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similar to other pipelines, it remains at risk for unsubscribed capacity or terminated contracts. ACP's recourse rates are derived using billing determinants based on overall capacity, not subscribed capacity, meaning any particular customer paying the recourse rate is responsible for paying its share of the overall capacity. Thus, the risk of an underutilization in the event of contract termination remains, by design, with Atlantic.

73. NCUC points out that the Commission has conducted discounted cash flow analyses to assess an appropriate ROE in the past and it should have repeated that analysis here or performed other analyses based on current market data. As we explained in the Certificate Order, an initial rate is based on estimates until we can review Atlantic's cost and revenue study at the end of its first three years of actual operation.[183] ACP's proposed initial rates are based on estimates of what an appropriate rate for the service should be, which is not supported by any operating history. The actual costs associated with constructing the pipeline and providing service may increase or decrease and the revenues recovered may not closely match the projected cost-of-service. Conducting a discounted cash flow analyses in individual certificate proceedings would not be the most effective or efficient way to determine the appropriate ROEs and attempting to do so would unnecessarily delay proposed projects with time sensitive in-service schedules.[184] As the Commission pointed out in the Certificate Order, in a section 4 or 5 proceeding parties have the opportunity to file and examine testimony with regard to the composition of the proxy group in the use of the discounted cash flow analysis, the growth rates used in the analysis, and the pipeline's position within the zone of reasonableness with regard to risk, it would be difficult, if not impossible, to complete this type of analysis in section 7 certificate proceedings in a timely manner.[185] The Commission's current policy of calculating incremental rates for new pipelines using equity returns of up to 14 percent, as long as the equity component of the capitalization is no more than 50 percent, is an appropriate exercise of its discretion to approve initial rates under the "public interest" standard of section 7. These initial rates will "hold the line" until just and reasonable rates are adjudicated under section 4 or 5 of the NGA.[186]

74. Finally, Shenandoah Valley Network maintains that the fact that Atlantic's rates will be reassessed, and potentially adjusted, after three years of operations does not protect

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[183] Certificate Order, 161 FERC ¶ 61,042 at PP 101-103.

[184] *See Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 at P 39.

[185] Certificate Order, 161 FERC ¶ 61,042 at P 101.

[186] *CATCO*, 360 U.S. at 392.

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the public from, what it contends is, an unnecessary pipeline.[187] There is no evidence that this ROE will incentivize what is ultimately an unneeded pipeline. As discussed, the Commission conducts a separate needs determination and is satisfied that there is demand for the ACP Project.[188] Moreover, the Commission requires that initial rates be designed on 100 percent of the design capacity of the project, thereby placing the risk of underutilization on the pipeline.

b. <u>Pack Accounts</u>

75. Atlantic argues that the Commission erred in rejecting its proposed "pack account" provisions for Foundation and Anchor Shippers.[189] Atlantic states that the proposed provisions, which would allow Foundation and Anchor Shippers to tender gas quantities in advance for later use on an essentially no-notice basis, reflect the unique circumstances involved in construction of the ACP Project[190] and do not present a significant risk of undue discrimination among similarly situated shippers.[191]

76. First, Atlantic contends that although Foundation and Anchor Shippers will exclusively receive this service, all other potential shippers had the opportunity to qualify as Foundation or Anchor Shippers through the open season process, which made clear that certain categories of shippers would receive pack accounts.[192] Thus, Atlantic concludes that the Certificate Order wrongly states that pack accounts were offered to only a "select group of shippers."[193] Next, Atlantic argues that because of the commitments made by Foundation and Anchor shippers, they should not be considered similarly situated to other firm shippers.[194] Atlantic asserts that no undue discrimination exists where there is a

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[187] Rehearing Request of Shenandoah Valley Network at 40.

[188] *See supra* PP 39-63.

[189] Atlantic Rehearing Request at 4-10.

[190] Specifically, Atlantic asserts that given the lack of storage on the system, the pack quantities can be used to meet variable and unexpected gas needs for electric generation plants. *Id.* at 5.

[191] *Id.* at 4.

[192] *Id.* at 4, 6.

[193] *Id.* at 6 (citing Certificate Order, 161 FERC ¶ 61,042 at P 130).

[194] *Id.* at 7.

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rational basis for treating two entities differently based on relevant, significant facts.[195] Here, Atlantic contends that shippers making major, long-term commitments necessary to make the project possible are not similarly situated to shippers making lesser commitments.[196] Atlantic further states that the Certificate Order recognizes the Commission's precedent that pipelines may provide shippers that have made the project possible certain rights that reflect the unique circumstances involved in the construction of new infrastructure.[197]

77. The Commission has held that impermissible negotiated terms and conditions of service include any provisions that result in a customer receiving a different quality of service than that provided to other customers under the pipeline's tariff or that affect the quality of service received by others.[198] Consistent with Order No. 637, where a material deviation in a non-conforming contract constitutes a negotiated term and condition of service, the Commission would require that the pipeline modify its tariff to offer the negotiated service to all its customers or explain why it can only provide the service to this one customer.[199] Atlantic's proposed pack accounts are an exclusive arrangement in addition to the standard firm transportation service offered by Atlantic, which results in standard firm shippers receiving a different quality of operational service than that of the Anchor and Foundation Shippers. Therefore, we deny rehearing of Atlantic's original proposal.

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[195] *Id.*

[196] *Id.*

[197] *Id.* (citing Certificate Order, 161 FERC ¶ 61,042 at P 112).

[198] Certificate Order, 161 FERC ¶ 61,042 at P 117; *see also Vector Pipeline L.P.*, 155 FERC ¶ 61,251, at P 3 (2016) (citing *Dominion Transmission, Inc.*, 93 FERC ¶ 61,177 (2000)).

[199] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005). *See also Northern Natural Gas Co.*, 110 FERC ¶ 61,321, at P 10 (2005) (*Northern Natural*) (citing *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,024 (2001)).

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78. In the alternative, Atlantic proposes to maintain pack accounts as an aspect of standard firm transportation service.[200] That is, rather than allocating the pack capacity only to Foundation and Anchor Shippers, Atlantic would allocate the capacity to all firm shippers.[201] Atlantic asserts that such an approach would resolve the Commission's concerns regarding undue discrimination against other firm transportation customers.

79. We find that Atlantic's alternative proposal is consistent with Commission policy, provided that Atlantic allows firm shippers to opt-in or -out of the pack account service.[202] Additionally, in order to ensure that the service is not subsidized by shippers that have opted-out of the service, any costs that may be attributable to providing the pack account service shall only be recoverable from those firm shippers that have opted-in to the service.[203] We direct Atlantic to file actual tariff records setting forth its pro-rata allocation of pack capability provisions available to all firm transportation shippers and the applicable rate associated with the pack account service, at least 30 days but no more than 60 days prior to the date the project facilities go into service.

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[200] Rehearing Request of Atlantic at 9.

[201] *Id*. Atlantic states that, under current design assumptions, it can offer up to 277,400 Dth per day of pack capacity while still retaining the line pack needed to maintain its day-to-day operations. *Id.* at 6.

[202] In the Certificate Order, the Commission also noted that proposed pack accounts limited Atlantic's ability to provide imbalance management services as required by Order No. 637. Because the pack accounts would be available to all firm shippers under the alternative proposal, we find that such an arrangement, along with Atlantic's other imbalance provisions, is consistent with Order No. 637's requirement that "pipelines … provide imbalance management services, like park and loan service, and greater information about the imbalance status of shippers and the system, to make it easier for shippers to remain in balance in the first instance." Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062, *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, *order on remand*, 101 FERC ¶ 61,127, *order on reh'g*, 106 FERC ¶ 61,088, *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255.

[203] Additionally, requiring Atlantic to provide firm shippers with the option to opt-out of the pack account service furthers the Commission's policy favoring the unbundling of services to the extent feasible. *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299, at 62,111 (2004).

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c. Allowance for Funds Used During Construction (AFUDC)

80. Atlantic argues that the Certificate Order erred to the extent that it ruled that the AFUDC rate must not exceed the Commission-allowed overall rate of return in every month of the construction period.[204] Atlantic states that rather than examining individual periods, the Commission should only require that the AFUDC rate not exceed the allowed rate of return for the entire construction period as a whole.[205] Atlantic claims that such a ruling would prevent Atlantic from obtaining compensation for its financing costs during construction at the allowed rate that could be earned on operating facilities, contrary to the purpose of AFUDC.[206]

81. Specifically, Atlantic asserts that the costs of funding for new pipeline companies fluctuate over time, and if a new pipeline company must utilize its actual financing costs in months when they are lower than the allowed rate of return but is capped at the allowed rate at times when its costs are actually higher, the pipeline company will recover less than the allowed return over the entire construction period.[207] Atlantic contends that such a result is contrary to the purpose in establishing the AFUDC rate, which was to compensate a company for the capital committed to construction projects at a rate that could be earned on operating assets.[208]

82. We disagree. A basic tenet of the Commission's AFUDC rules is the allowance should compensate a company for capital committed to construction projects at a rate that could be earned on operating assets. In *Gulfstream Natural Gas System, L.L.C.*, the Commission rejected a proposal where the AFUDC rate was calculated to reflect a phase-in of debt financing that is higher than the rate of return which the Commission would

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[204] Rehearing Request of Atlantic at 3.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 12.

[208] *Id.* (citing *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 51 (2014); *Buccaneer Gas Pipeline Co., L.L.C.*, 91 FERC ¶ 61,117, at 61,447 (2000); *Gulfstream Natural Gas System, L.L.C.*, 91 FERC ¶ 61,119, at 61,466 (2001); Order No. 561, *Amendments to Uniform System of Accounts for Public Utilities and Licenses and for Natural Gas Companies (Classes A, B, C and D) to Provide for the Determination of Rate for Computing the Allowance for Funds Used During Construction and Revisions of Certain Schedule Pages of FPC Reports*, Order No. 561, 57 FPC 608 (1977)).

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authorize for an operating asset.[209] The Commission reasoned that Gulfstream did not show why it is reasonable for it to earn a higher rate of return during construction than the Commission would authorize it to earn on an operating asset.[210] Similarly, Atlantic's AFUDC calculation reflects only equity financing through August 2016, and Atlantic has provided no evidence supporting the reasonableness of that approach. Although Atlantic indicates that it intends to subsequently obtain debt financing for its construction and, by the in-service date of its project, to achieve the 50/50 percent debt/equity capital structure authorized by the Commission, it has not shown why it is reasonable for it, through its proposed approach, to earn a higher rate of return during portions of construction than the Commission would authorize it to earn on an operating asset.

83. Atlantic is required to use an AFUDC rate for the entire construction period that is less than or equal to the approved overall rate of return on rate base. Although the overall return on operating assets is included in its recourse rates, both the debt and equity components are considered separately. In Atlantic's case, that rate is 50 percent debt at a cost of 6.8 percent,[211] and 50 percent equity based on a 14 percent rate of return. Therefore, the equity component included in the AFUDC rate is capped at 50 percent of the approved recourse rate for equity,[212] and the debt rate is similarly capped, for the entire construction period. Atlantic is required to recalculate its AFUDC and utilize an AFUDC rate equal to the overall project capitalization and cost rates for the entire construction period.[213] This permits the utility to achieve a rate of return on its construction program at approximately the rate which would be allowed in a rate case. The requirement to use an AFUDC rate for the entire construction period includes each period for which AFUDC is calculated, whether the actual calculation is computed on a monthly, quarterly, or semi-annual basis.

3. Eminent Domain

84. Shenandoah Valley Network argues that the Commission violated the Fifth Amendment to the U.S. Constitution and the NGA by granting Atlantic the power of

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[209] *Gulfstream Natural Gas System, L.L.C.*, 94 FERC ¶ 61,185, at 61,637-38 (2001) (*Gulfstream*).

[210] *Id*. at 61,638.

[211] If Atlantic's actual cost of debt financing exceeds 6.8 percent, Atlantic may include its actual debt cost in its AFUDC rate. *Id.*

[212] *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070, at P 71 (2005).

[213] *Gulfstream*, 94 FERC at 61,638.

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eminent domain through the Certificate Order. Specifically, petitioners state that: (1) the Commission improperly granted Atlantic eminent domain authority before determining whether the pipeline can provide just compensation to landowners;[214] (2) the Commission's refusal to consider constitutional challenges to eminent domain violated due process rights of landowners;[215] and (3) the Commission should prohibit "quick take" procedures, which violate the due process clause and the separation of powers doctrine.[216]

85. NGA section 7(h) states that a certificate holder may "acquire . . . by the exercise of the right of eminent domain" all "necessary land or other property."[217] However, the actual transfer of ownership rights, and the compensation for the ceded property rights, are established in a court proceeding.[218] The D.C. Circuit has held that the Commission does not have the discretion to deny a certificate holder the power of eminent domain.[219]

86. In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain if it cannot acquire the easement by an agreement with the landowner. Some courts have held that a natural gas company may be granted possession pending a trial for just

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[214] Rehearing Request of Shenandoah Valley Network at 170.

[215] *Id.* at 174-175.

[216] *Id.* at 171-174.

[217] 15 U.S.C. § 717f(h) (2012).

[218] *Williston Basin Interstate Pipeline Co.*, 124 FERC ¶ 61,067, at P 8 n.12 (2008).

[219] *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (*Midcoast Interstate*).

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compensation under a preliminary injunction procedure.[220] The Commission itself does not grant the pipeline the right to take the property by eminent domain.[221]

87. It is beyond dispute that the federal government has the constitutional power to acquire property by exercise of eminent domain.[222] The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of an NGA section 7 certificate, when needed to fulfill the certificate,[223] which it has done here.

88. Nonetheless, the Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of NGA section 7(h), including issues regarding the timing of acquisition and just compensation are matters for the applicable state or federal court.[224] Because the Commission has no authority to determine what constitutes just

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[220] *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 68 (2017) (citing *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004) ("we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction")).

[221] *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 124-31 (2003) (*Islander East*).

[222] *Tenneco Atlantic Pipeline Co.*, 1 FERC ¶ 63,025, at 65,203 (1977) (citing *U.S. v. Carmack*, 329 U.S. 230 (1946); *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941)). *See also Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005) ("a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking"); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 230-31 (1984) ("Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause").

[223] *Tenneco Atlantic Pipeline Co.*, 1 FERC at 65,203 (1977) (citing *Thatcher*, 180 F. 2d 644); *see also Islander East*, 102 FERC ¶ 61,054 at PP 128, 131.

[224] *Northwest Pipeline, LLC*, 156 FERC ¶ 61,086, at P 12 (2016); *Californians for Renewable Energy, Inc. (Care) v. Williams*, 135 FERC ¶ 61,158, at P 19 (2011) ("The Commission is not the appropriate forum in which to adjudicate property rights."); *Northwest Pipeline*, 135 FERC ¶ 61,158, at P 19 (2011).

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compensation,[225] it consequently cannot determine whether a party has sufficient assets to pay such just compensation.[226]

89. "Quick-take" procedures are established by the judiciary as one method for carrying out the right of eminent domain. While the Shenandoah Valley Network alleges various constitutional infirmities with quick-take procedures as a category, the Commission's role does not include directing courts how to conduct their own proceedings.

4. Conditional Certificates

90. The Public Interest Group contends that the Commission's standard for state issued-permits is overreaching and incorrect.[227] Specifically, they argue that the Commission attempts to assert federal preemption over matters that are clearly within the state's jurisdiction.[228] Public Interest Groups cite *Constitution Pipeline*[229] where the United States Court of Appeals for the Second Circuit found that a state can deny a Clean Water Act section 401 water quality certification for a pipeline if the project does not meet state standards.[230] Public Interest Groups contends that the Commission can only authorize a pipeline project after the state makes its decisions on water quality, erosion control, and air quality for the proposed compressor station in North Carolina.[231]

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[225] *Rover Pipeline LLC*, 158 FERC ¶ 61,109 at P 54; *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 15. *See also Ketchikan Pub. Util.*, 82 FERC ¶ 61,162, at 61,593 (1998) ("Under eminent domain, the courts determine what is just.").

[226] Due process rights are nonetheless preserved because constitutional challenges to agency decisions may be raised in appeals of final agency decisions. *See, e.g., Elgin v. Dep't of Treasury*, 567 U.S. 1, 30 (2012) (citing *Mathews v. Eldridge*, 424 U.S. 319, 327–332 (1976)).

[227] Rehearing Request of Public Interest Group at 16-17.

[228] *Id.* at 16.

[229] *Constitution Pipeline Co. LLC, v. New York State Dep't of Environmental Conservation*, 868 F.3d 87 (2d Cir. 2017).

[230] Rehearing Request of Public Interest Group at 16-17.

[231] *Id.*at 17.

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91. Shenandoah Valley Network argues that the conditional certificate is statutorily and constitutionally flawed.[232] Shenandoah Valley Network argues that Congress did not intend the NGA to make the certificate of public convenience and necessity "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence.[233] Rather, Shenandoah Valley Network argues that Congress intended to place limitations on pipeline activity.[234] Shenandoah Valley Network cites *CATCO*,[235] where the Supreme Court held that the conditions clause in NGA section 7(e) vests the Commission with control over the conditions under which gas may be initially dedicated to interstate use, so that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.[236] Shenandoah Valley Network acknowledges that some district courts have endorsed the Commission's use of its conditional authority, but contends that the Commission should not rely on these cases to justify its practice.[237]

92. The Commission's practice of issuing conditional certificates has consistently been affirmed by courts as lawful.[238] Shenandoah Valley Network claims that the

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[232] Rehearing Request of Shenandoah Valley Network at 154.

[233] *Id*. at 154-155.

[234] *Id*. at 155.

[235] 360 U.S. at 389, 392.

[236] Rehearing Request of Shenandoah Valley Network at 156-157.

[237] *Id*.

[238] *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017) (upholding Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the Clean Water Act); *see also Myersville*, 783 F.3d at 1320-21 (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state); *Del. Dep't. of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 578-79 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from the Commission's conditional approval of a natural gas terminal construction despite statutes requiring states' prior approval because the Commission conditioned its approval of construction on the states' prior approval); *Pub. Utils. Comm'n. of State of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding the Commission had not violated NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

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Commission's conditioning authority is *restricted* to limits "on the terms of the proposed service itself,"[239] but such a restriction finds no support in NGA section 7(e). Rather, the statute itself speaks broadly, authorizing the Commission to attach "reasonable terms and conditions" "to the *issuance* of the certificate and to the *exercise* of the rights granted thereunder."[240]

93. In this regard, the Shenandoah Valley Network errs in suggesting that the Supreme Court's decision in *CATCO*[241] precludes the Commission's issuance of conditional certificates. In that case, the Supreme Court explained that "Congress, in [section] 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require when the Commission exercises authority under section 7."[242] The Court held that, in order to assure that the initial section 7 rates are in the public interest, "the Commission in the exercise of its discretion might attach such conditions as it believes necessary."[243] The Commission's authority to evaluate the public convenience and necessity (which encompasses a wide-range of factors, including market need, environmental, and landowner impacts), is as broad as the scope of its authority to condition certificates in such manner as the public convenience and necessity may require. The conditions attached to the Certificate Order limit the companies' activities where necessary to ensure that the projects are, in fact, consistent with the public convenience and necessity.

94. Moreover, as we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies because large projects, such as this, take considerable time and effort to develop.[244] Perhaps more important, their

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[239] Rehearing Request of Shenandoah Valley Network at 155 (quoting *N. Nat. Gas Co., Div. of InterNorth v. FERC*, 827 F.2d 779, 782 (D.C. Cir. 1987)). As *Northern Natural Gas* explains, the statute does permit the Commission to impose "conditions on the terms of the proposed service." That case, like *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979), concerns limits on the scope of the Commission's authority to condition rates under section 7(e) as "necessary to preserve the integrity of 'just and reasonable' rate review under sections 4 and 5" of the NGA, 15 U.S.C. §§ 717c, 717d (2012).

[240] 15 U.S.C. § 717f(e) (2012) (emphasis added).

[241] 360 U.S. at 389-94.

[242] *Id*. at 391.

[243] *Id*.

[244] *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 94*; East*

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development is subject to many variables whose outcomes cannot be predetermined. And, as we found elsewhere, in some instances, the certificate holder may need to access property in order to acquire the necessary information.[245]

95. We disagree with the Shenandoah Valley Network's argument that granting conditional certificates violates the Takings Clause of the Fifth Amendment. At the time the Commission granted the certificate of public convenience and necessity, there was a public need for the acquisition of the property, and thus a constitutional purpose.

5. Blanket Certificates

96. The Shenandoah Valley Network raises concerns regarding Atlantic's receipt of blanket certificates.[246] Specifically, Shenandoah Valley Network states that the Commission's blanket authority: (1) is impermissibly broad and incompatible with the requirements of the NGA;[247] (2) violates due process by not allowing for notice and comment on the application;[248] (3) permits companies to engage in activities that the applicant has not described in the pipeline application;[249] (4) allows companies to use eminent domain authority;[250] and (5) minimizes economic and environmental review.[251]

97. We find those arguments amount to an impermissible collateral attack on the blanket certificate program. Moreover, we find that the blanket certificate program is consistent with the NGA. In 1982, the Commission created the blanket certificate program, citing its authority vested in section 7(c) of the NGA.[252] The blanket certificate

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Tennessee Natural Gas Co., 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

[245] *Midwestern Gas*, 116 FERC ¶ 61,182 at P 92.

[246] Rehearing Request of Shenandoah Valley Network at 159-170.

[247] *Id.* at 160.

[248] *Id.* at 163-164.

[249] *Id.* at 160-163.

[250] *Id.* at 165.

[251] *Id.* at 163-164.

[252] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665 (1985) (cross-referenced at 33 FERC ¶ 61,007). *See also ANR Pipeline Co.*, 50 FERC ¶ 61,140, at 61,427 (1990) ("blanket and

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authorization was created because the Commission found that a limited set of activities did not require case-specific scrutiny as they would not result in a significant impacts on rates, services, safety, security, competing natural gas companies or their customers, or on the environment.[253] Blanket authority is issued pursuant to the public convenience and necessity standard.[254]

98. A blanket certificate authorizes routine activities on a self-implementing basis. A blanket certificate relieves natural gas companies from the requirement of having to obtain a certificate of public convenience and necessity for certain covered activities. The rationale for offering a blanket certificate is that there are certain activities that natural gas pipeline operators must undertake in maintaining and operating facilities for which they have already received a certificate of public convenience and necessity. The blanket certificate increases administrative efficiencies for the Commission and companies subject to its jurisdiction by reducing the filing requirements for those activities. In some instances, these activities are so well understood as an established industry practice that little scrutiny is required to determine their compatibility with the public convenience and necessity.[255] For other types of activities, the Commission requires that companies notify the public in advance and provides an opportunity to protest.[256]

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individual certificates are issued under section 7 of the Natural Gas Act (NGA) and, as such, are subject to the same statutory requirements. Accordingly, any terms and conditions imposed by the Commission, whether they are imposed on a case-specific basis or through a blanket certificate, must conform to section 7(e) of the NGA which requires that the terms and conditions be 'reasonable' and 'required' by the 'public convenience and necessity.'").

[253] *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, at P 8 (2006) (cross-referenced at 117 FERC ¶ 61,074) (explaining that "[t]he blanket certificate program was designed to provide an administratively efficient means to authorize a generic class of routine activities, without subjecting each minor project to a full, case-specific NGA section 7 certificate proceeding.").

[254] 18 C.F.R. § 157.208 (c)(7) (2017).

[255] *Interstate Pipeline Certificates for Routine Transactions*, Order No. 234, FERC Stats. & Regs. ¶ 30,368 (1982) (cross-referenced at 19 FERC ¶ 61,216). These types of blanket certificate project activities are known as Automatic.

[256] These types of blanket certificate project activities are known as Prior Notice.

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99. Because all the activities permitted under the blanket certificate regulations must satisfy environmental requirements and meet certain cost limits, they have minimal impacts; thus, the close scrutiny involved in considering applications for case-specific certificate authorization is not necessary to ensure compatibility with the public convenience and necessity. Concerns that a company will acquire and construct facilities "well outside the footprint considered and approved by the Commission"[257] are misplaced, because the financial and environmental thresholds inherent in the blanket certificate program are intended to preclude the type of work petitioners envision.

100. Shenandoah Valley Network's contentions that blanket certificates permit activities not found in a company's case-specific NGA section 7 certificate application are also misplaced. Shenandoah Valley Network is correct in observing that blanket authority enables a company to undertake activities that go beyond those described in a case-specific application. As noted above, blanket authority is limited to activities that the Commission has found do not result in significant adverse impacts, and thus do not require the same scrutiny as activities subject to case-specific certificate review. Thus, a blanket certificate is intended to serve as adjunct authority to enable a company to make certain relatively minor, cost-constrained modifications to a larger system that has been separately scrutinized and approved under case-specific certificate authorization. To ensure projects with potentially significant impacts are not constructed under blanket authority, companies are prohibited from dividing larger projects into multiple smaller blanket-eligible segments.[258]

101. Before acting under blanket authority, a company must provide notice to all affected landowners at least 45 days in advance.[259] In many cases, landowners must receive notice 60 days in advance, accompanied by an opportunity to protest the proposed project.[260] Exceptions to this notification are limited.[261] In establishing this notice period, the Commission considered the needs of landowners and the nature of permitted projects.[262] Additionally, in this instance, Atlantic will also have to document minor

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[257] Rehearing Request of Shenandoah Valley Network at 82.

[258] 18 C.F.R. § 157.208(b) (2017) states a blanket certificate holder "shall not segment projects in order to meet the [blanket program] cost limitation."

[259] *Id*. § 157.203(d).

[260] *Id*. § 157.205.

[261] *Id*. § 157.203(d)(3).

[262] *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, *order on reh'g*, Order

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future actions performed under the blanket certificate program in either annual reports or as Prior Notice applications,[263] subject to the Commission's environmental review in accordance with section 157.206 of the Commission's regulations.[264] For these reasons, blanket certificate process in full compliance with the NGA and consistent with all notice and comment requirements.

102. Receipt of a Part 157 blanket certificate does confer the right of eminent domain authority under section 7(h) of the NGA.[265] However, Commission regulations require companies to include information on relevant eminent domain rules in notices to potentially affected landowners.[266] The compensation landowners receive for property rights is a matter of negotiation between the gas company and landowner, or is determined by a court in an eminent domain proceeding. In view of the above-noted blanket program procedures and protections, we expect landowners will have the opportunity to raise specific concerns and seek specific relief regarding Atlantic's reliance on blanket authority in undertaking any future activity.

103. Further, we dismiss the argument that the Commission did not properly consider the impact of the case-specific certificate or blanket certificate on nearby property values. The Certificate Order reviewed the submitted anecdotes, public surveys, and opinion polls on property values, and concluded that such examples do not constitute substantial evidence that natural gas projects decrease property values.[267] Thus, we find the

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No. 686-A, FERC Stats. & Regs. ¶ 31,249, at P 16, *order on reh'g*, Order No. 686-B, 120 FERC Stats. & Regs. ¶ 31,255 (2007).

[263] Prior Notice applications are those types of blanket certificate program activities which are not deemed automatic and require 60-day notice of publication in the Federal Register, https://www.ferc.gov/industries/gas/indus-act/blank-cert.asp.

[264] 18 C.F.R § 157.206.

[265] *See* 15 U.S.C. § 717f(h) (2012); *also Columbia Gas Transmission, LLC*, 768 F.3d 300, 314 (3d Cir. 2004) (finding that the plain meaning of the Commission's Part 157 blanket certificate regulations grants the holder of a blanket certificate the right of eminent domain to obtain easements from landowners).

[266] 18 C.F.R. § 157.203(d)(2)(v) (2017).

[267] Certificate Order, 161 FERC ¶ 61,042 at P 251. *See* Final EIS at 4-504 ("The responses to these polls were strictly personal opinion and not based on real estate sales data. Also, questionnaires and surveys, while providing a snapshot of public opinion, do not carry with them the rigors of statistically developed and controlled studies").

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Commission conducted an appropriate review to identify any appreciable impact on property values due to the ACP Project.

104. We find no merit in the Shenandoah Valley Network's argument that the blanket certificate minimizes economic and environmental review.[268] The blanket certificate program is limited to activities that will not have a significant adverse environmental impact. The Commission ensures this by restricting blanket certificate authority to certain types of facilities and to individual projects that can comply with a cost cap and the environmental requirements specified in the Commission's regulations.[269]

B. Environmental Issues

1. The Draft EIS Satisfied NEPA Requirements

105. Shenandoah Valley Network argues that the Commission's Draft EIS was missing relevant environmental information and that a substantial amount of information was added to the record after the conclusion of the public comment period, depriving the public of any input and preventing meaningful public participation in the NEPA process.[270] In particular, Shenandoah Valley Network argues that the Draft EIS was required to include site-specific construction plans.[271]

106. We disagree. The Draft EIS is a draft of the agency's proposed Final EIS and, as such, its purpose is to elicit suggestions for change.[272] A draft is adequate when it allows for "meaningful analysis" and "make[s] every effort to disclose and discuss" "major points of view on the environmental impacts."[273] Shenandoah Valley Network do not

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[268] Rehearing Request of Shenandoah Valley Network at 83.

[269] 18 C.F.R. § 157.206(b) (2017).

[270] Rehearing Request of Shenandoah Valley Network at 45-49, 58-61 at 39-40.

[271] *Id.* at 91.

[272] *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

[273] 40 C.F.R. § 1502.9(a); *see also National Committee for the New River v. FERC*, 373 F.3d 1323, 1328 (D.C. Cir. 2004) (holding that the Commission's Draft EIS was adequate even though it did not have a site-specific crossing plan for a major waterway where the proposed crossing method was identified and thus provided "a springboard for public comment").

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demonstrate that the information they list renders the Draft EIS inadequate by these standards. For instance, Shenandoah Valley Network acknowledges[274] that at least some of the information submitted after the Draft EIS was addressed in the Final EIS, though it does not identify that information.

