

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

Tennessee Gas Pipeline Company, L.L.C.

Docket No. CP15-88-000

**COMMENTS OF ALLEGHENY DEFENSE PROJECT, CENTER FOR BIOLOGICAL
DIVERSITY, FRACK FREE FOOTHILLS, FRESHWATER ACCOUNTABILITY
PROJECT, HEARTWOOD, KENTUCKY HEARTWOOD, AND OHIO VALLEY
ENVIRONMENTAL COALITION**

The following comments are provided on behalf of the Allegheny Defense Project, Kentucky Heartwood, Center for Biological Diversity, Frack Free Foothills, FreshWater Accountability Project, Heartwood, and Ohio Valley Environmental Coalition (collectively, “Commenters”) regarding the Environmental Assessment (“EA”) for Tennessee Gas Pipeline Company’s (“Tennessee”) proposed Abandonment and Capacity Restoration Project (“ACRP”). Tennessee proposes to abandon in place and sell approximately 964 miles of its existing 100 and 200 Lines (“Abandoned Line”) to its affiliate, Utica Marcellus Texas Pipeline, LLC (“UMTP”). UMTP will then convert the abandoned gas line so that it can transport natural gas liquids (“NGL”) as part of the UMTP Project. Tennessee will replace the Abandoned Line with new pipeline, compressor stations and other related infrastructure (“Replacement Facilities”) to maintain natural gas capacity under existing, long-term contracts currently supported by the Abandoned Line.

COMMENTS

I. FERC failed to provide the legally required statement of need for the ACRP.

FERC failed to provide the legally required statement of need for the ACRP. Pursuant to FERC’s regulations implementing NEPA, “[e]nvironmental assessments must include brief discussions of the need for the proposal[.]” 18 C.F.R. § 380.2(d)(3). FERC must “exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.” *Simmons v. U.S. Army Corps of Eng’s*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)). FERC “cannot restrict its analysis to those ‘alternative means by which a particular applicant can reach his goals.’” *Id.* (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986); see also *Nat’l Parks & Cons. Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009) (finding a purpose and need statement that included the agency’s goal to address long-term landfill demand, and the applicant’s three private goals was too narrowly drawn and constrained the possible range of alternatives in violation of NEPA).

While FERC included a section that purportedly discusses the “purpose and need” for the ACRP, there is, in fact, no discussion about the “need for the proposal.” See EA at 1-2. Instead, FERC simply refers to Tennessee’s stated “purpose of the Project” without providing any independent assessment of that purpose and no inquiry into the actual need for the ACRP. *Id.* Without performing an independent assessment of the need for the project, FERC cannot determine the reasonable range of alternatives that must be analyzed in the EA. In particular,

without determining the need for the project, FERC cannot reasonably assess the desirability of the required “no action” alternative.

FERC appears to point to its obligations under the Natural Gas Act to suggest that it may consider project need at some point before it makes a decision on whether to issue a certificate. At that point, however, the public comment period under NEPA will have long since passed. By waiting until some unspecified future date to determine the need for the project, FERC denies the public its right to comment on all aspects of the EA, including the statement of need and the alternatives analysis that depends on that statement.

There are serious questions about the need for the ACRP. In September 2015, Tennessee’s parent company, Kinder Morgan, gave its “customers three more months to work out deals to ship natural gas liquids from Ohio and Pennsylvania to the Gulf Coast.” Robert Grattan, Kinder Morgan gives customers more time to sign on to \$4 billion pipeline project, Fuel Fix (Sept. 15, 2015) available at <http://fuelfix.com/blog/2015/09/15/kinder-morgan-gives-customers-more-time-to-sign-on-to-4-billion-pipeline-project/>. “As of July [2015], Kinder Morgan had not listed the UMTF Pipeline on the \$22 billion in backlog projects the company believes it’s most likely to build.” *Id.*

In Kinder Morgan’s most recent annual report, neither the ACRP nor the UMTF Project are identified in its “listing of significant developments and updates related to our major projects.” Kinder Morgan, 2015 Annual Report (Form 10-K), at 7-10 (Jan. 4, 2016), available at http://ir.kindermorgan.com/sites/kindermorgan.investorhq.businesswire.com/files/report/additional/KMI-2015-10K_Final.pdf. This is a notable change from Kinder Morgan’s 2014 Annual Report, which included the UMTF Project on this list. See Kinder Morgan, 2014 Annual Report (Form 10-K), at 11 (Jan. 8, 2015), available at http://ir.kindermorgan.com/sites/kindermorgan.investorhq.businesswire.com/files/report/additional/KMI-2014-10K_Final.pdf. The “abandonment and conversion” project was also included in Kinder Morgan’s 2013 Annual Report. See Kinder Morgan, 2013 Annual Report (Form 10-K), at 13 (Jan. 6, 2014), available at http://ir.kindermorgan.com/sites/kindermorgan.investorhq.businesswire.com/files/report/additional/KMI_2013_annual_report_financials.pdf.

In other words, between January 2014 and January 2015, Kinder Morgan identified the UMTF Project (which included the abandonment that is proposed in the ACRP) in its annual reports. By September 2015, however, Kinder Morgan announced it needed to give customers more time (December 2015) to “work out deals to ship natural gas liquids from Ohio and Pennsylvania to the Gulf Coast.” Then, in January 2016, neither the UMTF Project nor the ACRP are identified in Kinder Morgan’s list of major projects.

Likewise, in a May 2015 investor presentation, Kinder Morgan identified the UMTF Project as one its “opportunities for growth from increased liquids production.” Kinder Morgan, MUFJ Oil & Gas Conference, at 22 (May 7, 2015), available at http://ir.kindermorgan.com/sites/kindermorgan.investorhq.businesswire.com/files/event/additional/0507_MUFJ_AA_vR.pdf. In its latest investor presentation, however, there is no mention of the UMTF Project. See Kinder Morgan, Run for Shareholders, By Shareholders (Nov. 18, 2016),

available at

http://ir.kindermorgan.com/sites/kindermorgan.investorhq.businesswire.com/files/event/additional/1118_BAML_DS.pdf. Thus, there is a serious question as to whether there is an actual need for the UMTF Project. If there is no need for the UMTF Project, then it follows that there is no need for the ACRP either.

FERC must revise the EA and discuss whether there is indeed a need for the ACRP and UMTF Project.

II. The ACRP and UMTF Project are connected, cumulative and similar actions that must be considered in a detailed environmental impact statement.

FERC's scope of review in an environmental analysis must encompass connected, cumulative, and similar actions. *See* 40 C.F.R. § 1508.25(a); *Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014). Actions are connected if they automatically trigger other actions which may require an EIS, cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a larger action and depend on the larger action for their justification. *Id.* at § 1508.25(a)(1). “[A]n agency must discuss ‘[c]onconnected actions’ – that is, ‘closely related’ actions – ‘in the same impact statement.’” *Nevada v. Department of Energy*, 457 F.3d 78, 91 n 8 (D.C. Cir. 2006). Cumulative actions are those actions that, when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed in the same EIS. *Id.* at § 1508.25(a)(2). Similar actions are those actions that, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. *Id.* at § 1508.25(a)(3). An agency should analyze similar actions in the same EIS when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single EIS. *Id.* Importantly, “significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). “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.” *Delaware Riverkeeper*, 753 F.3d at 1313.

As Commenters explained in their scoping comments, the ACRP and UMTF Project are connected, cumulative, and similar actions that FERC and other cooperating agencies should be analyzing in a comprehensive environmental impact statement (“EIS”). *See* Scoping Comments at 2-10. FERC provides no substantive response to these comments in the EA. Instead, it simply stated the following:

The majority of concerns brought up by commenters were related to the UMTF Project and the future use of the abandoned pipeline to transport products other than natural gas. Although TGP has indicated that UMTF intends to use the abandoned pipeline to transport natural gas liquids (NGL), the eventual disposition of the pipeline after abandonment, whether it would be left idle, converted for another use, or eventually sold to another entity, is not part of TGP's proposed action.

We discuss the UMTF Project in more detail in section 1.7.1; however, if the Commission grants the abandonment, the pipeline would no longer be under the Commission's jurisdiction. Any subsequent construction by the UMTF or any other entity related to future use of the abandoned pipeline for NGL transportation would also not be under the Commission's jurisdiction. Further, while the abandonment would allow for whatever future use TGP ultimately decides to undertake, the abandonment would not be the cause of the future use as contemplated by CEQ regulations. Therefore, the EA does not address the potential impacts that could occur after the abandonment as indirect effects . . . The U.S. Army Corps of Engineers (COE) and state agencies would be responsible for reviewing environmental impacts of the UMTF Project.

EA at 4 (citation omitted). There are several problems with FERC's characterization of the ACRP and UMTF Project. First, the notion that "the eventual disposition of the pipeline after abandonment . . . is not part of TGP's proposed action" is disingenuous at best. For example, in Kinder Morgan's 2014 Annual Report, it described the UMTF Project as follows:

Project involves the *abandonment and conversion* of over 1,000 miles of natural gas service on TGP, the construction of new pipeline from Louisiana to Texas and 155 miles of new laterals in Pennsylvania, Ohio and West Virginia.

Kinder Morgan, 2014 Annual Report (Form 10-K), at 11 (emphasis added). It is telling that Kinder Morgan did not identify the ACRP in the 2014 Annual Report. That is because it is clear that Kinder Morgan considered the "abandonment" as part of the UMTF Project as it is obviously the critical first step to converting the line to NGL transport. The idea that the ACRP and UMTF Project are two independent proposals strains credulity.

FERC's explanation that the COE and state agencies would be responsible for reviewing environmental impacts of the UMTF Project does not relieve FERC, the lead agency, of its obligation to work with these agencies in preparing a joint EIS. Commenters explained that a recently prepared EIS in Minnesota supports preparation of a multi-agency, joint EIS here. *See* Scoping Comments at 6-7. In that case, the COE, U.S. Forest Service, and Minnesota Department of Natural Resources ("MDNR") prepared a joint EIS for a proposed copper mine. *See* MDNR *et al.*, Northmet Mining Project and Land Exchange Supplemental Draft Environmental Impact Statement, <http://www.dnr.state.mn.us/input/environmentalreview/polymet/sdeis-toc.html>. The EIS contained two "proposed actions." One proposed action was a land exchange involving lands owned by the Forest Service. The other proposed action was the proposed copper mine, which was being reviewed by the COE and MDNR.

Under FERC's logic, the Forest Service could have isolated the land exchange and prepared a separate EA, rather than working with the other agencies to prepare a joint EIS. Instead, the Forest Service recognized that, even though its decision was focused solely on the land exchange, that action was obviously connected to the proposed mine. *See* SDEIS at 1-9. Similarly, the abandonment is inextricably linked with the conversion to NGL service.

As the lead agency, FERC needs to contact the COE and other relevant state and federal agencies to prepare a detailed EIS for both the ACRP and UMTP Project. The ACRP is obviously an interdependent part of a larger action (i.e., Kinder Morgan’s plan to transport NGLs from the Marcellus and Utica shale formations to the Gulf Coast). 40 C.F.R. § 1508.25(a)(1)(iii). The UMTP Project cannot proceed unless FERC first authorizes the abandonment through the ACRP. 40 C.F.R. § 1508.25(a)(1)(ii). Thus, the ACRP and UMTP Project are unquestionably closely related connected actions that must be discussed in the same EIS. *Nevada v. Department of Energy*, 457 F.3d 78, 91 n 8 (D.C. Cir. 2006). By refusing to consider these connected actions in a detailed EIS, FERC “fails to address the true scope and impact of the activities that should be under consideration.” *Delaware Riverkeeper*, 753 F.3d at 1313.

