

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Columbia Gas Transmission, LLC)

Docket No. CP17-80-000

**JOINT MOTION TO INTERVENE AND COMMENTS IN OPPOSITION
TO REQUEST FOR EXTENSION OF TIME
BY
CHESAPEAKE CLIMATE ACTION NETWORK AND POTOMAC RIVERKEEPER,
INC. D/B/A POTOMAC RIVERKEEPER NETWORK**

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission (“Commission” or “FERC”) Rules of Practice and Procedure,¹ Chesapeake Climate Action Network and Potomac Riverkeeper, Inc. d/b/a Potomac Riverkeeper Network (together, “Conservation Intervenors”) move to intervene² and submit comments in opposition to the request by Columbia Gas Transmission, LLC for a three-year extension of time to construct and place into service the Eastern Panhandle Expansion Project.³

I. INTEREST OF PROPOSED INTERVENORS

The Chesapeake Climate Action Network (“CCAN”) is the first grassroots, nonprofit organization dedicated exclusively to fighting climate change and all of the harms fossil-fuel infrastructure causes in Maryland, Virginia, and Washington, D.C. and to securing policies that will put us on a path to climate stability. One of the primary tools CCAN uses to fight climate change and move toward a clean-energy future is building, educating, and mobilizing a powerful grassroots movement to push for a societal switch away from dirty fossil-fuel energy and toward clean energy. In support of its mission, CCAN opposes projects that could contribute to climate change, harm the public, and degrade water resources.

Potomac Riverkeeper Network (“PRKN”) is a member-supported, nonprofit organization, founded in 2000, with the mission of protecting the public’s right to clean water in the 14,000 square mile Potomac River watershed. PRKN engages in citizen enforcement of environmental

¹ 18 C.F.R. §§ 385.212, 385.214.

² The Commission granted Conservation Intervenors’ motions to intervene in the underlying proceeding. *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036, at ¶¶ 7, 8 (July 19, 2018) (“Certificate Order”).

³ Letter from Robert D. Jackson, Columbia Gas Transmission, LLC (“Columbia”), to Kimberly D. Bose, FERC, Dkt. No. CP17-80 (July 8, 2020) (eLibrary No. 20200708-5151) (“Extension Request”).

laws as well as legislative and grassroots advocacy to stop pollution, preserve river habitat, and enhance public use and enjoyment of our shared waterways. Through advocacy and citizen enforcement actions, the Potomac, Upper Potomac, and Shenandoah Riverkeepers seek to prevent or remedy pollution that damages water quality and river habitats and negatively impacts the ability of its 1,400 members and the public to use and enjoy the Potomac and Shenandoah Rivers.

II. COMMENTS IN OPPOSITION TO REQUEST

A. No good cause exists for the extension where Columbia's permitting delays were both foreseeable and avoidable

Construction deadlines may be extended only for good cause.⁴ The project proponent “bears a heavy burden of showing good cause as to why it should not be held to” its original deadline.⁵ To that end, the proponent must demonstrate “that it made good faith efforts to meet its deadline but encountered unforeseeable circumstances.”⁶ Then the Commission, “[i]n order to properly evaluate an assertion of ‘good cause[,]’” will “review carefully the facts surrounding each formal request.”⁷

Whether good cause exists here turns on whether the Eastern Panhandle Expansion Project’s (“the Project”) delay has resulted from unforeseeable circumstances or from Columbia’s own discretionary action.⁸ The record before the Commission demonstrates the latter. Columbia claims that:

Due to unforeseen delays in acquiring an easement from the government of Maryland across the Western Maryland Rail Trail, additional time is required in order to complete the construction of the authorized Project facilities. This potential easement is now the subject of litigation pending before the U.S. Court of Appeals for the Fourth Circuit, and may also be impacted by the outcome of a

⁴ See 18 C.F.R. § 385.2008(a); see also *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at ¶ 32.

⁵ *Gary & Catherine Wright*, 37 FERC ¶ 62,165, 63,171 (1986).

⁶ *Algonquin*, 170 FERC ¶ 61,144, at ¶ 32 (emphasis added); see also *Arlington Storage Co.*, 155 FERC ¶ 61,165, at ¶ 8 (2016).

