

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

Transcontinental Gas Pipe Line Company, LLC

Docket Nos. CP15-138-000
CP15-138-003

**Amended Request for Rehearing and Rescission
of Letter Order Granting Requests to Proceed**

I. Introduction

Pursuant to section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a) and Rule 713 of the Federal Regulatory Energy Commission’s (“FERC”) Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Allegheny Defense Project, Clean Air Council, Concerned Citizens of Lebanon County, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council (“Intervenors”) hereby request rehearing¹ and rescission of the Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (“9/15 Notice to Proceed” or “Letter Order”), which FERC issued on September 15, 2017.² This letter order grants Transcontinental Gas Pipe Line Company, LLC’s (Transco) September 5 and September 8, 2017 requests to proceed with construction of the Central Penn Line North Pipeline, Central Penn Line South Pipeline, Meter and Regulatory Stations, and use of contractor yards (as identified in table 1 of each of Transco’s requests) (respectively, “9/5 Request for Notice to

¹ The Natural Gas Act allows an aggrieved party to file a request for rehearing within 30 days after the issuance of a final Commission decision. 15 U.S.C. § 717r(a). Accordingly, Intervenors request rehearing of the letter order granting Transco’s requests for notice to proceed, which constitutes a “final decision” by the Commission. *See, e.g., Atlanta Gas Light Co. v. Federal Power Com’n*, 476 F.2d 142, 147 (5th Cir. 1973) (holding “interim suspension order” is reviewable because it is “definitive in its impact upon the rights of the parties and threatens irreparable harm”). *See also* 18 C.F.R. § 385.1902.

² Intervenors file this amended pleading pursuant to Rule 215 of FERC’s Rules of Practice and Procedure, which allows an amendment so long as it “conforms to the requirements applicable to the pleading to be amended.” 18 CFR 385.215(a)(1). The applicable requirements include time limitations. *See, e.g., Green Mountain Power Corporation*, 48 FERC P 61,315, 62,050, n.15. Here, the amendment is timely because it is filed within 30 days of the applicable letter order. *See* 18 CFR 385.213(d)(2).

Proceed” and “9/8 Request for Notice to Proceed”). Intervenors previously objected to Transco’s 9/5 and 9/8 Requests for Notices to Proceed.³ The construction is part of the Atlantic Sunrise pipeline project (“Atlantic Sunrise” or “Project”).

FERC granted the Intervenors’ respective motions to intervene in this proceeding. Thus, the Intervenors are “parties” to this proceeding, 18 C.F.R. § 385.214(c), and have standing to file this request for rehearing. *See* 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).⁴ All communications regarding this request should be addressed to and served upon:

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II. Statement of Issues

Pursuant to Rule 713(c) of FERC’s Rules of Practice and Procedure, Intervenors provide a statement of issues and alleged errors in the Letter Order:

1. FERC should not issue notices to proceed while the finality of the Commission’s February 3, 2017 Order Issuing Certificate (“Certificate Order”) is in dispute, or before the D.C. Circuit Court of Appeals has issued a final decision in Intervenors’ pending legal challenge. The Natural Gas Act unambiguously requires the Commission to act on a request for rehearing within 30 days to prevent denial by operation of law. 15 U.S.C. § 717r(a). Here, Intervenors contend that their Rehearing Request was denied by operation of law 30 days after it was filed and have filed a petition for review with the court of appeals, while FERC maintains that its staff’s issuance of a “tolling order” served to indefinitely delay the Certificate Order from becoming an appealable order. By issuing a Notice to Proceed with

³ *See, e.g.*, Response and Objection to Requests for Notice to Proceed, Request for Rehearing and Rescission of Authorization Granting Request to Proceed (Accession No. 20170912-5001). Intervenors filed an amended response and rehearing request on September 22, 2017.

⁴ Pursuant to Rule 203(a), *see* Request for Rehearing and Motion for Stay (Accession No. 20170210-5182) at 46-47, and Request for Rehearing and Motion for Stay (Accession No. 20170224-5106) at 1.