The ACRP and UMTP Project are also cumulative actions that should be considered in the same EIS because they will have cumulatively significant impacts. The EA contains contradictory statements regarding the cumulative aspects of the two projects. For example, FERC initially claims that only “[a] minor portion of the UMTP Project facilities lie within the geographic scope of the cumulative impacts analysis for the ACRP[.]” EA at 4. In the cumulative impacts section, however, FERC says that “many of the[] modifications under the UMTP Project would occur at locations where ACRP activities would also take place.” *Id.* at 142. Indeed, “[o]f the[] 219 UMTP Project sites, 130 would overlap with ACRP minor abandonment activities” while “[a]t an additional 15 locations, UMTP Project activities would overlap with larger ACRP new construction activities.” *Id.* The overlap between the two projects indicates the need to consider cumulatively their potential for significant environmental impacts in an EIS.

The geographic overlap and common timing also indicates that the ACRP and UMTP Project should be considered similar actions. In *Delaware Riverkeeper*, the court emphasized the importance of the timing of four related projects. 753 F.3d at 1318. There, the court noted that the four projects “were reviewed separately by FERC, approved, and then constructed in rapid succession between 2010 and 2013.” *Id.* at 1308. Here, the timing of the ACRP and UMTP would be even closer together. Therefore, FERC should consider the two projects should be considered similar actions in the same EIS.

Commenters are not alone in our concerns about the need for a detailed EIS for the ACRP and UMTP Project. In March 2015, the U.S. Fish and Wildlife Service (“USFWS”) stressed to FERC the fact that “the proposed ACRP is part of a larger proposed project – the Utica Marcellus Texas Pipeline Project (UMTPP).” USFWS, March 23, 2015 Comments at 2 (Accession No. 20150323-5146). USFWS further noted that:

In accordance with section 7 of the ESA, the [USFWS] must consider the effects of the *entire action*. Therefore, in accordance with the ESA, the [USFWS] recommends that FERC determine if it is appropriate to authorize the pipeline abandonment at this time or wait until the [USFWS] has completed consultation for the *entire action, which would include the UMTP Project*.

Id. (emphasis added). The USFWS reiterated these comments on May 15, 2015. *See* Accession No. 20150515-5258. In June 2015, FERC and USFWS discussed the ACRP and UMTP Project. The notes of the conversation indicate that, despite the fact that USFWS “stated that [it] is looking at both projects together” because it “sees both projects as interrelated,” FERC said its “EA will address the ACRP” only “because that is the project that is under FERC jurisdiction.” FERC, June 12, 2015 Phone Call Memorandum (Accession No. 20150612-4004).

In May 2016, the USFWS once again stressed that:

[FERC’s] action for the [ACRP] portion has no independent utility apart from the Corps’ action(s) on the UMTP portion, and vice versa. Further, upland segments of the UMTP portion of the project have no independent utility apart from the wetland/stream segments or apart from the converted pipeline of the [ACRP] portion of the Project. The federal actions and the non-federal actions related to constructing the upland portions of the UMTP that together constitute the larger Project are clearly interdependent under the ESA regulatory definitions. Therefore, section 7 consultation for any federal decision to authorize any portion of the Project must consider the effects of all the other portions of the Project.

By this letter we are advising [FERC] that the [USFWS] is not able to conclude consultation without an assessment of the interrelated and interdependent components of this Project, as required under the ESA implementing regulations. The [USFWS] recommends that [FERC] serve as the lead agency, in coordination with the Corps, for section 7 consultation purposes for this Project. We believe this is advisable due to [FERC’s] special expertise with pipelines and the energy industry, and because *none of the interdependent new-construction activities would occur without [FERC’s] decision about abandoning the existing use of the pipeline for its conversion to NGLs conveyance.*

USFWS, May 24, 2016 Comments at 2-3 (emphasis added) (Accession No. 20160609-5081). On December 1, 2016, the USFWS again explained that it “must consider the effects of both the [ACRP] and UMTP portions of the Project in order to appropriately evaluate the effects of the Project.” USFWS, Dec. 1, 2016 Comments at 2 (Accession No. 20161201-5393).

While the concerns expressed by the USFWS are centered on its consultation with FERC under the ESA, the same concerns apply to FERC’s flawed NEPA analysis. For example, just as the USFWS recommended that FERC, in coordination with the Corps, act as the lead agency for purposes of ESA consultation, so too should FERC act as the lead agency for a coordinated review of the “entire action” (i.e., the ACRP and UMTP Project) under NEPA. “A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency . . . [i]s involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.” 40 C.F.R. § 1501.5(a)(2). The fact that the project area spans several states is irrelevant since “Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies” to prepare an EIS. *Id.* § 1501.5(b). Such a coordinated review would harmonize FERC’s obligations under both NEPA and the ESA. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 647-48 (9th Cir. 2014) (“agencies are expected to concurrently comply with both Section 7 of the ESA

and NEPA; *see also Defenders of Wildlife v. U.S. Dep't of the Navy*, 733 F.3d 1106, 1120 n. 6 (11th Cir. 2013) (“the ESA regulations envision agency coordination on ESA and NEPA compliance.”); *Strahan v. Linnon*, 967 F.Supp. 581, 630 (D. Mass. 1997) (“the regulatory framework envisions coordination between ESA consultation and NEPA review.”).

The best way to coordinate the ESA and NEPA reviews for Tennessee’s “entire action” is to designate FERC as the lead agency for both reviews and to prepare a detailed EIS that takes into account the potential environmental consequences of that “entire action,” which would include both the ACRP and UMTP Project.

III. The intensity of the ACRP and UMTP Project weigh heavily in favor of the need for an EIS.

In determining whether to prepare an EIS, FERC must consider several “intensity” factors. *See* 40 C.F.R. § 1508.27(b). In considering these factors, FERC “must bear in mind that more than one agency may make decisions about partial aspects of a major action.” *Id.* “A court may find a substantial effect based on just one of the ‘intensity’ factors.” *Oregon Wild v. U.S. Forest Serv.*, 107 F.Supp.3d 1102, 1111 (D. Or. 2015) (citing *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005)). “Even if no single factor justifies an EIS, the factors may require an EIS when considered cumulatively.” *Id.* (citing *Cascadia Wildlands v. U.S. Forest Serv.*, 937 F.Supp.2d 1271, 1283-84 (D. Or. 2013)). In this case, there are several intensity factors triggered, any one of which compel the need for an EIS. Moreover, when the entire action is taken into account, there can be little doubt that there will be significant environmental impacts. Therefore, FERC must prepare an EIS.

For example, FERC must consider the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). According to the USFWS, “the Kentucky cave shrimp is endemic to an area of five groundwater basins in Kentucky.” USFWS, Dec. 1, 2016 Comments at 3. According to FERC, “[d]uring construction, the UMTP Project could directly affect habitat for [the endangered Kentucky cave shrimp and candidate Tatum Cave beetle] through impacts on caves, sinkholes, or other karst features.” EA at 166. FERC also identifies numerous public lands and wildlife areas that overlap with or are near the project area. *See id.* at 65-66. These areas include the “Green River Bioreserve Megasite, which is “an area characterized by karst features that extend for miles” and “is important for wildlife as it contains one of the highest concentrations of rare freshwater mussels in the United States.” *Id.* at 65. These areas constitute “ecologically critical areas” for the survival of the Kentucky cave shrimp and rare freshwater mussels. Therefore, this factor weighs in favor of a finding of significance.

Next, FERC must consider “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4). The term “controversial” refers to cases where “a substantial dispute exists as to the size, nature, or effect” of an action, not “the existence of opposition to a use.” *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (emphasis in original) (quoting *Found. for N. Am. Wild*

Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982)). Here, there are substantial disputes as to the nature and effect of the ACRP and UMTF Project.

The specific issues from which significant controversy arise are the evidence-based concerns over the effects, hazards, and risks posed to the human and natural environment from repurposing of the TGP to transport NGLs. These concerns include the behavior of NGLs in the pipeline (e.g. issues of compressibility and pressure spikes), the manner of NGL dispersal in the case of a leak, patterns of NGL ignition, integrity of the pipe with respect to flow reversals, integrity of the pipe with respect to the increased density of NGLs, NGL risks to groundwater and drinking water resources, NGL risks to soil and agricultural resources, mitigation measures following an NGL release, and the risks to aquatic organisms (particularly state and federally listed species) posed by minor or significant NGL releases. Integral to all of these concerns is the factual understanding that pipeline failures are a regular occurrence and must be planned for.

Over 800 comment letters have been submitted to FERC over the course of this project, with the vast majority of letters expressing concern over the risks, hazards, and effects relating to transporting NGLs in the repurposed pipeline. Many of these comments request that a full EIS be conducted to better disclose to the public potential risks associated with approval of the project. Among the comments received expressing these and similar concerns are the Madison County, Kentucky Fiscal Court (Accession No. 20150518-5205), the Clark County Kentucky Fiscal Court (Accession No. 20161129-0061), the Boyle County, Kentucky Fiscal Court (Accession No. 20160808-0039), the Marion County, Kentucky Fiscal Court (Accession Nos. 20150324-0034 and 20161129-0008), the Barren County, Kentucky Fiscal Court (Accession No. 20150728-0026), Kentucky State Senate Majority Whip Jimmy Higdon (Accession Nos. 20161116-5018 and 20160627-0122), the Bluegrass Areas Development District (representing elected officials and citizen members in a 17-county area, Accession No. 20161007-0145), the Danville-Boyle County Chamber of Commerce (Accession No. 20161117-5036), the City of Danville (Accession Nos. 20160729-0016 and 20150319-5071), Kentucky, the Danville Independent School District and Danville Schools Board of Education (Accession No. 20150519-5011), the National Park Service/Mammoth Cave National Park (Accession No. 20150518-5256), the Kentucky Department of Fish and Wildlife (Accession Nos. 20150518-5206 and 20150602-0025), the U.S. Fish and Wildlife Service (Accession Nos. 20150323-5146, 20161201-53931, 20160602-0019, and 20160609-5081), and the Kentucky State Nature Preserves Commission (Accession No. 20150323-5331). Planning and zoning ordinances relating to hazardous liquids pipelines were adopted in Madison (Accession No. 20160919-0015) and Boyle Counties out of concern for risks posed by NGL pipelines, with the Madison County ordinance supported by Eastern Kentucky University and Madison County Schools.

As addressed elsewhere in these comments, concerns over the environmental effects and risks posed by NGL transmission through the aged TGP have an objective scientific basis and are reasonable, rational, and prudent. These concerns were raised early and often by multiple parties, as the record makes evident. Regardless of this fact, FERC failed to meaningfully address these risks in the EA.

As explained above, there is a substantial dispute between FERC and the USFWS as to the nature of the project. According to FERC, even though “[t]he majority of concerns brought

up by commenters were related to the UMTP Project and the future use of the abandoned pipeline to transport products other than natural gas . . . [t]hese actions are not under [FERC's] jurisdiction and are not part of the proposed Project.” EA at 4, 10. Therefore, FERC only included brief, generic discussions of the UMTP Project and its impact on resources in the EA. *See id.* at 10-11, 142-43, 160-72.