⁷ *Gary & Catherine Wright*, 37 FERC ¶ 62,165, at 63,171.

⁸ Compare Letter from Richard W. Foley, FERC, to Sean P. Jamieson, Spire STL Pipeline, LLC, Dkt. No. CP 17-40 (June 18, 2020) (eLibrary No. 20200618-3095) (Exhibit 3) (granting extension request in light of construction delays resulting from COVID-19 pandemic), with *Gary & Catherine Wright*, 37 FERC ¶ 62,165, at 63,171–72 (“mere discretionary” action and circumstances “not beyond the control” of the project proponent insufficient to show good cause) (citing *Van Buren Twp.*, 27 FERC ¶ 61,361 (1984)).

similar case with a pending Petition for a Writ of Certiorari before the United States Supreme Court.⁹

The circumstances at the heart of these cases were anything but unforeseen.

The litigation pending in the Fourth Circuit arose because the Maryland Board of Public Works (“BPW”) refused to grant Columbia an easement to cross the state-owned Western Maryland Rail Trail. That Maryland would take issue with this pipeline was foreseeable. Maryland has adopted a ban on fracking,¹⁰ yet the construction of the pipeline threatens Maryland with many of the same risks to public health that Maryland’s ban seeks to avoid. In addition, the construction of additional infrastructure to support the use and development of fossil fuels runs counter to state policy that seeks to increase renewable energy production and combat climate change.¹¹ To address the greenhouse gas (“GHG”) emissions crisis, the Maryland General Assembly passed and Governor Hogan signed the Greenhouse Gas Reduction Act of 2016. The main feature of the law is a requirement that the state reduce GHG emissions 40 percent below 2006 levels by 2030. In addition, the state’s Renewable Energy Portfolio Standard law states that the General Assembly intends the state to “eliminate carbon-fueled generation from the State’s electric grid.”¹² Moreover, public interest in the project was significant from the outset: three separate environmental groups intervened in the proceeding¹³ and the Maryland Department of the Environment (“MDE”) had to hold two separate hearings on the water permit to accommodate the number of speakers.¹⁴

Given Maryland’s demonstrated commitment to clean energy and its fracking ban, it was foreseeable that MDE, recognizing the risks presented by the project, imposed 23 special conditions designed to mitigate those risks.¹⁵ It was also foreseeable that Maryland’s statewide-

⁹ Letter from Robert D. Jackson, Columbia Gas Transmission, LLC, to Kimberly D. Bose, FERC, Dkt. No. CP17-80 (July 8, 2020) (eLibrary No. 20200708-5151) (“Extension Request”).

¹⁰ See Md. Code Ann., Envir. § 14-107.1(b) (“A person may not engage in the hydraulic fracturing of a well for the exploration or production of oil or natural gas in the State.”).

¹¹ Md. Code Ann., Pub. Util. §§ 7-701 *et seq.*

¹² Md. Code Ann., Pub. Util. § 7-702(a)(2).

¹³ The three environmental groups that intervened were: Potomac Riverkeeper, Inc. d/b/a Potomac Riverkeeper Network, Allegheny Defense Project and Chesapeake Climate Action Network. In addition, the following entities intervened: NJR Energy Services Company, NiSource Distribution Companies, PSEG Energy Resources & Trade L.L.C., New Jersey Natural Gas Company, Conoco Phillips Company, Rice Energy Marketing L.L.C., Duke Energy Kentucky, Inc., Piedmont Natural Gas Company, Inc., Exelon Corporation, the cities of Charlottesville and Richmond, Virginia, National Grid Gas Delivery Companies and Paul A. Stern.

¹⁴ Michael Lewis, *Big crowd leads to continuance of natural-gas pipeline hearing in Hancock*, Herald Mail (Dec. 20, 2017), https://www.heraldmillmedia.com/news/local/big-crowd-leads-to-continuance-of-natural-gas-pipeline-hearing-in-hancock/article_71d954a4-e5d3-11e7-a70a-07ee83a2992a.html.