- construction while maintaining that it may indefinitely delay ruling on Intervenors' Rehearing Request, FERC is acting in direct contravention to 15 U.S.C. § 717r(a). *See also Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998); *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001). FERC should disallow construction to proceed while the finality of FERC's Certificate Order remains in dispute, and pending judicial review of the Certificate Order. *See Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985).
2. FERC must suspend the Certificate Order and revisit its impacts analysis in the Environmental Impact Statement ("EIS"), in light of the D.C. Circuit's recent decision in *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. August 22, 2017).⁵ Several holdings from that decision apply here, and show that FERC has impermissibly downplayed and avoided an adequate discussion of the Project's climate impacts. *See, e.g., Sierra Club v. FERC*, slip op. at 23-27. To comply with the requirements of the National Environmental Policy Act ("NEPA"), FERC therefore must rescind the 9/15 Notice to Proceed, and halt construction activity until it has performed the necessary analysis in a Supplemental EIS. *See* 40 CFR § 1500.1(b); *id.* at § 1502.9(c); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989).
 3. FERC should not allow construction activities to proceed while the status of approvals related to air and water quality is unresolved. For example, notices to proceed that would result in discharges to navigable waters are impermissible at this time because Pennsylvania has not yet issued a final water quality certification for the Project under Section 401 of the Clean Water Act. 33 U.S.C. § 1313(a)(1); *cf. Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 857 F.3d 388 (D.C. Cir. 2017). *See also* 33 U.S.C. § 1313(d); *id.* at 1341(d). Multiple petitions concerning the non-final certification are pending before the U.S. Court of Appeals for the Third Circuit and the Pennsylvania Environmental Hearing Board. *See Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, et al., at 5 (May 10, 2017). Until these matters are resolved, FERC cannot issue notices to proceed that would result in discharges to navigable waters. *See* 158 FERC ¶ 61,125 at Appendix

⁵ Attached hereto as Exhibit A.

C, Environmental Condition 31; *Delaware Riverkeeper Network v. Sec’y Pennsylvania Dep’t of Env’tl. Prot.*, 833 F.3d 360, 386 (3rd Cir. 2016).

III. Statement of Relevant Facts

Intervenors timely moved to intervene in the Atlantic Sunrise proceeding, and FERC granted their motions to intervene. On February 3, 2017, the Commission entered an Order Issuing Certificate in favor of Transco. On February 10, 2017, Intervenors submitted a request for rehearing and motion for stay (“Rehearing Request”).⁶ The Commission issued an order denying Intervenors’ stay request on August 31, 2017. As described below, the status of Intervenors’ Rehearing Request – and thus the finality of the Certificate Order – is in dispute. On March 23, 2017, Intervenors filed a Petition for Review in the D.C. Circuit Court of Appeals. The court has not yet ruled on FERC’s and Transco’s motions to dismiss.⁷

On September 5, 2017, Transco submitted a Request for Notice to Proceed at CPL North, CPL South, 4 Meter and Regulator Stations, and 9 Contractor Yards. On September 8, 2017, Transco submitted a Request for Notice to Proceed at CPL South in Lancaster County, River Road Regulator Station, and Contractor Yard. On September 15, 2017, FERC granted those requests.

IV. Statement of Alleged Errors

Intervenors object to the 9/15 Notice to Proceed on several grounds. (Notably, FERC takes the position that Intervenors’ Rehearing Request is pending and, consequently, that the Certificate Order is not yet final.⁸ Intervenors disagree.)

1. FERC erred by issuing the 9/15 Notice to Proceed while maintaining that it has not yet taken final action granting or denying the Intervenors’ Rehearing Request, and prior to resolution of the dispute regarding the finality of the Certificate Order. Authorizing

⁶ Intervenor Accokeek, Mattawoman, Piscataway Creeks Communities Council Inc. submitted a rehearing request and motion for stay on February 24, 2017 (Accession No. 20170224-5106).

⁷ On September 21, 2017, the court ordered “that the motions to dismiss be referred to the merits panel to which these consolidated petitions for review are assigned.” Case No. 17-1098, Document No. 1693943 (Sept. 21, 2017).