According to the USFWS, however, it is indisputable that “the proposed ACRP is part of a larger proposed project – the Utica Marcellus Texas Pipeline Project (UMTPP).” USFWS, March 23, 2015 Comments at 2. The USFWS has repeatedly emphasized this fact to FERC. Therefore, this constitutes a substantial dispute as to the nature of the project and this factor weighs in favor of a finding of significance. *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003).

FERC must also consider “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” 40 C.F.R. § 1508.27(b)(6). Here, the approval of the ACRP “may establish a precedent” for the UMTP Project, which will certainly have significant effects on the environment resulting from the construction of hundreds of miles of new pipeline and related facility development. In addition, approval of the ACRP “represents a decision in principle” that abandonment of natural gas service is appropriate so that the Abandoned Line can be converted to transport NGLs as part of the UMTP Project. Thus, this significance factor supports the need for an EIS.

“The purpose of [this] section is to avoid the thoughtless setting in motion of a ‘chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.’” *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1162-63 (9th Cir. 1998) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985)). In *Presidio Golf Club*, the plaintiffs failed to show “that any similar or related projects are being contemplated.” *Id.* at 1163. That is certainly not the case here where Tennessee’s stated objective is to abandon the line so it can be sold to an affiliate for conversion to NGL service. In *Marsh*, the court held that it “is both practical and necessary” to include in an EIS other “plans and [] proposal[s]” when they exist. *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985). Here, it “is both practical and necessary” to review in a detailed EIS the plans and proposals for the entire project (i.e., the ACRP and UMTP Project).

In *Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Serv.*, the court held that Forest Service’s adoption of a map that changed boundaries and removed logging restrictions “represents a decision in principle” about the future use of the land within a national forest, weighing in favor of a finding of significance. 866 F.Supp.2d 1209, 1229-30 (D. Idaho, 2012). Likewise, authorization of the abandonment through the ACRP “represents a decision in principle” about the future use of the Abandoned Line for conversion to NGL service. Thus, this factor weighs in favor of a finding of significance.

FERC must also consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the

environment.” *Id.* “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.*

In addition to the construction of replacement facilities as part of the ACRP, the UMTF would involve the construction of nearly 240 miles of pipeline, the Tuscarawas NGL Storage Facility, 23 new NGL pump stations, 35 MLVs, and three new meter stations. EA at 162. It is “reasonable to anticipate a cumulatively significant impact on the environment” from the construction of the ACRP’s replacement facilities and the UMTF Project facilities. 40 C.F.R. § 1508.27(b)(7). FERC cannot avoid a finding of significance by breaking the larger project into two smaller parts. *Id.* Therefore, this factor weighs in favor of a finding of significance.

FERC must also consider “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. § 1508.27(b)(9). Here, there is no doubt that the ACRP and UMTF Project may adversely affect threatened or endangered species or their critical habitat. For example, “[b]ased on consultation with each USFWS field office, 31 federally listed wildlife species, 8 federally listed plant species, 2 candidate federal species, and 2 federal species of concern are known to occur in counties affected by the proposed [ACRP].” EA at 73. In addition, the USFWS identified potential impacts on the eastern hellbender, diamond darter, pallid sturgeon, pygmy madtom, Kentucky cave shrimp, Tatum Cave beetle, and 12 species of federally listed mussels that could be impacted by the “UMTF Project operation and future use of the abandoned pipeline for NGL transportation.” *Id.* This factor alone should have alerted FERC to the need to prepare an EIS.

This is supported by comments submitted by the USFWS. In its comments on the EA, USFWS said that it could not concur with FERC’s “may affect, not likely to adversely affect” determinations for the following species and critical habitat:

- Eastern hellbender
- Diamond darter critical habitat
- Pallid sturgeon
- Pygmy madtom
- Fanshell mussel
- Fat pocketbook mussel
- Orangefoot pimpleback mussel
- Pink mucket mussel
- Rabbitsfoot mussel
- Ring pink mussel
- Rough pigtoe mussel
- Sheepnose mussel
- Slabside pearlymussel
- Snuffbox mussel
- Spectaclecase mussel
- White wartyback mussel
- Kentucky cave shrimp

USFWS, Dec. 1, 2016 Comments at 3. USFWS specifically requested that Tennessee “provide a more specific description of the NGL components and the approximate volumes of each of those components that would be transported through the repurposed pipeline and specify which components would remain in a liquid state if released into the environment.” *Id.* In addition, USFWS expressed concern that “because the Kentucky cave shrimp is endemic to an area of five groundwater basins in Kentucky,” it recommends “identifying exactly where the pipeline runs through the basin(s), estimating the movement of material through the karst basin(s) in the event of a leak in the pipeline, and evaluating the potential impacts resulting from a leak on the species and its critical habitat.” *Id.* USFWS also said that “effects determinations should also be made for rabbitsfoot critical habitat and Kentucky cave shrimp critical habitat.” *Id.* Therefore, this factor weighs in favor of a finding of significance.

As stated at the beginning of this section, consideration of any one of these factors is sufficient for a finding of significance. *Oregon Wild*, 107 F.Supp.3d at 1111. When these factors are considered cumulatively, there can be no doubt about the significance of this project. *Id.* Therefore, FERC must prepare an EIS for the ACRP and UMTP Project.

IV. The length of the EA indicates the need for an EIS.

In addition to the intensity factors discussed in the previous section, the length of the EA also indicates the need to prepare an EIS. According to CEQ, “[a]gencies should avoid preparing lengthy EAs except in unusual cases[.]” CEQ, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, Q.36b (Mar. 16, 1981); *see Sierra Club v. Marsh*, 769 F.2d 868, 874 (1st Cir. 1985). “In most cases . . . a lengthy EA indicates that an EIS is needed.” *Id.* *See also Curry v. U.S. Forest Serv.*, 988 F.Supp. 541 (W.D. Pa. 1997) (an EA covering 49 pages with 349 pages of appendices undermined the Forest Service’s decision not to prepare an EIS); *National Audubon Soc’y v. Hoffman*, 917 F.Supp. 280, 287 (D. Vt. 1995) (magnitude of project and a 65-page EA undermined defendants’ contention that proposals are not significant).

Here, FERC prepared a 403-page EA. By any reasonable measure, this counts as “a lengthy EA indicat[ing] that an EIS is needed.” As the court in *Marsh* aptly noted, an agency in this position “would have saved time in the long run had [it] devoted their considerable effort to the production of an EIS, instead of the production of documents seeking to prove that an EIS is not needed.” 769 F.2d at 875. The court further explained that even though an agency prepares a lengthy EA, it is not a substitute for an EIS “because an EA and an EIS serve very different purposes.”

An EA aims simply to identify (and assess the ‘significance’ of) potential impacts on the environment; it does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project’s other objectives, such as, for example, economic development. This latter balancing job belongs to the officials who decide whether to approve the project; and (where there are ‘significant effects’) those officials should make the decision in light of an EIS. An EIS helps make their decision by describing and evaluating the project’s

likely effects on the environment. The purpose of an EA is simply to help the agencies decide if an EIS is needed.

To treat the EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment. For one thing, those outside the agency have less opportunity to comment on an EA than on an EIS. For another thing, those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS.

Id. The intensity factors (individually and cumulatively) and the length of the EA indicate that FERC should have prepared, and now must prepare, an EIS.

V. FERC failed to disclose and analyze the risks, effects, and potential mitigation measures associated with NGL transmission through a repurposed TGP

FERC has failed to consider the effects of an inadvertent minor or catastrophic release of NGLs through a pipeline failure as either indirect or cumulative effects in the EA. This specific concern has been raised by a broad section of the public, several federal and state agencies, multiple county and municipal governments, and other institutions and associations of note. Instead, FERC has limited consideration of the impacts of the UMTP to ground disturbing activities associated with planned construction and conversion activities. In fact, the only reference we could find in the EA discussing concerns relating to NGL leaks and pipeline failures is the following:

We received a number of comments on the potential for leaks during operation of the UMTP Project and the impact of those leaks on waterbodies and other resources. Leaks of NGL could result in contamination of groundwater or surface water. The NPS noted the potential for impacts on Mammoth Cave National Park, which would be crossed by the UMTP Project. In a letter dated May 18, 2015, the NPS cited concerns about spills affecting Mammoth Cave National Park, the longest known cave system in the world, and the surrounding karst topography and “groundwatersheds” extending outside Park boundaries. (EA at 164)

This appears to be the entire analysis with regard to possible NGL leaks. This must be corrected in an EIS.

FERC states at EA-73:

We received comments from the USFWS regarding potential effects on special status species as a result of the UMTP Project. The USFWS requested that FERC consider the potential impacts associated with the UMTP Project in our effect determinations on special status species. FERC has no jurisdiction to enforce mitigation for the UMTP Project impacts. The lead federal agency with ESA Section 7 responsibilities for the UMTP Project is the COE. However, in our EA we are disclosing what we know about

the potential impacts of the UMTF Project on federally listed and special status species to inform decision makers, the USFWS, and other interested stakeholders. This information can be found in section 2.11.4 and appendix J, tables J-2 through J-8. (EA at 73)

We note that USFWS expressed concerns regarding leaks of both NGLs in the repurposed line and natural gas (NG) in retained natural gas lines caused by increased capacity in their May 15, 2015 to FERC:

Additionally, the pipelines cross the Green River within a reach of the Green River that has been designated as critical habitat for rabbitsfoot. *Leaks in these areas could contaminate federally-listed mussel habitat, directly or indirectly* (i.e., via other streams and groundwater in the some drainages), and could adversely affect federally-listed mussels or critical habitat for the rabbitsfoot mussel. For these species and the rabbitsfoot critical habitat area, the Service also recommends that FERC require the applicant to evaluate the structural soundness of the existing pipeline in the watersheds affected by these crossings that contain the listed mussel species and critical habitat to determine if the pipeline can handle the proposed increased capacity of natural gas and the transport NGLs. *If portions of the pipeline within these watersheds are likely to fail in the foreseeable future or would otherwise be more likely to cause adverse effects on federally listed mussels or critical habitat due to the age of the existing pipeline or other factors, we believe FERC's action could have indirect adverse effects on these species and/or critical habitat areas.* We recommend that FERC's authorization include a requirement to replace the portions of the pipelines in the applicable watershed(s) that are determined likely to cause adverse effects to federally-listed mussel species and/or rabbitsfoot critical habitat.¹ (emphasis added)

The National Park Service raised multiple concerns and also made specific requests with regard to addressing concerns about risks posed by NGLs (Accession No. 20150518-5256), stating:

1...(NPS) is very concerned about the integrity of the existing pipeline that has previously been designed and used to transport natural gas product and will be transformed into transporting undefined NGL products. *The NPS is concerned about the potential for a catastrophic failure of the existing pipeline with these undefined NGL products inside the groundwater basin of the Kentucky Cave Shrimp or Kentucky Cave Shrimp critical habitat because of the extreme differences in product. The existing pipeline was designed and constructed for the transport of only natural gas and not NGLs.*

2. *The NPS requests that FERC require an intensive groundwater dye-trace study to determine the flow of groundwater along the Barren County, Kentucky portion of the project area. The dye-trace study will define the movement of groundwater along the project area in the event of a future catastrophic failure of the pipeline. The NPS is concerned with the change from natural gas to undefined NGL products and the dye-*

¹ Letter from U.S. Fish and Wildlife Service to FERC, dated May 15, 2015.

trace study will provide critical scientific information in understanding the groundwater migration of NGLs if they escape the pipeline.