107. The inclusion in the Certificate Order of environmental conditions that require Atlantic and DETI to file mitigation plans does not violate NEPA. Indeed, NEPA "does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated."[275] Here, Commission staff published a Final EIS that identified baseline conditions for all relevant resources. Later-filed mitigation plans will not present new environmentally-significant information nor pose substantial changes to the proposed action that would otherwise require a supplemental EIS. As we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies because large projects, such as this, take considerable time and effort to develop.[276] Perhaps more important, their development is subject to many variables whose outcomes cannot be predetermined. And, as we found elsewhere, in some instances, the certificate holder may need to access property in order to acquire the necessary information.[277] Accordingly, post-certification studies may properly be used to develop site-specific mitigation measures. It is not unreasonable for the Final EIS to deal with sensitive locations in a general way, leaving specificities of certain resources for later exploration during construction.[278] What is important is that the agency make adequate provisions to assure that the certificate holder will undertake and identify appropriate mitigation

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[274] Request for Rehearing of Shenandoah Valley Network at 53 (discussing the Transco Pipeline Alternative).

[275] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (*Robertson*).

[276] *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 94*; East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225 at P 23, *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d at 1323.

[277] *Midwestern Gas*, 116 FERC ¶ 61,182, at P 92.

[278] *Mojave Pipeline Co.*, 45 FERC ¶ 63,005, at 65,018 (1988).

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measures to address impacts that are identified during construction.[279] We have and will continue to demonstrate our commitment to assuring adequate mitigation.[280]

108. Moreover, while the Draft EIS serves as "a springboard for public comment,"[281] any information that is filed after the comment period is available in the Commission's public record, including through its electronic database, eLibrary.[282] As noted in the Certificate Order, when Atlantic proposed certain route modifications after the Draft EIS, Commission staff mailed letters soliciting comments from newly affected landowners.[283] Shenandoah Valley Network claims that parties were precluded from commenting on supplemental information,[284] but the Commission in fact received numerous written individual letters and electronic filings commenting on the Final EIS or about the projects after the issuance of the Final EIS. The Commission addressed those additional submissions in the Certificate Order.[285]

109. While Shenandoah Valley Network disagrees with the Commission's Final EIS, both as to its conclusions and its analysis of the environmental impacts, those disagreements do not show that the Commission's decision-making process was uninformed, much less arbitrary and capricious. "If supported by substantial evidence, the Commission's findings of fact are conclusive."[286] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence."[287] When

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[279] *Id.*

[280] *Id.*

[281] *See Robertson*, 490 U.S. at 349.

[282] The eLibrary system offers interested parties the option of receiving automatic notification of new filings.

[283] Certificate Order, 161 FERC ¶ 61,042 at P 197.

[284] Request for Rehearing of Shenandoah Valley Network at 57, 62.

[285] *See, e.g.*, Certificate Order, 161 FERC ¶ 61,042 at PP 208, 223, 232, 237-39 (addressing mining; surface water and fisheries; vegetation, forested land, and wildlife.).

[286] *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting *B & J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (citing 15 U.S.C. § 717r(b))).

[287] *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014)

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considering the Commission's "evaluation of scientific data within its expertise," the courts afford the Commission "an extreme degree of deference."[288] Petitioners have not shown that "omissions in the [draft EIS] left the public unable to make known its environmental concerns about the project's impact."[289] As more fully discussed below, we find that the Final EIS's conclusions were supported by substantial evidence and affirm the Commission's findings in the Certificate Order.

2. Supplemental EIS

110. Petitioners contend that the Commission must prepare and issue a supplemental EIS because they assert Atlantic supplemented its application 18 times post-Draft EIS issuance, five times post-Final EIS issuance, and three times post-Certificate issuance.[290] Petitioners argue that the Commission should have required Atlantic to file all project information prior to issuing its Certificate Order – without doing so, they assert that the Commission did not evaluate all environmental considerations in its decision making process.[291]

111. We dismiss petitioners' claims that we should have prepared a supplemental EIS. Section 1502.9(c) of the Council on Environmental Quality's (CEQ) regulations implementing NEPA requires agencies to prepare supplements to the Draft or Final EIS if "there are significant new circumstances or information relevant to the environmental

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(internal quotation and citation omitted).

[288] *Myersville*, 783 F.3d at 1308 (internal quotation marks omitted); *see also Marsh v. Oregon National Resources Council*, 490 U.S. 306, 377 (1989) ("Because analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.") (internal quotation marks omitted).

[289] *Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399, 2018 WL 3595760, at *10 (4th Cir., July 27, 2018) (rejecting petitioners claim that the Commission's draft environmental impact statement precluded meaningful comment where the applicant had not yet filed an erosion and sediment control plan at the time the draft EIS was published) (citing *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004)).

[290] Rehearing Request of Public Interest Groups at 10; Rehearing Request of Ashram-Yogaville at 7; Rehearing Request of Friends of Nelson at 11.

[291] Rehearing Request of Ashram-Yogaville at 7; Rehearing Request of Friends of Nelson at 11, 13.

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concerns and bearing on the proposed action or its impacts."[292] In determining whether new information is "significant," courts have provided that agencies should consider whether "the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS."[293]

112. Petitioners state that the Certificate Order relied on significant new evidence that would alter the environmental analysis; however petitioners offer nothing more than a numerical accounting[294] or dated list of information filed by Atlantic.[295] Petitioners fail to explain why or how the information filed post-Draft EIS issuance presented significant new circumstances that would have altered the analysis in the Final EIS or in the Certificate Order, requiring the preparation of a supplemental EIS. Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not suffice to raise an issue. Further, petitioners are not permitted to incorporate arguments on rehearing by reference and must identify their specific concerns.[296] Because petitioners do not list any specific concerns explaining why or how

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[292] 40 C.F.R. § 1502.9(c) (2017).

[293] *Tennessee Gas Pipeline Company, L.L.C.*, 162 FERC ¶ 61,013 (2018) (citing *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984)); s*ee also City of Olmsted Falls, Ohio v. F.A.A.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (applying the rule from *Wisconsin v. Weinberger*); *Sierra Club v. Froehlke*, 816 F.2d. 205, 210 (5th Cir. 1987) (describing that "significant" requires that "the new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned").

[294] Rehearing Request of Public Interest Groups at 10.

[295] Rehearing Request of Ashram-Yogaville at 7; Rehearing Request of Friends of Nelson at 12.

[296] *San Diego Gas and Electric Co. v. Sellers of Market Energy*, 127 FERC ¶ 61,269 at P 295. *See Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 ("[T]he Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent. Bootstrapping of arguments is not permitted."). *See also ISO New England, Inc.*, 157 FERC ¶ 61,060 (explaining that the identical provision governing requests for rehearing under the Federal Power Act "requires an application for rehearing to 'set forth specifically the ground or grounds upon which such application is based,' and the Commission has rejected attempts to incorporate by reference grounds for rehearing from prior pleadings"); *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 10 ("The Commission, however, expects all grounds to be set forth in the rehearing request, and will dismiss any ground only incorporated by reference.") (citations omitted).

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newly filed information altered the determinations in the Final EIS or Certificate Order, we dismiss those allegations.

113. Additionally, Ashram-Yogaville contends that the Commission did not analyze the environmental or visual impacts of the crossing of the Blue Ridge Parkway and the Appalachian National Scenic Trail in the Reeds Gap area if horizontal directional drilling (HDD) is infeasible.[297] Thus, the Commission must prepare a supplemental EIS addressing this issue.[298] We disagree. The Final EIS explained that Atlantic will only cross the Blue Ridge Parkway and the Appalachian National Scenic Trail in the Reeds Gap area using the direct pipe method if multiple attempts at HDD fail.[299] Under its *Initial Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*, Atlantic acknowledged that under the direct pipe option, the length of the pipeline right-of-way that would be visible along portions of Reeds Gap Road would increase. However, the Final EIS concluded that the visual impacts resulting from this option would be the same as the proposed action and access roads, work spaces, and temporary construction areas would be restored as close as possible to pre-construction conditions.[300] We agree. As specified in the Certificate Order, Environmental Condition 49 requires Atlantic to file for review and approval, site-specific HDD crossing plans and alternative direct crossing plans for the Blue Ridge Parkway and provide proof of consultation with the Department of the Interior's National Park Service (National Park Service) regarding these plans.[301] We do not find that any additional information submitted by Atlantic as a result of its potential alternate crossing methods caused the Commission to make substantial changes in the proposed action, nor did it present significant new circumstances or information relevant to environmental concerns.

114. Further, we disagree with Ashram-Yogaville's argument that we rushed to issue the Certificate Order without giving the public an opportunity to review information submitted by Atlantic.[302] As discussed in the Certificate Order, staff issued the Draft EIS

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[297] Rehearing Request of Ashram-Yogaville at 7.

[298] *Id.*

[299] Final EIS at 4-481.

[300] *Id.* *See* Atlantic's October 27, 2017 Supplemental Information at Attachment P (*Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*) (Accession No. 20171027-5240).

[301] Certificate Order, 161 FERC ¶ 61,042 at Environmental Condition 49.

[302] Rehearing Request of Ashram-Yogaville at 7-8.

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for a 90-day comment period ending on April 6, 2017.[303] While it is true that "a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions,"[304] the Supreme Court has stated that under the "rule of reason," an agency need not supplement an [EIS] every time new information comes to light after the EIS is finalized."[305] The Commission's approach is fully consistent with *National Committee for New River v. FERC*,[306] where the D.C. Circuit held that "if every aspect of the project were to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project."[307]

115. Any additional environmental information filed by Atlantic between the issuance of the Draft EIS and the Final EIS did not cause the Commission to make "substantial changes in the proposed action," nor did it present "significant new circumstances or information relevant to environmental concerns."[308] Further, to the extent the Commission relied on additional environmental information in the Certificate Order, this information was disclosed and available for comment on rehearing. Thus, we find that Ashram-Yogaville had an opportunity to comment on additional environmental information and there was no violation of its due process rights.

3. Project Purpose and Alternatives

116. Petitioners contend that the EIS's "statement of purpose and need" is impermissibly narrow and as a result, the Commission failed to fully evaluate several alternatives. Petitioners allege that the Commission should have evaluated the broader energy demands being met by the Projects and whether those needs can be met by existing pipelines or with non-transportation alternatives, such as energy conservation or

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[303] Certificate Order, 161 FERC ¶ 61,042 at P 197.

[304] Rehearing Request of Preserve Craig at 42 (citing *Warm Springs Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980)).

[305] *Marsh*, 490 U.S. at 373.

[306] 373 F.3d 1323 (D.C. Cir. 2004) (*New River*).

[307] *Id*. at 1329 (citing *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225 at P 25).

[308] 40 C.F.R. § 1502.9(c)(1) (2017).

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renewable energy resources.[309] Petitioners also allege that the Commission failed to fully consider several route alternatives.

117. We disagree. Pursuant to NEPA, the Commission evaluated alternatives to satisfy the project's purpose and need.[310] As discussed below, the Final EIS fully analyzed all reasonable alternatives, including the no action alternative, system alternatives, and route alternatives, or properly dismissed those alternatives that would not meet project goals.

a. <u>Project Purpose and Need Statement</u>

118. Petitioners contend that the Final EIS narrowly constructed the "Purpose and Need" statement in order to exclude reasonable alternatives.[311] Shenandoah Valley Network faults the Final EIS for relying on Atlantic's stated project purpose, which, it alleges, does not reflect genuine market demand. Citing *Hughes River Watershed Conservancy v. Glickman*, Shenandoah Valley Network argues that the purpose and need statement is based on misleading economic benefits significant to the evaluation of alternatives.[312] We disagree.

119. In *Hughes River Watershed Conservancy v. Glickman*, the court found that the EIS at issue failed to properly assess project impacts by mistakenly including gross economic benefit values associated with recreation at a proposed dam rather than net values, resulting in a much higher projected economic benefit.[313] Shenandoah Valley Network argues that the Final EIS here is analogous because, it believes, the amount of natural gas transportation service needed is less than that requested in precedent agreements.

120. But as discussed, the precedent agreements are significant evidence of demand. The Certificate Order also explained that the genesis for the project was a response to a solicitation by Duke Energy Corporation and Piedmont for competitive firm transportation to North Carolina to serve its growing need for natural gas.[314] Thus, the Final EIS

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[309] Rehearing Request of Ashram-Yogaville at 10; Rehearing Request of Friends of Buckingham at 10; Rehearing Request of Friends of Nelson at 21.

[310] 40 C.F.R. § 1502.14 (2017).

[311] Rehearing Request of Ashram-Yogaville at 8-9.

[312] Rehearing Request of Shenandoah Valley Network at 50 (citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 447 (4th Cir. 1996)).

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

[314] Certificate Order, 161 FERC ¶ 61,042 at P 50. Additionally, Virginia Power

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reasonably relied on this demand and the applicants' stated goals, explaining that the ACP Project would provide 1.5 million Dth per day of natural gas to six public utilities and local distribution companies in Virginia and North Carolina, while the upstream Supply Header Project would connect Atlantic's customers to the Dominion South Point supply hub to access several natural gas supply pipelines.[315] The Commission's purpose is "*whether* to adopt an applicant's proposal and, if so, to what degree,"[316] not to engage in resource planning for energy end-users.

121. Petitioners also allege that "a major driver" of the project is gas export.[317] Petitioners fail to provide any support for their contention aside from noting that a gas export facility is located in Georgia.[318] As discussed, there is no evidence in the record to suggest that the natural gas to be transported by the project is actually intended for export.[319] Based on the information in the project's precedent agreements and statements by Atlantic, the ACP Project would provide natural gas domestically to generate electricity and for residential, industrial, and commercial uses.[320]

Services Energy Corporation also requested proposals for firm transportation to serve natural gas-fired generation in Virginia. *Id.*

[315] Final EIS at 1-3 to 1-5. *See Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399, 2018 WL 3595760, at *10 (4th Cir. July 27, 2018) ("[T]he statement [of purpose and need] allows for a wide range of alternatives but is narrow enough (i.e., it explains where the gas must come from, where it will go, how much it would deliver) that there are not an infinite number of alternatives.").

[316] *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73.

[317] Rehearing Request of Friends of Buckingham at 10; Rehearing Request of Ashram-Yogaville at 10; Rehearing Request of Friends of Nelson at 22. *See* Rehearing Request of William Limpert at 2-3.

[318] Rehearing Request of William Limpert at 2.

[319] *See supra* at P 58.

[320] Atlantic anticipates approximately 79.2 percent of the natural gas transported by ACP would be used as a fuel to generate electricity for industrial, commercial, and residential uses. Lesser amounts of the natural gas would also be used directly for residential (9.1 percent), industrial (8.9 percent), and commercial and other uses (e.g. vehicle fuel) (2.8 percent). Final EIS at 1-3.

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b. Alternatives Analysis in the Final EIS

122. Friends of Wintergreen contend that NEPA requires the Commission to take an independent look at alternative routes in the record, rather than relying on staff's conclusions in the Final EIS. Friends of Wintergreen cites *Association of Public Agency Customers, Inc. v. Bonneville*[321] as support, but that case simply states that NEPA requires that agencies study appropriate alternatives whenever there are unresolved conflicts as to the proper use of resources, even if the proposed action does not require an EIS.[322] The Commission complied with this requirement by appropriately relying on the staff prepared EIS, which analyzed a wide range of alternatives. No additional analysis was necessary.

c. No Action and System Alternatives

i. No Action and Renewable Energy Alternatives

123. Petitioners next claim that the Commission improperly rejected the no-action alternative based on Atlantic's claims of public benefit and, based on these claims, the Final EIS improperly excluded renewable energy and energy efficiency.[323] Courts review both an agency's stated project purpose and its selection of alternatives under the "rule of reason," where an agency must reasonably define its goals for the proposed action, and an alternative is reasonable if it can feasibly achieve those goals.[324] When an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal, adopting

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[321] *Association of Public Agency Customers, Inc. v. Bonneville*, 126 F.3d 1158, 1174 (9th Cir. 1997).

[322] Rehearing Request of Friends of Wintergreen at 13 (citing *Association of Public Agency Customers, Inc. v. Bonneville*, 126 F.3d 1158, 1174 (9th Cir. 1997)).

[323] Rehearing Request of Ashram-Yogaville at 9; Rehearing Request of Friends of Buckingham at 9; Rehearing Request of William Limpert at 2-3; Rehearing Request of Friends of Nelson at 20, 37.

[324] *See, e.g.*, *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded "considerable discretion to define the purpose and need of a project," agencies' definitions will be evaluated under the rule of reason.). *See also City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2016) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action").

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the proposal, or adopting the proposal with some modification.[325] An agency may eliminate those alternatives that will not achieve a project's goals or which cannot be carried out because they are too speculative, infeasible, or impractical.[326]

124. The Final EIS explained that it excluded renewable energy and energy efficiency alternatives because renewable energy and energy efficiency measures do not transport natural gas. Because these energy technologies would not feasibly achieve the projects' aims, they were not considered or evaluated further.[327] Petitioners contend this approach is impermissibly restrictive,[328] but for purposes of NEPA, an agency may take into account an applicant's needs and goals when assessing alternatives, so long as it does not limit the alternatives to only those that would adopt the applicant's proposal.[329]

125. Several petitioners also cite the EIS for the Constitution Pipeline Project[330] as an example where the Commission did consider these alternatives.[331] There is no indication that the Commission was required to consider such alternatives in that proceeding but they were ultimately dismissed for the reasons stated here. The Constitution EIS concluded that gains in energy efficiency would only occur on a much longer time-line than the

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[325] *See Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72-74.

[326] *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (The Commission need not analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or ... impractical or ineffective.") (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (internal quotation marks omitted)); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (same). *See also Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives).

[327] Final EIS at ES-15.

[328] Rehearing Request of Ashram-Yogaville at 9; Rehearing Request of Friends of Buckingham at 9; Rehearing Request of William Limpert at 3; Rehearing Request of Friends of Nelson at 20.

[329] *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73-74.

[330] Final EIS for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000, CP13-502-000 (Oct. 2014) (Constitution EIS).

[331] Rehearing Request of Ashram-Yogaville; Rehearing Request of Friends of Buckingham at 10; Rehearing Request of Friends of Nelson at 21.

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shippers' contracted service and would not be expected to eliminate the increasing demand for energy or natural gas in New England.[332] The Constitution EIS also concluded that renewable resources would not meet overall anticipated consumer needs and would not be completely interchangeable with natural gas because the process to electrify the combustion-based uses of natural gas for heating, cooking, and transportation would require that consumers make a costly transition to new electric equipment and would require major investment in electric transmission lines to move renewable electricity to consumers.[333]

ii. Other Pipeline System Alternatives

126. Petitioners next argue that the Commission erred by dismissing the use of other pipelines to serve as alternatives to ACP.[334] Petitioners allege that the Commission ignored testimony by Thomas Hadwin and the 2016 Synapse Report, both of which allege that existing pipeline infrastructure, with minor modifications, could supply ACP's intended markets.[335] According to Shenandoah Valley Network, the Commission recently approved the nearby Transco pipeline to bring 1.7 billion cubic feet (Bcf) per day of Marcellus gas to the Southeast on behalf of gas marketers, all of which are looking for customers.[336]

127. As discussed in the Certificate Order, the Final EIS analyzed the availability of capacity on other pipelines to serve as alternatives to the ACP Project, and concluded that they do not presently serve as practical alternatives to the project.[337] Shenandoah Valley Network alleges the Final EIS ignores the Commission's recent approval of the Transco system to bring gas south. But the Final EIS explained that Transco does not have sufficient capacity to serve the project's customers.[338] Besides new compression, Transco

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[332] Constitution EIS at 3-4 to 3-5.

[333] *Id.* at 3-7 to 3-13.

[334] Rehearing Request of Shenandoah Valley Network at 8; Rehearing Request of William Limpert at 3; Rehearing Request of Friends of Wintergreen at 28-33.

[335] Rehearing Request of William Limpert at 3; Rehearing Request of Shenandoah Valley Network at 53.

[336] Shenandoah Valley Network Rehearing Request at 53.

[337] Final EIS at 5-38.

[338] *Id.* at 3-4 to 3-5.

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would need to add 640 to 680 miles of new pipeline, including looping to increase capacity and multiple laterals to accommodate Dominion's and Atlantic's proposed receipt and delivery points.[339] The Final EIS concluded that the use of Transco's system would have similar impacts as the ACP and Supply Header Projects, and therefore, would not be environmentally preferable.

128. Shenandoah Valley Network argues that the Commission should have nonetheless considered a different configuration to use the Transco System, the Columbia System, or both. It argues that the Final EIS failed to support its claim that 300 miles of new pipeline would be necessary to connect Transco's system to supply areas.[340] Shenandoah Valley Network also argues that the Final EIS failed consider that the Transco's System is already connected to several of Atlantic's delivery points in southeastern Virginia.[341] The Final EIS should have also considered those connections and whether existing laterals could connect Transco to Atlantic's proposed delivery points in North Carolina. More broadly, Shenandoah Valley Network argues that the Final EIS should have examined whether combinations of existing interstate and intrastate pipeline infrastructure could connect the Transco system to the Dominion supply hub or otherwise meet customers' needs.[342]

129. The Final EIS also considered other pipeline infrastructure. As explained in the Final EIS, the Final EIS considered transportation on existing Columbia, Transco, and East Tennessee Systems and on new pipeline projects—Mountain Valley Pipeline and Columbia's WB XPress Project—but found that these alternatives do not have available capacity and are not environmentally preferable due to necessary modifications.[343] As for other configurations that could potentially connect Dominion to Transco, Columbia, or any other pipeline system, none would be able to meet project purposes given capacity constraints on these systems.[344] Like Transco's system, the Columbia system does not have enough capacity to serve the project's customers.[345] The Final EIS explained that

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[339] *Id.*

[340] Shenandoah Valley Rehearing Request at 54.

[341] *Id.* at 55.

[342] *Id.* at 54.

[343] Final EIS at 3-4 to 3-6.

[344] *Id.*

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

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400 miles of new pipeline loop as well as a new pipeline segment in North Carolina, similar to the North Carolina section of the ACP mainline, would be required to reach delivery points.[346]

130. Shenandoah Valley Network argues that the Final EIS should have addressed partial alternatives using existing infrastructure that may meet demand,[347] but an agency is not obligated "to consider in detail each and every conceivable variation of the alternatives stated,"[348] particularly once it is determined that a key component of that alternative—capacity on interstate systems—renders such an alternative infeasible. Such an alternative would not meet the Project's goals and is simply too speculative when petitioners fail to point with any specificity to any available intrastate systems.

iii. Mountain Valley Co-Location and Merged Systems Alternatives

131. Petitioners next allege that the Final EIS erred when it rejected the merged systems and the co-location alternatives for the ACP Project and Mountain Valley Project and Equitrans Expansion Project[349] without assessing the need for either project. According to Shenandoah Valley Network, if the Final EIS had properly examined the need for either project, it could have assessed whether smaller-scale adjustments would allow a pipeline using the Atlantic corridor to meet the actual market demand for both projects.[350] Friends of Wintergreen also allege that the Commission did not support the analysis of the merged systems alternative with substantial evidence.[351]

132. The Final EIS properly considered the volumes to be transported by both the Mountain Valley Project and ACP Project at approximately 3.44 billion cubic feet per day. As discussed above and in the Mountain Valley Project proceeding, the Final EIS

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[346] *Id.*

[347] Shenandoah Valley Network Rehearing Request at 55.

[348] *Brooks v. Coleman*, 518 F.2d 17, 19 (9th Cir. 1975).

[349] At the time of the Final EIS, the Mountain Valley Project was proposed in Docket Nos. CP16-10-000 and CP16-13-000. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2018); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197.

[350] Rehearing Request of Shenandoah Valley Network at 55.

[351] Rehearing Request of Friends of Wintergreen at 28-33.

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reasonably relied on this demand and the applicants' stated goals when assessing the co-location and merged system alternatives.[352]

133. The Commission need not analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective."[353] With respect to the collocation alternative, as described in the Final EIS and Certificate Order, there is insufficient space along the narrow ridgelines to accommodate two parallel 42-inch-diameter pipelines.[354] As a result, this alternative is technically infeasible and would not offer a significant advantage.

134. The Final EIS also determined that merging ACP Pipeline and the Mountain Valley Pipeline into one pipeline system was infeasible.[355] If a 42-inch diameter pipeline were used to transport the volumes to be supplied by both projects, the pipeline would require a higher operating pressure. Because this higher operating pressure would negatively impact shippers by reducing operational flexibility and future expansibility, the Final EIS determined that this alternative was not preferable.[356] As explained in the Final EIS, higher pressures would create operational constraints that would restrict Atlantic's ability to provide flexibility for customers' needed flow rate variations and line pack, and could foreclose contractually required possible future expansions.[357]

135. If thicker-walled pipe or higher grade steel modifications were used to maintain necessary pipeline pressure with a 42-inch diameter pipeline, the associated weight

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[352] *See supra* at P 120; *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 134.

[353] *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir.1992) (internal quotation marks omitted)); *Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (same).

[354] Final EIS at 3-10 to 3-11; Certificate Order, 161 FERC ¶ 61,042 at P 316.

[355] Final EIS at 3-8.

[356] *Id*.

[357] *Id*. ACP Foundation Shippers have a one-time right to request an increase in contracted capacity. *Id*.; *see also* Certificate Order, 161 FERC ¶ 61,042 at PP 124 – 127 (approving expansion rights as non-conforming tariff provisions).

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increases would render the alternative infeasible.[358] This additional weight would: require larger construction equipment; reduce the elasticity of the pipeline; increase the complexity of the welding; and possibly increase the construction period and damage to public roads.[359] The construction of larger diameter, non-typical 48-inch diameter pipeline would face similar construction challenges due to its heavy weight. Specifically, this scenario would increase the complexity of the welding, increase construction workspaces, and increase construction complexity in steep terrain.[360] Such construction would also require a wider construction right-of-way by increasing the trench area, and therefore spoil, by about 30 percent.[361]

136. The Final EIS also found that the merged system alternatives would also result in additional compression, and therefore air emissions and noise, compared to the Mountain Valley Pipeline Project and ACP Project combined.[362] Although the merged system alternatives would result in some environmental advantages,[363] the Final EIS did not find that the merged system alternatives hold a significant advantage over the proposed action when these alternatives' environmental factors, technical feasibility, and ability to meet the ACP Project's operational needs and timelines are considered together.[364] A more detailed analysis was not required under NEPA once the Commission determined that the one pipeline merged system alternative was not feasible.[365]

137. Friends of Wintergreen argue these findings are unsupported by the record. First, Friends of Wintergreen argue that the Commission has failed to support the claim that the

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[358] Final EIS at 3-9.

[359] *Id.*; *see also* ACP Resource Report 10 – Alternatives, 10-40.

[360] Final EIS at 3-9.

[361] *Id.* at 3-10 (installation of 48-inch pipeline would require 30 feet or more of additional construction right-of-way over entire length of the pipeline route and would displace about 30 percent more soil).

[362] *Id.*

[363] *Id.* We note that since no entity has proposed or engineered this hypothetical alternative, the assessments of potential benefits and impacts is necessarily limited, and based on best available information.

[364] *Id.*

[365] *See supra* n.353.

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merged systems alternative would require additional time for planning and design, and therefore, would fail to meet project timeframes.[366] As discussed above, the Commission staff's analysis identified several concerns with this alternative, but the Final EIS noted that the new alternative would add significant time to the project. Atlantic had originally requested that the Commission authorize the project so that it could begin service by November 1, 2018.[367]

138. Friends of Wintergreen also argue that the Commission offered no support for its statement in the Certificate Order that the 42-inch-diameter pipeline merged system alternative (Merged System 42-Inch Alternative) would "triple" air quality impacts.[368] Friends of Wintergreen points out that the Final EIS only states that compression, and resulting air quality impacts, would increase under this alternative, and Atlantic's application states that compression would increase between 133 percent and 44 percent.[369] The Certificate Order's claim that the Merged System 42-Inch Alternative would triple air quality impacts was in error. The Certificate Order statement was taken from the Mountain Valley Pipeline Project Final EIS, but that proceeding examined the merged system alternative along the ACP route.[370] As discussed above, the Final EIS dismissed the Merged System 42-Inch Alternative based on several factors.

139. Friends of Wintergreen argue that the Final EIS should not have considered future expansibility as a project need when future expansions were not part of the certificated ACP Project.[371] Friends of Wintergreen argue that this approach violates the requirement, cited in *Citizens Against Burlington, Inc. v. Busey,* that "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the

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[366] Friends of Wintergreen Rehearing Request at 29.

[367] Atlantic Application at 3 (Sept. 18, 2015).

[368] Rehearing Request of Friends of Wintergreen at 29-30.

[369] *Id.* (citing Final EIS at 3-9, ACP Resource Report 10 at 10-24 to 10-26).

[370] Commission staff's updated analysis in that proceeding indicated that a merged system along the ACP route would result in additional compression requirements that increase air pollutants by 130 to 520 percent compared to the Mountain Valley Pipeline and ACP Projects considered individually. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 148.

[371] Rehearing Request of Friends of Wintergreen at 32.

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goals of the agency's action, and the EIS would become a foreordained formality."[372] The Commission did not so narrowly draw the purpose and need statement that the only project that would meet the purpose and need statement is the project proposed by Atlantic.[373] *Citizens Against Burlington, Inc. v. Busey* acknowledges that the NEPA permits agencies to take the project proponent's needs into account, which the Commission did here by ensuring that any pipeline alternative be designed to allow for future expansions.[374] Regardless, we note that the increased pressure requirements were needed not only to ensure future expandability but for operational requirements as well.[375]

140. The dissent argues the Commission should have given more consideration to the merged systems alternative given associated environmental benefits, including fewer crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway. The dissent contends that analyzing such an alternative in depth would have been appropriate given that, in *Sierra Club v. U.S. Dept. of the Interior*, the Fourth Circuit Court of Appeals (Fourth Circuit) vacated the National Park Service's (NPS) right-of-way permit allowing the ACP Project to cross under the Blue Ridge Parkway.[376] The dissent points out that the Court questioned whether it is possible for the ACP Project to be consistent with parkway purposes,[377] and the decision leaves unaddressed the threshold question of whether NPS has authority to grant a pipeline right-of-way at all.[378]

141. We disagree. As discussed, the Final EIS eliminated the merged systems alternative because it would not meet the project's purpose and need. With respect to the Blue Ridge Parkway crossing, the ACP Project avoids any direct impacts to the Parkway by tunneling under the Parkway using a 4,639-foot-long HDD crossing and, if HDD is

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[372] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[373] Rehearing Request of Friends of Wintergreen at 32

[374] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) ("When an agency is asked to sanction a specific plan, see 40 C.F.R. § 1508.18(b)(4), the agency should take into account the needs and goals of the parties involved in the application").