¹⁵ See Md. Dept. of Environment, Nontidal Wetlands and Waterways Permit No. 17-NT-3089, at 3-7 (eLibrary No. 20180316-5122), available at https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20180316-5122.

elected Governor and Comptroller and their Treasurer (elected by their legislature) would stand in unanimous opposition to the disposition of an easement for the pipeline land.¹⁶ Furthermore, Columbia was on notice that an easement from BPW was required. In its letter to Columbia, filed June 16, 2017, the Department of Natural Resources, which manages the Western Maryland Rail Trail, stated that “this project will need to be scheduled on the BPW docket.”¹⁷

The denial of the easement led Columbia to sue the State of Maryland in federal court.¹⁸ As a company routinely engaged in the business of condemning pipeline rights of way, Columbia surely was aware of the obstacle that the State’s Eleventh Amendment immunity would present to this suit in federal court—an issue that had been made even clearer by two recent federal court decisions.¹⁹ Less than a year before Columbia received its Certificate of Public Convenience and Necessity (“CPCN”), a pipeline company in Texas lost a court case because a federal court decided that a private pipeline company could not sue the state in federal court.²⁰ Like here, *Sabine* involved a condemnation action by a gas company against a state agency pursuant to a grant of eminent domain under the NGA. The gas company argued that, because the federal government can exercise eminent domain against state land in federal court, so can the government’s delegee.²¹ Rejecting this argument, the *Sabine* court observed that the company was conflating two distinct concepts: (1) the federal government’s power to exercise eminent domain; and (2) its power to sue the states in federal court.²² Those powers must be treated distinctly because they arise from different sources. Whereas the power of eminent domain is an implicit attribute of sovereignty, the power to sue states in federal court is a permission granted to the federal government by the states.²³

¹⁶ State of Md., Bd. of Public Works, Jan. 2, 2019 Meeting, Transcript at 28-29, *available at* <https://bpw.maryland.gov/MeetingDocs/2019-Jan-2-Transcript.pdf> (Governor, Comptroller, and Treasurer voting unanimously against approval of easement).

¹⁷ Letter from Greg Golden, Md. Dept. of Nat. Resources, to Amanda Sigillito *et al.*, Md. Dept. of Environment, FERC, Dkt. No. CP17-80 (July 8, 2020) (eLibrary No. 20170616-5213).

¹⁸ *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington County, Maryland*, No. 1:19-cv-01444 (D. Md. 2019).

¹⁹ *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Co., Texas*, 327 F.R.D. 131 (E.D. Tex. 2017); *In re Penneast Pipeline, LLC*, Civ. No. 18-1585, 2018 WL 6584893 (D.N.J., Dec. 14, 2018), *vacated and remanded*, 938 F.3d 96 (3d Cir. 2019), *petition for cert. filed sub nom. PennEast Pipeline Co., LLC v. New Jersey*, 2020 WL 3492643 (U.S. filed Feb. 18, 2020) (No. 19-1039).

²⁰ *Sabine*, 327 F.R.D. 131 (E.D. Tex. 2017).

²¹ *Id.* at 139.

²² *Id.* at 139-40.

²³ *Id.* at 140; see *Alden v. Maine*, 527 U.S. 706, 755 (2008) (observing that by ratifying the Constitution, the states consented to suits by the federal government).

A similar case, *In re PennEast Pipeline, LLC*, was also working its way through the court system. In December 2018—only four months after Columbia received its CPCN—a district court found that the pipeline company could sue for eminent domain in federal court.²⁴ This decision was appealed to and subsequently vacated by the U.S. Circuit Court of Appeals for the Third Circuit in September 2019,²⁵ only a few months after Columbia filed its Complaint in Condemnation with the Maryland District Court.²⁶ The PennEast case further alerted Columbia to the lingering legal questions surrounding its lawsuit. TC Energy, Columbia’s parent company,²⁷ has filed an amicus brief in support of PennEast’s request for an *en banc* hearing before the Third Circuit Court of Appeals,²⁸ demonstrating that Columbia and its parent company TC Energy are closely following PennEast’s lawsuit.

The reasons for the Project’s delay were entirely foreseeable and Columbia has not demonstrated good cause for its extension. As a result, the Commission should deny its extension request.