⁸ FERC’s attempt to indefinitely delay acting on Intervenors’ Rehearing Request violates the Natural Gas Act requirement that it act within thirty days.

construction of greenfield pipeline under these circumstances deprives FERC and/or the court of the ability to fully exercise jurisdiction, and to fairly and fully review Intervenor's challenge to the Certificate Order. Importantly, additional consideration of the issues raised in the Rehearing Request could result in modifying or revoking the Certificate Order.

2. FERC erred because irreparable harm that cannot be remedied by subsequent action by FERC or the court will result from construction activities, including (but not limited to) destruction of forests and wetlands.
3. FERC's issuance of the 9/15 Notice to Proceed while insisting that it has not taken final action on Intervenor's Rehearing Request (and thus that Intervenor's court challenge is premature) renders FERC's position unreasonable.

V. Argument for Rehearing

A. FERC's Issuance of the Notice to Proceed Wrongfully Precedes the Court's Decision Regarding the Finality of the Certificate Order

The Natural Gas Act unambiguously requires the Commission to act on a request for rehearing within 30 days to prevent denial by operation of law: "Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." 15 U.S.C. § 717r(a). *See also* 18 C.F.R. § 385.713(f). Although some cases have held that the "act" requirement in 717(r) allows the Commission to issue a "tolling order," *i.e.*, an order continuing an application for rehearing to give itself more time, those courts did not consider the implications of notices to proceed and commencement of construction under these circumstances.⁹

⁹ The First, Fifth, and D.C. Circuits have generally accepted the Commission's use of tolling orders in different contexts. In both *California Co. v. Fed. Power Comm'n*, 411 F.2d 720 (D.C. Cir. 1969) and *Gen. Am. Oil Co. of Texas v. Fed. Power Comm'n*, 409 F.2d 597 (5th Cir. 1969), the subject matter of the orders involved rate proceedings, and in *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988), the relevant complaint involved "unreasonable fees" charged by a utility for access to a particular water body. The first two cases pre-dated NEPA, and the *Kokajko* court indicated its decision could likely be different in a case of harm to human health or welfare. *Id.* at 526.

Here, as the Commission is aware, Intervenors contend that their Rehearing Request was denied by operation of law 30 days after it was filed,¹⁰ and consequently have filed a Petition for Review in the D.C. Circuit Court of Appeals. FERC disagrees – instead maintaining that its staff’s issuance of a “tolling order” served to indefinitely delay the Certificate Order from becoming a final, appealable order – and filed a motion to dismiss the petition for review. The D.C. Circuit has not yet issued a decision. On September 21, 2017, the court ordered “that the motions to dismiss be referred to the merits panel to which these consolidated petitions for review are assigned.” Case No. 17-1098, Document No. 1693943 (Sept. 21, 2017).

By issuing a Notice to Proceed with construction while maintaining that it may indefinitely delay ruling on Intervenors’ Rehearing Request, FERC is acting in direct contravention to 15 U.S.C. § 717r(a) (requiring the Commission to act on a request for rehearing within 30 days to prevent denial by operation of law). The Natural Gas Act clearly contemplates that a certificate order will become final within 30 days of filing a rehearing request – so that parties such as Intervenors (who filed their rehearing requests in February 2017) can petition a court for review in a timely fashion (*i.e., before* a challenged project is constructed and placed into service).

In FERC’s view, which Intervenors dispute, it has now allowed Intervenors’ Rehearing Request to remain in administrative purgatory for approximately seven months.¹¹ (The Commission can hardly blame this delay on its lack of quorum, as it has established a disturbing pattern of issuing tolling orders that serve to keep challengers out of court – contrary to the intent of the Natural Gas Act.) Even if FERC were correct that the tolling order issued by staff is effective, FERC should not issue notices to proceed until it acts on the Rehearing Request; a request for notice to proceed changes the circumstances and requires the Commission to rule on a rehearing request before construction begins. Otherwise, Intervenors are subjected to the

¹⁰ See Petitioners’ Response in Opposition to Respondent’s Motion to Dismiss for Lack of Jurisdiction, Case No. 17-1098 [Doc. No. 1674354] (May 8, 2017).