3. The NPS requests best management practices (BMPs) be addressed to minimize the potential adverse impacts to water quality and cave aquatic species within the Sinkhole Plain of southcentral Kentucky. The identification and use of BMPs to avoid, reduce, or mitigate impacts to Sinkhole Plain resources of concern is essential in protecting and conserving the sensitive groundwater and cave aquatic species.

4. *The NPS requests an inventory of possible NGL products that would be transported in the repurposed pipeline.* (emphasis added)

The Kentucky Department of Fish and Wildlife Resources stated in their May 15, 2015 letter to FERC (Accession Nos. 20150518-5206 and 20150602-0025):

KDFWR requests that the environmental review address the maintenance and operation plans for the pipeline and proposed facilities. The plans should include an examination of pipeline integrity and thresholds to ensure the pipeline is designed to safely transport new materials proposed for transport through the line. *The project plans should address monitoring of the pipeline system for leaks and an environmental response plan for potential leaks or spills from the pipeline particularly near streams and important conservation areas.*

The Kentucky State Nature Preserves Commission (KSNPC) stated similarly in their letter to FERC dated March 23, 2015 (Accession No. 20150323-5331). In that letter, KSNPC states:

We believe a full Environmental Impact Statement should be developed, not just covering all direct, indirect, and cumulative effects of the abandonment of the pipeline, but the possible environmental effects of repurposing of the pipeline from Natural gas to the transportation of natural gas liquids must also be considered. FERC should coordinate with the U.S. Army Corps of Engineers and other federal and state agencies to assure thorough environmental review. (emphasis added)

And further that:

Our expertise is in natural heritage resources, and not pipeline safety, but the potential significant impacts to the natural resources from the activities that the authorization of this application would set into motion are noted in Advisory Bulletin Docket No. PHMSA-2014-0040. We request that the alerts regarding conversions of service be fully considered before approval of this project, as *we do not have full knowledge of the nature of the substances and the environmental consequences and dangers of reversing flow directions and moving these materials through an antiquated system.*

Also, we are not sure that all of the adverse impacts on the land, air and water resources are known at this time. We can see that there are multiple crossing of rivers and karst terrain with high biodiversity values, including federally listed species. *The impacts of the*

entire project, from abandonment and building new facilities to leak detection and monitoring must be subject to full review and proper notice to all stakeholders.
(emphasis added)

Commenters note here that we raised these same issues in detail in our May 18, 2015 scoping comments to FERC.

FERC does nothing to address USFWS, NPS, KDFWR, KSNPC or Commenters concerns regarding NGL or NG leaks of the operating pipelines on fish and wildlife resources. The statement that “we are disclosing what we know about the potential impacts of the UMTF Project on federally listed and special status species to inform decision makers, the USFWS, and other interested stakeholders,” is flatly dishonest.

VI. County, municipal, and other statements of concern regarding repurposing for NGLs

Multiple County, municipal, and other institutional entities of note have also submitted comments or taken action out of rational concern for public and environmental safety in the event of a NGL release to the environment. Actions and requests that we are aware of (most of which are in the project docket) include the following:

1. A letter November 16, 2016 letter submitted to FERC by Kentucky State Senate Majority Whip Jimmy Higdon requesting and EIS, stating, “This pipeline in discussion is more than 70 years old and it has a history of known leaks and ruptures. The age and condition of the pipeline bring about not only safety issues but also environmental concerns. The pipeline runs through Marion County’s watershed. Marion County has a karst terrain and a pipeline leak or rupture could cause permanent contamination to our water supply, which obviously would be detrimental to our community.”
2. A March 19, 2015 letter to FERC from the Marion County, Kentucky Fiscal Court opposing the repurposing out of specific concerns relating to NGL hazards.
3. Passage of a Conditional Use ordinance relating to hazardous material pipelines adopted by the Boyle County, Kentucky Fiscal Court.
4. Passage of a Conditional Use ordinance relating to hazardous material pipelines adopted by the City of Danville, Kentucky.
5. Passage of a Conditional Use ordinance relating to hazardous material pipelines adopted by the Madison County, Kentucky Fiscal Court, as noted in a September 14, 2016 letter from the Madison County Fiscal Court to FERC.
6. A statement of support at a public hearing for the Madison County Conditional Use Ordinance by the Madison County, Kentucky Schools Superintendent due to concerns relating to NGL hazards and the proximity to Madison County Schools to the pipeline. The pipeline passes through the property of at least one elementary school in the district.

7. A statement of support for the Madison County Conditional Use Ordinance by Eastern Kentucky University, due to concerns relating to NGL hazards and the proximity of Eastern Kentucky University to the pipeline.
8. A September 29, 2016 letter and request to FERC for an EIS by the Bluegrass Area Development District representing “elected officials and citizen members in a 17-county area,” expressing concerns about NGLs and stating “the members of the Bluegrass ADD Executive Committee, oppose any changes in the current pipeline that could negatively affect our land, water, and air, putting the health and safety of our citizens and our environment at risk. The Bluegrass ADD hereby adopts this resolution, authorizes the Chair of the Bluegrass ADD Board to sign and forward this resolution to the Federal Energy Regulatory Commission and urges them to complete an Environmental Impact Statement prior to approving any proposed plans on the referenced pipeline.”
9. A July 23, 2015 letter from the Barren County Judge Executive, Micheal Hale on behalf of the Barren County Fiscal Court presenting a resolution urging “FERC to deny any applications to repurpose the Tennessee Gas Pipeline... to transport NGLs through any portion of the Commonwealth of Kentucky.”
10. A November 14, 2016 letter to FERC by the Danville-Boyle County, Kentucky Chamber of Commerce requesting an EIS and raising multiple specific concerns about NGLs and leaks, stating “We strongly disagree and ask FERC to develop a full Environmental Impact Statement (EIS) that includes thorough review of both the environmental effects of the abandonment and the subsequent use of the pipeline for transporting NGLs.”
11. A May 18, 2015 letter from the Madison County, Kentucky Fiscal Court to FERC requesting a full EIS and stating “The MCFC notes that it has unanimously passed a Resolution (attached) opposing the repurposing of the pipeline in question” and expressing specific concerns about minor and major NGL leaks.
12. A letter to FERC dated August 3, 2016 from the Boyle County Fiscal Court including a “Joint Resolution of the Board of Commissioners of Danville, Kentucky and the Fiscal Court of Boyle County, Kentucky” registering concerns over the risks posed by NGLs and repurposing the pipeline and formally opposing the repurposing of the TGP.
13. A May 18, 2015 letter from Keith Look, Superintendent of the Danville Independent School District and Lonnie Harp, Chairperson of the Danville Schools Board of Education requesting an EIS out of concern for risks posed by the repurposing, stating “The pipeline runs through the property of one of our elementary schools.”
14. An ordinance passed by the Clark County, Kentucky Fiscal Court on November 23, 2016 and submitted to FERC urging the agency to perform an EIS and opposing “any changes to the pipeline that would negatively affect our land, water and air, putting the health and safety of our citizens and environment at risk.”

FERC offers no analysis on the reasonably foreseeable indirect and cumulative effects associated with flow reversal and transport of NGLs through the TGP, despite many substantive requests by multiple affected state, municipal, county, and federal governmental agencies throughout the analysis process. This is a fundamental flaw the EA which must be corrected in an EIS.

VII. FERC violated NEPA in failing to consider impacts and risks associated with UMTP as “indirect effects.”

FERC has violated NEPA, the CEQ regulations, established case law, and common sense in failing to address the impacts and risks associated with the UMTP as “indirect effects.” FERC states in the EA:

We discuss the UMTP Project in more detail in section 1.7.1; however, if the Commission grants the abandonment, the pipeline would no longer be under the Commission’s jurisdiction. Any subsequent construction by UMTP or any other entity related to future use of the abandoned pipeline for NGL transportation would also not be under the Commission’s jurisdiction. Further, *while the abandonment would allow for whatever future use TGP ultimately decides to undertake, the abandonment would not be the cause of the future use as contemplated by CEQ regulations. Therefore, the EA does not address the potential impacts that could occur after the abandonment as indirect effects.* (EA at 4, emphasis added)

FERC predicates this determination on a farcical finding that there is no reasonably foreseeable connection between the proposed action (ACRP) and UMTP:

The majority of concerns brought up by commenters were related to the UMTP Project and the future use of the abandoned pipeline to transport products other than natural gas. *Although TGP has indicated that UMTP intends to use the abandoned pipeline to transport natural gas liquids (NGL), the eventual disposition of the pipeline after abandonment, whether it would be left idle, converted for another use, or eventually sold to another entity, is not part of TGP’s proposed action.* (EA at 4, emphasis added)

FERC directly contradicts the above determination under **1.2 Purpose and Need**, stating:

TGP states that the purpose of the Project is to disconnect and abandon segments of its pipeline system, which would be removed from interstate natural gas service. TGP further proposes as part of the ACRP to construct and operate new natural gas infrastructure as a replacement to maintain service to existing customers affected by the abandonment. *TGP further indicates that following abandonment, it intends to sell the pipeline to Utica Marcellus Texas Pipeline LLC (UMTP), an affiliate of TGP.* (EA at 2, emphasis added)

While FERC does state that “this EA does disclose available resource impact information for the UMTP Project in section 2.11.4 to inform stakeholders and decision makers,” (EA at 4) as we discuss elsewhere in this letter, the analysis of effects related to the UMTP is substantially inadequate by ignoring the effects associated with NGLs and flow reversal in this aging pipeline.

Whether FERC prepares an EA or an EIS (and we insist the latter), it must take a “hard look” at the direct and indirect effects of the Projects as a whole. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Direct effects are “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b).

“Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use . . . and related effects on air and water and other natural systems, including ecosystems.” *Id.* An indirect effect 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.” *Sierra Club v. Marsh*, 976 F.2d at 767.

It should be obvious that the environmental impacts associated with the UMTF are properly analyzed as indirect effects. The UMTF follows and depends upon approval of the ACRP, is explicitly the stated purpose of the ACRP, and a “person of ordinary prudence” would certainly take into account the effects and risks associated with the UMTF when considering the effects of any decision regarding the ACRP. To do otherwise is irrational.

It is strange that Kinder Morgan, the project’s petitioner and parent company of TGP and UMTF, does not suffer the same confusion as FERC with regards to the association between the ACRP and UMTF. Kinder Morgan states on their website:

Construction of the replacement facilities will enable TGP to abandon the lines by sale to UMTF, which plans to convert the lines to non-jurisdictional natural gas liquids transportation as a component of the UMTF project.²

Elsewhere on their website, Kinder Morgan states:

Kinder Morgan continues to develop its Utica Marcellus Texas Pipeline (UMTF) project which is designed to transport purity and mixed natural gas liquids produced from the Utica and Marcellus areas. Products will be transported in batches to delivery points along the Texas Gulf Coast. In February 2015, the company filed for abandonment of a Tennessee Gas Pipeline (TGP) line with the FERC. The proposed project involves the abandonment and conversion of 964 miles of natural gas service on TGP, the construction of approximately 200 miles of new pipeline from Louisiana to Texas, and new storage capacity and laterals in Ohio, all with an anticipated in-service date in the fourth quarter of 2018. The pipeline will provide connectivity to major processing and fractionation hubs in the basin and will have a maximum design capacity of 430,000 barrels per day. On June 17, 2015, the company launched a binding open season to secure commitments from potential shippers.³

² http://www.kindermorgan.com/pages/business/gas_pipelines/east/acrp/description.aspx accessed and saved 11/22/16.