B. Changed circumstances have revealed that the Project is no longer necessary

Mountaineer Gas Company is pursuing alternative supplies of gas in lieu of the Project, negating the need for the pipeline. In addition, the Commission’s failure to consider the feasible alternative of shipping gas by truck before issuing the CPCN caused it to violate the National Environmental Policy Act (“NEPA”) and rendered its environmental review insufficient.

1. Mountaineer Gas Company’s actions have shown that there is no longer a need for the pipeline

Columbia proposes to construct and operate approximately 3.37 miles of 8-inch-diameter pipeline, commencing at interconnections with Columbia’s Line 1804 and Line 10240 in Fulton

²⁴ *In re Penneast Pipeline, LLC*, Civ. No. 18-1585, 2018 WL 6584893 (D.N.J., Dec. 14, 2018), *vacated and remanded*, 938 F.3d 96 (3d Cir. 2019), *petition for cert. filed sub nom. PennEast Pipeline Co., LLC v. New Jersey*, 2020 WL 3492643 (U.S. filed Feb. 18, 2020) (No. 19-1039).

²⁵ *In re Penneast Pipeline, LLC*, 938 F.3d 96 (3d Cir. 2019), *petition for cert. filed sub nom. PennEast Pipeline Co., LLC v. New Jersey*, 2020 WL 3492643 (U.S. filed Feb. 18, 2020) (No. 19-1039).

²⁶ Complaint in Condemnation, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington County, Maryland*, No. 1:19-cv-01444 (D. Md. 2019) (complaint filed May 16, 2019).

²⁷ See Columbia Gas Transmission, <https://www.tcenergy.com/operations/natural-gas/columbia-gas-transmission/> (last accessed July 30, 2020) (stating that TC Energy acquired Columbia in 2016).

²⁸ Brief Amicus Curiae of TC Energy Corporation in Support of Appellee Penneast Pipeline Company, LLC’s Petition for Panel Rehearing or Rehearing En Banc, *In re: PennEast Pipeline Company, LLC*, 2019 WL 5690784 (2019).

County, Pennsylvania, and extending through Washington County, Maryland, to a point of delivery with the local distribution system of Mountaineer Gas Company (“Mountaineer Gas”), the project shipper, in Morgan County, West Virginia. The Certificate Order found that the Eastern Panhandle Expansion Project was designed to meet Mountaineer Gas’ request for 47,500 Dth/d of capacity.²⁹ Mountaineer Gas and Columbia entered into a precedent agreement for the entire capacity of the project.³⁰

The Commission therefore found market need for the Eastern Panhandle Expansion Project based on Columbia’s agreement with one company for 100 percent of the Project’s capacity.

Mountaineer Gas received approval for and is operating approximately 23 miles of 10-inch-diameter natural gas pipeline in Morgan and Berkeley Counties, West Virginia, known as the Mountaineer Eastern Panhandle Expansion Project.³¹ “The function of [Columbia’s] pipeline is to deliver natural gas from [a] pipeline [in Pennsylvania] to the P[oint of] D[elivery] meter station of the Mountaineer Gas Pipeline.”³²

Given the uncertainty raised by the failure of the BPW to grant Columbia an easement over the Western Maryland Rail Trail, however, Mountaineer Gas is pursuing other alternatives. Specifically, Mountaineer Gas set up a facility in the town of Berkeley Springs in Morgan County, West Virginia, to receive gas from trucks. Based on conversations with the Chairman of the Berkeley County Solid Waste Authority (“BCSWA”),³³ Conservation Intervenors understand that the Morgan County site accepted liquefied natural gas (“LNG”).³⁴ The Morgan County facility regasified the gas and injected it into Mountaineer Gas’s existing pipeline. According to the BCSWA

²⁹ Certificate Order at ¶ 5.

³⁰ *Id.*

³¹ Matthew Umstead, *Mountaineer Gas: First segment of distribution line project nearly complete*, Herald Mail (Jan. 3, 2019), https://www.heraldmillmedia.com/news/tri_state/west_virginia/mountaineer-gas-first-segment-of-distribution-line-project-nearly-complete/article_c6509dc8-f482-5da6-9969-1cda44d9f6c4.html (quoting Moses Skaff, senior vice president of Mountaineer Gas, as saying “the project is more than 95 percent complete and should be ready by the end of January with the exception of work at the point of delivery from TransCanada [Columbia’s parent company, now known as TC Energy] in Morgan County.”).