[375] Final EIS at 3-8.

[376] *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

[377] *Id.* at *58.

[378] *Id.* at *55.

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unsuccessful, the project will tunnel under the parkway using a shorter trenchless crossing method.[379] Under either scenario, after crossing the Parkway, Atlantic would cross private property using an open-cut method. This method requires that Atlantic clear a 125-foot-wide right-of-way during construction, which would narrow to a 50-foot-wide permanent right-of-way.[380] Atlantic, in consultation with NPS, prepared a visual impact assessment to examine the project's impacts on the Parkway. The assessment conducted a full simulation of the view from a scenic overlook known as the Three Ridges Overlook and indicated that the cleared right-of-way on Piney Mountain private land, approximately 1 mile outside the Parkway, would be visible.[381]

142. As the Fourth Circuit noted, the visual impact assessment concluded that "[v]iews of the ACP corridor from the Three Ridges overlook . . . would likely be inconsistent with NPS management objectives…"[382] The Final EIS included this finding,[383] but mistakenly omitted the assessment's next sentence, which states "[t]o mitigate this effect, Atlantic has committed to planting shrubs and other low vegetation in the right-of-way, to reduce visual contrast . . ."[384] This mitigation is required by the Certificate Order[385] and all

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[379] *See* Final EIS at 3-21 to 3-23.

[380] *Id.* at 2-15; 5-24.

[381] *Id.* at Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 38-42.

[382] *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 at * 36 (citing J.A. 1020), *58 (citing J.A. 1020); Final EIS at 4-479, Appendix T, 111.

[383] Final EIS at 4-479.

[384] *Id.* at Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 111. *See also id.* at 110 ("With no mitigation, the ACP corridor at KOP 39 would likely be inconsistent with NPS management objectives for visual resources. Atlantic would plant additional shrubs along the right-of-way, as shown in Figure 3-14. These plantings would help to reduce the contrast between the right-of-way and surrounding areas, and would reduce the inconsistency with NPS management objectives.").

[385] Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 1 ("Atlantic . . . shall follow the construction procedures and mitigation measures described in their applications and supplements (including responses to staff data requests) and as identified in the EIS…"); Appendix T, *Visual Impact Assessment for*

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restoration will be subject to on-site environmental inspectors and multi-year reporting to the Commission.[386] With required mitigation and restoration, we agree with the Final EIS that the permanent right-of-way would not significantly impact scenic resources.[387] Accordingly, we do not find that the Blue Ridge Parkway crossing alters our conclusions that the merged systems alternative is infeasible and not environmentally preferable.[388]

d. Route Alternatives

143. The Final EIS considered 26 major route alternatives, 3 route variations along the ACP Project route, and 1 route variation along the Supply Header Project route. In almost all cases, the alternative routes were found to not provide a significant environmental

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Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands, 110 ("Atlantic would plant additional shrubs along the right-of-way, as shown in Figure 3-14"); *Updated Restoration and Rehabilitation Plan* at 31 (March 5, 2018) (accession no. 20180305-5034) ("To reduce the AP-1 mainline visual impacts at Piney Mountain between approximately Mileposts 158.9 and 159.4, associated with clearing the rights-of-way and as seen from the west side, particularly from the Three Ridges Overlook along the Blue Ridge Parkway, Atlantic will replant the temporary construction rights-of-way and ATWS with a combination of shrub and tree species. The 15 feet of the temporary construction areas nearest to the pipeline will be replanted with shrubs and shallow rooted small trees. The remaining areas of the temporary construction rights-of-way will be replanted with trees. The permanent rights-of-way will be seeded with herbaceous vegetation.").

[386] FERC, *Upland Erosion Control, Revegetation and Maintenance Plan* at 2, 3, 17-18, https://www.ferc.gov/industries/gas/enviro/plan.pdf; *Updated Restoration and Rehabilitation Plan* (accession no. 20180305-5034).

[387] *See* Final EIS at 5-26; Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 28 ("USFS. As shown in the simulation images, the bottom (closer) portion of the corridor is partially obscured by trees during leaf-off conditions. During leaf-on conditions, this portion of the corridor would likely not be visible at all, although the upper portion of the corridor would remain visible as a vegetated (but not forested) strip. The width of the corridor would become narrower, and the contrast with surrounding areas less prominent, as trees and other vegetation reclaim the temporary right-of-way over time").

[388] On August 10, 2018, the Director of the Commission's Office of Energy Projects issued a letter ordering Atlantic and DETI to cease work on the project pending further inquiry in light of the recent court decision.

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advantage over the proposed route segments and were not recommended. Nonetheless, several petitioners challenge this determination and contend that the Commission violated NEPA by failing to properly consider their preferred alternative.

i. <u>Alternatives Affecting National Forest Land</u>

144. Petitioners allege that the Commission did not justify its decision to approve the preferred alternative, route GWNF-6, instead of Atlantic's originally proposed route, particularly when the Final EIS stated that the preferred alternative had more environmental impacts.[389]

145. In the Final EIS, Commission staff rejected the original route because it was not feasible.[390] The U.S. Department of Agriculture's Forest Service (Forest Service) determined that the original route was not consistent with the Land and Resource Management Plans for the Monongahela National Forest and the George Washington National Forest.[391] According to the Forest Service, the original route would negatively impact wildlife, specifically the endangered Cheat Mountain and Cow Knob Salamanders and their habitats, the West Virginia Northern Flying squirrel and its habitat, and sprue ecosystem restoration areas.[392] As explained in the Final EIS, because the Forest Service indicated that it would not approve the alternative, it was no longer feasible and was not analyzed in greater detail.[393]

146. Friends of Nelson argues that the Commission was obliged to consider an alternative that completely avoids Forest Service land, noting that the Forest Service can only approve a right-of-way when "[t]he proposed use cannot reasonably be

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[389] Rehearing Request by William Limpert at 3.

[390] Final EIS at 3-21.

[391] *Id.* (citing January 19, 2016 Letter from Kathleen Atkinson, Regional Forester Eastern Region, and Tony Tooke, Regional Forester Southern Region, to Ms. Leslie Hartz, Atlantic Coast Pipeline, LLC (filed Jan. 20, 2016) (citing 36 C.F.R. § 251.54(e)(1)(i)-(ii))).

[392] January 19, 2016 Letter from Kathleen Atkinson, Regional Forester Eastern Region, and Tony Tooke, Regional Forester Southern Region, to Ms. Leslie Hartz, Atlantic Coast Pipeline, LLC (filed Jan. 20, 2016). Atlantic subsequently developed and adopted a 90-mile route change to avoid impacting these resources. *See* Final EIS at ES-15.

[393] Final EIS at 3-21.

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accommodated on non-National Forest System land. . . ."[394] Friends of Nelson notes that instead of fully analyzing alternatives that met this standard, the Final EIS eliminated alternatives that avoided use of National Forest land only because such routes would be longer.[395] The Final EIS eliminated routes that would completely avoid National Forest land, including the Blue Ridge Parkway, because such routes would not be environmentally preferable.[396] Routing the ACP Project to the south of the Monongahela National Forest and George Washington National Forest would increase the route by 43 miles.[397] In general, shorter pipeline routes have fewer environmental impacts than, and are environmentally preferable to, longer routes.[398] The Final EIS explained that no information suggested that the shorter pipeline route through the National Forests would have sufficiently greater impacts on sensitive resources that would justify approval of the longer southern route.[399] Similarly, the route to the north of the National Forests would affect 15 additional miles through similar forest habitats, waterbodies, and mountainous terrain.[400] To the extent Friends of Nelson has concerns with the Forest Service's authority to grant Atlantic a special use permit, Friends of Nelson must seek recourse with the Forest Service, not the Commission.

ii. <u>Nelson County Creekside Alternative</u>

147. Mr. Demian K. Jackson jointly with Ms. Bridget K. Hamre, landowners of Nelson County Creekside, contend Atlantic gave insufficient consideration to an alternative route they deem preferable and request the Commission adopt their alternative. Both contend that the Commission failed to consider a route alternative that would avoid bisecting their property.[401]

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[394] Rehearing Request of Friends of Nelson at 19. Friends of Nelson cites 36 C.F.R. § 251.54(b) but this standard is found in the Forest Service Manual. Forest Service Manual 2703.2(2)(b), https://www.fs.fed.us/dirindexhome/dughtml/fsm.html

[395] Rehearing Request of Friends of Nelson at 19.

[396] Final EIS at 3-18 to 3-21.

[397] *Id.* at 3-19.

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] Rehearing Request of Demian Jackson at 6-7.

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148. After publication of the Draft EIS and prior to the issuance of the Final EIS, Atlantic filed a minor route modification on January 19, 2017, adopting a series of minor route adjustments and modifications into its proposed route.[402] One of these variations crossed the Jackson property at approximate mileposts 170.1 to 171.6, and was developed specifically to avoid structures, septic fields, wells, and springs on the property. The Final EIS notes that this modification had been incorporated into the overall design of the project subsequent to the Draft EIS's issuance.[403]

149. This modification addresses the concerns expressed by the petitioners by increasing the distance between the route and their residence, springs, and grassed lawn. Commission staff has determined that attempting to exactly match the landowners' request would induce excessively sharp bends in the pipeline that may result in changes to gas hydraulics and impact one new additional landowner. Further, the alternative, as requested, would increase the overall length of the pipeline, nearly all of which would be forested and required the route to parallel a waterbody on the property. Finally, the landowners' preferred alternative would place the route closer to their neighbor's property, including a residence, on the north side of Route 623. On balance, we find the requested alternative would not offer significant environmental advantages.

iii. Wintergreen Resort Alternatives

150. On rehearing, Friends of Wintergreen renew their arguments that the Commission should have accepted their proposed alternatives which would have avoided impacts to the Wintergreen Resort. Atlantic plans to conduct approximately 5,000 feet of hydraulic directional drilling (HDD) to bore under, and avoid impacts to, the Blue Ridge Parkway and Appalachian National Scenic Trail. This HDD route would also cross under the main road providing access to Wintergreen Resort—Beech Grove Road/State Highway 664—with an HDD entry/exit workspace located directly across from the resort's entrance.[404] Friends of Wintergreen contend that the Commission improperly rejected their South of Highway 664 and Lyndhurst to Farmville Alternatives, and improperly attributed a separate alternative, Alternative 28, to Friends of Wintergreen.[405] As discussed in more detail below, the Final EIS properly dismissed these alternatives.

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[402] Atlantic's January 19, 2017 Supplemental Filing (Accession No. 20170119-5180).

[403] Final EIS at 3-53.

[404] *See* Final EIS at 3-35.

[405] Rehearing Request of Friends of Wintergreen at 21-27.

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(a) <u>South of Highway 664 Alternative</u>

151. Friends of Wintergreen argue that the Final EIS improperly rejected their proposed South of Highway 664 alternative, which would reroute a portion of the ACP Project to avoid the entrance to Wintergreen Resort.[406] They claim the Final EIS erred in concluding that the South of Highway 664 Alternative would not reduce the amount of side slope and steep terrain construction when Friends of Wintergreen's expert study shows that the ACP Project's proposed route over Piney Mountain is much steeper than the South of Highway 664 Alternative.[407] Friends of Wintergreen points out that submitted testimony and soil samples show that soil failure is likely along the ACP Project route and the nearby HDD exit location.[408] Friends of Wintergreen also argue that the Final EIS's conclusion that the proposed route and the South of Highway 664 route's visual impacts are similar is wrong when the proposed route would impact more local communities and trails. Finally, Friends of Wintergreen argues that the alternative route is superior because the proposed route is directly across from Wintergreen Resort's sole entrance and exit, and therefore poses a safety concern. Friends of Wintergreen contend that their comments were not seriously considered during the NEPA process, pointing out that the analysis of the South of Highway 664 alternative did not change between the Draft EIS and Final EIS.[409]

152. The Final EIS analyzed the South of Highway 664 alternative and did not recommend it because it would not offer a significant environmental advantage over the proposed route. With regard to safety, the Final EIS found that the alternative would increase the distance of the HDD workspace from the Wintergreen gate by 1,400 feet. The Final EIS determined that this would not grant a significant safety advantage because the project would be constructed and operated in accordance with federal regulations and federal oversight.[410] Atlantic is also required to follow its *Operational Emergency*

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[406] *Id.* at 21.

[407] *Id.* at 22.

[408] *Id.* at 23 (citing a report by Dr. Melvin J. Bartholomew and soil study by Blackburn Associates, discussed in the March 24, 2017 Draft EIS Comments by Friends of Wintergreen, Accession No. 20170324-5252).

[409] *Id.* at 21.

[410] *See* Final EIS at 3-35. The Final EIS also explained that interstate pipeline operations present low safety risks, noting that from 1997 to 2016, there were an average of 66 significant incidents and 2 fatalities per year. The number of significant incidents distributed over the more than 315,000 miles of natural gas transmission pipelines indicates the risk is low for an incident at any given location. *Id.* at 4-587.

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Response Plans in coordination with local emergency response providers.[411] The *Operational Emergency Response Plans* would address incident evacuation requirements. Furthermore, Atlantic must coordinate with landowners and local emergency response services to implement the *Local Emergency Response Providers Emergency Response Plan* in the event of an emergency.[412]

153. As for the remainder of Friends of Wintergreen's alleged benefits, as explained in the Final EIS, the alternative would merely transfer construction constraints and visual impacts from one location to another while adding 0.9 mile to the project route. The South of Highway 664 Route would reduce visual impacts on Wintergreen residences and guests, but similar visual impacts would occur along the side slopes and ridgelines of the Three Ridges and Horseshoe Mountains crossed by the South of Highway 664 Route as would occur along the proposed route's crossing of Piney and Bryant Mountains.[413] The South of Highway 664 right-of-way would be in the proximity of the viewshed of motorists traversing Highway 664 in the approximate 4-mile stretch approaching Wintergreen Resort. This would expose additional passing receptors (motorists and tourists) along this motorway, which the Final EIS noted is a state-designated scenic byway as part of the Nelson Scenic Route, to permanent visual impacts.[414]

154. The Final EIS also explained that this alternative would not reduce the amount of side slope and steep terrain construction, based on aerial and topographic data. Friends of Wintergreen argues that this data is not in the record, but the Commission's regulations specifically require,[415] and Atlantic provided, U.S. Geological Survey 7.5-minute-series topographic maps with the project facilities, which allows for a technical comparison of project routes over terrain of varying elevations.[416]

155. With regard to Friends of Wintergreen's claims that its data proves that there is a high risk of soil failure along the proposed route, we disagree. The Final EIS fully

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[411] Certificate Order, 161 FERC ¶ 61,042 at P 277.

[412] *Id.*; Final EIS at 4-584 to 4-586.

[413] Final EIS at 3-33 to 3-35.

[414] *Id.* at 4-384.

[415] 18 C.F.R. § 380.12 (c)(3) (2017).

[416] Atlantic's Application, Resource Report 1, Appendix 1A (Accession No. 20150918-5212).

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analyzed the risk of soil failures in detail.[417] The Final EIS explained that slope failures or landslides may result from the projects' alteration of the surface and subsurface drainage in construction areas and near natural slopes along the pipeline and access roads.[418] To mitigate these potential impacts, Atlantic developed a suite of mitigation measures and criteria to implement on slopes of varying grades including buttressing slopes, geogrid reinforced slopes, and drainage improvement, including providing subsurface drainage at seep locations through granular fill and outlet pipes, incorporating drainage into trench breakers using granular fill, and/or intercepting groundwater seeps and diverting them from the right-of-way.[419]

156. Furthermore, Atlantic conducted additional geotechnical analysis of the slope on Piney Mountain which indicated that the slope in question posed a low geohazard ranking.[420] Atlantic's review included that of aerial photography and LiDAR imaging, with additional field review to occur when full access to the property was granted. The Final EIS ultimately concluded that Atlantic's "proposed design features and mitigation measures would minimize the risk of landslides in the project area."[421] Moreover, while the South of Highway 664 Route avoids one particular slope on Piney Mountain, in doing so the alternative increases the amount of steep slopes—i.e., those greater than 30 percent—from 2.49 miles to 3.61 miles and lands of high susceptibility to landslide from 7.69 miles to 8.59 miles – a fact acknowledged in Friends of Wintergreen's own comments.[422] Thus, we agree with the Final EIS that the South of Highway 664 does not offer a significant advantage over the proposed route.

(b) <u>Rockfish Gap Alternatives</u>

157. Friends of Wintergreen contends that the Commission erred in rejecting its proposed Lyndhurst to Farmville alternative that would have routed ACP through Rockfish Gap, which would avoid resource impacts within the Wintergreen resort area.[423]

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[417] *Id.* at 4-25 to 4-31.

[418] *Id.* at 4-27.

[419] *Id.* at 4-29.

[420] Atlantic's October 17, 2017 Implementation Plan (Accession No. 20171018-5002)

[421] Final EIS at 4-48.

[422] Comments of Friends of Wintergreen, Inc. (Accession No. 20160513-5259).

[423] Rehearing Request of Friends of Wintergreen at 25.

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Friends of Wintergreen acknowledges that the Lyndhurst to Farmville alternative would be longer, but asserts that this impact is offset by greater collocation with other utilities and roads. Friends of Wintergreen argues that the 500-foot-long HDD tunnel at Rockfish Gap under the Lyndhurst to Farmville Alternative is superior to the 4,639–foot-long HDD tunnel under the Blue Ridge Parkway and Appalachian Trail, and that the EIS erred by arguing that this alternative crossing would require certain regulatory approvals. Friends of Wintergreen also contends that the Commission erred by attributing to Friends of Wintergreen Alternative Number 28, which is a separate alternative that would also route ACP through Rockfish Gap. Friends of Wintergreen argues that the Commission staff's failure to fix this error after receiving notice is evidence that the Final EIS failed to respond to any of its comments.[424]

158. As discussed in the Final EIS, the Farmville to Lyndhurst Alternative would require a different HDD tunnel under the Blue Ridge Parkway and Appalachian Trail. Friends of Wintergreen claims that the EIS erred in claiming that Congressional and Presidential approvals would be necessary to cross these resources, referencing its Draft EIS comments in which it asserts that a narrow slice of land is available in which Congressional and Presidential approvals are not required. The Final EIS explained that the alternative was dismissed on other grounds.[425] The Farmville to Lyndhurst alternative advanced by Friends of Wintergreen would more negatively impact the Appalachian Trail and Blue Ridge Parkway than the approved route. As discussed in detail throughout the EIS, the Appalachian Trail and Blue Ridge Parkway have various visual and recreation qualities necessitating trenchless crossings to avoid potentially significant impacts on these resources.[426] The Final EIS describes the constraints and physical requirements needed to successfully execute trenchless crossings, none of which Friends of Wintergreen address.[427]

159. Friends of Wintergreen next asserts that the Commission erred in relying on the Final EIS because the Final EIS mistakenly attributes "Alternative 28" to Friends of Wintergreen. The Final EIS mistakenly attributed the alternative to Friends of Wintergreen because Alternative 28 would increase the distance between the Wintergreen

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[424] *Id.* at 26.

[425] Final EIS at 3-31 ("[T]he Congressional and Presidential approval process that would be required to construct the alternative across the [Appalachian National Scenic Trail] was not a significant factor in our decision [to dismiss this alternative].").

[426] *Id.* at 3-21, 4-396, 4-460 to 4-63, 4-475 to 4-479.

[427] *Id.* at 2-41 to 2-43.

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Resort and ACP, which is Friends of Wintergreen's main concern. Nonetheless, we acknowledge this was in error.

160. Finally, Friends of Wintergreen also argues, within its alternatives argument, the Commission failed to reveal Commission staff qualifications.[428] We note that that Appendix Y of the Final EIS provides the names and qualifications of all individuals and contractors who contributed to the evaluation of the Final EIS. Additionally, Appendix X provides a list of publicly available references reviewed by staff in preparing the Final EIS.

4. Segmentation

a. South Carolina Expansion

161. Shenandoah Valley Network claims that Atlantic plans to expand the Atlantic Coast Pipeline to South Carolina and that the Commission's failure to examine this expansion violates the NEPA requirement prohibiting segmentation and requiring that all indirect impacts are analyzed.[429] Public Interest Groups argue that the Commission has engaged in "piecemealing" by ignoring in its analysis the alleged South Carolina expansion.[430] As evidence, Shenandoah Valley Network points to comments made on September 21, 2017, by Dan Weekley, Vice President of Southern operations for Dominion Energy where he allegedly stated the pipeline could be extended from Lumberton, North Carolina, for approximately 12 miles into South Carolina and deliver nearly 1 Bcf per day of natural gas into South Carolina by adding upstream compression.[431] Public Interest Groups argue that this expansion must be considered, particularly when the Commission approved non-conforming agreements in Atlantic's tariff that grant shippers future expansion rights.[432] Shenandoah Valley Network argues that the Commission should hold a hearing to assess whether the applicant intends to extend the pipeline and conduct supplemental NEPA analysis based on any new information on that subject that may emerge.[433]

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[428] Rehearing Request of Friends of Wintergreen at 27.

[429] Rehearing Request of Shenandoah Valley Network at 65.

[430] Rehearing Request of Public Interest Groups at 37.

[431] Rehearing Request of Shenandoah Valley Network at 66 – 67.

[432] Rehearing Request of Public Interest Groups at 37.

[433] *Id.*

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162. CEQ regulations require the Commission to include connected actions, cumulative actions, and similar actions in its NEPA analyses.[434] "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."[435]

163. CEQ regulations define connected actions as those that: (i) automatically trigger other actions, which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; and (iii) are interdependent parts of a larger action and depend on the larger action for their justification.[436] Actions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts and should therefore be discussed in the same impact statement.[437] Only proposed federal actions can meet the regulatory definition of a "connected" or "cumulative" action.[438]

164. Indirect impacts are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[439] The requirement that an impact must be "reasonably foreseeable" to be considered in a NEPA analysis applies to both indirect and cumulative impacts. Courts have found that an impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[440]

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[434] 40 C.F.R. § 1508.25(a)(1)-(3).

[435] *See Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (*Delaware Riverkeeper*). Unlike connected and cumulative actions, an agency has some discretion about combining similar actions in the same environmental review. *See, e.g., Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-06 (9th Cir. 2003).

[436] *Id.* § 1508.25(a)(1).

[437] 40 C.F.R. § 1508.25(a)(2).

[438] *See, e.g., Big Bend Conservation Alliance v. FERC*, No. 17-1002, 2018 WL 3431729 at *10 (D.C. Cir. July 17, 2018) ("The connected-actions doctrine does not require the aggregation of federal and non-federal actions"); *Sierra Club v. U.S. Army Corps of Eng'r*, 803 F.3d 31, 50 (D.C. Cir. 2015) (holding that CEQ connected action regulation "does not dictate that NEPA review encompass private activity").

[439] 18 C.F.R. § 1508.8(b) (2017).

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

(continued ...)

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165. To date, neither Atlantic nor any of its affiliate owners have proposed a pipeline extending from the ACP Project terminus at Lumberton, North Carolina, into South Carolina. Without a proposal, the Commission cannot determine if the projects are related to each other closely enough to be considered a single course of action. Similarly, without a proposal, the alleged expansion is not reasonably foreseeable. At this time, any expansion is speculative in nature, and thus the Commission will not reopen the record to update its NEPA analysis.

b. <u>Piedmont Pipeline Spur</u>

166. Public Interest Groups claim the Final EIS failed to examine the environmental and socioeconomic impacts associated with Piedmont Pipeline's 26-mile-long spur line from Junction A to the Smith Energy Complex near Hamlet in Rockingham County, North Carolina. Public Interest Groups claim that the Certificate Order erred by stating that this portion of the Piedmont Pipeline already exists when it has yet to be constructed.[441]

167. The Final EIS identified the spur line as a nonjurisdictional facility associated with the ACP Project, included in the cumulative impacts analysis.[442] Public Interest Groups do not challenge, however, the Commission's cumulative impacts analysis. Rather, Public Interest Groups claim the Commission had improperly segmented its review, alleging that the spur line was "part and parcel to the project" and that the Commission cannot "piecemeal" its environmental review.[443] The spur line, however, cannot be a connected action. The spur line is a state distribution line subject to NCUC jurisdiction, not a federal action. Accordingly, it would not constitute a "connected action."[444]

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omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[441] Rehearing Request by Public Interest Groups at 36 (citing Certificate Order 161 FERC ¶ 61,042 at P 8).

[442] Final EIS at 2-58, Appendix W.

[443] Rehearing Request by Public Interest Groups at 37-38.

[444] *Big Bend Conservation Alliance v. FERC*, No. 17-1002 (D.C. Cir. July 17, 2018) ("The connected-actions doctrine does not require the aggregation of federal and non-federal actions."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) ("The point of the connected actions doctrine is to prevent the government from 'segment[ing]' its own 'federal actions into separate projects and thereby fail[ing] to address the true scope and impact of the activities that should be under consideration.'") (quoting *Delaware Riverkeeper*, 753 F.3d at 1313).

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5. Deforestation

a. Forest Fragmentation

168. Shenandoah Valley Network contends that the Final EIS underestimates the impacts of interior forest fragmentation in Virginia by 27,000 acres because it fails to include the indirect impacts of forest fragmentation in a "landscape context."[445] Shenandoah Valley Network states that the Virginia Forest Conservation Partnership (VFCP) previously noted that the Final EIS did not acknowledge or analyze impacts of forest fragmentation on "a diverse suite of forest ecosystem services"[446] and recommended a methodology for quantifying the full scope of indirect forest impacts.[447] Shenandoah Valley Network asserts that the Final EIS lists the size of individual forest cores that will be fragmented, but does not take into account the relative amount of interior forest in the area, or address the full range of loss of forest values when cores are permanently fragmented.[448] Shenandoah Valley Network states the mitigation recommended in the Final EIS, including restoration and rehabilitation, "would not offset the substantial indirect impacts to interior forests, including reduction in ecosystem services."[449]

169. We disagree. The Final EIS fully describes the effects of forest fragmentation and the resulting effects that these losses of habitats cause to the wildlife species that inhabit them using similar methodologies recommended by the Virginia Forest Conservation Partnership, and presents measures committed to by Atlantic and DETI that would be implemented to minimize or avoid fragmentation impacts.[450] Specifically, the Final EIS discusses that creation of forest edges in previously contiguous block leads to increased predation, changes in microclimate and community structure along the newly formed forest edge, and can exacerbate the spread of noxious and invasive species along the construction and operational rights-of-way.[451] It further notes that where forest tracts are

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[445] Rehearing Request of Shenandoah Valley Network at 108.

[446] *Id.* at 108-109 (quoting VFCP's August 21, 2017 letter).

[447] *Id.* at 110 (noting that using VFCP's methodology, the total acreage of direct and indirect impacts for core forest areas in Virginia is 47,650 acres, more than double the estimate in the Final EIS).

[448] *Id.* at 109-110.

[449] *Id.* at 116 (quoting VFCP's August 21, 2017 letter).

[450] Final EIS at 4-187 to 4-202.

[451] *Id.* at 4-201.

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fragmented to beyond minimum levels required for a given species, particularly those that require large tracts of unbroken forest land, those species would need to seek suitable habitat elsewhere.[452]

170. As stated in the Certificate Order, Atlantic has committed to incorporating mitigation measures including: (1) using regionally-specific flowering plant seed mixes to provide food and habitat for pollinators and local wildlife species; (2) mitigating for impacts on sensitive environmental resources including listed species habitats and migratory birds; (3) restricting maintenance mowing to occur outside of the bird nesting season for migratory birds; (4) identifying conservation easements or sites where forested areas could be restored; and (5) acquiring a 400-acre conservation site adjacent to the Monongahela National Forest to provide offsite mitigation.[453] The Certificate Order further found that despite the mitigation measures that would be implemented in Atlantic's and DETI's construction and restoration plans and conditions of the Certificate Order, forested areas would experience long-term to permanent significant impacts as a result of fragmentation.[454]

171. With respect to arguments that the analysis ignores forest quality, the Final EIS acknowledges that fragmentation would result in disproportionate effects along the right-of-way. For example, the Final EIS notes that in North Carolina, the available habitat is of lesser quality than that of other either West Virginia or Virginia.[455] In Virginia, the Final EIS categorized the impacts of the project on specific blocks of forest using available datasets and noted whether the value provided, based on an Ecological Integrity Score, was either outstanding, very high, high, moderate, or general.[456] Of the blocks in Virginia, the Final EIS noted that the greatest effects were on moderate or general quality forest blocks. (150 out of 187 total forest blocks crossed in the state).[457]

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[452] *Id.* at 4-188.

[453] Certificate Order, 161 FERC ¶ 61,042 at P 237 (citing Final EIS at 4-202).

[454] *Id.* P 237.

[455] Final EIS at 4-201.

[456] *Id.* at 4-194.

[457] *Id.*

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b. Impacts on Migratory Birds

172. Shenandoah Valley Network contends that the Final EIS and Migratory Bird Plan fail to disclose and assess the impacts of forest fragmentation on migratory birds, particularly forest interior migrant songbirds and forest interior species experiencing rapid and range-wide declines.[458] For example, Shenandoah Valley Network states that the cerulean warbler is one of the most rapidly declining migratory songbirds in the United States, and that the Final EIS did not acknowledge or address the cumulative impacts of forest fragmentation that will likely have significant impacts on this and other declining species.[459] Shenandoah Valley Network contends that despite evidence demonstrating that the cerulean warbler's preferential use of ridgetops for breeding habitat, the *Migratory Bird Plan* states that the vegetation clearing time restriction will minimize direct impacts on nesting cerulean warblers.[460] Shenandoah Valley Network asserts that this impact was not acknowledged even though much of the pipeline will be routed on ridgetops within the Monongahela and George Washington National Forests.[461]

173. We disagree. The Final EIS addresses the projects effects on migratory bird species including the cerulean warbler, and acknowledges that habitat losses for migratory birds will occur as a result of the ACP Project.[462] Specifically, the Final EIS identifies the locations where species presence falls into designated "Important Bird Areas,"[463]

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[458] Rehearing Request of Shenandoah Valley Network at 111-115. Shenandoah Valley Network further notes that Atlantic did not survey for a single forest interior songbird species along the route or consult publically available data on bird occurrence or abundance. *Id.* at 115.