³ At <http://www.kindermorgan.com/pages/projects/umtf/default.aspx> accessed and saved 11/22/16.

On September 15, 2015, Kinder Morgan published a press release stating:

HOUSTON, Sept. 15, 2015 – Kinder Morgan, Inc. (NYSE: KMI) today announced it will extend its current binding open season to review shipper comments and interest received to date, as well as continue to seek commitments for the proposed Utica Marcellus Texas Pipeline (UMTP) project, which would transport natural gas liquids and condensate produced from the Utica and Marcellus basins to delivery points along the Texas Gulf Coast, including connectivity to a Kinder Morgan dock located along the Houston Ship Channel. The binding open season scheduled to end today will now end at 5 p.m. Central Time on Dec. 15, 2015...

The proposed project would involve the abandonment and conversion of 964 miles of natural gas service on KMI's existing Tennessee Gas Pipeline, the construction of approximately 200 miles of new pipeline from Louisiana to Texas, new storage in Ohio and 120 miles of new laterals to provide basin connectivity.

The approximately \$4 billion UMTP project will be designed to transport propane, butanes, natural gasoline, y-grade and condensate in batches along the system, with a maximum design capacity of 430,000 barrels per day.⁴ (emphasis added)

The press release includes in its disclaimer a statement that:

Kinder Morgan believes that these forward-looking statements are based on reasonable assumptions.

Kinder Morgan, the petitioning company for this project, clearly and very publicly expressed their determination that the “project” includes both the “abandonment and conversion” of the TGP, and that the conversion and reversal of flow in the line to transport “propane, butanes, natural gasoline, y-grade and condensate” is “based on reasonable assumptions.”

In the “ABBREVIATED APPLICATION OF TENNESSEE GAS PIPELINE COMPANY, L.L.C. FOR AUTHORIZATION TO ABANDON CERTAIN MAINLINE FACILITIES AND A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT, INSTALL, MODIFY, OPERATE, AND MAINTAIN CERTAIN PIPELINE AND COMPRESSION FACILITIES” (Abbreviated Application) submitted to FERC on February 15, 2015 TGP states:

“Following receipt of abandonment authority and construction of the Replacement Facilities, Tennessee will remove the Abandoned Line from natural gas service and sell those facilities to its affiliate, UMTP, for conversion to natural gas liquids (“NGL”) service. Prior to the abandonment and sale of the Abandoned Line, Tennessee will also undertake activities at a series of worksites along the length of the Abandoned Line to

⁴ Kinder Morgan Press Release dated September 15, 2015.

disconnect it from the remaining Tennessee system, as discussed below.” (Abbreviated Application at 2)

Also, a large part of the argument made in the initial February 15, 2015 Abbreviated Application regarding the need for the project relies heavily on the fact that it would be repurposed to run NGLs, stating:

After abandonment and sale of the Abandoned Line, UMTTP will have the opportunity to convert the Abandoned Line to NGL transportation service as a component of UMTTP’s Utica Marcellus Texas Pipeline Project (“UMTTP Project”), which will be subject to the Commission’s Interstate Commerce Act jurisdiction. The UMTTP Project will provide a more efficient and environmentally superior means of securing the NGL pipeline capacity to meet increasing NGL transportation demand in the Marcellus and Utica regions. Due to production of liquids-rich natural gas in the Utica and Marcellus production areas, demand for takeaway capacity for NGLs has increased and local markets in the Northeast cannot absorb the growing NGL production. The lack of sufficient NGL pipeline capacity in the Northeast and Midwest traps NGLs in the Northeast and Midwest and prevents NGLs from reaching the markets with high demand for NGLs, many of which are located in the Gulf Coast region. Once the conversion activities are complete, the UMTTP Project will help meet the demand for NGL takeaway capacity from the Utica and Marcellus production regions.

The abandonment and repurposing of the Abandoned Line for NGL transportation represents an efficient use of existing infrastructure. The ultimate conversion and use of the Abandoned Line for NGL service will obviate the need for new NGL transportation facilities to achieve the same purpose of the abandonment and eventual conversion (e.g., the construction of over 1,000 miles of new greenfield NGL pipeline), and the resulting environmental and landowner impacts.

Therefore, as further demonstrated below, the Commission should determine the Project to be required by the public convenience and necessity. (Abbreviated Application at 5)

TGP further makes explicit that the purpose and intent of the abandonment is the “ultimate conversion” for NGL transmission, stating:

Tennessee’s proposal is not without precedent. The Commission has found similar requests to abandon pipeline facilities for ultimate conversion to a non-jurisdictional purpose, including the construction of new facilities to maintain service to existing customers, to be in the public interest.” (Abbreviated Application at 16)

On pages 25 and 26 of the Abbreviated Application, TGP states:

After abandonment, Tennessee intends to ultimately sell the Abandoned Line to an affiliate, UMTTP, to be repurposed as an NGL pipeline. Demand for takeaway capacity of NGLs from the Utica and Marcellus production areas has increased, and local markets in the Northeast cannot fully absorb the growing NGL production. The lack of sufficient

NGL pipeline takeaway capacity in the Northeast and Midwest traps NGLs in the Northeast and Midwest and prevents NGLs from reaching the markets with high demand for NGLs largely located on the Gulf Coast. Utilizing the Abandoned Line, the UMTF Project will help meet the current and growing demand for NGL takeaway capacity in the Utica and Marcellus production regions. NGL production in the East Coast Region has more than doubled in the past year.

Whether the Project goes forward or not, there is a need for infrastructure to allow for the transportation of NGLs to market, whether by building a new pipeline, with significant environmental and landowner impacts, or by repurposing the Abandoned Line to allow for the transport of NGLs.

While there may be other ways for NGLs to be transported to market, the best option is to repurpose existing infrastructure. The proposed Project, therefore, will allow for an economically efficient use of Tennessee's existing pipeline assets, with relatively little impact on environmental resources and pronounced public benefits. (Abbreviated Application 25-26)

We note that in Appendix 10 of the Abbreviated Application (Agency Correspondence), that even Santec, the environmental consulting firm tasked with surveying for listed species, refers to the project as the "Kinder Morgan TGP Conversion Project" in the minutes of a meeting with Kinder Morgan and Stantec staff at the Louisville Army Corps of Engineers office on October 29, 2013.

Soon after in an email from Jeff Brown of Stantec to the U.S. Forest Service, Wayne National Forest, Ironton District dated November 5, 2013, Mr. Brown states:

Thank you both very much for meeting with us last week. In summary, *the project will take 1 or 4 existing lines out of service for natural gas and be converted to natural gas liquids*. Repurposing the line will occur from Ohio to Texas. (emphasis added)

Again, among the parties petitioning and preparing the analysis there is a clear understanding the project includes both the abandonment *and* conversion.

And in a slideshow titled "Kinder Morgan Abandonment and Capacity Replacement Project (ACRP) New OH Compressor Stations Pre-Application Meeting 11/13/2014 Presented to the OH Environmental Protection Agency Division of Air Pollution Control," Kinder Morgan states on slide 4 that:

"The purpose of the ACRP will be to develop a natural gas liquids (NGLs) pipeline for the purpose of transporting YGrade NGLs from the Utica and Marcellus Shale's to the Texas Gulf Coast."

The following is a slide from that presentation:

Abandonment and Capacity Replacement Project Overview

- The purpose of the ACRP will be to develop a natural gas liquids (NGLs) pipeline for the purpose of transporting Y-Grade NGLs from the Utica and Marcellus Shale's to the Texas Gulf Coast.
- Compression
 - New OH Stations 202.5, 206.5, 211.5, 216.5 (One Titan 130 each)
 - KY Station 110 Expansion (Two Mars 100)
 - KY Station 875 Expansion (One Taurus 70)

The U.S. Fish and Wildlife Service (USFWS) has also made a determination regarding the intrinsic and causal relationship between the ACRP and UMTF. In a May 24, 2015 letter submitted to FERC (Accession No. (20160602-0019), USFWS states:

The implementing regulations for section 7(a)(2) at 50 CFR §402.02 define effects as:

"the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.... Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. *Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.* Interdependent actions are those that have no independent utility apart from the action under consideration."

Lack of federal agency jurisdiction over interrelated and interdependent actions does not remove their effects from consideration in consultation. Interrelated and interdependent actions would not occur without the federal agency action, and federal agencies must ensure, in consultation with the Service, that their actions do not jeopardize listed species or adversely modify designated critical habitat.

In this instance, the larger action is the Project, which is intended to convey natural gas liquids (NGLs) across seven states. Since neither agency has jurisdiction over the larger action, both the ACR (Commission jurisdiction) portion and the UMTP (Corps jurisdiction for its wetland and stream crossings) portion depend on the larger Project. The Commission's action for the ACR portion has no independent utility apart from the Corps' action(s) on the UMTP portion, and vice versa. Further, upland segments of the UMTP portion of the project have no independent utility apart from the wetland/stream segments or apart from the converted pipeline of the ACR portion of the Project. The federal actions and the non-federal actions related to constructing the upland portions of the UMTP that together constitute the larger Project are clearly interdependent under the ESA regulatory definitions. Therefore, section 7 consultation for any federal decision to authorize any portion of the Project must consider the effects of all the other portions of the Project.

Thus, while USFWS has insisted that the ACRP and UMTP are inherently and causally connected, and while Santec (tasked with surveying for species under the purview of USFWS) clearly considered the abandonment and conversion to be a single project, FERC has decided that there is no causal or even reasonably foreseeable connection between the projects. The lengths that FERC has gone to in order to abdicate its responsibility as the lead agency in preparing this assessment are astounding and bizarre.

VIII. Concerns over pipeline failures and NGL leaks are rational and prudent

As noted above, indirect effects are “reasonably foreseeable” if they are “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Marsh*, 976 F.2d at 767 (1st Cir. 1992). Here, a “person of ordinary prudence” would take into account the possibility of pipeline failures in reaching a decision regarding the appropriateness of converting an outdated natural gas pipeline to NGL service. As demonstrated in this letter, a wide range of federal, state, county, and municipal governments, along with various non-governmental institutions and associations, have all registered substantive concerns about the risks associated with converting the TGP to NGL service.

The Center for Biological Diversity, analyzing publicly available data reporting pipeline incidents rated “significant” by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) from 1986 through 2013, found nearly 8,000 reported incidents (nearly 300 per year on average) during that period. Richard Stover, Ph. D., and Center for Biological Diversity, *America’s Dangerous Pipelines*, available at http://www.biologicaldiversity.org/campaigns/americas_dangerous_pipelines/. Another analysis of PHMSA data on pipeline failures shows hazardous liquids pipelines (including those carrying NGLs) make up 11% of total pipeline mileage but were responsible for 56% of total pipeline incidents and 53% of property damage costs - \$3.3 billion - over the last 20 years.⁵ In 2013, hazardous liquids pipelines were responsible for 64% of incidents and nearly 80% of property damage costs.⁶

⁵ United States Pipeline Mileage and Incidents, pp. 1, 3 (2014).

⁶ *Id* at 3.

According to a 2011 U.S. Department of Transportation report:

Risks to the public from hazardous liquid and gas transmission pipelines result from the potential for an unintentional release of a product transported through the pipelines. Releases of a product carried by these pipelines can impact surrounding populations, property, and the environment, and may result in injuries or fatalities as well as property and environmental damage.