¹¹ The APA provides that “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). See also *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998) (stating that, among other factors, “the reasonableness of the delay should be judged in the context of the statute authorizing the agency’s action”).

procedural harm of NEPA violations, on-the-ground harm from construction, the taking of their members' property through eminent domain, acting on incomplete information, and acting while the possibility exists that the Certificate Order may be modified or revoked. FERC's issuance of notices to proceed at this time also deprives Intervenors of due process.¹² In addition, the Commission is violating the spirit and letter of National Environmental Policy Act ("NEPA") regulations concerning the prohibition on the irretrievable commitment of resources during the NEPA process (40 C.F.R. § 1506.1).

The Commission is also denying, or attempting to deny, the federal courts of meaningful jurisdiction over Intervenors' NEPA claims. FERC has taken the position that judicial review is premature. *But see In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) ("[A]gencies cannot insulate their decisions from Congressionally mandated judicial review simply by failing to take 'final action' . . ."). FERC wants to have it both ways, maintaining that the Rehearing Request is pending but refusing to act on it in a timely manner (*e.g.*, within 30 days of the rehearing request, or *before* issuing notices to proceed), while simultaneously arguing that Intervenors' court challenge is premature.

FERC should not allow construction to proceed while the finality of FERC's Certificate Order remains in dispute. Furthermore, FERC should disallow construction, including construction of greenfield pipeline, pending judicial review of the Certificate Order. Otherwise, Intervenors will be left without an adequate remedy at law to address the irreparable harms from construction, and the public will permanently lose important environmental resources. If FERC allows construction activities to proceed, irreversible procedural and environmental harm (including harms to Intervenors' members¹³) will take place by the time the legality of the

¹² *See Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988) finding FERC's tolling order procedure did not violate due process but emphasizing that the case did not entail impacts to human health or welfare ("The present matter concerns economic regulation, and human health and welfare are not implicated."). *See also id.* (noting that "should the petitioner ultimately prevail, it is assumed he will be refunded any excess payments he may have made," and that he is therefore not "subject to irreparable injury").

¹³ *See, e.g.*, Affidavit of Gerald Arcuri (attached hereto as Exhibit B); Declaration of Barbara Spiegelberg (attached hereto as Exhibit C); Declaration of Ann K. Pinca (attached hereto as Exhibit D); Declaration of Kathryn Ruof (attached hereto as Exhibit E); Declaration of Jonathan Mark Telesco (attached hereto as Exhibit F); Declaration of Susan Pantalone (attached hereto as Exhibit G); Declaration of Megan Detter (attached hereto as Exhibit H).

Certificate Order is adjudicated, thereby potentially rendering Intervenors' statutory remedies inadequate. For example, construction pursuant to notices to proceed will result in permanent deforestation and long-term conversion of other forested lands, permanent removal of wetlands, impacts to numerous water bodies, and emission of significantly increased amounts of air pollution.

These harms would take place pursuant to a certificate order that Intervenors contend was issued in violation of NEPA. As the D.C. Circuit has stated, “[t]he NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury.” *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original). FERC’s issuance of notices to proceed – while maintaining that the Rehearing Request is pending, and arguing that Intervenors’ court challenge is premature – is, therefore, particularly egregious. While allowing harmful construction activities to move forward, FERC attempts to deprive Intervenors of meaningful review of its legal claims before both FERC and the court.

The statutory intent on the face of the Natural Gas Act is that petitioners are entitled to timely rehearing and judicial review, which FERC’s approach here attempts to deny. As demonstrated by the D.C. Circuit’s recent ruling in *Sierra Club v. FERC* (see below), the Commission should not allow construction to move forward until the court has reviewed the Certificate Order. FERC should rescind the September 15th authorization granting Transco’s requests to proceed with construction.

B. FERC Must Revisit its Greenhouse Gas and Climate Impact Analysis in Light of the D.C. Circuit’s Recent Decision in *Sierra Club v. FERC*

The D.C. Circuit Court of Appeals recently decided *Sierra Club v. FERC*, No. 16-1329 (August 22, 2017), agreeing with the petitioners that FERC must do more to assess the downstream greenhouse gas emissions and serious climate impacts of the gas pipeline at issue in that case. Several holdings from the decision apply here, and indicate that FERC has impermissibly downplayed and avoided a thorough discussion of the Project’s climate impacts here. Accordingly, FERC must rescind the 9/15 Notice to Proceed, and halt construction activity until it has performed the necessary analysis in a Supplemental EIS. *See* 40 CFR § 1502.9(c).