³² Fed. Energy Regulatory Comm’n, Eastern Panhandle Expansion Project: Env’tl. Assessment, at 2, Dkt. No. CP17-80 (Jan. 2018) (eLibrary No. 20180126-3000) (“EA”).

³³ **Attachment A.**

³⁴ LNG is natural gas in its liquid form. LNG is produced by purifying natural gas and super-cooling it to -260°F to turn it into a liquid in a process known as liquefaction. U.S. Dept. of Energy, Energy Efficiency and Renewable Energy, Natural Gas Fuel Basics, https://afdc.energy.gov/fuels/natural_gas_basics.html (last accessed July 24, 2020).

official, Mountaineer Gas stated that it only needed the Morgan County LNG site in the winter and recently dismantled the portable equipment.³⁵



Picture of Morgan County LNG site taken on November 19, 2019, courtesy of Tracy Cannon, West Virginia resident.



Picture of Morgan County LNG site with Mountaineer Gas logo in the foreground, taken November 21, 2019, courtesy of Tracy Cannon, West Virginia resident.

³⁵ Attachment A.



Picture of gas injection equipment, taken November 21, 2019, courtesy of Tracy Cannon, West Virginia resident.

According to the same county official, Mountaineer Gas is now looking at the BCSWA's property, an old landfill site on Grapevine Road, just outside of Martinsburg, and near the Opequon Creek.³⁶ This facility would house a more permanent compressed natural gas ("CNG") facility.³⁷ CNG would be shipped in on trucks and injected into the pipeline. The practice of loading CNG and LNG onto specially designed trucks and hauling the gas between existing pipelines or to areas not connected to a natural gas distribution system is a well-known industry practice known as a "virtual pipeline."³⁸

Mountaineer Gas subscribed to receive the entire capacity of the Project. Because Mountaineer Gas has already used a temporary alternative to replace the need for the pipeline and

³⁶ **Attachment A.**

³⁷ See **Attachment A** (noting that the Mountaineer representation was looking for a three- to five-year lease with the option to purchase the land.)

³⁸ John Siggins, *Virtual Pipeline™ Technology: The Concept & Active Companies Offering the Service*, Ben Franklin Shale Gas Innovation & Commercialization Ctr. (Mar. 2016), http://www.sgicc.org/uploads/8/4/3/1/8431164/virtual_pipeline_description_company_list_march_2016.pdf.

is actively pursuing a permanent replacement, the need for the Eastern Panhandle Expansion Project has been displaced since the issuance of the Certificate Order.

To demonstrate need, Columbia insists that “[t]he precedent agreement that demonstrates the need for the Project remains in place.”³⁹ Yet FERC itself has acknowledged that the practice of relying solely on long-term precedent agreements might contribute to over-building. In June 2019, FERC issued a notice of inquiry to determine whether, among other considerations, it should “revise its approach . . . to determine whether a proposed natural gas project is or will be required by the present or future public convenience and necessity.”⁴⁰ Noting the need to “appropriately consider . . . the possibility of over building,”⁴¹ the Commission sought “input on whether, and if so how, the Commission should adjust: (1) its methodology for determining whether there is a need for a proposed project, including the Commission’s consideration of precedent agreements and contracts for service as evidence of such need.”⁴² While FERC has yet to take final action on its inquiry, the fact that it was raised at all shows that the Commission has questions about the relevance of precedent agreements.

2. FERC’s failure to consider “virtual pipeline” alternative is in violation of the National Environmental Policy Act

Even if the Commission accepts Columbia’s assertion that the project is needed because the precedent agreement with Mountaineer Gas remains in place, the fact remains that the alternatives analysis conducted by the Commission under NEPA was flawed. Under NEPA, an agency must consider “alternatives to the proposed action”⁴³—here the construction of the Eastern Panhandle Expansion Project, which was designed solely to meet the needs of Mountaineer Gas. Federal regulations oblige agencies to discuss alternatives that are feasible or reasonable.⁴⁴

Trucking in gas to supply Mountaineer Gas’s needs is clearly feasible since Mountaineer Gas is actively pursuing that option. This practice is so well-known in the industry that it has its own trademarked term: “virtual pipelines.”⁴⁵ Yet FERC’s alternatives analysis completely fails to

³⁹ Extension Request at 2.