[459] *Id.* at 113.

[460] Shenandoah Valley Network also notes that ridge-associated habitat is used in "high concentration by raptors and songbirds during spring and fall migration." *Id.*at 111-112 (citing Shenandoah Valley Network April 6, 2017 Draft EIS Comments at 117 (Draft EIS Comments) and Laura S. Farwell, Potential Impacts of the Atlantic Coast Pipeline and Supply Header Project on Forest Interior Migratory Birds 10 (Apr. 2017) (Attachment 16 of Draft EIS Comments) (Farwell Report)).

[461] *Id.* at 111.

[462] Final EIS at 4-179 to 4-181.

[463] Important Bird Area are those areas that provide essential habitat for one or more species of bird and include sites for breeding, wintering, and/or migrating birds. *Id.* at 4-179.

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describes both the direct and indirect effects the project would have on migratory birds,[464] and describes the consequences of the project in conjunction with other ongoing past, present, or reasonably foreseeable future projects.[465] With respect to the cerulean warbler specifically, the Final EIS notes that the ACP Project crosses the Upper Blue Ridge Mountains Important Bird Area, which supports what is likely the largest population of cerulean warblers in Virginia.[466]

174. Shenandoah Valley Network also contends that the Final EIS fails to support Atlantic's claim that 35 acres is the minimum size of interior forest habitat that would support most interior forest bird species.[467] Shenandoah Valley Network asserts that despite evidence to the contrary, the Draft and Final EIS misrepresent the source used support the 35 acre claim.[468] Shenandoah Valley Network avers that the article cited actually finds that habitat required for 26 forest bird species range from 0.5 to 2,471 acres, and that the Final EIS failed to respond to or include this information.[469]

175. As stated in the Final EIS, 35 acres is the minimum size of interior forest habitat that would support *most* interior forest bird species.[470] The 35-acre metric, which the Commission has previously used, supports a broad analysis of the project's fragmentation effects on a wide variety of species.[471] As Shenandoah Valley Network acknowledges,

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[464] These effects include the destruction of nests with eggs or chicks, the disturbance of active nests outside the right-of-way from construction noise, and the ongoing nuisance effects associated with operational maintenance activities. *Id.* at 4-181.

[465] *Id.* at 4-609.

[466] *Id* .at 4-180. We also disagree with Shenandoah Valley Network's reliance on the Farwell Report because the report fails to acknowledge the importance of time of year tree-cutting restrictions during the breeding season designed to avoid direct mortality of eggs and chicks from occurring in the first place.

[467] Rehearing Request of Shenandoah Valley Network at 112.

[468] *Id.*

[469] *Id.* at 113 (citing Farwell Report at 8).

[470] Final EIS at 4-189 (citing Chandler S. Robins, et al., Habitat Area Requirements of Breeding Forest Birds of the Middle Atlantic States (1989)).

[471] Final EIS for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000 and CP13-502-000, at 4-71 (2014).

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individual species may require habitat as small as 0.5 acres or as large as 2,471 acres, and nowhere does the Final EIS claim that the 35-acre metric would be an appropriate habitat for *all* migratory bird species. Shenandoah Valley Network relies on the Farwell Report to demonstrate that different species require different habitat sizes, but does not suggest what metric the Final EIS should have used to analyze these impacts. Moreover, even if a more restrictive metric were used, the Final EIS's conclusion – that the project would result in significant long-term and permanent impacts on forested vegetation[472] – would have remained the same.

176. Next, Shenandoah Valley Network argues that the mitigation measures in the Migratory Bird Plan do not address the full scope of adverse impacts or offset the harms caused by the project.[473] Shenandoah Valley Network asserts that the Migratory Bird Plan wrongly finds that direct impacts on nesting birds are not anticipated due to the timing of construction of activities and the fact that suitable habitat is available in adjacent areas.[474] Shenandoah Valley Network contends that this ignores the impacts of forest fragmentation on adjacent areas, which will impact nesting birds.[475] Shenandoah Valley Network also contends that the Migratory Bird Plan oversimplifies its conclusion that certain species will benefit from open and successional habitat created by the pipeline corridor.[476] Shenandoah Valley Network asserts that the Migratory Bird Plan failed to consider widespread population declines in forest interior species, the lack of decline in edge species, the creation of a corridor by which predators may penetrate forests, the development of biotic homogenization, the loss of endemic species, and the creation of ecological traps.[477]

177. Shenandoah Valley Network erroneously asserts that the analysis in the Migratory Bird Plan is inadequate. The Migratory Bird Plan provides mitigation measures committed to by Atlantic and is not a substitute for the analysis done by Commission staff in the Final EIS. As discussed above the Final EIS provided an extensive analysis of the

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[472] Final EIS at ES-12 and 4-170.

[473] Rehearing Request of Shenandoah Valley Network at 114.

[474] *Id.*

[475] Shenandoah Valley Network notes that there are no plans to survey interior forest prior to construction or to monitor birds in impacted areas after construction is complete. *Id.* at 114-115.

[476] *Id.* at 116.

[477] *Id.* at 116-117.

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direct and indirect impacts that would occur as a result of deforestation.[478] Moreover, the Final EIS determined that the time-of-year restrictions will avoid most direct impacts, however, indirect effects, will still occur.[479]

178. Last, Shenandoah Valley Network argues that the Migratory Bird Plan fails to explain how Atlantic's acquisition of 2,820 acres of forest for preservation mitigates the adverse impacts occurring on state and commonwealth-owned lands.[480] Shenandoah Valley Network notes that the *Migratory Bird Plan* provides no comparison of habitat type and quality.[481] Additionally, Shenandoah Valley Network notes that the acquisition was done to mitigate impacts to state-owned lands, not private forest lands.[482] Thus, Shenandoah Valley Network concludes that the mitigation measures would not offset the substantial impacts to interior forests or to migrant songbirds.[483]

179. The acquisition of forested lands for conservation or preservation efforts offset the loss of forested lands that would occur from unavoidable tree removal associated with the ACP Project regardless of whether the primary purpose was to offset losses on state lands, private lands, or national forest lands.[484] The Final EIS notes that overall operation of the projects would have long-term to permanent effects on about 3,456 acres of vegetation, including about 2,744 acres of upland forest vegetation (deciduous, coniferous, and mixed).[485] Thus Atlantic's mitigation efforts would fully account for the acreage of forested land permanently lost by the project. Over time, these lands would reach greater maturity in forested canopy and increasingly provide for greater habitat.

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[478] Final EIS at 4-181 to 4-182.

[479] *Id.* at 4-182 ("most direct impacts on migratory birds would be avoided").

[480] Rehearing Request of Shenandoah Valley Network at 117.

[481] *Id.*

[482] *Id.*

[483] *Id.* at 117-118.

[484] However, we note that mitigation efforts, associated with state or other federal permits are voluntary and not required by the Commission, but undertaken by the project sponsor at their discretion to meaningfully offset unavoidable impacts.

[485] Final EIS at ES-10. The Final EIS concluded that the project would permanently alter forested resources and noted that because of the extent in magnitude and quality, it would be a *significant* impact. *Id.* at ES-12.

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6. Seismic Activity and Landslides

180. Shenandoah Valley Network argues that the Final EIS was inadequate because the analysis relating to water impacts from steep slope construction remains ongoing.[486] Further, Shenandoah Valley Network contends Atlantic is still developing a Best in Class Steep Slope Management Program, but because the standards were not finalized at the time the Final EIS was issued, the Commission's reliance on this standard falls short of NEPA requirements.[487] Even if the standards were complete by the time of the Final EIS, Shenandoah Valley Network states that this would not satisfy NEPA requirements because an EIS must contain a reasonable discussion of mitigation measures and cannot merely rely on an applicant's general assurance of the implementation of best management practices or best in class methods.[488] Shenandoah Valley Network argues that because the standards are still developing, the Commission has not yet determined the criteria to identify high-hazard slope locations designation.[489]

181. Shenandoah Valley Network next argues that while the Commission acknowledges that long term impacts related to slope instability have the potential to adversely impact water quality and stream channel geometry, this determination was not based on the Commission's consideration of accurate, high-quality information about environmental impacts. The Shenandoah Valley Network argues that there was considerable fundamental information missing regarding the impacts of construction on steep slopes and landslide-prone areas, and therefore, there is no basis for the Commission's findings about the effects of the ACP Project on water resources, in violation of NEPA. Thus, Shenandoah Valley Network argues the Commission should issue a revised Draft EIS for public comment based on sufficient information from Atlantic to allow the Commission and the Forest Service to make a meaningful assessment of impacts to water quality from erosion and sedimentation caused by construction across steep slopes.

182. Friends of Nelson argues that the Commission and Atlantic failed to adequately consider the potential for slope failure from steep slopes and ridgetops across the route.[490] Friends of Nelson argues that the filings the Commission used as a basis for the Draft EIS include gross generalities based on regional data sets unsuited for the kind of

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[486] Rehearing Request of Shenandoah Valley Network at 77.

[487] *Id.*

[488] *Id.* at 78.

[489] *Id.*

[490] Rehearing Request of Friends of Nelson at 46.

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detailed analysis necessary to ensure the safety of slopes and residents.[491] Friends of Nelson contends the Commission should require a more comprehensive risk-analysis and that site specific stabilization and mitigation be prepared, offering the public the opportunity to review and comment on those plans before a certificate is granted.[492]

183. We disagree that the Final EIS was based on inadequate information. As we have explained in other cases, practicalities require the issuance of orders prior to completion of certain reports and studies because large projects such as these take considerable time and effort to develop.[493] Perhaps more important, project development is subject to many significant variables whose outcomes cannot be predetermined. Thus, some aspects of a project may remain in the early stages of planning even as other portions of the project become a reality.

184. As the Supreme Court explained in *Robertson*, NEPA does not require a complete plan to be actually formulated at the onset, but only that the proper procedures are followed for ensuring that the environmental consequences have been fairly evaluated.[494] Here, we made extensive efforts to ensure that environmental issues were resolved appropriately. The issues the parties raise were discussed in considerable detail in the Final EIS and were subject to public comment.[495] Based on the information in the record, we imposed additional measures (such as Environmental Condition 51). Environmental Condition 51 requires that further geotechnical studies be completed and the Best in Class Steep Slope Management Program be developed prior to commencement of construction.[496]

185. In this case, the existing information included in the Final EIS is substantial.[497] This information adequately supports the facts found and the conclusions reached in

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[491] *Id.* at 47.

[492] *Id.*

[493] *See, e.g.*, *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 108-115 (2006); *Islander East*, 102 FERC ¶ 61,054 at PP 41-44.

[494] *Robertson*, 490 U.S. at 332, 352.

[495] Final EIS at ES-2 to ES-5; 2-45 to 2-46.

[496] Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 51.

[497] Final EIS at 4-26 to 4-31.

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support of the decision to issue a certificate for the project. The additional information gathering and refinement of mitigation plans that will occur during the post-certificate, pre-construction period is not essential to the certificate issuance decision, but rather will enable the certificate holder to better develop and implement the required mitigation plans.

186. Contrary to petitioner's contentions, the Final EIS examined landslides and steep slopes along the pipeline route and did not simply rely on the best in class standards. As the Final EIS explains, Atlantic identified over 100 possible slope instability hazard locations along the AP-1 mainline where evidence suggests previous slope instability, or where the potential exists for slope instability, and 46 steep slopes that met the criteria for further evaluation used in the Geohazard Analysis Program.[498] When determining routing, Atlantic and DETI also attempted to avoid slip prone areas and completed a desktop analysis to inventory and categorize areas of slope instability as part of the Geohazards Analysis Program.[499] We find these measures to be reasonable.

187. Further, the Commission conditioned the certificate upon the requirement that Atlantic provide all the geotechnical studies and mitigation regarding steep slopes pursuant to Environmental Condition 51 prior to proceeding with project construction. This is precisely the type of analysis that Friends of Nelson requests. Specifically, as part of the *Best in Class Steep Slope Management Program*, Atlantic and DETI would implement mitigation measures for susceptible slopes or hillsides depending on the length and inclination of the slope. Some of these measures include: (1) implanting drainage improvement, such as providing subsurface drainage at seep locations through granular fill and outlet pipes, incorporating drainage into trench breakers using granular fill, and/or intercepting groundwater seeps and diverting them from the right-of-way; (2) buttressing slopes with concrete trench breakers; (3) changing slope geometry to make the slope shallower; (4) benching and re-grading with controlled backfill; (5) using alternative backfill; (6) using chemical stabilization of backfill (e.g., cement, lime); (7) implementing Geogrid reinforced slope that consists of benching existing slope, installing subsurface drains, and incorporating Geogrid reinforcement into compacted backfill; and/or (8) using retaining structures.[500] Thus, Shenandoah Valley Network's contention that the Commission did not include a reasonable discussion of mitigation measures is incorrect.

188. Next, Mr. Limpert argues that the Commission failed to independently verify the ACP Project survey on his property, and that Atlantic failed to conduct a geohazard field

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[498] *Id.* at 4-28.

[499] *Id.*

[500] *Id.* at 4-28 to 4-31.

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survey for his property despite excavation and blasting for the proposed pipeline on slopes up to 78 percent.

189. As stated above, the Geohazard Analysis Program identified slopes along the pipeline route that warranted further evaluation. In addition, Atlantic and DETI are developing a *Best in Class Steep Slope Management Program* to incorporate the results of the Geohazard Analysis Program into the project design and engineering and to address issues of landslide potential and susceptibility. We find that these identification and mitigation measures will ensure that steep slopes are properly identified and addressed with the appropriate measures. Moreover, areas subject to blasting are subject to the *Blasting Plan* that describes how blasting would be conducted to ensure safety and protect nearby facilities, pipelines, residences, wells and springs.[501] Atlantic's *Blasting Plan* contains specific mitigation measures that would be employed when blasting along step slopes, and describes how Atlantic would conduct post-blasting inspections and repair damages sustained through blasting. These measures, in conjunction with routine in-field FERC compliance monitoring, will ensure that measures are appropriately implemented and any slope instability issues that occur are addressed and remediated promptly to avoid impacts on sensitive resources.[502]

190. Friends of Nelson further contends that the pipeline route crosses a ridgeline with slopes of 30-40 percent grades on either side. Friends of Nelson argues that the impacts are significant but the impacts are not mentioned anywhere.

191. We disagree. The Final EIS specifically finds that constructing the pipelines in steep terrain or high landslide incidence areas could increase the potential for landslides to occur, including areas outside National Forest lands.[503] The mitigation measures described above attempt to minimize these effects.

192. Finally, Friends of Nelson contends that the combined impacts of extreme weather events, such as hurricanes, will be catastrophic, and the Final EIS incorrectly concluded that construction and mitigation measures were generally acceptable. We disagree. The aforementioned mitigation measures will ensure that any significant adverse impacts are fully mitigated. Friends of Nelson's blanket assertions are unsupported and not described with any level of detail, and thus will not be addressed further.

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[501] *Id.* at 2-28 (Table 2.3.1-1 showing construction and restoration plans include a Blasting Plan), 4-5 (Table 4.1.2-1 showing types of areas that could be subject to blasting).

[502] *Id.* at 2-53; 4-4 to 4-7.

[503] *Id*. at 4-74, 4-594.

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7. Safety

193. Mr. Limpert argues that the proposed pipeline would come within several hundred feet of an area that experienced a very large landslide on a virtually identical slope.[504] Mr. Limpert argues that geohazard surveyors for Atlantic have designated this as a low hazard area, stating that the landslide was on a much steeper slope than the pipeline would be on, although such slopes are not listed. Mr. Limpert argues he measured the slopes and that the pipeline would be on a 60 percent slope, whereas the landslide was on a 62 percent slope.[505]

194. As the EIS acknowledged, numerous segments of pipeline would be constructed on steep slopes and in areas of high landslide potential.[506] The Commission considered the historic and recent landslide incidences in the immediate project area, and concluded that constructing the pipelines in steep terrain or high landslide incidence areas could increase the potential for landslides to occur.[507] To address this concern, the Commission found that the aforementioned mitigation measures[508] and compliance with U.S. Department of Transportation regulations, specifically 49 C.F.R. § 192.317(a), which requires pipeline operators to protect transmission pipelines from hazards, including landslides, would minimize the risk of damage to the pipeline in the event of landslides in the project area.[509] Moreover, the Final EIS explained that Atlantic and Dominion Energy Transmission, Inc. are working to provide documentation of the likelihood that the proposed restoration design features and mitigation measures that would be implemented in steep slope areas would minimize the risk of landslides in the project area (see section 4.1.4.2).[510]

195. Next, Mr. Limpert argued that the Commission failed to adequately address pipeline safety issues, including geohazards and incorrect designation of areas with no

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[504] Rehearing Request of Mr. Limpert at 5.

[505] *Id.*

[506] Final EIS at Volume IV – Part 9 of 11, Z-2983 (item LO70- addressing William Limpert).

[507] *Id.*

[508] *Supra* P 189.

[509] *Id.*

[510] *Id.*

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egress and no chance of rescue or escape during a pipeline emergency.[511] Fairway Woods Condominium Association also argues that the Commission improperly erred by relying on Atlantic's commitment to work with local emergency responders to address an accident or terrorist attack.[512] Fairway Woods Condominium Association explains that there is only one entry and exit from the mountain community, using Wintergreen Drive. If a pipeline incident were to occur at the entrance of Wintergreen Drive, the Fairway Woods Condo Association argues the community cannot evacuate. Thus, Fairway Woods Condominium Association contends the Commission improperly assumes an evacuation is possible.[513]

196. Moreover, Fairway Woods Condominium Association argues that the Commission does not fully address the risk of a terrorist attack upon the pipeline at the entrance to Wintergreen.[514] Fairway Woods Condominium Association states that the Commission simply suggests that terrorist attacks cannot be accounted for because they are "unpredictable," but because terrorists seek to inflict maximum damage with minimum use of resources, this is likely and devastating.[515]

197. We disagree. As we found in the EIS, terrorist attacks are unpredictable,[516] and difficult to measure effectively. Nonetheless, the required *Operational Emergency Response Plans*[517] and Department of Transportation's Minimum Federal Safety Standards, among other measures, are reasonable to address the safety and security concerns raised by petitioners.

198. Further, Mr. Limpert states that the Commission does not notify property owners who are in the blast zone or the evacuation zone of the pipeline, even though their safety is at risk, and their property values are significantly reduced.[518]

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[511] Rehearing Request of Mr. Limpert at 5.

[512] Rehearing Request of Fairway Woods Condominium Association at 6-7.

[513] *Id.*

[514] *Id.* at 8 (citing Certificate Order, 161 FERC ¶ 61,042 at P 278).

[515] *Id.*

[516] Final EIS at4-590 to 4-591.

[517] *Id* at 4-584 to 4-585.

[518] Rehearing Request of Mr. Limpert at 6.

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199. This is inaccurate. The EIS describes the public outreach to stakeholders and landowners regarding the development of the ACP Project, which includes publication in the *Federal Register*, multiple scoping meetings, and mailings to affected landowners.[519] And, the Commission did not find that the property values of nearby landowners will be significantly reduced, contrary to Mr. Limpert's claims.[520]

200. Finally, Mr. Limpert argues that ACP incorrectly shows no high consequence areas in Bath County, asserting there are seven homes that would be trapped in the evacuation zone with no chance of escape or rescue if an incident were to occur.[521] Mr. Limpert states that the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations require that the ACP Project identify high consequence areas, but has not done so here.[522]

201. We disagree. High consequence areas are segments along the pipeline route that would pose the greatest threat to human health and safety and property should the pipeline fail. In general, these locations are determined based on population density near pipeline facilities which require more rigorous safety requirements for populated areas.[523] A single home, or low density housing along a pipeline right-of-way typically does not constitute an HCA unless it would be dense enough to qualify as a Department of Transportation Class III area, or there is an identified site where groups of people would gather. The Final EIS identifies and lists high consequence areas for the ACP Project, developed pursuant to PHMSA regulations.[524] The area of Bath County was not classified as a high consequence area, nor does the provided evidence suggest the Commission erred in its assessment of this area.

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[519] Final EIS at E-2 to ES-3; 1-13, 1-21.

[520] *Id.* at Volume IV – Part 9 of 11, Z-2993 (item LO70- addressing William Limpert).

[521] Rehearing Request of Mr. Limpert at 5.

[522] *Id.* at 6.

[523] 49 C.F.R. § 192.905 (2017); 49 C.F.R. § 192.903 (2017).

[524] Final EIS at 4-580 to 4-581.

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8. Historic Properties

a. Conditional Certificate

202. Shenandoah Valley Network and Friends of Nelson contend that the extent to which the Commission has deferred aspects of compliance with section 106 of the National Historic Preservation Act (NHPA) until after the Certificate Order has severely limited the consideration of alternatives that could avoid, minimize, or mitigate harm to historic resources.[525] Shenandoah Valley Network asserts that this has also foreclosed any opportunity of the Advisory Council on Historic Preservation (Advisory Council) to comment meaningfully on proposed avoidance and mitigation prior to approval of the undertaking.[526]

203. Similarly, Public Interest Groups argue that the Commission wrongly deferred consultation with the Lumbee Indian Nation, Coharie Tribal Council, Haliwa-Saponi Tribe, and the Meherrin Tribe regarding traditional tribal sites.[527] Public Interest Groups assert that rather than requiring these consultations as a condition of the Certificate Order, the Commission should have conducted consultations as part of the review process.[528] Public Interest Groups also state that these consultations should have occurred with Commission staff, rather than with the project developers.

204. As discussed above,[529] the Commission has previously affirmed that a conditional certificate could be issued prior to completion of cultural resource surveys and consultation procedures required under NHPA because construction activities would not commence until surveys and consultation are complete.[530] The D.C. Circuit's decision in *City of Grapevine* supports this interpretation. In that case, the D.C. Circuit held that the Federal Aviation Administration properly conditioned approval of a runway project upon

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[525] Rehearing Request of Shenandoah Valley Network at 154; Rehearing Request of Friends of Nelson at 48-49.

[526] Rehearing Request of Shenandoah Valley Network at 154.

[527] Rehearing Request of Public Interest Groups at 29.

[528] *Id.* (citing 18 C.F.R. § 2.1c(e) (2017)).

[529] *See supra* PP 92-95.

[530] *See generally Iroquois Gas Transmission System, L.P.*, 53 FERC ¶ 61,194, at 61,758-64 (1990).

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the applicant's subsequent compliance with the NHPA.[531] Moreover, the Advisory Council's regulations permit an agency granting project approval to "defer final identification and evaluation of historic properties if it is specifically provided for in a programmatic agreement executed pursuant to § 800.14(b)."[532] On January 19, 2018, the Commission executed a Programmatic Agreement (PA) with the Advisory Council on Historic Preservation, the State Historic Preservation Offices (SHPO) of Pennsylvania, West Virginia, Virginia and North Carolina, the Forest Service, and the National Park Service.[533] Therefore, the Commission's practice of issuing a conditional certificate prior to completion of cultural resource surveys and consultation procedures was appropriate.

205. With respect to the Lumbee Indian Nation, Coharie Tribal Council, Haliwa-Saponi Tribe, and the Meherrin Tribe, these tribes are not federally recognized tribes, and therefore, are not "Indian tribes" as defined by the regulations implementing section 106 of the NHPA.[534] Thus, these tribes were treated as members of the public with the same rights to comment and participate. Nevertheless, because of concerns raised by the tribes and others during the public comment periods, we directed Atlantic to provide copies of the archaeological survey reports and meet with tribes to hear their concerns.[535] None of the tribes have commented on those reports or identified any particular sites or locations of concern.

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[531] *City of Grapevine*, 17 F.3d at 1509 (upholding the agency's conditional approval because it was expressly conditioned on the completion of section 106 process).

[532] 36 C.F.R. § 800.4(b)(2) (2017). *See also Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 554 (8th Cir. 2004) (the Advisory Council's regulations "when read in their entirety, thus permit an agency to defer completion of the NHPA process until after the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued").

[533] January 19, 2018 Letter Providing the Advisory Council on Historic Preservation with a Copy of the Executed Programmatic Agreement (Accession No. 20180119-3012) (Programmatic Agreement).

[534] 36 C.F.R. § 800.16(m) (2017) ("Indian tribe means an Indian tribe, … which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.").

[535] Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 56; Final EIS at 4-539 to 4-540.

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b. Consultation

206. Next, Shenandoah Valley Network asserts that the Commission failed to meet the requirements of section 106 of the National Historic Preservation Act.[536] Specifically, Shenandoah Valley Network contends that the Commission: (1) failed to identify and invite consulting parties to participate in the section 106 process; (2) failed to adequately consider and consult regarding requests from individuals and organizations to participate as consulting parties; and (3) did not adequately include non-consulting party members of the public.[537] Shenandoah Valley Network concludes that because of inadequate consultation, the Commission's process did not sufficiently identify potential resources, evaluate their historic significance, assess whether the undertaking will adversely affect them, and then evaluate ways to avoid, minimize, or mitigate adverse effects.[538]

207. We disagree. The Final EIS described the public outreach for the project, including Applicant-sponsored open houses, public scoping meetings, and receipt of more than 8,000 written comments. Moreover, Commission staff considered requests for consulting party status in accordance with the regulations implementing section 106 of the NHPA, and Shenandoah Valley Network fails to detail any instance where those determinations were in error.[539] For those groups and individuals that did not meet the consulting party criteria, Commission staff asked Atlantic to work with the SHPOs and assist interested stakeholders with obtaining privileged archaeological information on a case-by-case basis.[540] As a result, Atlantic's and Dominion's surveys[541] identified a total of 447 archeological sites, 770 structures, 10 historic districts, and 57 cemeteries within or in the vicinity of the projects' area.[542] Four historic districts and 10 archaeological sites listed in

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[536] Rehearing Request of Shenandoah Valley Network at 152 (citing 54 U.S.C. § 300101 (2012)).

[537] *Id.* at 152-153.

[538] *Id.* at 153.

[539] Final EIS at 4-538.

[540] *Id.*

[541] As of September 27, 2017, Atlantic and Dominion had surveyed over 98 percent of the pipeline corridor. Atlantic and Dominion continue to survey as they gain access to additional parcels.

[542] Atlantic's September 27, 2017 Data Response at 3 (Accession No. 20170927-5104).

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or eligible for listing in the National Register of Historic Places would be adversely affected by the project,[543] and Atlantic has prepared, or is preparing treatment plans to mitigate the adverse effects of the project on these properties. Thus, the Commission met its consultation obligations pursuant to section 106 of the NHPA.

c. Effects on Historic Districts

208. Shenandoah Valley Network and Friends of Nelson argue that the Commission did not properly evaluate potential impacts on historic districts or districts eligible for listing, such as the Union Hill/Woods Corner area, the Warminster Rural Historic District, the Elk Hill Baptist Church community, Red Apple Orchards, the South Rockfish Valley Rural Historic District (including the Elk Hill Baptist Church community), and the Route 151 Virginia Scenic Byway.[544] Shenandoah Valley Network faults the Commission for assessing such districts as collections of individual architectural resources and structures without adequately considering impacts of the project on these resources' broader landscapes and settings.[545] Shenandoah Valley Network notes that National Park Service Bulletin No. 30 states that changes to historic landscapes such as loss of vegetation and the introduction of public utilities can threaten historic integrity, and such impacts to this and other historic districts impacted by the project have been improperly overlooked or downplayed.[546]

209. We disagree. The Final EIS details all historic districts that may be affected by the ACP Project.[547] With respect to the Union Hill/Woods Corner area, the area is not a historic district and the area of potential affects for the pipeline and compressor station do not constitute a cultural landscape.[548] The Final EIS explained that the buildings in the area of potential effects were non-farm structures built after World War II, and that the overall landscape did not reflect the development of an agricultural community in the late

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[543] October 25, 2017 Notification of Adverse Effect for the Atlantic Coast Pipeline and Supply Header Projects (Accession No. 20171025-3044).

[544] Rehearing Request of Shenandoah Valley Network at 153; Rehearing Request of Friends of Nelson at 49-52.

[545] Rehearing Request of Shenandoah Valley Network at 153.

[546] *Id*.

[547] Final EIS at 4-515 to 4-545.

[548] *Id.* at 4-538.

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nineteenth and early twentieth centuries.[549] Additionally, the visual area of potential effects for the Union Hill area did not exhibit a cohesive cultural landscape that would be threatened by construction of Compressor Station 2 and sub-surface pipeline.[550]

210. Of the remaining properties of concern to petitioners, the Final EIS analyzed the project's impacts on historic resources.[551] For Red Apple Orchards, the Final EIS determined that the property was potentially eligible for listing on the National Register of Historic Places,[552] but surveys confirmed the project would not compromise the historic setting or adversely affect the property not be adversely affected by the project.[553] With respect to the South Rockfish Valley Rural Historic District and the Warminster Rural Historic District, the Final EIS explained that consultation was contingent on additional field surveys, but that Atlantic must, after consulting with the Virginia Department of Historical Resources and other interested parties, avoid or mitigate potential adverse effects to cultural resources or historic properties.[554] Finally, the Final EIS describes the potential visual impacts on scenic byways, including Route 151 from tree removal for construction and operation of the pipeline facilities. The Final EIS recommended, and the Certificate Order required, that Atlantic implement additional visual mitigation measures for scenic byways on a site-specific basis, subject to Commission approval.[555]

211. Friends of Nelson assert that the Draft EIS did not sufficiently examine cultural attachment with regards to Nelson County.[556] Friends of Nelson note that the Commission

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[549] *Id.* at 4-538.

[550] *Id.*

[551] *Id.* at 4-515 to 4-545.

[552] *Id.* at 4-524, Table 4.10.1-2.

[553] Atlantic's July 28, 2017 Supplemental Information at Appendix D, Part 8a, 114 (Accession No. 20170728-5118) (explaining that the pipeline would not affect any structures, would cross the 1,100 acre property at its northeastern edge through open pasture, and any tree clearing on adjacent parcels would have a minimal effect on the farm's viewshed).

[554] Final EIS at 3-47, 4-527; Certificate Order, 161 FERC ¶ 61,042 at PP 267, 269, Appendix A, Environmental Condition 56.