First, the Final EIS for Atlantic Sunrise impermissibly downplays cumulative climate impacts, including of the gas infrastructure build-out now occurring in Pennsylvania and surrounding states, which will also result in the transport of gas to other regions (such as the Southeast and Gulf Coast). Instead, in the EIS, FERC looked at the types of climate change impacts that will generally burden the project's geographic area, such as flooding, heat waves, and disease vectors. Final EIS at 4-316 to 4-317.¹⁴ FERC makes no real effort to assess the regional gas infrastructure in the current or recent regulatory review pipeline. Instead, FERC simply states: "For the major projects included in the table, such as the Tenaska Lebanon Valley Generating Station, air permit applications for these projects are required to use BACT for GHG. Thus, the air permits issued for these major projects would minimize GHG emissions in accordance with current air permitting requirements." Final EIS at 4-317. These two sentences, which do not specify which table is referenced, hardly qualify as a hard look at cumulative greenhouse gas impacts. Moreover, compliance with air permitting requirements cannot substitute for NEPA review. *Sierra Club v. FERC*, slip op. at 26 (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971)).

FERC thus fails to reach an informed decision about the climate ramifications of the project. This must be corrected. As the D.C. Circuit instructed FERC in the Sabal Trail case:

The EIS accordingly needed to include a discussion of the "significance" of this indirect effect, see 40 C.F.R. § 1502.16(b), as well as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions," see *WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7).

FERC's conclusory statement that "neither construction nor operation of the Project would significantly contribute to GHG cumulative effects or climate change" does not suffice. Final EIS at 4-318.¹⁵ Accordingly, FERC must prepare a Supplemental EIS that quantifies and assesses the significance of the project's emissions combined with past, present, and reasonably

¹⁴ FERC also conclusorily states, without support, that "the potential environmental impacts associated with climate change in the Northeast region is unlikely to significantly affect Project construction and operation." *Id.* at 4-317.

¹⁵ Although FERC quantified the Project's downstream greenhouse gas emissions, it incorrectly concluded that these "downstream impacts ... do not meet the definition of indirect impacts" and that "downstream combustion of gas is not causally connected." Certificate Order at P 139, 138. *But see Sierra Club v. FERC*, slip op. at 19, 23. FERC consequently failed to conduct or disclose an adequate analysis of the project's downstream greenhouse gas and climate impacts.

foreseeable future gas projects in the region. To decide otherwise would violate NEPA's mandate for an informed public process.

FERC also tries to downplay the project's downstream GHG emissions by noting that "some of the gas *may* displace fuels (i.e., fuel oil and coal) which *could* result in lower total CO₂e emissions" and "[i]t *may* also displace gas that otherwise would be transported via different means." Certificate Order at P 143 (emphasis added). Similarly, the Atlantic Sunrise Final EIS notes that "increased production and distribution of natural gas would *likely* displace *some* use of higher carbon emitting fuels, which "would result in a *potential* reduction is [*sic*] regional GHG emissions." Final EIS at 4-318 (emphasis added). Consequently, FERC concludes that "neither construction nor operation of the Project would significantly contribute to GHG cumulative effects or climate change." *Id.* This runs contrary to NEPA. As the D.C. Circuit held:

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

Sierra Club v. FERC, slip op. at 25. Accordingly, the D.C. Circuit rejected this unsupported "offset" analysis in *Sierra Club v. FERC*: "An agency decisionmaker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, the EIS fails to fulfill its primary purpose." *Id.* at 26.

The Supplemental EIS should also, at a minimum, employ the social cost of carbon methodology to assess the severity of the project's direct, indirect, and cumulative impacts. FERC has disavowed the use of this methodology, but the D.C. Circuit has instructed FERC to explain its decision:

FERC has argued in a previous EIS that the Social Cost of Carbon is not useful for NEPA purposes, because several of its components are contested and because not every harm it accounts for is necessarily "significant" within the meaning of NEPA. *See EarthReports*, 828 F.3d at 956. We do not decide whether those arguments are applicable in this case as well, because FERC did not include them in the EIS that is now before us. On remand, FERC should explain in the EIS, as an aid to the relevant decisionmakers, whether the position on the Social Cost of Carbon that the agency took in *EarthReports* still holds, and why.