⁴⁰ Certification of New Interstate Natural Gas Facilities, 163 FERC ¶ 61,042, Docket No. PL18-1 (Apr. 19, 2018), at ¶ 1 (eLibrary No. 20180419-3060), <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14893673>.

⁴¹ *Id.* at ¶ 3.

⁴² *Id.* at ¶ 1.

⁴³ 42 U.S.C. § 4332(2)(C)(iii).

⁴⁴ 40 C.F.R. §§ 1502.14(a)–(c), 1508.25(b)(2); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (noting that the discussion must be moored to “some notion of feasibility.”).

⁴⁵ Siggins, *supra* note 38, at 1.

discuss this alternative.⁴⁶ While it is up to an agency to define the scope of the alternatives it considers, and a court grants considerable deference to an agency's analysis, agencies *must* consider feasible options.⁴⁷ Deference to an agency, after all, “does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies,”⁴⁸ that is, discount without due consideration alternatives in favor of the proposed action.

The purpose of an agency's consideration of alternatives is to “inform both the public and the agency decisionmaker.”⁴⁹ Without a full analysis of the “virtual pipeline” alternative, FERC did not fulfill this educational imperative and its NEPA review was flawed.

C. New information has rendered certain parts of FERC's environmental analysis stale

The Commission must deny or suspend consideration of the Extension Request because the U.S. Fish and Wildlife Service's (“the Service”) assessment of the impacts of the Project on listed species has expired. The Commission's analysis of the cumulative impacts of the Project and other nearby projects has also expired. Finally, the state of climate change science has developed since the Commission issued the Environmental Assessment (“EA”) and Certificate Order, such that the Commission's climate change assessment no longer supports its conclusion that the Project is an environmentally acceptable action.

1. The Service's concurrence under the Endangered Species Act will expire before the July 19, 2023 deadline requested by Columbia

Under the Endangered Species Act, the Service needs to certify that federally permitted actions, like the Project, will not adversely affect endangered or threatened species. In the present matter, the Service's determination that the Project will not adversely affect listed species will expire at least a year before the new deadline to construct requested by Columbia. Without a valid, up-to-date certification from the Service, which is required under the Endangered Species Act, the Commission cannot grant the Extension Request.

⁴⁶ See EA at 98-103 (entire alternatives analysis with no discussion of trucking in CNG or LNG).

⁴⁷ 40 C.F.R. §§ 1502.14(a)–(c), 1508.25(b)(2).

⁴⁸ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

⁴⁹ *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989); see also 40 C.F.R. § 1502.14 (“This section . . . should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”).

A federal agency taking an action⁵⁰ that “may affect” endangered or threatened species can proceed with the action if (1) it determines that the action “is not likely to adversely affect” those species; and (2) the Service concurs with this determination.⁵¹ Pursuant to this process, FERC consulted with the Service while reviewing the consequences of the Project for federally listed species. The Service determined that two federally endangered species and one threatened species may occupy the proposed project area: the endangered Indiana bat and harperella, and the threatened northern long-eared bat.⁵² Impacts to these species could result from tree clearing and use of a construction staging area in Morgan County, West Virginia.⁵³

The Service conducted a bat mist net survey in West Virginia from May 16 to May 21, 2017.⁵⁴ The Service concurred with the Commission’s determination that the Project would not adversely affect either bat species.⁵⁵ The Service explicitly premised its concurrence on the results of the survey.⁵⁶ In a letter to Columbia’s engineering firm, the Service stated that “[s]urvey results are considered current for 5 years (the summer they are completed and the following four summer seasons). In this case, the survey will expire on May 15, 2021.”⁵⁷ In a subsequent letter to the Commission, the Service made the same remarks about the survey, except it defined the survey’s expiration date as May 15, 2022.⁵⁸

Even assuming the survey expires on the later of these two dates, the Extension Request seeks coverage under the CPCN until July 19, 2023. The survey and, accordingly, the basis for the Service’s concurrence, will expire at least a year before this date. In its concurrence letter to the Commission, the Service stated that “[i]f a significant amendment is proposed to change or expand this project, *or if timber will be removed after that date [May 15, 2021 or 2022]*, a new survey may be necessary and the Service should be contacted.”⁵⁹

⁵⁰ See 50 C.F.R. § 402.02 (defining agency “action” to include “the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid”).