[555] Final EIS at 4-420; Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 44.

[556] Rehearing Request of Friends of Nelson at 49.

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did not conduct a cultural attachment assessment, and therefore, had no basis to determine that negative impacts on the rural community's cultural attachment to the landscape are not anticipated.[557] As stated in the Final EIS, regulations implementing the NHPA do not require an assessment of cultural attachment, and do not recognize a property type defined by cultural attachment.[558] However, as detailed above, Commission staff did review the adverse effects on historic districts, historic landscapes, and traditional cultural properties, which can convey the experience of cultural attachment.[559] Therefore, we find that the Final EIS properly considered cultural attachment.

212. Last, Friends of Nelson contend that the Commission did not consider a September 22, 2017 filing from the Virginia Department of Historical Resources regarding the Phase I Archaeological Survey, which highlights the adverse impacts to the South Rockfish Valley Rural Historic District and the Warminster Rural Historic District.[560] However, Commission staff's October 25, 2017 letter to the Advisory Council identified the South Rockfish Valley Rural Historic District and the Warminster Rural Historic District as properties which would be adversely affected by the project.[561] Additionally, on March 8, 2018, Commission staff requested that Atlantic provide additional information and mitigation for these two districts to further consider the Virginia Department of Historical Resources' September 22, 2017 letter.[562] Thus, the Commission is still evaluating the issues identified in the Virginia Department of Historical Resources' September 22, 2017 letter.

9. Property Values

213. Mr. Limpert argues that the Commission improperly concluded that property values would not be reduced by the ACP Project.[563] Mr. Limpert states that all the studies the Commission relied upon to draw its conclusion were industry studies and were

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[557] *Id.*

[558] Final EIS at 4-528. *See also* 36 C.F.R. § 60 (2017).

[559] Final EIS at 4-528.

[560] Rehearing Request of Friends of Nelson at 50-51.

[561] October 25, 2017 Notification of Adverse Effect for the Atlantic Coast Pipeline and Supply Header Projects (Accession No. 20171025-3044).

[562] March 8, 2018 Data Request (Accession No. 20180308-3011).

[563] Rehearing Request of Mr. Limpert at 5.

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flawed.[564] For example, Mr. Limpert argues that one study reviewed rural properties in Katy, Texas, but Katy, Texas is not a rural location.[565]

214. As explained in the Certificate Order, the Final EIS identified ten studies that conclude that the presence of a pipeline or compressor station either has no effect or an insignificant effect on property values.[566] Mr. Limpert fails to describe which studies were flawed or inaccurate with any degree of specificity.

215. Mr. Limpert further argues that the Commission only contacted one appraiser to see if property values would be reduced, and that appraiser told the Commission he did not know if property values would be impacted.[567] This is incorrect. The Final EIS clearly states its conclusion was based on a variety of factors including independent prior research[568] conducted by the Commission with real estate appraisers that indicated empirical evidence indicates no difference in value attributable to the existence of a pipeline easement.[569] The Final EIS acknowledges that specific valuation predictions cannot be made on a property-by-property basis and that it is reasonable to expect that property values may be impacted differently based on the setting and inherent characteristics of the property. Yet, based on the available research, there is no conclusive evidence indicating that natural gas pipeline easements or compressor stations would have a significant negative impact on property values.[570]

10. Wildlife Impacts

216. Shenandoah Valley Network argues that the Draft and Final EIS failed to include sufficient information regarding impacts to wildlife protected by the Endangered Species

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[564] *Id.*

[565] *Id.*

[566] Certificate Order, 161 FERC ¶ 61,042 at P 251 (citing the Final EIS at 4-504 to 4-506).

[567] Rehearing Request of Mr. Limpert at 5.

[568] Final EIS for the Constitution Pipeline and Wright Interconnects Projects at 4-153.

[569] Final EIS at ES-12 to ES-13, 4-504 to 4-506.

[570] *Id.* at 4-506.

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Act (ESA), such as the Indiana and northern long-eared bats.[571] Shenandoah Valley Network contends that because the Final EIS was issued prior to completion of consultation with the U.S. Fish and Wildlife Service (FWS), full impacts, including cumulative impacts, to listed species were not disclosed.[572] Shenandoah Valley Network asserts that the Draft EIS's failure to include this information is in violation of NEPA regulations, which require "[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analysis and related surveys and studies required by . . . the Endangered Species Act."[573]

217. Shenandoah Valley Network's assertions have no merit. As stated in the Final EIS, Commission staff consulted with FWS, U.S. Department of Commerce, National Marine Fisheries Service, Forest Service, and state resource agencies regarding the presence of ESA-listed, proposed for listing, or state-listed species in the project areas.[574] Based on these consultations and field surveys, Commission staff extensively analyzed the effect the project would have on listed species and determined that construction and operation of the projects are likely to adversely affect seven ESA-listed species, including the Indiana bat and northern long-eared bat.[575] Last, the Final EIS explicitly complies with the NEPA regulation cited by Shenandoah Valley Network because the Final EIS was developed concurrently with the environmental impact analysis required by the ESA.[576]

11. Visual Impacts

218. Mr. Limpert claims that the Certificate Order violated section 380.15 of the Commission's regulations, which requires the Commission to avoid siting impacts on

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[571] Rehearing Request of Shenandoah Valley Network at 151.

[572] *Id.* Shenandoah Valley Network notes that the public does not have an opportunity for comment on FWS's development of a Biological Assessment or Biological Opinion. *Id.*

[573] *Id.* at 152 (citing 40 C.F.R. § 1502.25(a) (2017)).

[574] Final EIS at ES-7.

[575] *Id.* at ES-7, 4-244 to 4-331, 4-610 to 4-611.

[576] *Id.* at ES-7 ("In compliance with section 7, we are submitting this EIS as our Biological Assessment and requesting formal consultation with the FWS and [the National Marine Fisheries Service].").

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scenic, historic, wildlife, and recreational values.[577] Specifically, Mr. Limpert states that the project will severely impact scenic, historic, wildlife, and recreational values of ridgetops that will be excavated due to pipeline construction.[578] Mr. Limpert explains that about 38 miles of excavated ridgeline will be "scarred forever" and disputes the Commission's conclusion that the ridgelines will not be seen from a lower elevation.[579] Friends of Nelson argues that this permanent disturbance of forested lands will create a significant visual impact to the Blue Ridge Parkway and the Appalachian National Scenic Trail.[580]

219. We find that the Certificate Order complied with section 380.15 of the Commission's regulations. The Final EIS and Certificate Order found that the proposed ACP Project route was preferable based on a comparison of the construction and environmental impacts between the proposed route and alternative routes, as discussed above. The proposed site was the most unobtrusive site available among the options evaluated. Atlantic and DETI collocated portions of the proposed facilities where possible and attempted to construct them parallel to cleared and/or previously disturbed linear corridor facilities including pipelines, electric transmission lines, roads and railroads.[581] In the Commission's examination of alternative sites, we considered landowner concerns, siting impact avoidance, and unobtrusive site selection as required by the regulations.

220. The Final EIS recognizes that pipeline construction will result in a greater degree of visual impacts in heavily forested areas with high elevations and along steep mountainsides, particularly where the cleared and maintained right-of-way in these forested areas will create a visual contrast more noticeable to viewers.[582] The ACP Project will create long-term permanent impacts in these areas.[583] To mitigate the long-term impacts due to the removal of trees along temporary work space areas and the operational right-of-way, the Final EIS recommended that Atlantic identify by milepost the locations where a narrowed construction right-of-way would be adopted to reduce impacts on forest

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[577] Rehearing Request of Mr. Limpert at 6. *See* 18 C.F.R. § 380.15 (2017).

[578] *Id*.

[579] *Id*.

[580] Rehearing Request of Friends of Nelson at 50-51.

[581] Final EIS at 4-416.

[582] *Id*. at 4-417.

[583] *Id*. at 5-26.

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land within the Seneca State Forest, the Monongahela National Forest, and the George Washington National Forest.[584]

221. The Monongahela National Forest and George Washington National Forest operate under Land and Resource Management Plans. The Forest Service analyzed amending its Management Plans to allow for the project within the Monongahela National Forest and George Washington National Forest, and on June 21, 2017, issued a draft record of decision to authorize the use and occupancy of National Forest System lands for the ACP Project. The draft record of decision was available for public objections until September 5, 2017. After resolving objections, the Forest Service issued a final decision on the respective authorizations before it on November 17, 2017.[585] Impacts on National Forest resources will be minimized by Atlantic following the measures outlined in its *Construction, Operation, and Maintenance Plan* (*COM Plan*), which is required as part of any Special Use Permit on Forest Service land.[586]

222. Further, as discussed above, the ACP Project will cross the Blue Ridge Parkway and the Appalachian National Scenic Trail using the HDD method.[587] Under its *Initial Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*, Atlantic acknowledged that attempts at HDD could fail and, if this happens, Atlantic would attempt to use the direct pipe option; however, Atlantic concluded that the visual impacts resulting from this option would be the same as the proposed action and access roads, work spaces, and temporary construction areas would be restored as close as possible to pre-construction conditions.[588] We agree and find that the visual impacts to the Blue Ridge Parkway and the Appalachian National Scenic Trail would not be significant. Further, as specified in the Certificate Order, Environmental Condition 49 requires Atlantic to file for review and approval, site-specific HDD crossing plans and alternative

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[584] *Id*.

[585] Forest Service, *Record of Decision on the Atlantic Coast Pipeline Project Special Use Permit/Land and Resource Management Plan Amendments* at 6 (Nov. 17, 2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf.

[586] Certificate Order, 161 FERC ¶ 61,042 at P 250.

[587] Final EIS at 4-481.

[588] *Id*. at 4-481, 5-28. *See* Atlantic's October 27, 2017 Supplemental Information at Attachment P (*Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*) (Accession No. 20171027-5240).

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direct crossing plans for the Blue Ridge Parkway and provide proof of consultation with the National Park Service regarding these plans.[589]

12. Water Resources

a. Surface Water Impacts

i. Construction Across Steep Terrain

223. Shenandoah Valley Network argues that the Final EIS failed to adequately assess or mitigate impacts to streams and wetlands from construction along steep slopes.[590] Shenandoah Valley contends that such construction will increase sedimentation from erosion and landslides and result in long-term adverse effects on pristine headwaters, wetlands, and brook trout habitat.[591]

224. As discussed in the Certificate Order and throughout this order, to avoid or minimize impacts from construction over steep terrain, Atlantic and DETI will adopt the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* (Plan) *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures).[592] Atlantic is also required to implement a *Best in Class Steep Slope Management Program* to use specialized techniques when constructing on specific steep slopes[593] and a *Slip Avoidance, Identification, Prevention, and Remediation – Policy and Procedure* plan to avoid, minimize, and mitigate potential landslide issues in slip prone areas.[594] Within National Forests, Atlantic must also adhere to its *COM Plan*, which describes the additional avoidance and minimization measures that will be implemented during construction and operation activities to ensure compliance with the National Forests' Land and Resource Management Plans.[595] The Final EIS concluded, and we affirmed in the

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[589] Certificate Order, 161 FERC ¶ 61,042 at Environmental Condition 49.

[590] Rehearing Request of Shenandoah Valley Network at 71.

[591] *Id.* at 72.

[592] FERC, *Wetland and Waterbody Construction and Mitigation Procedures* (May 2013), https://www.ferc.gov/industries/gas/enviro/guidelines/wetland-pocket-guide.pdf. *See* Final EIS at 2-31.

[593] Certificate Order, 161 FERC ¶ 61,042 at PP 203 – 204.

[594] *Id.* P 204.

[595] Final EIS at 4-73, 4-75, Appendix G.

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Certificate Order, these construction requirements will avoid or minimize impacts to soils located on steep slopes and on streams located on and below these slopes.[596]

225. Shenandoah Valley Network argues that the Final EIS failed to fully account for impacts to water resources from construction on steep slopes in the National Forests because the *COM Plan* was not finalized at the time of the Final EIS.[597] The group notes that a report commissioned by Atlantic, the *Soil Erosion and Sedimentation Model Report*, indicated that sedimentation during the first year of construction on affected National Forest Land could be "approximately 200 to 800 percent above baseline erosion rates," and argues that such reports likely underestimate sedimentation levels.[598] Shenandoah Valley Network points to comments by the Forest Service expressing concern that construction techniques along steep slopes in the National Forests have a high risk of failure.[599] According to Shenandoah Valley Network, the Forest Service expressed concerned about this lack of information and indicated, "[s]hould the ACP Project be permitted, multiple additional high hazard areas will need to be addressed on a site-specific basis."[600]

226. The Final EIS explained that the *Soil Erosion and Sedimentation Model Report* likely overstated construction impacts on erosion. As discussed in the Final EIS, the report modeled impacts over a longer time period (3 months vs. 2 weeks), during the summer when intense storms are more likely to occur (vs. the Project's proposal to conduct steep slope construction throughout the year), and only relied on slope breakers and silt fences for mitigation in its model when Atlantic will actually use a variety of erosion and sediment control measures.[601] The Final EIS concluded that surface water impacts from construction along steep slopes on Forest Service land would be avoided or minimized through adherence to the mitigation requirements discussed above.[602] For example, the Commission's Plan requires more erosion control measures in addition to slope breakers and silt fences, including: temporary seeding, mulching, established

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[596] *Id.* at 5-1; Certificate Order, 161 FERC ¶ 61,042 at P 204.

[597] Rehearing Request of Shenandoah Valley Network at 75.

[598] *Id.* (citing the Final EIS at 4-240, 5-20).

[599] *Id.* at 73.

[600] *Id.* at 75 (citing Forest Service High-Hazard Stabilization Measures Request).

[601] Final EIS at 4-231, 4-240.

[602] *Id.* at 2-30 to 2-31.

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construction entrances, straw bales, and sediment basins and traps.[603] The *Best in Class Steep Slope Management Program* requires additional site-specific mitigation measures, such as soil nailings, enhanced drains (German Drains), armored channels and drain pipes, slope breaker armored outlets, energy dissipation drains, and targeted seep collectors.[604]

227. The *COM Plan* also includes site-specific designs and performance-based standards which would be used in the National Forests to minimize the risks for sliding and other slope instabilities.[605] The Final EIS included the *COM Plan* as Appendix G, which had already been subject to Forest Service review in its second revision, and explained that additional review of the *COM Plan* by the Forest Service was ongoing. Therefore, mitigation measures included in the plan could be modified should the Forest Service determine that additional mitigation is necessary.[606] Atlantic submitted an updated *COM Plan* in October 2017 which addressed Forest Service comments and included additional details on mitigation measures to further minimize impacts.[607] The Forest Service approved the *COM Plan* on November 17, 2017, and will require its use on all special use permits for the ACP Project.[608]

228. Several petitioners contend that the Commission has failed to show that this mitigation is effective.[609] We disagree. Mitigation measures are sufficient when based on agency assessments or studies or when they are likely to be adequately policed, such as

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[603] Plan at 11-19.

[604] Atlantic Coast's January 10, 2017, Supplemental Filing, Appendix C: Revised Site Specific Geohazard Mitigation Design Drawings (Accession No. 20170110-5142). *See* Certificate Order, 161 FERC ¶ 61,042 at P 204 (listing examples of mitigation measures).

[605] Final EIS at 4-38.

[606] *Id.* at 2-31.

[607] Atlantic's October 27, 2017 Supplemental Information (Accession No. 20171027-5240).

[608] Forest Service, *Record of Decision on the Atlantic Coast Pipeline Project Special Use Permit/Land and Resource Management Plan Amendments* at 6 (Nov. 17, 2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf.

[609] Rehearing Request of Ashram-Yogaville at 11; Rehearing Request of Friends of Buckingham at 11; Rehearing Request of Friends of Nelson at 23-24.

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when they are included as mandatory conditions imposed on pipelines.[610] The Commission's Plan and Procedures were developed in consultation with multiple state agencies across the country and updated based on Commission staff's field experience gained from pipeline construction and compliance inspections conducted over the last 25 years. Based on Commission staff's experience, these measures are an effective means to mitigate the impacts of construction and operation of the pipeline on affected resources. The *Best in Class Steep Slope Management Program* was developed based on results of a Geohazard Analysis Program, which identified steep slopes along the project route, and mitigation measures from industry-developed "Mitigation of Land Movement in Steep and Rugged Terrain for Pipeline Projects"[611] During construction and restoration, Atlantic and Dominion must employ environmental inspectors to ensure compliance with the aforementioned construction standards and other certificate conditions.[612] The Forest Service also requires construction monitoring by geotechnical professionals to review construction implementation and any needed modifications due to unforeseen conditions.[613] Where, as here, mitigation measures are mandatory, and a program exists to monitor and enforce those measures, such measures have been found to be sufficiently supported by substantial evidence.[614]

ii. Site-Specific Information

229. Shenandoah Valley Network and Friends of Nelson argue that the Commission violated NEPA by failing to have information on site-specific construction plans for each waterbody crossing.[615] Shenandoah Valley Network notes that the Commission required Atlantic to submit site-specific drawings for all major waterbody crossings, which shows that construction procedures at particular sites is essential to understanding actual impacts.

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[610] *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 239 n.9 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

[611] Final EIS at 4-28 to 4-29.

[612] *Id.* at 2-51 to 2-53 (describing the roles and responsibilities of environmental inspectors); *id.* at 2-53 (discussing aspects of the Commission's compliance monitoring program).

[613] *Id.* at 4-41.

[614] *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997).

[615] Rehearing Request of Shenandoah Valley Network at 91; Rehearing Request of Friends of Nelson at 44.

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Accordingly, Shenandoah Valley Network asserts that more detailed site-specific data is warranted.[616]

230. We disagree. Site-specific drawings are not required to assess the impacts from all waterbody crossings. The Final EIS provided detailed site-specific information on the 1,536 and 133 waterbodies crossings within the ACP Project and Supply Header Project workspaces, respectively, including location (milepost or facility), waterbody name, flow regime, crossing width, crossing method, and, where applicable, state water quality classifications, anticipated timing restrictions, potential for blasting, proposed water appropriations, and any impairment or sensitivity.[617] The Final EIS explained that Atlantic and DETI would mitigate adverse impacts associated with waterbody crossings. Atlantic and DETI would implement mitigation measures outlined in the FERC Procedures, including the installation of trench plugs to prevent water from flowing along the trenchline during and after construction.[618] For waterbodies being crossed with HDD, Atlantic and DETI have prepared a *HDD Plan* that describes the drilling techniques and other measures that would be implemented to minimize and address potential issues associated with HDD.[619] The Final EIS concludes, and we agree, that with these measures impacts on surface waters would be effectively minimized or mitigated, and would be largely temporary in duration.[620]

231. Shenandoah Valley Network next alleges that the Commission was required to include site-specific information on water withdrawals and discharges for both hydrostatic testing and dust control.[621] The Final EIS discussed the impacts from and baseline mitigation associated with water withdrawals. Atlantic and DETI will require a total of approximately 86.6 million gallons of water for hydrostatic testing (82.9 million gallons for the ACP Project and 3.7 million gallons for the Supply Header Project).[622] Of this volume, 46.9 and 39.7 million gallons will be required from municipal sources and surface water sources, respectively. Water for hydrostatic testing will be withdrawn and

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[616] Rehearing Request of Shenandoah Valley Network at 91.

[617] Final EIS at 4-100, Appendix K.

[618] *Id.* at 4-115.

[619] *Id.* at 4-116 to 4-117.

[620] *Id.* at 5-10.

[621] Rehearing Request of Shenandoah Valley Network at 92-93.

[622] Certificate Order, 161 FERC ¶ 61,042 at P 222; Final EIS at 4-121.

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discharged in accordance with the Commission's Procedures, state/commonwealth regulations, and required permits. Atlantic and DETI will construct temporary cylindrical water impoundment structures adjacent to several of the water withdrawal points to allow a slower withdrawal rate. Friends of Nelson contends that this practice will result in a significant impact, but we disagree and point to several additional mitigation measures to minimize environmental impacts.[623] For example, Environmental Condition 61 requires Atlantic and DETI to limit water withdrawal to not exceed 10 percent of instantaneous flow at waterbodies that contain federally protected species.[624] Environmental Condition 17 requires Atlantic and DETI to identify proposed or potential sources of water used for dust control, anticipated quantities of water to be appropriated from each source, and the measures they will implement to ensure water sources and any related aquatic biota are not adversely affected by the appropriation activity.[625] We affirm that these measures are sufficiently protective against any significant impacts associated with water withdrawals.

232. Friends of Nelson argues that the Final EIS failed to consider site-specific details associated with floodplains crossing impacts. The Final EIS explains that any structure built in a floodplain would use graveled lots, but Friends of Nelson contends that such mitigation would produce additional run-off relative to the soils being replaced and that site-specific data are needed to assess impacts.[626] We disagree. As discussed, the facilities would be built on graveled lots that allow for some infiltration of rainwater. Based on Atlantic's and DETI's construction and restoration measures, and the minor project-related modifications within floodplains, the Final EIS concluded, and we affirm, that constructing and operating the ACP and Supply Header Projects would not result in a significant impact on floodplains or result in a measurable increase on future flood events.[627]

233. Shenandoah Valley Network contends that the Final EIS failed to discuss the depth of the pipeline burial.[628] It claims if the pipeline is not buried deeply enough, water

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[623] Rehearing Request of Friends of Nelson at 45-46.

[624] Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 61.

[625] *Id.* at Appendix A, Environmental Condition 17.

[626] Rehearing Request of Friends of Nelson at 45.

[627] Final EIS at 4-118.

[628] Rehearing Request of Shenandoah Valley Network at 93-94.

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related weather events can re-expose the pipeline.[629] We disagree. Installation of the pipeline would include digging a trench at least 8 feet deep for the larger pipeline segments and between 6 and 7 feet for smaller segments to provide a minimum of 3 feet of cover over the top of the pipe after backfilling. These depths provide sufficient cover over the pipeline in accordance with Department of Transportation standards.[630]

iii. Road Construction Impacts

234. Petitioners argue that the Final EIS violated NEPA because it failed to analyze the impacts from 99 acres of access roads on water resources.[631] It is not clear which roads petitioners are referring to, but the Final EIS fully analyzed impacts from all access roads. The Final EIS lists the access roads proposed for use for the projects, whether their use is temporary or permanent, and considers these impacts.[632] With regard to water resources, the Final EIS analyzed impacts to surface water by describing: all waterbody crossings by access roads,[633] the potential impacts from construction generally,[634] and along steep slopes,[635] adjustments to avoid sensitive water resources[636] and mitigation to minimize impacts from sedimentation and erosion.[637]

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[629] *Id.* at 93.

[630] Final EIS at 2-34.

[631] Rehearing Request of Ashram-Yogaville at 11-12; Rehearing Request of Friends of Buckingham at 11-12; Rehearing Request of Friends of Nelson at 24.

[632] Final EIS at 2-25, Appendix E. The Final EIS explained that Atlantic will require 369 existing roads that would need to be temporarily improved, 64 new access roads, and 18 access roads that would also include a new portion that would need to be constructed, with 419 permanent roads that would be required for operation of ACP over the life of the project. Final EIS at 2-25; *see also id.* at 2-16 (acreage). DETI will require 46 existing roads that would need to be temporarily improved for the Supply Header Project, 17 new access roads during construction of for the Supply Header Project, and 12 proposed access roads consist of an existing road that would also include a new portion, with a total of 75 permanent roads that would be required for operation of for the Supply Header Project and maintained for the life of the project. Final EIS at 2-25 to 2-26; *see also id.* at 2-17 (acreage).

[633] *Id.* at 4-104 to 4-106.

[634] *Id.* at 4-113.

[635] *Id.* at 4-27, 4-42, 4-44, 4-46 (explaining that access roads, including existing

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iv. Impacts to Water Quality Standards

235. Friends of Nelson alleges that the Final EIS erred when it determined that certain waterbody crossings in Nelson County would be minor. Friends of Nelson acknowledges that the Final EIS indicated that these crossings would follow the requirements of the Commission Plan and Procedures, but also notes that this construction would be conducted in accordance with required Construction Stormwater National Pollutant Discharge Elimination System (NPDES) permits, as appropriate under the Clean Water Act. Because these permits require a project-specific Erosion and Sediment Control Plan, Friends of Nelson argues that the Commission's NEPA analysis requires this information as well.[638] Friends of Nelson goes on to argue that the Final EIS discusses stormwater NPDES permits for stream crossings, but the entire ACP Project requires this permit as well.[639]

236. As discussed, the Commission fully considered surface water impacts, including impacts to waterbodies crossings and from stormwater runoff. The Final EIS explained that Atlantic and DETI would minimize impacts from erosion and sedimentation by implementing the Commission's Plan and Procedures, West Virginia Department of Environment's Erosion and Sediment Control Best Management Practice Manual, the Virginia Erosion and Sediment Control Handbook, the Pennsylvania Erosion and Sediment Pollution Control Program Manual, and the North Carolina Erosion and Sediment Control Planning and Design Manual.[640] Pursuant to these requirements,

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roads upgraded for the project, have the potential to result in unstable slopes, which could impact nearby streams if left unmitigated).

[636] *Id.* at 3-52 to 3-57, 4-16, 4-47 (describing minor route adjustments and the strategy of locating the pipeline route on ridgetops to avoid landslide hazards and stream hazards).

[637] *See id.* at 4-66 (explaining for new access roads "erosion controls would be used and maintained to minimize erosion and sedimentation potential" and for temporary access roads, the area "would be reclaimed and revegetated after construction"); *id.* at 4-72 (describing mitigation measures for road construction on Forest Service land; *id.* at 4-115 (describing erosion controls that would be used and maintained to minimize erosion and sedimentation potential from access roads proximate to waterbodies).

[638] Rehearing Request of Friends of Nelson at 44.

[639] *Id.* at 45-46.

[640] Final EIS at 4-231 to 4-232.

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Atlantic and DETI would also use compost filter socks at the edges of workspaces and access roads within 300 feet of the ESA sensitive waterbodies, and would implement the FWS' enhanced conservation measures for ESA sensitive waterbodies.[641] Based on these controls, the Final EIS concluded, and we affirm here, that constructed-related stormwater impacts would be minimal. To the extent site-specific mitigation measures are required by Construction NPDES permits or other authorizations, those requirements are in addition to those required by the Commission here, and thus more protective.[642] With regard to Friends of Nelson's comments regarding state/commonwealth authority under the Clean Water Act, we require applicants to obtain all necessary approvals before construction.

237. Shenandoah Valley Network argues that the Final EIS failed to assess the impacts of NO_x emissions on the Chesapeake Bay and Bay tributaries.[643] Shenandoah Valley Network argues that atmospheric deposition of nitrogen is the highest nitrogen input load to the Chesapeake Bay and ACP Project emissions may cause the bay to exceed its Total Maximum Daily Load (TMDL)[644] for nitrogen.[645] According to Shenandoah Valley Network, the Commission should not have relied on Atlantic and DETI's air permit applications to determine whether the Project would increase nitrogen deposition in the Chesapeake Bay. Shenandoah Valley Network points out because Atlantic's air modeling showed that the ACP Project's emissions would come close to National Ambient Air

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[641] *Id.* at 4-232.

[642] Friends of Nelson suggests that the Commission was required to await development of any site-specific mitigation measures required by such permits. *See* Rehearing Request of Friends of Nelson at 47. But NEPA does not require complete mitigation plans prior to agency action. *Robertson*, 490 U.S. at 353 ("it would be inconsistent with NEPA's reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act"); *see also U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (holding that FERC need not have "perfect information" before acting and need not definitively resolve all environmental concerns).

[643] Rehearing Request of Shenandoah Valley Network at 146-51.

[644] A TMDL is calculation of the maximum quantity of a given pollutant that may be added to a waterbody from all sources without exceeding the applicable water quality standard for that pollutant.

[645] Rehearing Request of Shenandoah Valley Network at 146 (citing the Chesapeake Bay TMDL).

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Quality Standards (NAAQS) limits set by the EPA, the Commission should have performed more extensive analysis to ensure that emissions would not violate the Chesapeake Bay TMDL.[646]

238. No additional analysis was necessary. The Final EIS appropriately relied upon federal air emission limits under the Clean Air Act. The Commission reviewed Atlantic's air quality modeling and identified no errors.[647] Shenandoah Valley Network claims the air quality modeling is inadequate because results for three of six ACP Project compressors show that emissions "are close to" NAAQS limits,[648] but identifies no error with established practices. Shenandoah Valley Network cites no authority for the proposition that additional modeling is required, and we find that the air quality modeling in the record satisfies NEPA requirements.[649] In any event, as Shenandoah Valley Network points out,[650] designated Chesapeake Bay jurisdictions have developed plans for assuring compliance with the Bay TMDL.[651] According to EPA, Clean Air Act regulations and programs, including the NAAQS with which the project emissions comply, will achieve significant decreases in air deposition of nitrogen by 2020, and EPA believes there is reasonable assurance that those reductions will occur and not contribute to further degradation of the Chesapeake Bay.[652] Based on the estimated emissions from construction and operation of the ACP and Supply Header Projects' facilities, Atlantic's and DETI's commitments to comply with the required federal and state regulations, and a review of the modeling analysis, the Final EIS determined, and we affirm here, that the

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[646] *Id.* at 151.

[647] *See* Final EIS at 4-560; *see also id.* at 4-559 to 4-564.

[648] Rehearing Request of Shenandoah Valley Network at 150.

[649] *See* Final EIS at 4-559 to 4-560 (addressing use of background pollutant concentrations in modeling).

[650] Rehearing Request of Shenandoah Valley Network at 148.

[651] *See* EPA, Chesapeake Bay TMDL: Chesapeake Bay Watershed Implementation Plans, https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-watershed-implementation-plans-wips.

[652] EPA, Chesapeake Bay TMDL: Air Pollution in the Chesapeake Bay Watershed https://www.epa.gov/chesapeake-bay-tmdl/air-pollution-chesapeake-bay-watershed.