Id. at 27.

FERC failed to adequately analyze or explore mitigation¹⁶ for the combustion emissions associated with the Project and similar projects in the region, based on the faulty positions explained above regarding compliance with air permits and potential offsetting of other fuel sources. Public scrutiny of environmental decision making, informed by high quality and accurate information, is essential to the purposes of NEPA. 40 CFR § 1500.1(b). *See also id.* at § 1502.9(c); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989). To fulfill NEPA’s mandate, FERC must account for the significance of cumulative GHG impacts from this project and, at a minimum, other gas projects in the region. Until then, FERC does not have adequate information to make a fully informed decision, compare alternatives (including the no-action alternative), or to develop reasonable mitigation measures to reduce the climate impacts. FERC must rescind the 9/15 Notice to Proceed until this analysis has been completed.

C. FERC Should Not Issue Notices to Proceed Until the Pending Section 401 Litigation is Resolved

Notices to proceed that would result in discharges to navigable waters are premature and impermissible at this time because Pennsylvania has not yet issued a final water quality certification for the Project under Section 401 of the Clean Water Act, and, as explained below, Transco cannot obtain such a certification until the litigation concerning the non-final certification by Pennsylvania is resolved.

It is black-letter law that the Commission must withhold its authorization under the Natural Gas Act until the requisite state water-quality certification for the Project “has been obtained or has been waived” pursuant to Section 401 of the Clean Water Act. 33 U.S.C. § 1313(a)(1); *cf. Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm’n*, 857 F.3d 388 (D.C. Cir. 2017) (upholding FERC’s conditional certificate order because it “expressly conditioned FERC’s approval of potential discharge activity on Transco first obtaining the requisite § 401 certification, and was not itself authorization of any potential discharge activity”). State-determined conditions of certification then “become a condition on any Federal license or permit” for the Project. *Id.* at § 1313(d). Therefore, before the Commission may grant notices to

¹⁶ “[G]reenhouse gas emissions are an indirect effect of authorizing this [pipeline] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.” *Sierra Club v. FERC*, slip op. at 24.

proceed, Transco must obtain Pennsylvania’s water quality certification for the Project, including “any effluent limitations and other limitations, and monitoring requirements necessary to assure [compliance with enumerated Clean Water Act provisions] and with any other appropriate requirement of State law set forth in such certification.” *Id.* at § 1341(d).

Here, Pennsylvania has only issued a non-final water quality certification for the Project¹⁷ and multiple petitions concerning that certification are pending before the U.S. Court of Appeals for the Third Circuit (Docket Nos. 16-2212, 16-2218, 16-2400) as well as the Pennsylvania Environmental Hearing Board (Docket Nos. 2016-075-L, 2016-076-L, 2016-078-L). Moreover, the Board has found that “there is no doubt whatsoever that the Department’s certification of Transco’s project *was not a final action.*” *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, *et al.*, at 5 (May 10, 2017) (emphasis added). Further, the Board has concluded: “Unless the Third Circuit holds that no final action is required, or that the one that is required by Pennsylvania law may simply be disregarded, the appeal before us may proceed.” *Id.* Subsequently, the Third Circuit has not yet decided the issue the Board deferred to it, nor reached the merits of petitioners’ claims that the non-final water quality certification is legally deficient and should be rescinded.

Accordingly, until these matters before the Third Circuit and the Board are resolved, FERC cannot issue notices to proceed that would result in discharges to navigable waters. In fact, FERC itself recognized that “prior to construction” Transco must provide FERC “a final copy of the Permittee-Responsible Mitigation Plan, including any comments and required approvals from the U.S. Army Corps of Engineers and the [Pennsylvania Department of Environmental Protection].” 158 FERC ¶ 61,125 at Appendix C, Environmental Condition 31. But Transco cannot produce a “final copy” of the same so long as the appeals of the non-final water quality certification are pending because that certification is not final, and it is “inextricably intertwined” with the Permittee-Responsible Mitigation Plan and the other required approvals on which Pennsylvania conditioned its non-final water quality certification. *Delaware Riverkeeper Network v. Sec’y Pennsylvania Dep’t of Envtl. Prot.*, 833 F.3d 360, 386 (3rd Cir. 2016) (rejecting argument to divorce judicial review of state water quality certification from other approvals on which the certification was conditioned).