⁵¹ See 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.13, 402.14(b)(1) (setting out the parameters of the “informal consultation” process under the Endangered Species Act).

⁵² Letter from John Schmidt, Field Supervisor, U.S. Fish and Wildlife Service, to Jacob Dunnell, Arcadis, U.S., Inc. 1 (Aug. 10, 2017), EA, App. E.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* (“Based on the results of the mist net survey, the Service concurs with FERC’s determination that the project is not likely to adversely affect the Indiana bat or [the northern long-eared bat].”).

⁵⁷ *Id.*

⁵⁸ Letter from John Schmidt, Field Supervisor, U.S. Fish and Wildlife Service, to James Martin, FERC 2 (Apr. 2, 2018).

⁵⁹ *Id.* (emphasis added).

The Service provided a strict period during which the survey, and the concurrence that depends on it, remain valid. Without a valid, up-to-date concurrence from the Service, a Commission decision to grant the Extension Request will not comply with the consultation requirements of the Endangered Species Act.

The Commission might consider satisfying the terms of the Service's concurrence by requiring Columbia to complete all of its tree clearing and staging activities before the concurrence expires. However, Columbia is seeking an extension that lasts until July 19, 2023, for a reason; an earlier date may be unworkable. The Commission should not shoehorn construction of the Project into an impossible timetable, producing a situation where another extension request is inevitable. But it also cannot set a new deadline that ignores the expiration of the Service's survey. If the Commission does not deny the Extension Request outright, these competing considerations demand that the Commission at least suspend its review of the request and reinitiate consultation with the Service.

2. The EA's cumulative impact analysis has expired

One of the leading purposes of an EA is to help the agency determine whether or not an Environmental Impact Statement ("EIS") is necessary.⁶⁰ If an EIS is not necessary, the EA helps to ensure that an agency has complied with NEPA.⁶¹ NEPA requires agencies to conduct a cumulative impacts analysis as part of any EA or EIS.⁶² When undertaking the analysis, the "incremental impact of the action [under review] must be considered when added to other past, present, and reasonably foreseeable future actions."⁶³ An up-to-date cumulative impacts analysis is critical to both of the aforementioned purposes of an EA. In the present matter, the Project's outdated EA contains an analysis of cumulative impacts that no longer reflects the true state of affairs and cannot serve as a basis for granting the Extension Request.

Commission staff issued the Project's EA in January 2018, over two-and-a-half years ago. The EA's cumulative impacts analysis assumed that "Project completion would occur within less

⁶⁰ See 18 C.F.R. §§ 380.2(d)(1), 380.5(a), 380.6(b); see also 40 C.F.R. §§ 1501.4(c), (e); 1508.9(a)(2).

⁶¹ See 18 C.F.R. §§ 380.2(d)(2), 380.6(c); see also 40 C.F.R. § 1508.9(a)(2).

⁶² See *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1319 (D.C. Cir. 2014) (remanding Certificate Order to Commission for failing to consider cumulative impacts under NEPA); *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 197 (4th Cir. 2005) (vacating and remanding to agency for failure to adequately consider cumulative impacts under NEPA).

⁶³ *Am. Rivers v. FERC*, 895 F.3d 32 (D.C. Cir. 2018); see 40 C.F.R. § 1508.7 (defining "cumulative impact").

than 1 year.”⁶⁴ Accordingly, the EA’s cumulative impacts analysis expired over eighteen months ago. This now-outdated cumulative impacts analysis led the Commission to conclude that the aggregated impacts of the Project and eight other nearby projects would not be significant.⁶⁵ This conclusion is no longer supported by up-to-date information about the Project’s cumulative impacts, further undermining the Commission’s conclusion that the Project is an environmentally acceptable action.