These consequences may result from fires or explosions caused by ignition of the released product. Some hazardous liquid releases can cause environmental damage, impact wildlife, or contaminate drinking water supplies.⁷

A May 4, 2016 article in Louisville Courier-Journal reported that “the Tennessee Gas Pipeline Co. has the worst safety record for this type of business.” The article goes on to state:

Among pipeline transmission companies, Tennessee Gas reported more significant incidents to the Pipeline and Hazardous Materials Safety Administration than any other operator over the last decade, The Courier-Journal has found....

Going back to 2004, an analysis of the records through May 2014 by USA TODAY and the C-J shows that of the 142 companies reporting incidents involving transmission lines, Tennessee Gas' 119 were more than twice the number for the second-highest company, Transcontinental Gas Pipeline Co., at 56. Twelve incidents were reported after Kinder Morgan announced its May 2012 purchase of Tennessee Gas.

The 119 incidents caused at least \$206 million in damage, the highest total, and at \$17,391 in damages per mile of pipe, the costliest damage rate per mile among the 10 companies with the most pipeline.

Six incidents were in Kentucky, causing \$2.4 million in damage. One was a fiery July 22, 2006, blast in Clark County that propelled piping 200 feet and burned for more than an hour near Winchester, causing \$888,000 in damage. Others were in Allen, Greenup and Green counties.⁸

The Center for Effective Government assembled an online report entitled “Map Displays Five Years of Oil Pipeline Spills.”⁹ The report, though focusing on oil pipelines specifically, makes

⁷ USDOT, The State of the National Pipeline Infrastructure, pp. 1-2 (Oct. 2011) *available at* http://opsweb.phmsa.dot.gov/pipelineforum/docs/Secretarys%20Infrastructure%20Report_Revised%20per%20PHC_103111.pdf.

⁸ Fracking pipeline company's safety questions, by James Bruggers, Louisville Courier-Journal May 4, 2015.

⁹ “Map Displays Five Years of Oil Pipeline Spills” by Amanda Starbuck, June 22, 2015. Accessed December 1, 2016 at <http://www.foreffectivegov.org/blog/map-displays-five-years-oil-pipeline-spills>

clear that it is a reasonable, rational, and prudent to consider the potential impacts of pipeline ruptures. The report states:

Since 2010, over 3,300 incidents of crude oil and liquefied natural gas leaks or ruptures have occurred on U.S. pipelines. These incidents have killed 80 people, injured 389 more, and cost \$2.8 billion in damages. They also released toxic, polluting chemicals in local soil, waterways, and air.

A report from High Country News using data from PHMSA found over 1,000 crude oil pipeline leaks over the five year period from 2010 through 2015.¹⁰ The report was predicated on the May 19 rupture of a pipeline owned by Plains All American that “killed or injured hundreds of birds, sea lions and other wildlife, sullied a long stretch of beautiful coastline.”¹¹

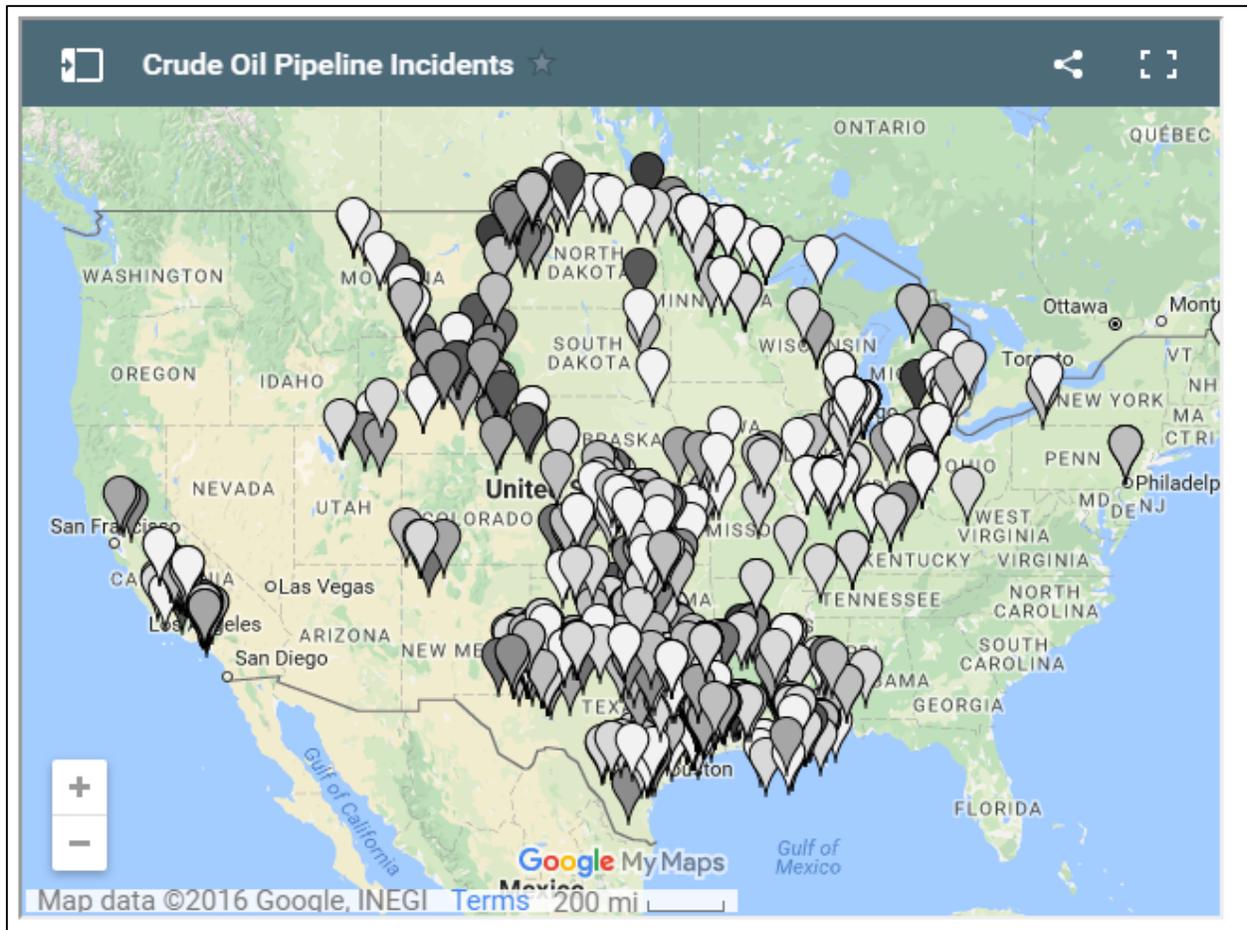
The report also states that four of the 1,000 crude oil pipeline incidents during the 5-year period reviewed were caused by lightning. In August, 2016 a lightning strike at a Clay City, Kentucky compressor station for the TGP triggered an emergency shutdown and malfunction in the emergency venting system that led to an oily residue coating the ground and properties more than ½ mile from the compressor station. So this event that happened just a few months ago is considered by FERC to be so improbable as to not warrant analysis under NEPA.

High Country News created the following map of crude oil pipeline leaks using PHMSA data¹²:

¹⁰ “Mapping 7 million gallons of crude oil spills: A thousand pipeline ruptures or spills reported nationwide in the past five years,” by Jonathan Thompson, High Country News, June 15, 2015. Accessed December 1, 2016 at <http://www.hcn.org/articles/spilling-oil-santa-barbara>

¹¹ Ibid

¹² Ibid



The EA analyzes none of this, and provides only a cursory discussion of pipeline incidents:

2.10.2 Impact on Public Safety

The available data show that natural gas transmission pipelines continue to be a safe, reliable means of energy transportation. From 1995 to 2014, there were an average of 63 significant incidents, 10 injuries, and two fatalities per year. The number of significant incidents over the more than 300,000 miles of natural gas transmission lines indicates that the risk is low for an incident at any given location. With strict observance of the pipeline safety rules and implementation of our recommendations, we conclude that operation of the Project would not represent a significant safety hazard and result in a slight increase in risk to the nearby public. (EA-138)

This value of 63 incidents per year appears to be notably less than the values provided in the other analyses cited above. But let us take this number, for the moment, at face value. Looking at this rate of significant incidents over a 20-year timeframe (not an unreasonable timeframe given the investments Kinder Morgan plans to make in this pipeline), one arrives at 1,260 significant incidents per 300,000 miles of pipeline, or an average of one incident per 238 miles of pipeline. At this incident rate we would anticipate 4 significant incidents of NGL releases into the environment along the 964 miles of the TGP over the next 20 years.

Further, by using the value of \$17,391 of damages per mile of pipeline per decade operated by TGP (provided in the Courier-Journal article cited above), and again looking at a 20-year timeframe, we should expect \$33,529,848 in damages across the 954 mile TGP.

And these pipeline leaks pose a serious risk of harm to people along pipeline routes as well as the environment. On November 8, 2004 a NGL pipeline failed in a housing division in Ivel, Kentucky. The vapor cloud from the leak ignited, seriously burning a Kentucky State Trooper evacuating those living in the area. Eight others were injured and five homes were destroyed.¹³

In 2013, a 4-inch NGL pipeline failed at a Williams Company gas-processing plant in Parachute Colorado, contaminating water and soil with various hydrocarbons, including benzene. The failure caused a leak of more than 50,000 gallons, with about 40,000 gallons evaporating and another 10,000 gallons entering the soil and groundwater.¹⁴ The leak was discovered in March 2013, and by June 2013 the leak had yet to be contained, with more than 369,000 gallons of groundwater contaminated with benzene and 1,500 cubic yards of soil contaminated and hauled to Utah for disposal.¹⁵

On September 18, 2014, the Pipeline and Hazardous Materials Safety Administration (PHMSA) published a bulletin in the Federal Register entitled Pipeline Safety: Guidance for Pipeline Flow Reversals, Product Changes and Conversion to Service¹⁶. The notice states:

PHMSA is issuing this advisory bulletin to alert operators of hazardous liquid and gas transmission pipelines of the potential significant impact flow reversals, product changes and conversion to service may have on the integrity of a pipeline. Failures on natural gas transmission and hazardous liquid pipelines have occurred after these operational changes.

Flow reversals, product changes and conversions to service may impact various aspects of a pipeline's operation, maintenance, monitoring, integrity management and emergency response. Pressure gradient, velocity, and the location, magnitude, and frequency of pressure surges and cycles may change.

While FERC makes note of the aforementioned bulletin in the EA, this does not mean that concerns over pipeline failures stemming from repurposing are not an issue and therefore do not need to be considered.

¹³ Gas explosion hurts nine in Kentucky, USA Today, November 8, 2004

¹⁴ Williams cleanup yields 9,000 gallons, by Dennis Webb, The Daily Sentinel, February 1, 2014

¹⁵ Colorado absorbs 179 oil and gas spills as Parachute cleanup continues, Bruce Finley, The Denver Post, June 22, 2013

¹⁶ Department of Transportation Pipeline and Hazardous materials Safety Administration, Pipeline Safety: Guidance for Pipelin Flow Reversals, Product Changes, and Conversion to Service. Federal Register Vol. 79, No. 181/ Thursday, September 18, 2014

Further, the EA fails to even discuss the specific components, properties, hazards, mitigation, and accident response recommendations of NGLs in the EA. The information in the EA is limited to natural gas:

2.10 Reliability and Safety

The pressurization of natural gas at a compressor station and the transportation of natural gas by pipeline involve some risk to the public in the event of an accident and subsequent release of gas. The greatest hazard is a fire or explosion following a leak or rupture at a compressor station or a major pipeline rupture.