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projects would result in continued compliance with the NAAQS and would not result in significant impact on local or regional air quality.[653]

b. Wetlands

239. Shenandoah Valley Network next argues that the Final EIS failed to adequately assess impacts or restoration to forested wetlands and wetland vegetation.[654] We disagree. Construction of the ACP and Supply Header projects will impact a total of 798.2 acres of wetlands, including 91 acres of emergent wetlands, 97.4 acres of scrub-shrub wetlands, and 604.1 acres of forested wetlands.[655] The Final EIS found that following construction, the operational easement would be restored and emergent and scrub-shrub wetlands would return in a few years to their original condition and function in accordance with the Commission's Procedures.[656] The projects would also permanently impact 227 acres of forested wetlands, 98 percent of which would, after clearing, necessarily convert to emergent wetlands.[657]

240. Shenandoah Valley Network argues that the Final EIS failed to fully account for all adverse impacts on forested wetlands, but the Final EIS acknowledged that these impacts would include potential impacts on water quality; changes in the density, type, and biodiversity of vegetation; and impacts on habitat due to fragmentation, loss of riparian vegetation, and microclimate changes associated with gaps in forest canopy.[658] The Final EIS acknowledged it would take decades for these resources to mature and return to their original conditions and functions.[659] The Final EIS noted that Atlantic and DETI are working with the U.S. Army Corps of Engineers (Corps) to determine wetland mitigation requirements and we required that they file copies of their final wetland mitigation plans and documentation of Corps approval of the plans.[660]

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[653] Final EIS at 4-564.

[654] Rehearing Request of Shenandoah Valley Network at 83-90.

[655] *See* Final EIS at 4-135.

[656] *See id.* at 4-140.

[657] *Id.* at 4-138.

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

[659] *Id.*

[660] Certificate Order, 161 FERC ¶ 61,042 at P 225, Appendix A, Environmental

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241. Nonetheless, Shenandoah Valley Network argues that the Final EIS mischaracterized the long-term impacts associated with lost forested wetlands, noting that this loss cannot be characterized as a mere "conversion" when it results in long-lasting and significant impacts.[661] Shenandoah Valley Network argues that the Final EIS is inconsistent when it estimates that upland mature forest will take "a century or more" to return to its precondition state, but forested wetlands will return to its preconstruction state in up to 30 years or more.[662]

242. We disagree. Mature upland forests and forested wetlands are two different ecosystems with different recovery timeframes. Forested wetlands typically have a mature tree canopy with a diverse range of understory and herbaceous community structure and species.[663] However, forested wetlands in both ACP and Supply Header Projects areas are dominated by herbaceous and shrub species similar to those found in emergent and scrub-shrub wetlands, along with a variety of ash, maple, oak, birch, and tupelos, among others.[664] Furthermore, of the forested wetlands that would be impacted by the ACP Project, the Final EIS notes that nearly all the permanent forested wetland impacts would be considered type conversions (e.g., conversion of forest to scrub-shrub or emergent wetland) meaning that the full length of time to return to full forested canopy would not be required, and thus only a shorter period of time will be necessary to regenerate scrub-shrub and emergent wetland species.[665] As we explained in the Final EIS, recovery would be closer to 30 or more years rather than a century or more.[666]

243. With regard to upland forests, the Final EIS also explains that the century or more of upland forest recovery refers not only to the mature forest canopy itself, but forest habitat, including for wildlife species. The Final EIS also explains that upland forest habitat comprises old-growth forest, primarily composed of oak and/or oak-pine regimes in National Forest System lands.[667] The EIS explained regeneration to existing conditions

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Condition 53; Final EIS at 4-140.

[661] Rehearing Request of Shenandoah Valley Network at 85.

[662] *Id.* at 86 (citing Final EIS at ES-10, 4-137).

[663] Final EIS at 4-132.

[664] *Id.*

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

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

[667] *Id.* at 4-167.

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in upland forest could take a century because the loss of hard mast production (i.e., hard nuts and seeds such as acorns, hickory nuts, and walnuts) will inhibit regeneration. On drier sites, pine species, black gum, and perhaps red maple would be expected to outcompete oak, and on more mesic sites,[668] a variety of other hardwood species including red maple and yellow poplar would likely outcompete oak, lengthening the time it may take to reach pre-construction conditions of forest growth.[669]

244. Shenandoah Valley Network contends that required restoration measures will not fully restore disturbed wetland vegetation.[670] It argues that the National Forest Service's *COM Plan*, which requires at least 80 percent of pre-construction cover, is not protective enough of forested wetlands. It contends that the 20 percent of vegetation cover could be trees that do not grow back after construction. It further argues that wetland regeneration will not occur because Atlantic will not segregate the topsoil of wetlands if the soil is inundated. Shenandoah Valley Network argues that failing to segregate soil will disrupt wetland soil layers and the compaction caused by heavy construction equipment will inhibit regeneration.[671]

245. The cited *COM Plan* will apply to less than 1 acre of forested and scrub-shrub wetlands that would be temporarily and permanently impacted on federal lands.[672] The restoration standards in the *COM Plan* are identical to the Commission's Procedures, which also consider revegetation successful if "vegetation is at least 80 percent of either the cover documented for the wetland prior to construction, or at least 80 percent of the cover in adjacent wetland areas that were not disturbed by construction."[673] Revegetation will be successful when wetlands reach 80 percent of cover in *density* when compared to adjacent undisturbed wetland locations. The Final EIS explains that forested wetlands comprise the majority of wetland impacts, accounting for 76 percent of all wetlands impacted, and 74 percent of the *permanent* wetland impacts.[674] Nearly all the permanent forested wetland impacts would be considered type conversions of forest to scrub-shrub or

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[668] Mesic means the site contains a moderate amount of moisture.

[669] *Id.* at 4-164.

[670] Rehearing Request of Shenandoah Valley Network at 88.

[671] *Id.* at 90.

[672] Final EIS at 4-140.

[673] FERC, *Wetland and Waterbody Construction and Mitigation Procedures*, Section VI.D.5.b.

[674] Final EIS at 4-140.

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emergent wetland.[675] We acknowledge that this standard permits permanent forested wetland loss, but requiring revegetation of all wetlands to be contingent upon growth of trees would be setting a standard that would either be unachievable or risk compromising the safety and integrity of the pipeline.

246. Shenandoah Valley Network alleges that Atlantic's treatment of wetland topsoil is not adequately protective. Shenandoah Valley Network points out that Atlantic plans to only segregate topsoil from subsoil in non-saturated wetlands, but the Final EIS explains that the failure to segregate topsoil and subsoil could affect restoration.[676] Shenandoah Valley Network argues that failing to segregate soil in saturated wetlands will disrupt wetland soil layers and the compaction caused by heavy construction equipment will inhibit regeneration.[677]

247. Shenandoah Valley Network is correct that in saturated wetlands, topsoil will not be segregated. This is due to the difficulty of such an operation and the fact that Atlantic would disturb a greater acreage of the same wetlands in order to store the saturated material. But the Commission requires other measures to minimize impacts on saturated soils. The Commission's Procedures require Atlantic to cut vegetation just above ground level, leaving existing root systems in place.[678] The Commission's Procedures also protect against compaction concerns. When saturated soils are present, Atlantic must use low-weight construction equipment, or operate normal equipment on timber riprap, prefabricated equipment mats or terramats.[679] Atlantic must also continue to monitor revegetation of wetlands after construction and file a report with the Commission documenting the success of wetland revegetation. For any areas where revegetation is unsuccessful, Atlantic must develop and implement a remedial revegetation plan with annual reporting until the area is successfully revegetated.[680]

248. Finally, Shenandoah Valley Network and Friends of Nelson allege that the Final EIS's claim that wetland replacement or compensatory mitigation would replace lost wetland function is unsubstantiated when it did not require proof of this mitigation until

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[675] *Id.*

[676] Rehearing Request of Shenandoah Valley Network at 89-90.

[677] *Id.*

[678] Procedures at 15.

[679] *Id.* at 26.

[680] *Id.* at 30.

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before construction.[681] As discussed in the Final EIS, Atlantic and DETI will restore wetlands in accordance with the Commission's Procedures and in coordination with the appropriate federal and state agencies.[682] Additionally, Atlantic filed its wetland mitigation plans with the Commission on February 23, 2018, including the Corps' approvals of the respective mitigation plans.[683] In compliance with Environmental Condition 53 of the Certificate Order, these were received prior to any construction in wetland locations.

c. Groundwater Impacts in Karst Terrain

249. Shenandoah Valley Network states that the Final EIS failed to adequately assess construction impacts on karst and related groundwater resources.[684] Specifically, it contends that the Commission's conclusion that there would not be a significant impact on aquifers or other groundwater resources was not supported by a meaningful assessment of potential impacts to water quality from construction through fragile karst terrain.[685]

250. As discussed in the Certificate Order, in order to prevent and mitigate adverse environmental impacts associated with construction and operation of the project within karst terrain, Atlantic and DETI developed a *Karst Terrain Assessment, Construction, Monitoring and Mitigation Plan* (*Karst Mitigation Plan*) to minimize and respond to karst activity during construction and operation of the projects.[686] This plan includes best management practices that will minimize impacts to the karst environment. These practices include: (1) measures to prevent unimpeded flow of surface drainage into the subsurface karst environment, such as, but not limited to, open throat sinkholes, caves that receive surface drainage, sinking streams, and losing stream segments; (2) procedures for

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[681] Rehearing Request of Shenandoah Valley Network at 90; Rehearing Request of Friends of Nelson at 43. *See supra* nn. 493, 642 (NEPA does not require completion of mitigation plans prior to agency action).

[682] Final EIS at 4-138 to 4-140.

[683] Atlantic's and DETI's February 23, 2018 Supplemental Information (Accession No. 20180223-5159).

[684] Rehearing Request of Shenandoah Valley Network at 80.

[685] *Id.* at 80-81.

[686] Certificate Order, 161 FERC ¶ 61,042 at P 206.

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unanticipated karst discoveries during construction; (3) mitigation options of karst features such as sinkholes; and (4) procedures for coordination with state agencies.[687]

251. In addition, Environmental Condition 26 of the Certificate Order requires Atlantic to use subsurface analysis and Light Imaging, Detection, And Ranging (LiDAR) data in order to construct digital terrain models, and existing dye tracing studies to further identify and characterize karst features along the project route in order to characterize groundwater flow conditions in the karst environment from construction workspaces to potential environmental receptors. Environmental Condition 29 requires Atlantic to revise its *Karst Mitigation Plan* to include post-construction monitoring data from LiDAR to ensure adequate pipeline integrity and safety in areas of karst terrain where the potential for collapse and subsidence exists. Environmental Conditions 62 through 64 also require specific karst mitigation, including protections to the Mingo Run and Simmons-Mingo cave system, coordination with the Virginia Department of Conservation and Recreation, adherence with the Virginia Cave Board's karst assessments, and protections to bat habitat in karsts.[688]

252. Shenandoah Valley Network contends that the Commission's reliance on its Atlantic's *Karst Mitigation Plan* is insufficient to address this concern because the Commission does not address the underlying problem of how groundwater moves through karst terrain, which Shenandoah Valley Network asserts is unknown without proper analysis.[689] Shenandoah Valley Network recommends that the Commission implement dye tracing to determine the path groundwater takes through karst terrain.[690] Although the Final EIS recommends, and Certificate Order requires, that Atlantic rely on past dye tracing studies in a Fracture and Dye Trace Study, Shenandoah Valley Network argues that the results of this study will only be available after the Final EIS has been issued. Shenandoah Valley Network argues that the Commission should issue a supplemental EIS once a final analysis is conducted.[691] Otherwise, Shenandoah Valley Network contends the accurate map of the karst terrain through which the pipeline would pass is untimely

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[687] *Id.* at P 206, Appendix A at Environmental Condition 29.

[688] *Id.* at P 206, Appendix A at Environmental Conditions 62 to 64.

[689] Rehearing Request of Shenandoah Valley Network at 80-83.

[690] *Id.* at 81-83.

[691] *Id.*

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developed, preventing the agency from identifying the full scope of impacts to groundwater from construction of the pipeline through the karst terrain.[692]

253. We disagree. Atlantic conducted an extensive analysis of geologic conditions in the project area, consulted with the applicable state agencies and local water management districts, and used these efforts to prepare the aforementioned plans to avoid, minimize, and mitigate project-related impacts on karst resources.[693] Atlantic was required to submit the requested Fracture and Dye Trace study before the commencement of construction, which it did as part of October 18, 2017 Implementation Plan. The study an analysis of surficial karst features with the potential for intersecting shallow interconnected karst voids and cave systems over a wide area; specifically, between the pipeline and nearby water receptors (i.e., public water supply wells, municipal water supplies, private wells, springs, caves systems, and to surface waters receiving discharge).[694] Performing a dye trace at every sinkhole or sink point along the pipeline alignment is not necessary, as requested by Shenandoah Valley Network, is unnecessary because the data generated from the Fracture and Dye Trace study provide groundwater flow paths and dye testing at each and every karst location would not significantly change the understanding of groundwater flow direction. The study used fracture trace/lineament analysis based remote sensing platforms (aerial photography and LiDAR), along with the results of existing dye trace studies to identify potential karst risks along the pipeline route. [695] The results of this study showed that that many of the karst features within or receiving drainage from the 300-foot-wide corridor along the ACP Project right-of-way are located inside of and/or may lead to the watersheds of nearby springs; that the greatest potential impact to groundwater is from features which allow surface water to plunge into the subsurface such as caves, sinkholes with open, rockbound throats, and sinking or losing streams. The study confirmed that the protocols in the *Karst Mitigation Plan* should be followed to limit the potential for groundwater to be impacted by Project construction.[696]

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[692] *Id.* at 83.

[693] Final EIS at ES-4.

[694] Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 26; *see* Atlantic's Implementation Plan, EC26 at Attachment 1 (October 18, 2017) (Accession number 20171018-5002).

[695] Atlantic's Implementation Plan, EC26 at Attachment 1 (October 18, 2017) (Accession number 20171018-5002) at 2.

[696] Certificate Order, 161 FERC ¶ 61,042 at P 17.

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254. We reject Shenandoah Valley Network's claim that the results of the study must be integrated into a supplemental EIS. As we discussed above, a supplemental EIS is only required if the new information would create "significant new circumstances or information relevant to environmental concerns" to warrant a supplemental EIS.[697] In determining whether new information is "significant," courts have provided that agencies should consider whether "the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS."[698] Here, however, the original EIS identified potential issues regarding the risk of pipeline construction on karst terrain. The additional studies offer further and more site-specific detail of features located on the terrain along the pipeline route. Any resulting minor routing variations and realignments to avoid impact to a specific resource, such as karst terrain, are commonplace for ongoing construction projects.[699]

255. Next, Mr. Limpert contends that Atlantic incorrectly surveyed his property.[700] Specifically, Mr. Limpert contends that the survey conducted on his property does not verify the karst conditions that he characterizes as present and obvious, and he further argues that Atlantic has consistently misrepresented karst in Little Valley. Mr. Limpert also contends that the Commission further failed to adequately assess the impacts on well water in this karst region.[701]

256. As the Final EIS states, because subsurface karst features, such as caves and sinkholes, can exist without exhibiting any form of surface expression, Atlantic will perform an electrical resistivity imaging investigation survey to detect subsurface solution features along all portions of the route that are mapped as limestone bedrock at the surface prior to construction.[702] To ensure the analysis reflects field conditions, the resistivity results would be correlated with boring logs.[703] We find this process sufficient to ensure that any karst features along the pipeline route, including Mr. Limpert's property, will be

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[697] *See supra* n. 308.

[698] *See supra* n. 293.

[699] *Transwestern Pipeline Company, LLC*, 122 FERC ¶ 61,165, at P 68 (2008).

[700] Rehearing Request of Mr. Limpert at 4.

[701] *Id.*

[702] Final EIS at 4-18.

[703] *Id.*

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properly identified, surveyed, mapped, and subsequently addressed with measures identified within Atlantic's *Karst Mitigation Plan.*[704]

257. We further disagree that the Commission did not assess the impacts of well water in the karst region. The EIS explains that private water supply wells and springs have been identified near the ACP Project and Supply Header Project areas; and therefore, Atlantic and DETI will communicate with landowners to complete surveys for private water.[705] The EIS requires that Atlantic complete and file the results of the remaining field surveys for wells and springs within 150 feet of the construction workspace, and within 500 feet of the construction workspace in karst terrain prior to construction.[706]

13. Climate Change Impacts of Greenhouse Gas (GHG) Emissions from Downstream Consumption and Upstream Production

258. Shenandoah Valley Network argues the Commission failed to adequately analyze the climate change impacts of the end use of the gas to be transported by the projects as required by NEPA.[707] Shenandoah Valley Network also argues the Final EIS erred by failing to determine the significance of the secondary effects resulting from GHG emissions from the consumption of gas to be transported by the projects by using a tool such as the Social Cost of Carbon.[708] Shenandoah Valley Network also argues the Commission should have looked at induced production as part of its cumulative effects analysis.[709]

259. Mr. Limpert argues the Final EIS's assessment of the effects of GHG emissions was extremely brief and inaccurate, and violates NEPA.

260. Friends of Buckingham and Ashram-Yogaville argue the Final EIS failed to take a hard look at the cumulative impacts on climate change resulting from the "thousands of existing and reasonably foreseeable shale gas developments."[710] Friends of Buckingham

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[704] *See id.* at ES-4.

[705] *Id.* at 4-80; Certificate Order, 161 FERC ¶ 61,042 at PP 213-215.

[706] Final EIS at 4-80; Certificate Order, 161 FERC ¶ 61,042 at PP 213-215.

[707] Rehearing Request of Shenandoah Valley Network at 96-106.

[708] *Id.* 98-105.

[709] *Id.* at 103.

[710] Rehearing Request of Friends of Buckingham at 12; Rehearing Request of Ashram-Yogaville at 3-4.

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asserts that the Final EIS should have considered the extent to which the project would offset new renewable energy production.[711] Finally, Friends of Buckingham and Ashram-Yogaville assert that the geographic scope of the cumulative impact analysis is fatally flawed because it ignored the substantial impacts of Marcellus and Utica shale gas development and climate change.[712]

a. Quantification of GHG Emissions

261. Evaluating GHG-related climate change impacts implicates two analytical steps.[713] The first step is quantifying GHG emissions, which can be direct, indirect, or cumulative effects as those terms are defined by CEQ regulations implementing NEPA. The second step, which the *Sabal Trail* court described as a "further analytical step,"[714] is linking GHG emissions to particular climate impacts through a qualitative or quantitative analysis. Consistent with CEQ regulations, the Final EIS estimated the GHG emissions associated with construction and operation of the projects,[715] and included a qualitative discussion of the relationship between GHG emissions and climate impacts.[716]

262. With regard to upstream production, such impacts are not reasonably foreseeable. Other sections of this order[717] conclude that upstream production does not fall within the scope of NEPA review under CEQ regulations; therefore, the Commission is not required to evaluate GHG emissions resulting from upstream production. No more was required.[718]

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[711] Rehearing Request of Friends of Buckingham at 12.

[712] *Id.* at 12-13; Rehearing Request of Ashram-Yogaville at 3-4.

[713] *See Sabal Trail*, 867 F.3d 1371-75.

[714] *Id*. at 1375.

[715] Final EIS at 4-547, 4-557 (Table 4.11.1-5 showing construction emissions), 4-559 (Table 4.11.1-7 showing compressor station emissions for ACP Pipeline and Table 4.11.1-8 showing meter and regulating station emissions for the ACP Pipeline).

[716] *Id.* at 4-618 to 4-622.

[717] *See infra* at PP 293-294.

[718] *See Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of shale gas production development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh'g*, 138 FERC ¶ 61,104

(continued ...)

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263. With regard to downstream GHG emissions, the Final EIS quantified these emissions[719] and reasonably evaluated cumulative effects of the downstream emissions on climate change. The Final EIS described how these GHG emissions would "increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described."[720] The dissent argues that the Commission's failure to label these emissions as indirect impacts violates NEPA, but such a finding would be immaterial when the Final EIS conservatively estimated GHG emissions from the downstream consumption of natural gas.

264. As for Shenandoah Valley Network's argument that this case resembles *Sabal Trail*. *Sabal Trail* relied on the fact that the applicants planned the pipeline facilities to "provide capacity to transport natural gas to the electric generating plants of two Florida utilities,"[721] to conclude that the Commissions needed to evaluate downstream GHG emissions.[722] The *Sabal Trail* court did not require the Commission to analyze the link between GHG emissions and climate change impacts. Instead, the court required the Commission to "explain in the EIS, as an aid to the relevant decisionmakers, whether the

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(2012), *aff'd, Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (Commission's cumulative impact analysis sufficient where it included a short summary discussion of shale gas production activities). *See also Sierra Club v. DOE*, 867 F.3d at 202 (holding that DOE's generalized discussion of the impacts associated with non-conventional natural gas production fulfill its obligations under NEPA; DOE need not make specific projections about environmental impacts stemming from specific levels of export-induced gas production).

[719] Final EIS at 4-621. *See* Certificate Order, 161 FERC ¶ 61,042 at PP 296-307; *id*. P 298 n.426. As discussed above, the information about downstream consumption-related emissions was provided outside the scope of our NEPA analysis. *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 41-44 (2018).

[720] Final EIS at 4-620.

[721] 867 F.3d at 1372 (quoting Sabal Trail brief) (internal quotations omitted).

[722] *Id.* at 1374. The environmental impact statement for the pipeline project at issue in Sabal Trail did not provide any information on potential GHG emissions from the downstream combustion of the transported gas. That EIS did not provide an upper-bound estimate of the downstream GHG emissions.

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position on the Social Cost of Carbon that the agency took in [*EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016)] still holds, and why."[723]

265. Friends of Buckingham argues the Final EIS failed to adequately address GHG emissions and climate change, specifically arguing that the Final EIS made no attempt to quantify the extent to which natural gas to be transported by the projects would offset fuel oil and coal.[724] Shenandoah Valley Network says the Final EIS "impermissibly downplayed" the emissions by discussing how the displacement of coal generation by gas generation could result in a net reduction of GHG emissions.[725]

266. We disagree that the Final EIS's quantification was flawed because it failed to provide specific predictions about how alternatives to natural gas electric generation would respond. The Final EIS noted that "[b]ecause natural gas emits less CO2 compared to other fuel sources (e.g., fuel oil or coal), it is anticipated that the eventual consumption of the distributed gas to converted power plants would reduce current GHGs emissions, thereby potentially offsetting some regional CO_2 emissions."[726] The Department of Energy's *2014 Life Cycle Analysis* provides support for this statement.[727]

267. Mr. Limpert asserts that the citation to the *2014 Life Cycle Analysis* study of methane emissions should have been updated with the *2016 Life Cycle Analysis.*[728] The Final EIS relied on the *2014 Life Cycle Analysis* to conclude that "although natural gas may have higher upstream GHG than coal, the total lifecycle GHG emissions from

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[723] *Id.* 1375.

[724] Rehearing Request of Friends of Buckingham at 12.

[725] Rehearing Request of Shenandoah Valley Network at 103.

[726] Final EIS at 4-621.

[727] *See* Dep't of Energy and Nat'l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation,* at 76 DOE/NETL-2014/1646 (May 29, 2014) (*2014 Life Cycle Analysis*) ("Natural gas-fired electricity has a 44 percent to 66 percent lower climate impact than coal-fired electricity. Even when fired on 100 percent unconventional natural gas, from tight gas, shale and coal beds, and compared on a 20-year [Global Warming Potential], natural gas-fired electricity has 51 percent lower GHGs than coal.").

[728] Dep't of Energy and Nat'l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation,* DOE/NETL-2015/1714 (Aug. 30, 2016) (*2016 Life Cycle Analysis*)

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electricity production using natural gas is significantly lower than that of electricity from coal."[729] The *2016 Life Cycle Analysis* used updated and expanded modeling to quantify more accurately fugitive methane emissions.[730] However, the *2016 Life Cycle Analysis* does not say the earlier conclusions were flawed, and Mr. Limpert does not explain on rehearing how the conclusions in the *2014 Life Cycle Analysis* were flawed.

268. Shenandoah Valley Network advances a similar argument and relies on *Sabal Trail* in support;[731] however, the *Sabal Trail* passage Shenandoah Valley Network quotes addresses the issue of whether the "EIS was absolved from estimating carbon emissions by the fact that some of the new pipelines' transport capacity will make it possible for utilities to retire dirtier, coal-fired plants."[732] The downstream consumption emissions were not quantified in *Sabal Trail*, and the court rejected the argument that potential offsets eliminated the need for quantification. This passage has no applicability here, where the Final EIS for the ACP Project and the Supply Header Project provided the downstream emissions estimates from consumption. The Final EIS also recognized that the displacement of other fuels such as fuel oil and coal would result in lower emissions.[733] The Certificate Order explained that the estimate was an upper bound of GHG emissions, and added that displacement of other fuels could actually lower total GHG emissions.[734] The Certificate Order's disclosure of these facts reveals no error in the Commission's quantification of emissions from consumption.

b. <u>Climate Impacts Resulting from GHG Emissions</u>

269. The Final EIS, recognized that "contributions to GHG emissions globally results in the climate change impacts,"[735] but observed that "there is no scientifically-accepted

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[729] Final EIS at 4-621. The Final EIS also concluded that "emissions of criteria pollutants, and HAPs are significantly less from natural gas combustion than for coal. For a typical (baseload) case, the report indicates that the lifecycle emissions of electricity from natural gas are less than half that of coal." *Id.*

[730] *2016 Life Cycle Analysis* at 69.

[731] Rehearing Request of Shenandoah Valley Network at 103-04 (quoting *Sabal Trail*, 867 F.3d at 1375).

[732] 867 F.3d at 1375.

[733] Final EIS at 4-621.

[734] Certificate Order, 161 FERC ¶ 61,042 at P 298.

[735] Final EIS at 4-620.

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methodology available to correlate specific amounts of GHG emissions to discrete changes in average temperature rise, annual precipitation fluctuations, surface water temperature changes, or other physical effects on the environment."[736] Shenandoah Valley Network disagrees with these statements, and states that "NEPA requires a more searching analysis than merely disclosing the amount of pollution."[737] Instead, Shenandoah Valley Network asserts that the Commission must take the next step of evaluating the secondary effects that result from GHG emissions, including an assessment of the significance of these secondary effects.[738]

270. We disagree with the premise of these arguments that the Final EIS did not take the next step of evaluating the secondary effects from GHG emissions. The rehearing requests overlook the Final EIS's qualitative analysis that included discussion of how GHGs occur in the atmosphere and how they induce global climate change.[739] The Final EIS recognized that GHG emissions are a primary cause of climate change, and that CO_2 is the most prevalent of GHG emissions and methane is the second most prevalent.[740] The Final EIS discussed the trend in GHG emissions, using data from 1990 to 2014.[741] Further, the cumulative impacts analysis in the Final EIS qualitatively described the link between GHG emissions and potential cumulative impacts of climate change on a global scale and in areas where markets expected to be served by the project exist, e.g., the Northeast and Southeast regions.[742]

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[736] *Id.*

[737] Rehearing Request of Shenandoah Valley Network at 98.

[738] *Id.* at 98-99.

[739] Final EIS at 4-618 to 4-622. The Final EIS referred to the U.S. Global Change Research Program's May 2014 Climate Change Impacts in the United States. *Id.* at 4-618.

[740] *Id.* at 4-619.

[741] *Id.* at 4-619 to 4-620.

[742] *Id.* at 4-618 to 4-619. Shenandoah Valley Network states the Final EIS makes conflicting statements when it included the qualitative discussion of climate change from a global and regional perspective. Rehearing Request of Shenandoah Valley Network at 101 n.321. As we discuss herein, one section of the Final EIS discussed the global impacts and another section described the impacts that are peculiar to the region. Any fair reading of the Final EIS reveals that both of these sections recognized the global phenomenon of GHG emissions and their climate change impacts. *See* Final EIS at 4-618 to 4-619.

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271. Globally, the Final EIS observed that (1) "GHGs have been accumulating in the atmosphere since the beginning of the industrial era (circa 1750);" (2) "combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture and clearing of forests is primarily responsible for this accumulation of GHG;" (3) "these anthropogenic GHG emissions are the primary contributing factor to climate change;" and (4) "impacts extend beyond atmospheric climate change alone, and include changes to water resources, transportation, agriculture, ecosystems, and human health."[743]

272. In the Northeast region, the Final EIS observed that (1) "from 1895 to 2011 the Northeast experienced a nearly 2 [degrees Fahrenheit (°F)] temperature increase;" (2) "from 1958 to 2010 the Northeast experienced a 70 percent increase in the amount of precipitation falling in heavy events and 5 to 20 percent increase in average winter precipitation;" (3) "temperatures are projected to increase by 4.5 to 10 °F by the 2080s under the worst-case scenario (continually increasing emissions), and would increase by 3 °F to 6 °F if emissions were decreased;" (4) "the number of days above 90 °F are projected to increase, resulting in major human health implications;" (5) "the global sea level has risen by about 8 inches since reliable record keeping began in 1880, and is projected to rise another 1 to 4 feet by 2100;" (6) "higher than average sea level rise along the Northeastern coast will occur due to land subsidence;" (7) "increased fall and winter precipitation could damage crops, and wetter springs would result in delayed planting of grain and vegetables;" (8) "risks to the Chesapeake Bay will be exacerbated by climate change, including disruption of certain fish species and increased invasive species;" and (9) "coastal water temperature in several regions are likely to continue warming as much as 4 to 8 °F by 2100."[744]

273. In the Southeast region, the Final EIS observed that (1) "from 1970 to 2014 the Southeast experienced an average temperature increase of 2 °F, although this region has cycled between warm and cool periods in the last century;" (2) "the number of days above 95 °F during the daytime and 75 °F at night are projected to increase;" (3) "regional average temperature will increase by 4 °F to 8 °F by 2100 under an increased (worst-case) emissions scenario;" (4) "ground level ozone is projected to increase in the 19 largest urban areas of the Southeast, impacting public health;" (5) "coastal wetlands are at risk from sea level rise, and a reduction in wetlands increases the loss of important fishery habitat;" (6) "heat stress could impact dairy and livestock production, shifting dairy production northward;" and (7) "a 2.2 °F increase in temperature would likely reduce overall productivity for corn, soybeans, rice, cotton, and peanuts across the Southeast,

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[743] *Id.* at 4-618.

[744] *Id.* at 4-618 to 4-619.

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although rising CO_2 levels could partially offset these decreases."[745] Therefore, it is not true that the Final EIS here ignored the climate impacts resulting from GHG emissions.