¹⁷ Pennsylvania Department of Environmental Quality, Conditional Water Quality Certification (April 5, 2016), *available at* <https://goo.gl/GCa23E>.

VI. Pending Resolution of the Issues Described Above, FERC Should Prohibit Further Construction Activities

Notices to proceed authorize an applicant to commence construction activities that it otherwise would not be allowed to conduct. Here, the interests of justice¹⁸ require that FERC suspend construction pending resolution of the issues described above, and pending judicial review. In addition to rescinding the 9/15 Notice to Proceed, FERC should deny any pending and future requests for notice to proceed submitted by Transco. *Sierra Club v. FERC*, in which FERC allowed the pipeline companies to proceed with construction but the court later vacated the certificate order, is a prime example of why FERC should not allow construction of Atlantic Sunrise to move forward pending judicial review. The rationale for this prohibition applies with even more force to greenfield pipeline construction. The Commission should not prejudge the outcome of Intervenor’s challenge by allowing construction to proceed before the issues raised in the Rehearing Request are fully resolved. In addition, for the reasons outlined in Intervenor’s previously filed Request for Rehearing and Motion for Stay, FERC should halt construction activity. *See* Rehearing Request at 39–46. Otherwise, Intervenor’s right to meaningful rehearing by FERC (should the court agree with FERC’s litigation position), and to meaningful judicial review by the court, would likely be foreclosed.

Given the high stakes, halting construction pending a final decision on the merits is clearly in the public interest. Rescinding the 9/15 Notice to Proceed will help ensure that a full and complete analysis of the impacts (and potential mitigation) occurs before alternatives are foreclosed by the construction. Furthermore, given the level of interest demonstrated by the public in this controversial pipeline project, the public interest lies in maintaining the *status quo* until the issues raised by the Intervenor are considered fully on the merits. *See San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) (large volume of public comments submitted indicates a public interest in maintaining the *status quo* pending proper review).

Conclusion and Requested Relief

FERC’s issuance of notices to proceed is premature. Intervenor has made substantial meritorious arguments in their Rehearing Request, which are incorporated herein by reference.

¹⁸ The standard that the Commission uses for granting a stay is whether “justice so requires.” 5 U.S.C. § 705.

FERC maintains that Intervenor's Rehearing Request remains pending; nonetheless FERC is allowing Transco to move forward with construction. Intervenor's contend that their Rehearing Request has been denied and, consequently, have filed a petition for review in the D.C. Circuit Court of Appeals; in an attempt to keep Intervenor's out of court, FERC and Transco have filed motions to dismiss in that proceeding. Until Intervenor's arguments are fully addressed, FERC should rescind the 9/15 Notice to Proceed. The risk of irreparable harm to the environment, Intervenor's and their members, and the public interest all outweigh the temporary economic harm that disallowing construction may cause for the applicant.

Accordingly, Intervenor's respectfully request that the Commission rescind the letter order granting authorization to proceed with greenfield pipeline construction, and halt construction activities and associated land disturbance pending final resolution of Intervenor's claims and the outstanding issues identified herein.

For the foregoing reasons, Intervenor's respectfully request the following relief:

- A. Grant Intervenor's Request for Rehearing and Rescission on the 9/15 Notice to Proceed;
- B. Immediately halt Project construction authorized by the 9/15 Notice to Proceed;
- C. Suspend the Certificate Order and halt Project construction while conducting the necessary greenhouse gas and climate analysis in a Supplemental EIS; and
- D. Grant any other relief to which Intervenor's may be entitled.

Dated: September 22, 2017

Respectfully submitted,



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Certificate of Service

I hereby certify that on this 22nd day of September 2017, I caused to be served the foregoing *Amended Request for Rehearing and Rescission of Letter Order Granting Requests to Proceed* electronically on all parties on the Commission's electronic service list in this proceeding, in accordance with the Commission's regulations.



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