Methane, the primary component of natural gas, is colorless, odorless, and tasteless. It is not toxic, but is classified as a simple asphyxiate, possessing a slight inhalation hazard. If breathed in high concentration, oxygen deficiency can result in serious injury or death. Methane has an auto-ignition temperature of 1,000 °F and is flammable at concentrations between 5 and 15 percent methane by volume. Unconfined mixtures of methane in air are not generally explosive. Methane is buoyant at atmospheric temperatures and disperses rapidly in air.

Natural gas liquids have unique properties and risks to groundwater, soil, and pipeline integrity that differ substantively from natural gas, and require different environmental and public safety responses. An MSDS sheet for NGLs from Conoco Phillips gives NGLs the following hazard categories:¹⁷

Flammable liquids -- Category 1

Skin corrosion/irritation -- Category 2

Aspiration Hazard -- Category 1

Specific target organ toxicity (single exposure) -- Category 3

Carcinogenicity -- Category 1B

Hazardous to the aquatic environment, chronic toxicity -- Category 2

Some of the descriptive sections of this safety data sheet state:

Unusual Fire & Explosion Hazards: Extremely flammable. This material can be ignited by heat, sparks, flames, or other sources of ignition (e.g., static electricity, pilot lights, mechanical/electrical equipment, and electronic devices such as cell phones, computers, calculators, and pagers which have not been certified as intrinsically safe). Vapors may travel considerable distances to a source of ignition where they can ignite, flash back, or explode. May create vapor/air explosion hazard indoors, in confined spaces, outdoors, or in sewers. This product will float and can be reignited on surface water. Vapors are heavier than air and can accumulate in low areas. If container is not properly cooled, it can rupture in the heat of a fire. Hazardous combustion/decomposition products,

¹⁷ ConocoPhillips Natural Gas Liquids Safety Data Sheet, accessed December 1, 2016 at http://www.conocophillips.com/sustainable-development/Documents/SMID_213_Natural%20Gas%20Liquids.pdf

including hydrogen sulfide, may be released by this material when exposed to heat or fire. Use caution and wear protective clothing, including respiratory protection.

Personal Precautions: Extremely flammable. Spillages of liquid product will create a fire hazard and may form an explosive atmosphere. Keep all sources of ignition and hot metal surfaces away from spill/release if safe to do so. The use of explosion-proof electrical equipment is recommended. May contain or release poisonous hydrogen sulfide gas. If the presence of dangerous amounts of H₂S around the spilled product is suspected, additional or special actions may be warranted, including access restrictions and use of protective equipment. Stay upwind and away from spill/release. Avoid direct contact with material. For large spillages, notify persons down wind of the spill/release, isolate immediate hazard area and keep unauthorized personnel out. Wear appropriate protective equipment, including respiratory protection, as conditions warrant (see Section 8). See Sections 2 and 7 for additional information on hazards and precautionary measures.

Toxicity: Acute aquatic toxicity studies on samples of gasoline and naphtha streams show acute toxicity values greater than 1 mg/L and mostly in the range 1-100 mg/L. These tests were carried out on water accommodated fractions, in closed systems to prevent evaporative loss. Results are consistent with the predicted aquatic toxicity of these substances based on their hydrocarbon composition. These substances should be regarded as toxic to aquatic organisms, with the potential to cause long term adverse effects in the aquatic environment. Classification: H411; Chronic Cat 2.¹⁸

An online resource from the Pipeline Operators Safety Partnership¹⁹ compares characteristics of NG versus NGL. For NG, the Partnership states that the characteristics are as follows:

Natural Gas	Natural Gas Liquids
Vapors are lighter than air	Highly volatile liquid
Dissipates rapidly into air	Vapors are heavier than air
Odorless, tasteless, and colorless	Vapors will seek low areas
May contain H ₂ S	Odorless, tasteless, and colorless
	Will travel long distances and form a vapor cloud
	Toxic

Clearly there are substantive differences between NG and NGLs in terms of hazards and impacts. The decision to abandon the TGP from NG service is the decision to proceed with repurposing for carrying NGLs. The properties and effects associated with failures in the system must be disclosed. Without addressing these difference there can be no informed decision made on this project.

¹⁸ Ibid

¹⁹ Pipeline Operators Safety Partnership, Are you prepared to: Work with our local pipeline operators? Accessed November 27, 2016 at <http://www.pipelinepartnership.com/potential-hazards.php>

IX. FERC's analysis of the project fails to comply with the Endangered Species Act and related requirements

At least 39 federally protected species have the potential to be adversely affected by the project including 31 animals and 8 plants. As the lead federal agency for the Project, FERC is required to comply with Section 7 of the Endangered Species Act (ESA) on behalf of itself and all cooperating federal agencies. Under Section 7 of the ESA, federal agencies are required to ensure that any actions authorized, funded, or carried out by the agency would not jeopardize the continued existence of a federally listed or candidate species, or result in the destruction or adverse modification of designated critical habitat of a federally listed species. 16 U.S.C. § 1536(a)(2). FERC must consult with the U.S. Fish and Wildlife Service (USFWS) to ensure that its actions do not harm protected species.

The EA reports that FERC designated the Tennessee Gas Pipeline Company (TGP) as its non-federal representative for purposes of informal consultation with USFWS, and TGP initiated informal consultation with the Service.

To be in compliance with the requirements of the ESA, FERC itself must initiate formal consultation with the Service. Further, FERC must initiate formal consultation not only on the impacts of the abandonment of the pipeline, but also on the impacts of the repurposing of the pipeline by Utica Marcellus Texas Pipeline LLC (UMTP) to transport natural gas liquids, and on the construction and maintenance of all related facilities. FERC claims in the EA that it does not have jurisdiction for the UMTP Project's impacts because the lead federal agency for the UMTP Project is the U.S. Army Corps of Engineers. FERC is incorrect in this claim; due to the undeniable interrelatedness of the projects, FERC is responsible for formal consultation on the entire project.

As stated clearly in a May 24, 2016 letter from the USFWS to FERC:

Lack of federal agency jurisdiction over interrelated and interdependent actions does not remove their effects from consideration in consultation. Interrelated and interdependent actions would not occur without the federal agency action and federal agencies must ensure, in consultation with the Service that their actions do not jeopardize listed species or adversely modify designated critical habitat. In this instance, the larger action is the Project, which is intended to convey natural gas liquids across seven states. Since neither agency has jurisdiction over the larger action, both the ACR (Commission jurisdiction) portion and the UMTP (Corps jurisdiction for its wetland and stream crossings) portion depend on the larger Project . . . Therefore, section 7 consultation for any federal decision to authorize any portion of the Project must consider the effects of all the other portions of the Project.

Moreover, FERC is responsible for consultation on the entire project because the abandonment and repurposing together are a cumulative impact. Under 40 C.F.R. 1508.7, a cumulative impact is "the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." The transfer and subsequent re-use of the abandoned pipeline is

clearly foreseeable and it is thus FERC's responsibility to initiate formal consultation on the entire project including the future conveyance of natural gas liquids.

X. FERC's analysis of the project's impacts on threatened and endangered species does not meet the requirements of NEPA.

NEPA requires that FERC fully disclose the project's impacts on all affected threatened and endangered species and their designated critical habitats. 40 C.F.R. § 1508.27(b)(9). NEPA requires analysis and discussion of all significant impacts to those species, including those impacts that may not cross the Section 7 threshold of jeopardy or adverse modification of critical habitat. The EA fails to meet this standard.

The EA does not provide sufficient information on the ESA Section 7 consultation on the project. Thus neither the public nor agency decision-makers have the benefit of FWS' expert opinion on the effects of the proposed project to threatened or endangered species and cannot determine if the effects determination in the EA will be endorsed by FWS, or whether that agency will disagree with FERC's determinations. The failure to include this vital information inhibits the public's ability to effectively comment on the EA. FERC should prepare an EIS for public comment that includes the full record of ESA consultation with FWS so that the public can be informed about the project's actual impacts to threatened and endangered species. The public needs to be provided with the views of FWS, the expert agency charged with protecting threatened and endangered species. At present, the public and agency decision makers have not been provided with full disclosure of or expert analysis on the project's impacts.

NEPA demands agency transparency in its decision-making through public involvement. *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983); *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002). "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decision-making by agencies and allows the political process to check those decisions." *New Mexico v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009). "An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit the members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 953 (9th Cir. 2008).

NEPA's procedural safeguards instruct that (1) environmental information be made available to the public before decisions are made and before action is taken, and (2) direct that this information be of "high quality," meaning that it "must concentrate on the issues that are truly significant to the action in question." 40 C.F.R. § 1500.1(b). Impacts to threatened and endangered species from the pipeline abandonment and repurposing project are highly likely and accordingly, they are "significant to the action in question." Additionally, FWS' expert opinion on the actual manner and extent of these impacts represents "high quality" information that FERC must disclose to the public. Accordingly, to allow the public to comment effectively on the EA before decisions are made and before action is taken, FERC should prepare an EIS and provide for additional public comment when the information provided by the ESA Section 7 consultation process is available.

Further, FERC is required to integrate its NEPA analysis with its requirements under the ESA and to disclose this information to the public. 40 C.F.R. § 1502.25(a) (“To 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 Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.”).

It is important to note that the NEPA process provides the public with its only opportunity to review the ESA Section 7 consultation process via public comment because, unlike the NEPA process, the ESA Section 7 consultation process itself will not involve public comment. The public’s only opportunity to “weigh in” on the impacts to threatened and endangered species via public comment occurs during the NEPA process – rendering FERC’s compliance with NEPA that much more critical in this instance as otherwise the public will not be afforded an opportunity to review and comment on FWS’ position as to the Project’s impacts on threatened and endangered species. *See New Mexico*, 565 F.3d at 704 (highlighting the importance of “informed public comment”) and *Id.* at 708 (holding inadequate public comment is not harmless).

XI. The sparse analysis of impacts to endangered and threatened species that is included in the EA is inadequate and must be supplemented.

Due to the degree to which the project may affect threatened and endangered species, FERC must prepare an Environmental Impact Statement for the entire project, including both the abandonment and the future transport of natural gas liquids. FERC failed to determine the appropriate scope for analysis to threatened and endangered species. The abandonment and capacity restoration project is clearly connected to the conversion of the abandoned line to transport natural gas liquids. Therefore, FERC must discuss the direct, indirect and cumulative effects of both projects on endangered species and must prepare an EIS. The improperly limited scope does not provide enough information to the public on the impacts of these projects to threatened and endangered species.

The harm that could come to threatened and endangered species due to project construction and the transport of natural gas liquids rises to the level of significant under Council on Environmental Quality (CEQ) regulations (40 CFR §§ 1500-1508). The determination of a significant impact is a function of both context and intensity; one of the factors that agencies must evaluate in determining the intensity of a project is the degree to which the action may adversely affect an endangered or threatened species or its critical habitat.

Of particular concern are freshwater mussels. Seventeen species of endangered freshwater mussels have the potential to be jeopardized by this Project. FERC completely fails to take into account the catastrophic harm that could come to endangered mussels in the event of a pipeline leak.