274. The Final EIS reasonably cited significant, easily accessible literature that exhaustively evaluates the link between GHG emissions and climate impacts using the current state of climate science.[746] Thus, the Commission has not ignored GHG-related impacts. Indeed, it is hard to imagine that the Commission could improve on the science in the Third National Climate Assessment. Accordingly, we deny rehearing.

275. Shenandoah Valley Network also argues that the Final EIS fails to compare the downstream emissions of the project to the emissions of any reasonable alternatives.[747] Shenandoah Valley Network ignores the comparison in the Certificate Order.[748]

c. <u>Usefulness of Social Cost of Carbon for Project Decisions under NGA and as Indicator of Significance under NEPA</u>

276. Shenandoah Valley Network is mistaken that the Commission failed to explain why the Social Cost of Carbon tool is not an appropriate methodology for determining how the proposed projects' incremental contribution to GHGs would translate into physical effects on the global environment. The Certificate Order explained that the Social Cost of Carbon methodology is not appropriate for determining how the proposed projects' incremental contribution to GHGs would translate into physical effects on the global environment.[749] The Certificate Order explained that there is no consensus on the appropriate discount rate to be used for analysis spanning multiple generations, resulting in significant variation in results.[750] The order also explained that there is no established

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[745] *Id.* at 4-619.

[746] *See id.* at 4-618 (referring to the U.S. Global Change Research Program, *Climate Change Impacts in the United States* (May 2014) (Third National Climate Assessment)). The Third National Climate Assessment is a more than 800-page document that "assess[es] the science of climate change and its impacts cross the United States, now and throughout this century. It documents climate change related impacts and responses for various sectors and regions, with the goal of better informing public and private decision-making at all levels." Third National Climate Assessment at iv.

[747] Rehearing Request of Shenandoah Valley Network at 106.

[748] Certificate Order, 161 FERC ¶ 61,042 at P 305.

[749] *Id.* P 307.

[750] *Id.*

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criteria identifying the monetized values that are to be considered significant under NEPA.[751]

277. Shenandoah Valley Network nevertheless asserts the Commission should have done more,[752] i.e., used the Social Cost of Carbon tool, which seeks to estimate the monetized climate change damage associated with an incremental increase in CO_2 emissions in a given year. For the reasons stated in prior decisions, the Commission declines to adopt the Social Cost of Carbon tool.[753] Moreover, EPA recently confirmed to the Commission that the tool, which "no longer represents government policy," was developed to assist in rulemakings and "was not designed for, and may not be appropriate for, analysis of project-level decision-making."[754]

278. The dissent argues that the Commission is obligated under NEPA to reach a significance finding on downstream GHG emissions. We are aware of no standard established by international or federal policy, or by a recognized scientific body that would assist us to ascribe significance to a given rate or volume of GHG emissions.[755] The Certificate Order agreed with the finding in the Final EIS[756] that "because the project's incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects' contribution to cumulative impacts on climate change would be significant."[757]

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[751] *Id.*

[752] Rehearing Request of Shenandoah Valley Network at 98 ("NEPA requires a more searching analysis than merely disclosing the amount of pollution.").

[753] *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at PP 30-51 (2018); *see also Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at PP 275-97. *See* Third National Assessment at 826 ("Documenting the costs of climate change impacts is extremely challenging because these impacts occur across multiple regions and sectors and over multiple time frames.").

[754] July 26, 2018 EPA Comments, Docket No. PL18-1-000 (letter, dated July 25, 2018, from Brittany Bolen, Associate Administrator, Office of Policy, EPA).

[755] *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at P 26 (2018).

[756] Final EIS at 4-620.

[757] Certificate Order, 161 FERC ¶ 61,042 at P 306.

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279. Commission staff is not aware of studies that assess the significance of monetized damages calculated with the Social Cost of Carbon tool. At most, we are able to publish estimated ranges of monetized damages under different assumptions in the Social Cost of Carbon tool. However, because we have no basis to designate a particular dollar figure calculated from the Social Cost of Carbon tool as "significant," such action would be arbitrary and would meaningfully inform neither the Commission's decision making nor the public. Moreover, if we were to calculate the Social Cost of Carbon, any two projects with the same capacity (or multiple smaller projects with an equivalent cumulative capacity), but which are designed to serve end users in different states or multiple states, will contribute identically to global climate change. Accordingly, we conclude that using the Social Cost of Carbon would not assist us in determining whether downstream GHG emissions are significant.

280. Although the Commission has found no studies to assess the significance of monetized damages,[758] the Certificate Order did not ignore the significance question. As explained in the Certificate Order, the Final EIS provided context for the GHG emissions from the ACP Project and Supply Header Project by including the GHG inventory for Pennsylvania, West Virginia, Virginia, and North Carolina.[759] The Certificate Order compared "the GHG emissions from the project to the GHG Inventories for the four-state region and nationwide.[760] The Certificate Order provided these calculations for a scenario where "all natural gas transported by the projects is used for end-use combustion"[761] and a scenario where "79 percent of the natural gas transported by project is used for power generation (estimate of actual consumption)."[762] Taking the highest percentage, the Certificate Order concluded that "the downstream use of the natural gas to be transported

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[758] We note that rehearing requesters do no propose a threshold for determining significance.

[759] *Id.* P 305 (citing Final EIS at 4-620).

[760] *Id*. Shenandoah Valley Network describes the Certificate Order as "outside the NEPA process." Rehearing Request of Shenandoah Valley Network at 105. Shenandoah Valley Network does not cite any authority. The Supreme Court has stated that under the ""rule of reason," an agency need not supplement an [EIS] every time new information comes to light after the EIS is finalized." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 373 (1989).

[761] Certificate Order, 161 FERC ¶ 61,042 at P 305.

[762] *Id.*

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by the project would potentially increase the GHG emissions inventory in the four-state region by up to 5.2 percent."[763]

281. Although now withdrawn, previous CEQ guidance[764] "[r]ecommend[ed] that agencies use projected GHG emissions . . . *as a proxy* for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action."[765] This is exactly what the Final EIS did. The Final Guidance recommended that "where agencies do not quantify" GHG emissions, "agencies include a qualitative analysis."[766] In this case, the Final EIS did both: (1) The Final EIS quantified downstream GHG emissions; and (2) it included a qualitative analysis of the link between GHG emissions and their climate impacts, both on a global scale and a regional scale. Finally, with regard to a methodology of monetizing costs and benefits such as the Social Cost of Carbon, the Final Guidance notes that "NEPA does not require monetizing costs and benefits,"[767] in part explaining that this should not be done "when there are important qualitative considerations."[768]

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[763] *Id.*

[764] *See* 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 (Aug. 1, 2016), Notice of Availability, 81 Fed. Reg. 51,866 (Aug. 5, 2016) (Final Guidance). The Final Guidance, which is "not a rule or regulation" and "does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable," was subsequently withdrawn. Withdrawal of 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, 82 Fed. Reg. 16,576 (Apr. 5, 2017).

[765] Final Guidance at 4 (emphasis added).

[766] *Id.*

[767] *Id*. at 32.

[768] *Id.* at 32 (citing 40 C.F.R. 1502.23). *See supra* at PP 39-63 (discussing whether the projects are required by present or future public convenience and necessity).

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d. Public Input on Mitigation Measures

282. Shenandoah Valley Network argues that the failure to take a hard look at the downstream GHG emissions resulted in the failure to adequately seek public input regarding possible mitigation measures.[769]

283. We disagree. Emissions associated with consumption were included in the Draft EIS and all participants had an opportunity to comment.[770] The Commission does not deny the link between GHG emissions and environmental impacts and climate change. However, linking particular GHG emissions to particular climate and environmental impacts in a way that results in analysis that is useful to the Commission for purposes of fulfilling its obligations under NEPA and the NGA is a different matter. In any event, given the discussion of those GHG emissions in the Draft EIS, any participant to these proceedings had full opportunity to comment on them, including the further analytical step of secondary environmental and climate impacts.

284. An environmental impact statement must discuss possible mitigation measures for adverse environmental consequences.[771] The Final EIS described in detail the federal and state regulatory regimes that will control the projects' direct emission sources.[772] The Final EIS also discussed mitigation measures for construction emissions, such as limiting the idling of engines when construction equipment is not in use,[773] and mitigation measures for operation emissions, such as preventive maintenance to identify leaks and commitments to reduce the frequency of unscheduled maintenance blowdowns, as well as mitigation measures dealing with the full spectrum of environmental resources.

285. We do not believe there are any additional mitigation measures the Commission could impose with respect to the GHG emissions analyzed in the Final EIS. Even if downstream emissions were an effect of the project, the Commission lacks jurisdiction to impose mitigation measures on downstream end-use consumers, be they power plants,

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[769] Rehearing Request of Shenandoah Valley Network at 106.

[770] Draft EIS at 4-390, 4-392, 4-401 to 4-412, 4-511 to 4-516, 5-12.

[771] *Robertson*, 490 U.S. at 351-353.

[772] Final EIS at 4-547 to 4-556.

[773] *Id.* at 4-558.

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manufacturers, or others. EPA and state regulatory agencies have authority to regulate power plant emissions under the federal Clean Air Act.[774]

286. In addition, the vast majority of the lifecycle GHG emissions associated with the natural gas delivery chain are a result of the end use of the natural gas, not the construction or operation of the transportation facilities subject to the Commission's jurisdiction. Thus, the downstream GHG emissions associated with a proposed project are primarily a function of a proposed project's incremental transportation capacity, not the facilities, and will not vary regardless of the project's routing or location. There are no conditions the Commission can impose on the construction of jurisdictional facilities that will affect the end-use-related GHG emissions.[775] The dissent argues that Section 7 of NGA grants the Commission broad authority to consider multiple factors when determining whether a project is in the public interest. For the reasons we explained in the *Florida Southeast Connection, LLC* issued concurrently today, we disagree.[776] Were we to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not "that the *pipeline* would be too harmful to the environment," but rather that the *end use* of the gas would be too harmful to the environment. The Commission believes that it is for Congress or the Executive Branch to decide national policy on the use of natural gas and that the Commission's job is to review applications before it on a case-by-case basis.[777]

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[774] *See Florida Southeast Connection*, 162 FERC ¶ 61,233 at PP 56-57.

[775] Contrast this with the direct project-related impacts, which the Commission has the ability to mitigate through conditions on routing (*e.g.*, changes to avoid sensitive resources), construction methodology (*e.g.*, timing restrictions to lessen impacts on wildlife, requirements to drill under sensitive streams rather than open cut), and operations (*e.g.*, noise restrictions, requiring electric instead of gas compressors in appropriate situations).

[776] *See generally*, *Florida Southeast Connection, LLC*, 164 FERC ¶ 61,099, at PP 52-57 (2018).

[777] *See Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purpose for which FERC was given certification authority."); *American Gas Association v. FERC*, 912 F.2d 1496, 1510-11 (D.C. Cir. 1990) ("[T]he Commission may not use its [Natural Gas Act] § 7 condition power to do indirectly . . . things that it cannot do at all.").

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14. Cumulative Impacts

287. Friends of Nelson asserts that the Commission failed to take a hard look at the cumulative impacts of the ACP Project along with other past, present, and reasonably foreseeable future actions, such as the Mountain Valley Pipeline Project and shale gas development projects.[778]

288. CEQ defines cumulative impacts as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[779] The requirement that an impact must be "reasonably foreseeable" to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

289. The "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies."[780] CEQ has explained that "it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful."[781] Further, a cumulative impact analysis need only include "such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible."[782] An agency's analysis should be proportional to the magnitude of a proposed action; actions that will have no significant direct or indirect impacts usually only require a limited cumulative impacts analysis.[783] A meaningful cumulative impacts analysis must identify five things: "(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected *in that area* from the

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[778] Rehearing Request of Friends of Nelson at 32, 36.

[779] 40 C.F.R. § 1508.7 (2017).

[780] *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976).

[781] CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (Jan. 1997), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf (1997 CEQ Guidance).

[782] *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

[783] *See* CEQ, Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis at 2-3 (June 24, 2005) (2005 CEQ Guidance).

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proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or expected to have impacts *in the same area*; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected in the individual impacts are allowed to accumulate."[784]

290. The geographic scope utilized in the cumulative impacts analysis was based on: projects and activities with impacts of a magnitude or nature comparable to the ACP Project, including Commission-jurisdictional and non-jurisdictional facilities; planned or proposed projects with a similar construction timeframe; and projects that would impact the same resource category.[785] Specifically, Commission staff defined the geographic scope for its analysis of cumulative impacts on specific environmental resources to include projects/actions within the same construction footprint as the projects for geology, soils, and land use; within the U.S. Geological Survey hydrologic unit code 10 watersheds for water resources, wetlands, vegetation, aquatic resources, wildlife, and reliability and safety; within 0.5 mile of the projects for visual resources, with an additional 5-mile visual radius around each compressor station; at the county level for socioeconomic impacts; within 0.5 mile of the projects for noise sensitive areas around compressor stations; within the area of potential effect for cultural resources; within the Air Quality Control Regions for climate change; and for air quality impacts, within 0.5 mile of the project for construction impacts and within the Air Quality Control Regions for operational impacts.[786] Friends of Nelson argues that we should have used a geographic scope of: the ecosystem level for vegetation and wildlife; the total range of population units for migratory wildlife; an entire state or region for land use; and the global atmosphere for air quality.[787] Friends of Nelson fails to explain how its suggested geographic scopes would have changed our analysis. We dismiss Friends of Nelson's request and affirm our determination that our geographic scopes are consistent with the requirements of NEPA.

291. We also dismiss Friends of Nelson's blanket claim that the Commission's selected geographic scope "for forested lands, forested and scrub-shrub wetlands and air quality are

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[784] *TOMAC v. Norton*, 433 F.3d 852, 964 (D.C. Cir. 2006) (emphasis added) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002) (internal quotations omitted). *See also Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

[785] Final EIS at 5-591 to 4-623.

[786] Certificate Order, 161 FERC ¶ 61,042 at P 311. *See* Final EIS at 4-593 to 4-594.

[787] Rehearing Request of Friends of Nelson at 35-36.

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not consistent with the requirements of NEPA."[788] Friends of Nelson failed to specify how our evaluation erred. Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not suffice to raise an issue. Because Friends of Nelson does not list any specific concerns with our geographic scope for forested lands, forested and scrub-shrub wetlands, and air quality, we dismiss those allegations.

292. Friends of Nelson asserts that the Final EIS's cumulative impacts analysis, limited to two paragraphs, contained "cursory statements and conclusory terms."[789] Friends of Nelson claims that the Final EIS wholly failed to address any cumulative impacts on water resources, vegetation, wildlife, fisheries, land use, or air quality.[790] We disagree. The Final EIS evaluated the cumulative impacts of the ACP Project on past,[791] present,[792] and future actions on geology;[793] soils and sediments;[794] water resources;[795] vegetation;[796] wildlife;[797] fisheries and aquatic resources;[798] special status species;[799] land use, special interest areas, and visual resources;[800] socioeconomics;[801] cultural resources;[802] air quality and noise;[803] climate change;[804] reliability and safety;[805] and national forests.[806]

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[788] *Id.* at 36.

[789] *Id.* at 32

[790] *Id.* at 33.

[791] Final EIS at 4-595 to 4-596.

[792] *Id.* at 4-596 to 4-602.

[793] *Id.* at 4-602 to 4-603.

[794] *Id.* at 4-603 to 4-604.

[795] *Id.* at 4-604 to 4-607.

[796] *Id.* at 4-607 to 4-608.

[797] *Id.* at 4-608 to 4-609.

[798] *Id.* at 4-610.

[799] *Id.* at 4-610 to 4-611.

[800] *Id.* at 4-612 to 4-613.

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a. Shale Gas Development

293. Friends of Nelson argues that the Final EIS failed to account for cumulative impacts of Marcellus and Utica shale gas development.[807]

294. We affirm our previous conclusion that future shale development upstream of the ACP Project is not reasonably foreseeable for the purposes of the ACP Project's cumulative impacts analysis and was thus not included in the NEPA review.[808] A cumulative impacts analysis requires inclusion of impacts to the environment from "reasonably foreseeable future actions."[809] While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that where the Commission lacks meaningful information about potential future natural gas production within the geographic scope for potential cumulative impacts of a project-affected resource, then production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.[810] Similarly, the

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[801] *Id.* at 4-613 to 4-614.

[802] *Id.* at 4-614 to 4-615.

[803] *Id.* at 4-615 to 4-618.

[804] *Id.* at 4-618 to 4-622.

[805] *Id.* 4-622.

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

[807] Rehearing Request of Friends of Nelson at 32-38.

[808] Certificate Order, 161 FERC ¶ 61,042 at P 289.

[809] 40 C.F.R. § 1508.7 (2017).

[810] Certificate Order, 161 FERC ¶ 61,042 at P 290; *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 at P 120; *see also Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (increased gas production not reasonably foreseeable when agency cannot predict the incremental quantity of natural gas that might be produced in response to an incremental increase in LNG exports); *Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of future Marcellus Shale wells and the associated development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh'g*, 138 FERC ¶ 61,104

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Commission found that an analysis of cumulative impacts related to future shale gas development is outside of the scope of ACP Project cumulative impacts because the exact location, scale, and timing of these facilities are unknown.[811] However, we note that where known, and within the appropriate resource-specific geographic scope, the Final EIS considered the effects of known past and ongoing oil and gas exploration and production.[812] On rehearing, Friends of Nelson has not raised any new contentions or a change in circumstances to persuade the Commission to reconsider its prior determination.

b. <u>Downstream GHG Emissions</u>

295. Friends of Nelson states that the failure to properly analyze downstream GHG emissions resulted in a flawed cumulative impacts analysis.[813] Friends of Nelson's argument relies on its flawed assumption that the GHG emissions associated with the downstream use of the gas transported by the projects are cumulative impacts of the project. GHG emissions from the downstream use of the transported gas do not fall within the definition of cumulative impacts.

296. The geographic scope of our cumulative impacts analysis varies from case to case, and resource to resource, depending on the facts presented. Further, where, as here, the Commission lacks meaningful information about downstream use of the gas; i.e., information about future power plants, storage facilities, or distribution networks, within the geographic scope of a project-affected resource, then these impacts are not reasonably foreseeable for inclusion in the cumulative impacts analysis.[814] As stated above, the ACP Project will provide 1.5 million Dth per day of natural gas to six public utilities and local distribution companies in Virginia and North Carolina, while the upstream Supply Header Project would connect Atlantic's customers to the Dominion South Point supply hub to access several natural gas supply pipelines.[815] There is no evidence in the record that ultimate end-use combustion of the gas transported by the projects is reasonably foreseeable and therefore does not meet the definition of cumulative impacts.

(2012), *aff'd*, *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012).

[811] Certificate Order, 161 FERC ¶ 61,042 at P 290. *See* Final EIS at 4-597.

[812] Final EIS at 4-597.

[813] Rehearing Request of Friends of Nelson at 36-38.

[814] *See, e.g.*, *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 34 (2018).

[815] Final EIS at 1-3 to 1-5.

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297. The Commission's finding that the end use of the gas being transported by a pipeline is not reasonably foreseeable and the GHG emissions associated with the end-use combustion did not require further analysis is not inconsistent with *Mid States*.[816] In *Mid States*, petitioners argued that the projected availability of 100 million tons of low-sulfur coal per year at reduced rates would increase the consumption by existing power plants of low-sulfur coal vis-à-vis other fuels (e.g., natural gas).[817] The court found that the likely increased consumption of low-sulfur coal by power plants would be an indirect impact of construction of a shorter, more direct rail line to transport the low-sulfur coal from the mining area to existing coal-burning power plants.[818] Thus, the Surface Transportation Board was required to consider the effects on air quality of such consumption. In *Mid States* it was undisputed that the proposed project would increase the use of coal for power generation. Here, it is unknown where and how the transported gas will be used and there is no identifiable end-use as there was in *Mid States*.[819] Further, unlike the case here, the Surface Transportation Board had stated that approval of the rail line would lead to increased coal production.[820] It is primarily for this reason that reliance on *Mid States* is "misplaced since the agency in *Mid States* stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so."[821] The Commission did neither of those things.

298. Nonetheless, the Certificate Order reasonably evaluated cumulative effects of the downstream emissions and described how these GHG emissions would combine "with past and future emissions from all other sources, and contribute incrementally to climate change."[822] As the Certificate Order explained, "because the project's incremental

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[816] 345 F.3d 520.

[817] *Mid States*, 345 F.3d at 548.

[818] *Id.* at 550 (finding compelling the fact that while the Board's Draft EIS had stated that it would consider potential air quality impacts associated with the anticipated increased use of the transported coal, the Final EIS failed to do so).

[819] While it may be foreseeable, as some suggest, that the gas transported on the expansion will be burned, we have no information as to the extent such consumption will represent incremental consumption above existing levels, as opposed to substitution for existing sources of supply.

[820] *Mid States*, 345 F.3d at 549.

[821] *See Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th Cir. 2005).

[822] Certificate Order, 161 FERC ¶ 61,042 at P 306. *See* Final EIS at 4-620.

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physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects' contribution to cumulative impacts on climate change would be significant."[823] No more was required.[824]

c. Other Pipeline Projects

299. Friends of Nelson argues that the Commission did not consider the Mountain Valley Pipeline Project in its cumulative impacts analysis.[825] Shenandoah Valley Network also argues that the Commission failed to adequately address the cumulative impacts of the ACP Project when the project crosses a waterbody several times and with other projects.[826]

300. The Final EIS identified 11 planned, proposed, or existing projects, including the Mountain Valley Pipeline Project, under the Commission's jurisdiction that would be within the geographic scope of the ACP Project.[827] The Final EIS determined and we agree that any potential cumulative impacts would be reduced because all Commission-jurisdictional projects must be: constructed and maintained according to our general measures; subject to additional project-specific mitigation measures; and subject to other construction, operation, and mitigation measures required by federal, state, and local permitting agencies.[828] Specific to the Mountain Valley Pipeline Project, the Final EIS determined that any cumulative impacts arising from the construction and operation of the ACP and Mountain Valley Pipeline Projects would be temporary and minor, such as impacts to: waterbodies,[829] fisheries and aquatic resources;[830] land use, special interest areas, and visual resources;[831] air emissions;[832] noise;[833] and forests.[834]

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[823] Certificate Order, 161 FERC ¶ 61,042 at P 306.

[824] *See, infra,* n.**Error! Bookmark not defined.**.

[825] Rehearing Request of Friends of Nelson at 36.

[826] Rehearing Request of Shenandoah Valley Network at 96-97.

[827] Final EIS at 4-597 to 4-600.

[828] *Id.* at 4-600.

[829] *Id.* at 4-606 to 4-607 (the ACP and Mountain Valley Pipeline Projects have the greatest overlap in waterbody crossings; however, the impacts will occur during construction and be temporary and minor).

[830] *Id.* at 4-610 (the ACP and Mountain Valley Pipeline Projects would both affect

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15. Environmental Justice

301. Shenandoah Valley Network and Public Interest Groups state the Final EIS erroneously stated that the Commission is not required to comply with Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[835] and failed to take a hard look at potential impacts on environmental justice communities, such as the harmful effects and enhanced risk the project imposes on low-income communities, communities of color, and Native American tribes.[836] Shenandoah Valley Network asserts it was error to state that the Executive Order does not apply to the Commission, reasoning that once the Commission assumed

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the candy darter; however the impacts would primarily occur during construction and be temporary and minor).

[831] *Id.* at 4-613 (the ACP and Mountain Valley Pipeline Projects would both cross the Blue Ridge Parkway and the Appalachian National Scenic Trail. Trail users will not see both the ACP and Mountain Valley Pipeline Projects from any one view point, but may see both projects from multiple viewpoints in a short duration of time or over a short distance. Both Atlantic and Mountain Valley will use the HDD method and/or the bore method to reduce impacts to vegetation and visual resources).

[832] *Id.* at 4-615 to 4-616 (the Mountain Valley Pipeline and Rover Projects are located within the geographic scope of the ACP Project and may contribute to air emissions, but these emissions are minor and localized (during construction) and will not result in significant cumulative impacts).

[833] *Id.* at 4-617 (the construction and operation of the Mountain Valley Pipeline and Rover Projects, are required to adhere to similar noise and mitigation measures as the ACP Project and will not result in significant cumulative impacts).

[834] *Id.* at 4-622 (portions of the ACP and Mountain Valley Pipeline Projects proposed to be constructed through the Monongahela, George Washington, and Jefferson National Forests will be regulated through project design, best management practices, and National Forest Service permitting, and will not have any significant cumulative impacts).

[835] 59 Fed. Reg. 7629 (Feb. 11, 1994) (Executive Order 12898).

[836] Rehearing Request of Shenandoah Valley Network at 118-45; Rehearing Request of Public Interest Groups at 23.

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the responsibility for the analysis, it was required to complete it in compliance with the Executive Order.[837]

302. We disagree that the Final EIS contained a flawed environmental justice analysis. However, before examining that question, we observe that Shenandoah Valley Network is mistaken that Executive Order 12898 applies to the Commission. The Executive Order states that "[i]ndependent agencies are requested to comply with the provisions of this order."[838] On rehearing, Shenandoah Valley Network does not address the language of the Executive Order, and does not cite any authority for its position. In any event, as we discuss below, the Final EIS and the Certificate Order adequately address environmental justice related impacts.[839] The approach in the Final EIS was consistent with the following steps: (1) "[d]etermine the existence of minority and low-income populations"; (2) "[d]etermine if resource impacts are high and adverse"; and (3) "[d]etermine if the impacts fall disproportionately on environmental justice populations."[840] If the Final EIS reaches a negative finding at any of these steps, then the analysis concludes. For example, if no minority or low-income populations are found, there is no reason to then consider whether the resource impacts are high and adverse.

a. Existence of Minority and Low-Income Populations

303. Shenandoah Valley Network states that the ACP Project and the Buckingham County compressor station in particular will have a disproportionately high and

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[837] Certificate Order, 161 FERC ¶ 61,042 at P 253 (stating that the Commission "is not one of the specified agencies listed in the executive order, and therefore it is not binding on the Commission"). *See* Rehearing Request of Shenandoah Valley Network at 119.

[838] Executive Order 12898 at section 6-604.

[839] Certificate Order, 161 FERC ¶ 61,042 at P 253. *See Dominion Transmission, Inc.*, 155 FERC ¶ 61,106, at PP 134-138 (2016); *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 at P 260; *Sound Energy Sols.*, 107 FERC ¶ 61,263, at P 109 (2004); *Texas E. Transmission, LP*, 141 FERC ¶ 61,043, at P 44 (2012); *AES Sparrows Point LNG, LNG*, 129 FERC ¶ 61,245, at P 160 (2009) ("While we may consider such impacts as part of our assessment of the socioeconomic aspects of proposed projects in the context of our NEPA review, we are not compelled to do so.").

[840] Final EIS at 4-512. These three steps are based on guidance provided by the U.S. Environmental Protection Agency. EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (Apr. 1998).

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detrimental effect on environmental justice communities.[841] Shenandoah Valley Network argues that the Final EIS should have provided a more refined analysis for the environmental justice communities most affected by the facilities by defining environmental justice communities using smaller, more granular census blocks, rather than the larger census tracts, because the census blocks "have significantly larger percentages of racial or ethnic minorities or people living in poverty than the broader census tract."[842] Shenandoah Valley Network asserts use of the larger census tracts disguises the "more direct and localized impacts felt by those communities closest to the pipeline and the infrastructure."[843] Shenandoah Valley Network and Public Interest Groups assert that the environmental justice analysis with respect to the compressor station in Buckingham County demonstrates how the overall analysis was flawed.[844] Public Interest Groups specifically argue that the use of census blocks around the Buckingham County compressor station dilutes the impacts to families in the Union Hill area, where 85 percent of adjoining landowners are African-American.[845]

304. Shenandoah Valley Network points out that the Final EIS and the Certificate Order mistakenly stated that three, rather than two, census tracts are within one mile of the Buckingham County compressor station.[846] We disagree that analyzing three rather than two census tracts resulted in a flawed analysis. As a result of additional letters and comments at public meetings regarding the Union Hill and Union Grove locations near the Buckingham County compressor station, Commission staff asked Atlantic to re-examine the properties near the compressor station.[847] At this direction, Atlantic resurveyed the location and "expanded the visual [area of potential effects] to include additional properties."[848] Including three tracts rather than two cast a wider net for analysis, which was done for the purpose of responding to comments concerning environmental justice.

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[841] Rehearing Request of Shenandoah Valley Network at 120.

[842] *Id.* at 120-21.

[843] *Id.* at 121.

[844] *Id.* at 128-34; Rehearing Request of Public Interest Groups at 25.

[845] Rehearing Request of Public Interest Groups at 25. With the exception of secondary literature, Public Interest Groups do not cite any authority showing the Commission's environmental justice analysis is flawed. *Id.* at 27 n.23.

[846] Rehearing Request of Shenandoah Valley Network at 128-29.

[847] Final EIS at 4-538.

[848] *Id.*

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According to Shenandoah Valley Network, these three census tracts should be designated environmental justice populations after comparing the census tract demographics to state-wide rather than county-wide demographics.[849]

305. Mr. Limpert challenges the environmental justice analysis, stating that, with one exception, all counties where the project is located have people who are "below the median income level for their respective states" and that the percentage of people who live below the poverty level who would be living near the pipeline is substantially higher than those living elsewhere.[850] Shenandoah Valley Network asserts that the methodology for determining low-income populations (comparing census tract with state-wide data) differed from the methodology for determining minority populations (comparing census tract with county-wide data).[851] Shenandoah Valley Network asserts that this disparate approach was arbitrary and capricious.[852]

306. We disagree that looking at demographics at the census tract rather than the census block level resulted in a flawed environmental justice analysis. The court in *Sabal Trail*, which noted that "the agency's 'choice among reasonable analytical methodologies is entitled to deference,'"[853] specifically observed that census tracts were used to define the relevant communities.[854] Shenandoah Valley Network's argument appears to be that that the Commission's analysis ignored the possibility that the applicants may have sited the project in counties that tended to have high numbers of environmental justice communities.[855] However, Shenandoah Valley Network ignores an important safeguard in

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[849] Rehearing Request of Shenandoah Valley Network at 130.