Freshwater mussels are the most endangered group of organisms in the United States with nearly 70 percent being at risk of extinction. Many species of federally protected freshwater mussels have dangerously low population sizes and exist as small, isolated populations that are highly vulnerable to extirpation. A single pollution event could thus jeopardize the continued existence of numerous species that could be significantly harmed by this project including the clubshell (*Pleurobema decisum*), cracking pearlymussel (*Hemistena lata*), fanshell (*Cyprogenia stegaria*), fat pocketbook (*Potamilus capax*), fluted kidneyshell (*Ptychobranthus subtentum*), littlewing pearlymussel (*Pegias fabula*), northern riffleshell (*Epioblasma torulosa rangiana*), orangefoot pimpleback (*Plethobasus cooperianus*), pink mucket (*Lampsilis abrupta*), rayed bean (*Villosa fabalis*), ring pink (*Obovaria retusa*), rough pigtoe (*Pleurobema plenum*), sheepnose (*Plethobasus cyphus*), slabside pearlymussel (*Pleuonaia dolabelloides*), snuffbox (*Epioblasma triquetra*), spectaclecase (*Cumberlandia monodonta*), and white wartyback (*Plethobasus cicatricosus*). The project could also cause significant adverse modification of critical habitat for the rabbitsfoot (*Quadrula cylindrica cylindrica*), fluted kidneyshell, and slabside pearlymussel.

The EA does not provide adequate information on the location of these species in relation to all aspects of the project including abandonment, construction, and transportation of natural gas liquids. The EA does not provide adequate information on the life history, habitat requirements, population status, and vulnerability to pollutants such as sediment, herbicides used in pipeline right of way maintenance, and substances that could be spilled such as natural gas liquids, for these species. The EA fails to take into account the harm that could come to mussels and their critical habitat downstream of construction activities. The EA fails to disclose or consider the physical condition and structural integrity of the pipeline that will be abandoned and repurposed. The public has not been provided with sufficient information on the nature of the substances that will be transported or on the quality of the existing older lines. FERC failed to provide sufficient detail on leak detection and monitoring.

Therefore, Commenters do not agree with FERC's conclusion that the project will not affect endangered freshwater mussels. Transporting natural gas liquids through aging pipeline in endangered mussel habitat has the potential to jeopardize the continued existence of multiple species in the affected area of the project. FERC must initiate formal consultation on all endangered freshwater mussels in the project area and must provide the consultation documents to the public in a format that allows for public comment.

As one example of the inadequacy of the analysis for freshwater mussels, there are only two remaining populations of the orangefoot pimpleback pearly mussel, one in the Tennessee River watershed and one in the Ohio River. TGP's proposed determination for this species is "may affect, not likely to adversely affect." This determination is based on horizontal directional drilling under waterbodies to avoid impacts, but fails to take into consideration the risk of accidents or spills which could jeopardize the continued existence of the species. The risk of jeopardy is equally real for other critically endangered mussels in the project area such as the pink mucket. The EA also fails to account for the cumulative downstream impacts that increased sedimentation from construction activities could have on freshwater mussels, which are highly sensitive to silt and sediment.

FERC also fails to provide sufficient information on the impacts to other endangered, threatened, proposed, and candidate species. FERC did not provide sufficient information, maps, and detail on the crossings of rivers, karst terrain, and endangered species habitat in the EA. Species of particular concern that merit more analysis include Indiana bats, northern long-eared bats, gray bats, Virginia big-eared bats, red-cockaded woodpeckers, least terns, the Kentucky cave shrimp, diamond darter critical habitat, the pygmy madtom, and the Louisiana pine snake. FERC also fails to provide FWS concurrence on determinations for these species.

In the case of the red-cockaded woodpecker and several endangered plants, surveys have not even been conducted yet. Public agencies and the public thus cannot adequately review and comment on the impacts of the project when the most basic of information has been omitted from the EA.

An example of the cursory nature of the analysis that is provided is the discussion of effects on the pygmy madtom. The conclusion for the paragraph discussing the pygmy madtom is that “the effect determination for pallid sturgeon is no effect” (EA, p. 167). The concluding sentence is obviously pasted from the paragraph for a different species and no conclusion is provided on effects to the pygmy madtom.

Another example of the superficial nature of the analysis of effects to species is that the comment period was inadequate for members of the public and public agencies to be able to thoroughly review the impacts on threatened, endangered, and sensitive species. This concern was expressed to FERC in a March 23, 2015 letter from the Kentucky State Nature Preserves Commission. The comment time period did not allow the KSNPC to fully review the impacts of pipeline crossings on their property and of crossings adjacent to their properties.

Another of the significance factors that agencies must consider under NEPA is the unique characteristics of the geographic area such as “ecologically critical” areas. One ecologically critical area that is threatened by this project and that is inadequately addressed in the EA is the Green River in Kentucky. The Green River is a world biodiversity hotspot. Historically the river harbored 66 mussel species, or 22 percent of North America’s mussel fauna (FWS 2003). It is one of the healthiest remaining refuges for freshwater mussels in the entire country and as such qualifies as an “ecologically critical area” that triggers the need for the preparation of an EIS. The Duck River in Tennessee, as well as other water bodies in the project area, are also ecologically significant because of the high levels of biodiversity they support.

The preparation of an EIS is necessary because public agencies and members of the public should be granted more time and more information on the impacts of the project, and FERC must take additional time to seriously consider and address the impacts of the project, and public concerns about these impacts. FERC has not fulfilled its duties under NEPA or the ESA in regards to analysis and disclosure of impacts to threatened, endangered, proposed, and candidate species.

XII. FERC failed to take a hard look at the cumulative effects of the ACRP and UMTF Project.

FERC failed to take a hard look at the cumulative impacts of the ACRP and UMTF Project in conjunction with other past, present, and reasonably foreseeable future actions, including shale gas development in the Marcellus and Utica shale formations. A cumulative impact is the:

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

40 C.F.R. § 1508.7. “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). Cumulative impact analyses that contain “cursory statements” and “conclusory terms” are insufficient. *See Delaware Riverkeeper*, 753 F.3d at 1319-20; *see also Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988) (although “FEIS contains sections headed ‘Cumulative Impacts,’ in truth, nothing in the FEIS provides the requisite analysis,” which, at best, contained only “conclusory remarks”).

FERC utilized various “resource-specific geographic scopes” to assess cumulative impacts. *See* EA at 140-41. For soils, water resources, and vegetation/wildlife/special-status species, FERC used HUC 12 watershed boundaries. *Id.* For land use and socioeconomics, FERC used county boundaries. *Id.* For visual resources, cultural resources, and noise, FERC used a 1-mile radius. Finally, for air quality, FERC used a 50-kilometer radius. *Id.*

Some of these geographic boundaries are arbitrary. For example, while it may make sense to consider impacts to water resources at the HUC 12 watershed boundary, FERC does not adequately explain why that same boundary is appropriate for analyzing cumulative effects on vegetation, wildlife, and special-status species. Instead, FERC simply states that “[c]umulative effects on biological resources typically are assessed within watershed boundaries due to the connectivity between biotic and abiotic resources that occurs within a drainage system.” *Id.* at 140. FERC does not cite anything in support of this assertion.

According to CEQ, cumulative effects on biological resources such as wildlife are *not* typically assessed within watershed boundaries. Instead, CEQ recommends that agencies consider cumulative effects on “resident wildlife” at either a “species habitat or ecosystem” level. CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 15 (Jan. 1997) (“CEQ Guidance”). For “migratory wildlife,” CEQ recommends analyzing cumulative effects in terms of “breeding grounds, migration route, wintering areas, or total range of affected population units.” *Id.* Using the HUC 12 watershed may make it easier for FERC, but it is not consistent with CEQ Guidance and not a rational basis for considering cumulative impacts on wildlife.

The cumulative effects analysis is also flawed because FERC improperly relied on the purported “minor” and/or “temporary” impacts of the project to minimize their cumulative effects. *See* 40 C.F.R. §§ 1508.7, 1508.27(b)(7). According to CEQ guidance, “[e]vidence is increasing that the most devastating environmental effects may not result from the direct effects

of a particular action, but from the combination of individually minor effects of multiple actions over time.” CEQ Guidance at 1. As the Ninth Circuit aptly explained:

the addition of a small amount of sediment to a creek may have only a limited impact on salmon survival, or perhaps no impact at all. But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that *no* salmon survive.

Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 994 (9th Cir. 2004) (emphasis in original).

Throughout the cumulative effects analysis, FERC claims the project would mostly have only minor and temporary effects on various resources. *See* EA at 43 (soils); 46 (groundwater); 61 (vegetation); 63 (fisheries); 67 (wildlife); 103 (socioeconomics); 144 (non-jurisdictional facilities); 151 (water resources); 153 (vegetation, wildlife, and special status species); 154 (land use); 160 (conclusion). FERC’s repeated reliance on the “minor” or “temporary” nature of the impacts ignores that, cumulatively, they can be significant, especially when considering other past, present, and reasonably foreseeable actions.

The flaw in this approach is evident when considering FERC’s review of natural gas drilling. First, it is important to note that FERC refused to consider natural gas drilling as an indirect effect because, according to FERC, the “environmental effects from natural gas production are generally neither caused by a proposed pipeline . . . nor are they reasonably foreseeable[.]” EA at 4. “In fact,” FERC continues, “the opposite causal relationship is more likely; that is, once production begins in an area, shippers or end users would support the development of a pipeline to move the produced gas.” *Id.* Commenters dispute FERC’s assertions on this issue, Nevertheless, if that is indeed what FERC believes, then FERC has an obligation to consider in detail the past and present natural gas drilling that it says is supporting the need for the ACRP and UMTP Project.

FERC, however, largely ignored the past and present impacts of natural gas drilling in the EA. While FERC “identified a number of proposed and permitted oil and gas wells in the air quality, land use, and socioeconomics geographic scope for some ACRP facilities,” natural gas drilling was excluded from other resource areas, including wildlife. EA at 142. Thus, the EA contains no analysis of the existing impacts of natural gas drilling on resources such as wildlife. Nor is there any analysis of reasonably foreseeable impacts. This is important because, unlike indirect effects, there is no “causation” element in the cumulative effects regulations. *Compare* 40 C.F.R. § 1508.8(b) *with* 40 C.F.R. § 1508.7. Thus, FERC must consider reasonably foreseeable actions in the context of its cumulative effects analysis regardless of whether it believes the project is the cause for those future actions. FERC should have considered a much broader analysis area for considering cumulative impacts on wildlife due to the past, present, and reasonably foreseeable future effects of shale gas development.

FERC claims that it “lack[s] quantitative and meaningful information regarding future gas production” to analyze the cumulative impact of gas drilling. Commenters provided

information on gas production. *See* Scoping Comments at 41-46. From this information and other sources that are available to an agency as sophisticated as FERC, it should be able to perform a meaningful analysis of the effects of natural gas drilling. Even if FERC does not know the extent of Marcellus/Utica gas extraction, however, it is certainly aware of its nature and may not simply ignore the effect. *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003). While FERC need not engage in analysis that is “fruitless or well nigh impossible,” it also “may not go to the opposite extreme” by treating a project in isolation when there is persuasive evidence concerning other projects with similar environmental consequences. *Natural Res. Def. Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975). An impermissibly restrictive cumulative impacts analysis “subject[s] the decisionmaking process contemplated by NEPA to the ‘tyranny of small decisions.’” *Kern v. BLM*, 284 F.3d 1062, 1078 (9th Cir. 2002). FERC must consider the “inter-regional” cumulative effects that the project will have, including past, present, and reasonably foreseeable shale gas extraction in the Marcellus and Utica Shale formations. *See Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988).

Dated: December 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on this official list compiled by the Secretary in this proceeding.

Dated: December 2, 2016

Respectfully submitted,

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