[850] Rehearing Request of Mr. Limpert at 5-6.

[851] Rehearing Request of Shenandoah Valley Network at 133 n.405.

[852] *Id.*

[853] *Sabal Trail*, 867 F.3d at 1378 (quoting *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004)).

[854] *Sabal Trail*, 867 F.3d at 1368-69 (defining environmental justice communities "as census tracts where the population is disproportionately below the poverty line and/or disproportionately belongs to racial or ethnic minority groups"). *See Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244, at P 149 (2014) (comparing census tract demographics to county demographics); *Dominion Energy Cove Point LNG, LP*, 162 FERC ¶ 61,056, at P 98 (2018) (noting that the percentage of minorities in census tracts exceeds 50 percent).

[855] Shenandoah Valley Network discusses a hypothetical where the African

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this regard. An environmental justice community can be defined either by comparing the percentage of census tract data with the county, or by identifying the county as a whole being more than 50 percent minority or impoverished – a standard set forth in the EPA guidance.[856] Shenandoah Valley Network does not cite any authority for using a smaller geographic region for environmental justice.

307. Shenandoah Valley Network states that collectively considering minority groups ignores the impacts the pipeline would have on particular racial or ethnic groups.[857] More specifically, Shenandoah Valley Network argues that the Final EIS failed to consider the disproportionate effects the project would have on state-recognized Native American tribes.[858]

308. We disagree. Shenandoah Valley Network cites no authority for its criticism of collective treatment of minority communities, and there is none to be found in Executive Order 12898, nor in the *Sabal Trail's* environmental justice review.[859] The collective treatment of minorities is consistent with EPA guidance.

b. <u>High and Adverse Resource Impacts</u>

309. Shenandoah Valley Network argues the Final EIS failed to consider the disproportionate exposure to risk of catastrophic accident.[860] The environmental justice analysis logically focused on impacts that would be unique to the impoverished and minority communities. The Final EIS contained discussion of risk of catastrophic accident; however, on rehearing, Shenandoah Valley Network fails to explain how the risk

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American population is over four times higher than the state average and the Native American population is seven times higher than the state average. Rehearing Request of Shenandoah Valley Network at 133 (noting that its hypothetical county has "disproportionately high African American and Native American populations").

[856] EPA, *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA's Environmental Analyses* (1998)) available at: https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf.

[857] Rehearing Request of Shenandoah Valley Network at 122.

[858] *Id.* at 122-24.

[859] *Sabal Trail*, 867 F.3d at 1368-69

[860] Rehearing Request of Shenandoah Valley Network at 125-28.

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of a catastrophic accident uniquely affects environmental justice communities. Shenandoah Valley Network asserts the potential impact radius should be 943 feet, not 660 feet, citing a study prepared by Clean Water for North Carolina.[861]

310. With regard to catastrophic accidents, Shenandoah Valley Network argues the PHMSA safeguards "have proven insufficient to prevent catastrophic accidents in gas transmission pipelines in the past."[862] We disagree. The Final EIS provides perspective for catastrophic events. After considering annual rates of deaths from motor vehicles, poisonings, falls, drownings, fire, smoke inhalation, and burns; floods; lightening; tornados, all of which outnumber deaths from natural gas transmission pipelines, the Final EIS put the issue in perspective when it concluded that operation of this 642.0 miles of pipeline "might result in a fatality (either an industry employee or a member of the public) on the pipeline every 156 years."[863] The Final EIS concluded, and we agree that this record supports the finding that "natural gas pipelines continue to be a safe, reliable means of energy transportation."[864]

c. Disproportionate Effect on Environmental Justice Populations

311. Shenandoah Valley Network argues that the Final EIS acknowledged the harmful health effects from air pollution at compressor stations, but failed to consider the environmental injustice of that pollution.[865]

312. The purpose of Executive Order 12898 is to consider whether impacts on human health or the environment (including social and economic aspects) would be disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population or other comparison group.[866] This is an inquiry that the Commission and its staff take very seriously.

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[861] *Id.* at 127.

[862] *Id.* at 128.

[863] Final EIS at 4-590.

[864] *Id.* at 4-590.

[865] Rehearing Request of Shenandoah Valley Network at 134-41.

[866] Final EIS at 4-511.

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313. The Certificate Order explained that due to construction dust and compressor station emissions, African American populations[867] near ACP and Supply Header projects could experience disproportionate health impacts due to higher rates of asthma within the overall African American community.[868] However, health impacts from construction dust would be temporary, localized, and minor. Health impacts from compressor station emissions would be moderate because, though they would be permanent facilities, air emissions would not exceed regulatory permittable levels. Although the Final EIS discusses the potential for the risk of impacts to fall disproportionately on minority communities, it further notes that, in relation to comments received regarding Compressor Station 2's effects on African Americans, the census tracts around the station are not designated as minority environmental justice populations. Additionally, the Final EIS required Atlantic and DETI to implement measures from their *Fugitive Dust Control and Mitigation Plan* to limit fugitive dust emissions.[869] With this implementation, impacts from compressor station emissions would be moderate because the pollutants would not exceed permissible levels.[870] Therefore, by following the methodology outlined above, the Certificate Order concluded,[871] and we affirm, that the projects will not result in disproportionately high and adverse impacts on environmental justice populations as a result of air quality impacts, including impacts associated with the proposed Compressor Station 2.[872]

314. Shenandoah Valley Network basically argues that there is no evidence of a safe level of exposure to any of the pollutants subject to National Ambient Air Quality Standards.[873] We disagree. The EPA established National Ambient Air Quality Standards to protect human health and public welfare, including sensitive subpopulations (e.g.

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[867] Although minorities, including African Americans, do reside in the three census tracts within one mile of Compressor Station 2, none of the tracts were designated as minority environmental justice populations.

[868] Certificate Order, 161 FERC ¶ 61,042 at P 257; Final EIS at 4-514 (citing U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Asthma Facts – CDC's National Asthma Control Program Grantees* (July 2013)).

[869] Final EIS at 5-30 to 5-31.

[870] *Id.* at 5-31.

[871] Certificate Order, 161 FERC ¶ 61,042 at P 257.

[872] Final EIS at 4-514.

[873] Rehearing Request of Shenandoah Valley Network at 134-41.

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asthmatics, children, and the elderly). To address air quality on a local or regional scale, states may adopt the NAAQS as established by EPA or establish standards that are more stringent than the NAAQS. The Final EIS states that Virginia and North Carolina adopted the federal NAAQS; therefore, these standards are appropriate for consideration of air quality impacts from the projects. The Final EIS concluded that the project would not cause or contribute to a violation of the NAAQS and concluded that a heath impact assessment was not required.[874] We agree.

315. With regard to the risk of catastrophic accidents, we reject Shenandoah Valley Network's assertion that the risk for environmental justice communities "appreciably exceeds the [risk to the] general population."[875] With regard to fatal accidents and risk from earthquakes, Shenandoah Valley Network has not shown that environmental justice communities are uniquely at risk. Shenandoah Valley Network provides no explanation or authority unique to environmental justice communities and does not rebut the Commission's analysis, which covers the entire pipeline route.

316. Friends of Nelson argues that the socio-economic impacts to the African-American community in Wingina and Westminster would be especially devastating.[876] Friends of Nelson argues that the finding in the Final EIS that "there is no evidence that such risks would be disproportionately borne by any racial, ethnic, or socioeconomic group,"[877] is flawed. However, Friends of Nelson fails to explain how our analysis erred. Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not suffice to raise an issue. Therefore, we dismiss Friends of Nelson's argument.

d. <u>Alternatives</u>

317. Shenandoah Valley Network argues the alternatives analysis ignored environmental justice concerns.[878] Shenandoah Valley Network asserts that there was no information about whether alternatives would further harm already over-burdened communities[879] or how environmental justice communities would be affected when it

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[874] Final EIS at 4-563.

[875] Rehearing Request of Shenandoah Valley Network at 125.

[876] Rehearing Request of Friends of Nelson at 52.

[877] Final EIS at 4-514. *See* Rehearing Request of Friends of Nelson at 52.

[878] Rehearing Request of Shenandoah Valley Network at 144-145.

[879] *Id.* at 144.

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considered alternatives of electric versus gas powered compressor stations.[880] Shenandoah Valley Network cites no authority for its position, and we are aware of none.

318. NEPA requires the Commission to analyze the environmental consequences of a proposed pipeline as well as reasonable alternatives to a project.[881] The purpose of NEPA's requirement is to ensure that the Commission is fully informed of the environmental consequences of a proposal before it decides whether to certificate it.[882] As discussed above, the Final EIS fully considered alternatives to the ACP and Supply Header Projects. Shenandoah Valley Network does not identify a particular alternative that would have been preferable to environmental justice communities, nor provide analysis disputing our results. Thus, we dismiss Shenandoah Valley Networks' request.

e. Environmental Justice Conclusion

319. Shenandoah Valley Network argues that the Final EIS failed to make use of the limited data it compiled.[883] Despite the information about minority and low-income groups in the Final EIS, Shenandoah Valley Network states that the Final EIS and Certificate Order failed to "consider the environmental injustice of allowing a massive, new industrial project to cut through so many communities with high percentages of low-income families, people of color, and American Indians."[884] Shenandoah Valley Network also argues that the Final EIS should have considered the secondary environmental justice impacts resulting from secondary projects such as connector lines, proposed gas generation, and other industrial facilities.[885]

320. We disagree. As we have stated in prior cases, the siting of linear facilities between two fixed end points is generally based on environmental and engineering factors.[886] Short of a substantive approach where the Commission denies the application

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[880] *Id.* at 145.

[881] 42 U.S.C. § 4332(C) (2012).

[882] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

[883] Rehearing Request of Shenandoah Valley Network at 124-25.

[884] *Id.* at 124.

[885] *Id.* at 125.

[886] *See, e.g.*, *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 235; *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 at P 262.

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or conditions it on the rerouting such that minority and impoverished groups are not affected,[887] it is not clear what additional "consideration" Shenandoah Valley Network seeks. The Final EIS made the information public and included discussion of it. No more is required. We further find that the review of the secondary impacts suggested by Shenandoah Valley Network is not required by law. Further, the inquiry would be unworkable. The impacts suggested by Shenandoah Valley Network are attenuated and often involve facilities and operations that are outside the jurisdiction and control of the Commission. Further, many of the activities are private activities not controlled by any government entity. Expanding the Commission's environmental justice review to include geographic regions affected by such projects would be unwieldy and result in analysis and information that the Commission would not be able to mitigate. Further, the purpose of the environmental justice review is in part to facilitate participation by environmental justice communities in the Commission's certificate proceeding; however, it is not clear how expanding the scope of the environmental justice analysis would increase such participation.

The Commission orders:

(A) The requests for rehearing filed by Demian Jackson; the Fairway Woods Homeowners Condominium Association; Friends of Buckingham; Friends of Nelson; the North Carolina Utilities Commission; Public Interest Groups; Ashram-Yogaville; Shenandoah Valley Network; Sierra Club; William Limpert; and Friends of Wintergreen are dismissed or denied.

(B) Atlantic's November 14, 2017 request for rehearing is granted in part and denied in part, and we direct Atlantic to file actual tariff records setting forth its pro-rata allocation of pack capability provisions available to all firm transportation shippers and the applicable rate associated with the pack account service, at least 30 days but no more than 60 days prior to the date the project facilities go into service.

(C) The November 14, 2017 requests for rehearing filed by Anne Bryan and Lakshmi Fjord are rejected as untimely.

(D) Friends of Nelson's November 20, 2017 corrected request for rehearing is rejected as untimely.

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[887] "As always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a 'hard look' at environmental justice issues." *Sabal Trail*, 867 F.3d at 1369 (citing *Latin Ams. for Social & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014)).

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(E) Atlantic's December 12, 2017 answer is rejected.

(F) The requests for stay filed by The Fairway Woods Homeowners Condominium Association, Friends of Buckingham, Friends of Nelson; Public Interest Groups, Ashram-Yogaville, Shenandoah Valley Network, Sierra Club, William Limpert, and Friends of Wintergreen are dismissed as moot.

By the Commission. Chairman McIntyre and Commissioner Glick are not participating. Commissioner LaFleur is dissenting with a separate statement.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Atlantic Coast Pipeline, LLC	Docket Nos.	CP15-554-002
Dominion Transmission, Inc.		CP15-555-001
Atlantic Coast Pipeline, LLC Piedmont Natural Gas Company, Inc.		CP15-556-001

(Issued August 10, 2018)

LaFLEUR, Commissioner, *dissenting*:

Today, the Commission denies rehearing of its original authorization of the Atlantic Coast Pipeline (ACP) Project.[1] For the reasons set forth herein, I respectfully dissent.

I did not support the Commission's underlying order authorizing the ACP Project because I concluded the project as proposed was not in the public interest.[2] My consideration of the ACP Project was influenced by my consideration of the certificate application of the Mountain Valley Pipeline (MVP) Project,[3] which was decided on the same day as the ACP Project. After carefully balancing the aggregate environmental impacts resulting from the authorization of both of these projects against the economic need of the projects, I could not find either proposal in the public interest. I am dissenting today on the rehearing order for the following reasons: (1) I still do not find the ACP Project is in the public interest. I disagree with the Commission's approach to evaluating system and route alternatives, particularly in light of the recently-issued Fourth Circuit Court of Appeals (Fourth Circuit) decision which vacated the National Park Service's (NPS) federal authorization allowing the ACP Project to cross the Blue Ridge Parkway;[4] (2) I disagree with the treatment of climate impacts; and (3) I have serious concerns

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[1] *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) (Rehearing Order).

[2] *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, *dissenting*) (Certificate Order).

[3] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, *dissenting*).

[4] *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

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regarding the majority's articulation of how a project's environmental impacts weigh into the Commission's finding that a project is required by the public convenience and necessity under the Natural Gas Act (NGA).

Route and System Alternatives

As noted in my dissent on the certificate authorizations, ACP and MVP will be located in the same Appalachian region, with similarities in route and timing. The projects, when considered collectively, pose significant environmental impacts. Both pipelines cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Moreover, the impacts on landowners and communities are significant, noting the numerous concerns raised by intervenors in this rehearing proceeding. For these reasons, I believe we should have given more consideration to the collocation and merged system/one-pipe alternative options that could result in less environmental disturbance and fewer landowner impacts.

I believe the record demonstrates that there are system and route alternatives, including collocation with MVP and merging of ACP and MVP into a single pipeline, which could provide significant environmental advantages over the certificated project. The merged systems alternative would largely follow the MVP route to deliver capacity to both ACP and MVP through a single large diameter pipeline. The route alternative would be 173 miles shorter than the cumulative mileage of the ACP and MVP projects individually,[5] and would substantially increase collocation with existing utility rights-of-way,[6] avoid sensitive National Forest terrain, and reduce crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway.[7]

While the majority acknowledges that the merged system/one-pipe alternative would result in some environmental advantages, it nonetheless declines to consider it based on the Final EIS's conclusion that the merged system alternative does not have a "significant advantage"[8] over the existing proposal when considering "environmental factors, technical feasibility, and ability to meet the ACP Project's operational needs and timelines."[9] The majority also specifically notes that this alternative would add significant

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[5] Final EIS at 3-8.

[6] *Id*. at 3-9.

[7] *Id.*

[8] *Id.*

[9] Rehearing Order at P 136.

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time to the project and would not meet the authorization timeline required by ACP.[10] I believe that the one-pipe options presented as alternatives provided reasonable approaches that warranted serious consideration, even if doing so would have delayed Commission action on the MVP and ACP applications. Going forward, when multiple projects are proposed in the same region, with similar timing, I believe we should consider a regional review for the development of natural gas infrastructure to assess both the need for pipeline capacity in the region, and the environmental impacts of multiple proposed pipelines on the region.

Furthermore, the majority's denial of rehearing challenges to the approved ACP Project route is even more problematic in light of the recent developments concerning the ACP Project. Earlier this week, the Fourth Circuit vacated the NPS's federal authorization allowing the ACP Project to cross the Blue Ridge Parkway.[11] As relevant here, the Fourth Circuit concluded that, before issuing a right-of-way permit to cross the Blue Ridge Parkway, the NPS "must make a threshold determination that granting the right-of-way is 'not inconsistent with the use of such lands for parkway purposes' and the overall National Park System to which it belongs."[12] The Court, after describing both the NPS's broad conservation and preservation mandate prescribed in statute,[13] and the specific purposes of the Blue Ridge Parkway,[14] concluded that the NPS provided no

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[10] *Id.* P 137.

[11] *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

[12] *Id*. at *55.

[13] *Id.* at *55-56 ("Critically, Congress has defined the National Park System's 'purpose' as 'conserv[ing] the scenery, natural and historic objects, and wild life in the System units and [] provid[ing] for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations…. Thus, unlike other Federal lands, such as the national forests, the National Park System's sole mission is conservation.").

[14] *Id.* at *56-57 (noting that the Blue Ridge Parkway's specific purposes are to "connect … national parks by way of a 'national rural parkway' – a destination and recreational road that passes through a variety of scenic ridges, mountainside, and pastoral farm landscapes"; "conserve the scenery and preserve the natural and cultural resources of the parkway's designed and natural areas"; "provide for public enjoyment and understanding of the natural resources and cultural heritage of the central and southern Appalachian Mountains"; and "provide opportunities for high-quality scenic and recreational experiences along with the parkway and in the corridor through which it

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explanation of how the ACP Project right-of-way satisfied these requirements.[15] In fact, the Court calls into question whether it is even possible for the ACP Project to be consistent with parkway purposes,[16] and the leaves unaddressed the threshold question of whether NPS has authority to grant a pipeline right-of-way at all.[17]

In light of these findings and the *vacatur* of the underlying NPS authorization, I believe that it would be prudent for the Commission to grant rehearing and reopen the record regarding route and system alternatives rather than denying rehearing arguments regarding those alternatives.[18] The Court's decision could have major impacts on the ACP Project, including the possibility of significant route changes, or even the abandonment of all or some of the project if it is unable to obtain a right-of-way to cross the Blue Ridge Parkway.

Downstream GHG Emissions from the ACP Project are Indirect Impacts

With regard to the climate impacts associated with the ACP Project, the majority refuses to even acknowledge that downstream GHG emissions in this case constitute indirect impacts. Rather, the majority claims that making a finding on the indirect impacts is immaterial because the Final EIS calculated a full-burn estimate of downstream emissions.[19] I disagree. Under *Sierra Club v. FERC*,[20] a finding that GHG emissions are an indirect impact requires the Commission to quantify and consider those impacts under

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passes.").

[15] *Id.* at *58-60.

[16] *E.g.*, *id.* at *58 ("We find this lack of explanation particularly troubling given the evidence in the record indicating that the presence of the pipeline is inconsistent with and in derogation of the purposes of the Parkway and the Park System. Indeed, a visual impact study that NPS oversaw specifically concluded that the effect of the pipeline on views from the Parkway 'would likely be inconsistent with NPS management objectives.'").

[17] *Id.* at *55.

[18] I appreciate that today, in response to the Fourth Circuit decision, Commission staff directed ACP to halt all construction of the ACP Project. While I strongly support that decision, the majority's decision to deny rehearing today reiterates the Commission's endorsement of that flawed route.

[19] Rehearing Order at P 263.

[20] 867 F.3d 1357 (D.C. Cir. 2017) (*Sierra Club*).

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the National Environmental Policy Act (NEPA).[21] Thus the majority's assertion runs afoul of Commission's obligations under NEPA because it only quantified the GHG emissions but did not consider them. Consideration of GHG emissions requires the Commission ascribe significance to those impacts. When evaluating the significance of a particular impact, the Commission must consider both context[22] and intensity.[23] Here, by evaluating how the emissions from the ACP Project would impact Pennsylvania, West Virginia, Virginia, and North Carolina and nationwide emissions inventories, the majority arguably provides context for the environmental impact.[24] The majority fails to reach a determination regarding the intensity of the impact.

Moreover, while the majority sidesteps the discussion of indirect impacts, its analysis under cumulative impacts is directly relevant. The majority states, "[t]he requirement that an impact must be 'reasonably foreseeable' to be considered in a NEPA analysis applies to both indirect and cumulative impacts."[25] The majority then concludes, "[t]here is no evidence in the record that ultimate end-use combustion of the gas transported by the projects is reasonably foreseeable and therefore does not meet the definition of cumulative impacts."[26] That finding would equally apply to indirect impacts. Thus, while the majority does its best to avoid making a determination on indirect impacts, it nonetheless effectively does so.

I believe that the record in this case demonstrates that downstream GHG emissions are reasonably foreseeable and must be assessed as indirect impacts under *Sierra Club*.[27] ACP indicates that the majority of the gas transported on the pipeline, approximately 79.2

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[21] 40 C.F.R. § 1508.8(b) (2017) (Indirect impacts are "*caused by* the action and are later in time or farther removed in distance, bust still are *reasonably foreseeable*." Indirect impacts "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." (italics added)).

[22] 40 C.F.R. § 1508.27(a) (2017) (Context means "that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests and the locality.").

[23] 40 C.F.R. § 1508.27(b) (2017) (Intensity refers to "the severity of the impact").

[24] Certificate Order at P 305.

[25] Rehearing Order at P 288.

[26] Rehearing Order at P 296.

[27] *Sierra Club*, 867 F.3d 1357.

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percent, will be used as fuel to generate electricity for industrial, commercial, and residential uses.[28] The Final EIS identifies GHG emissions from two power generation facilities that would be served by ACP, the Brunswick Power Station and the Greenville County Power Station.[29] Indeed, the majority itself acknowledges that the ACP Project will supply gas to these two power plants.[30] In addition, Public Interest Groups claim the Piedmont Pipeline, which is a 26-mile-long spur line, interconnecting with the ACP pipeline in Robeson County, North Carolina, will deliver gas to Smith Energy Complex in Hamlet, North Carolina.[31] The Smith Energy Center is also mentioned by Duke Energy Carolinas and Duke Energy Progress (Duke) in their joint comments supporting the ACP Project. Duke states that gas delivered by the ACP facilities will provide needed and critical additional supply for four existing Duke power plants.[32] In fact, the Certificate

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[28] Rehearing Order at P 50 ("[ACP] provided estimates of the likely end uses for the ACP Project, estimating that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes; 8.9 percent will serve industrial purposes, and 2.8 percent will serve other purposes such as vehicle fuel.").

[29] Final EIS 4-616 and 4-617 ("While ACP would deliver natural gas to the Brunswick and Greenville County Power Stations, these facilities are independent of the proposed projects.").

[30] Rehearing Order at P 57; *see also* Certificate Order at P 8 ("approximately 0.4 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline near Lawrenceville in Brunswick County, Virginia, and extending west to Dominion Virginia Power's Brunswick Power Station (AP-4 Lateral)" and "approximately 1.0 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline in Greensville County, Virginia, and extending to Dominion Virginia Power's proposed Greensville Power Station (AP-5 Lateral)").

[31] Rehearing Request of Public Interest Groups at P 36. I note, that the Final EIS identified the spur line as a nonjurisdictional facility associated with the ACP Project. Final EIS at 2-58, Appendix W.

[32] Duke Comments at 1-2 ("The four existing Duke Energy Progress (DEP) facilities that will be served by ACP are: 1) H.F. Lee Energy Complex, located in Goldsboro, NC totaling approximately 1,047 MW/910 MW (winter/summer) (Combined cycle); 2) Wayne County Station, located in Goldsboro, NC totaling approximately 959 MW/ 863 MW (winter/summer) (5 combustion turbines); 3) Sutton Energy Complex, located in Wilmington, NC totaling approximately 717 MW/622 MW (winter/summer) (Combined cycle); and 4) Smith Energy Complex, located in Hamlet, NC totaling

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Order not only disclosed a full burn estimate of downstream GHG emissions associated with the project, but also an estimate of actual consumption using ACP's 79.2 percent power generation number.[33] Thus, the Commission effectively acknowledges in the underlying Certificate Order that 79 percent of the natural gas transported by the project is used for power generation. I therefore believe there is more than sufficient information in the record to demonstrate that it is reasonably foreseeable that natural gas transported on ACP will be combusted at natural-gas fired generating facilities.

Given the extensive record evidence noted above, including representations by ACP itself, and the Commission recognition of actual downstream consumption in its calculations,[34] I am frankly unsure what level of evidentiary support the majority now needs to find that gas transported by ACP will be combusted at downstream generation facilities and cause indirect impacts within the meaning of the *Sierra Club* ruling.[35] Even assuming *arguendo* that the Commission did not have sufficient information about the natural gas-fired power plants to calculate the gross and net GHG emissions, I believe the Commission would then have an affirmative duty to seek the additional information to

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approximately 1,227 MW/1,088 MW (winter/summer) (Combined cycle) and approximately 916 MW/780 MW (winter/summer) (5 Combustion turbines). In addition, DEP will complete an approximately 100 MW/84 MW (winter/summer) Sutton fast start/black start CT in 2017 that will be able to utilize the transportation service from ACP.").

[33] Certificate Order at P 305.

[34] *Id.*

[35] In *Mid States*, the Court considered whether the Surface Transportation Board performed a sufficient environmental review associated with the construction of rail lines intended to transport coal. The Court concluded that the Surface Transportation Board erred by failing to consider the downstream impacts of the burning of transported coal. Even though the record lacked specificity regarding the extent to which transported coal would be burned, the Court concluded that the nature of the impact was clear. *See Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*). When the record does not have precise end use and location of natural gas deliveries, the Commission must consider the likely use of gas transported through the Project. NEPA does not require exact certainty; rather, it only requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action. *See, e.g., Sierra Club*, 867 F.3d at 1374 (recognizing that "NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may sometimes need to make educated assumptions about an uncertain future").

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clarify the copious information already in the record regarding the downstream end uses, including ACP's own statements and Duke's comments about its power plants, before simply concluding that there are no indirect impacts from the project.

The Social Cost of Carbon

The majority also argues that the Social Cost of Carbon is not an appropriate indicator of significance because "the project's incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects' contribution to cumulative impacts on climate change would be significant."[36] But that is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.[37] I recognize that determining the severity of a particular impact would require thoughtful and complex analysis, and I am confident that the Commission could perform that analysis if it chose to do so; indeed, we routinely grapple with complex issues in many other areas of our work.[38]

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[36] Rehearing Order at P 279.

[37] *See*, *e.g.*, Environmental Protection Agency Fact Sheet – Social Cost of Carbon, *available at* https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf; *see also Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (LaFleur, Comm'r, *dissenting in part*); *Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158 (2018) (LaFleur, Comm'r, *concurring*); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190 (2018) (LaFleur, Comm'r, *concurring*).

[38] Many of the core areas of the Commission's work have required the development of analytical frameworks, often a combination of quantitative measurements and qualitative assessments, to fulfill the Commission's responsibilities under its broad authorizing statutes. This work regularly requires that the Commission exercise judgment, based on its expertise, precedent, and the record before it. For example, to help determine just and reasonable returns on equity (ROEs) under the Federal Power Act, NGA, and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a discounted cash flow method to determine a range of potentially reasonable ROEs (i.e., the zone of reasonableness), and then considers various factors to determine the just and reasonable ROE within that range. *See also*, *e.g.*, *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (establishing Commission regulations and policy for reviewing requests for transmission incentives); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ *(continued ...)*

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Additionally, I continue to disagree with the technical and policy arguments relied upon by the majority to attack the usefulness of the Social Cost of Carbon, many of which I addressed in my dissent on the *Sabal Trail* Remand Order.[39] Without entirely rehashing those arguments, I reject the notion that the Social Cost of Carbon cannot meaningfully inform the Commission's decision-making. The majority presents various excuses, including arguments about the application of a cost-benefit analysis in our pipeline review and lack of consensus regarding the appropriate discount rate. I continue to find these arguments unpersuasive.[40]

Commission's Responsibilities to Consider Environmental Impacts Under the NGA and NEPA

Finally, I note my strong disagreement with the majority's characterization of the Commission's inability under NEPA to impose mitigation measures with respect to GHG emissions. The majority states that "the only way for the Commission to reflect consideration of downstream emissions in its decision making would be, as the *Sabal Trail* court observed, to deny the certificate."[41] I disagree with the majority's binary

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61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring, among other things, the development of regional cost allocation methods subject to certain general cost allocation principles); *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (conducting a prudence review of a significant expansion of the Trans Alaska Pipeline System).

[39] *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

[40] The majority incorporates arguments raised in prior dockets—many of which I dissented on—to justify its rejection of the Social Cost of Carbon. *See, e.g., Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (LaFleur, Comm'r, *dissenting*).

[41] Rehearing Order at P 286.

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distillation of the choice before the Commission: either ignore the impacts of downstream GHG emissions, or deny the certificate. In my view, the appropriate way to consider these impacts is to include them in our public interest analysis that balances the need for the pipeline with its environmental impacts, which would include the impacts from GHG emissions. Given that GHG emissions would be one of many factors reviewed as part of a complete record, I do not believe that consideration of GHG emissions would necessarily dictate a denial of a certificate application.

The majority further contends that, should the Commission actually consider denying a certificate due to the impacts of GHG emissions, its determination would rest on a finding that the "end use of the gas would be too harmful to the environment" and thus implies that the Commission could not legally deny a certificate on those grounds.[42] I fundamentally disagree—I do not believe the NGA is so limiting. The Commission has broad authority under Section 7 of the NGA, including the discretion not to issue a certificate for a proposed pipeline if the Commission finds that a particular project would not be in the public interest.[43] As articulated in *NAACP v. FPC*, the Commission review under Section 7 of the NGA allows for consideration of many factors in determining whether a project is in the public interest.[44] Therefore, the Commission can act on whatever information is included in its environmental review, including the downstream GHG emissions resulting from the combustion of the transported natural gas. I believe finding a project is in the public interest requires thoughtful review and consideration of all environmental impacts, and that could very well mean deciding not to authorize certain projects based on their environmental impacts.

Accordingly for these reasons, I respectfully dissent.

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Cheryl A. LaFleur
Commissioner

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[42] *Id.*

[43] 15 U.S.C. § 717f(c) (2012).

[44] *See NAACP v. FPC*, 425 U.S. 662, 670 & n.6 (1976) (noting that, in addition to "encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices," the Commission has the authority to consider "conservation, environmental, and antitrust" concerns).

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