It appears that seven of the eight projects considered in the EA’s cumulative impacts analysis were completed at least one year ago. This underscores the irrelevance of the expired analysis and the impropriety of granting an extension based on the information it contains and conclusions it produced. The projects that are finished, or were scheduled to finish in 2017, are: the Berkeley Springs restaurant (the Canary Grill);⁶⁶ Sheetz gas station;⁶⁷ Tractor Supply Co.;⁶⁸ two Route 522 resurfacing projects;⁶⁹ and the Mountaineer Gas pipeline.⁷⁰ With regards to the “Bath Water Line” project considered in the EA, it looks as though the Town of Bath is moving on to an entirely new phase of its municipal water line replacement project.⁷¹ In fact, the only project considered by the EA’s cumulative impacts analysis that is still relevant is the ongoing mining operation at U.S. Silica’s Berkeley Works Quarry.

Meanwhile, new development projects have further undermined the relevance of the EA’s cumulative impacts analysis. A major roadway project is proposed for Morgan County, West Virginia—the same county impacted by the Project. The U.S. Department of Transportation has awarded West Virginia a \$20,000,000 grant for the proposed U.S. 522 Berkeley Springs Bypass Project, a four-mile-long, four-lane divided highway with a total cost of \$40,000,000.⁷² This construction will take place along the same roadway traversed by the Project⁷³ and will certainly

⁶⁴ EA at 90.

⁶⁵ EA at 97-98.

⁶⁶ The restaurant’s website (<https://www.canarygrill.com/>) makes it clear that it is open for business.

⁶⁷ A quick google search (<https://bit.ly/3jJVe7V>) reveals that the gas station is operational.

⁶⁸ The store’s website indicates that it is open (https://www.tractorsupply.com/tsc/store_BerkeleySprings-WV-25411_2144).

⁶⁹ EA at App. G.

⁷⁰ Kate Shunney, *Mountaineer Gas preps platform to receive natural gas supply*, Morgan Messenger (Oct. 16, 2019), available at <https://www.morganmessenger.com/2019/10/16/mountaineer-gas-preps-platform-to-receive-natural-gas-supply/>.

⁷¹ As is apparent from the municipality’s website (<https://townofbath.org/projects/>).

⁷² U.S. Department of Transportation, BUILD Grants, 2018 Awards 94 (Dec. 11, 2018), available at <https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/327856/build-fact-sheets-121118-355pm-update.pdf>.

⁷³ EA at App. G.

have a significant impact on natural resources in the area. The Project's EA does not mention this major project or the cumulative impacts that may result.

In addition, a major waterline project is being permitted in Berkeley County, West Virginia, which borders Morgan County to the southeast. The project will increase the supply of water to Procter and Gamble's Berkeley County facility by about a third, bringing the supply to a total of 1 million gallons per day.⁷⁴ This development will certainly impact the hydrological resources in the vicinity of the project.

There are most likely other development projects, either proposed or under construction, that the EA's outdated cumulative impact analysis could not have taken into account. This new information invalidates the EA's cumulative impacts analysis and undermines the Commission's prior determination that the cumulative impacts of the Project and other nearby development will not be significant, as well as the Commission's conclusion that the Project is an environmentally acceptable action. The Commission should not rely on the cumulative impacts analysis in the EA to grant the Extension Request.

3. The Commission's prior assessment of the Project's climate impacts does not include significant new information about climate change

Two significant developments have occurred since the EA that materially alter the Commission's evaluation of the Project's impacts on climate change. First, the continued use of the Social Cost of Carbon by the federal government, as well as some state governments, has undercut the Commission's refusal to use the widely accepted methodology to evaluate and monetize long-term climate harm. Second, the leading national and international scientific bodies on climate change have issued comprehensive new reports that substantially advance our understanding of the projected scope and severity of climate impacts.

a. The Social Cost of Carbon

⁷⁴ Berkeley County Public Service Water District, Preliminary Engineering Report: Potomac River Water Treatment Facility Upgrade and Expansion to 10 MGD 1 (Jan. 2020), available at https://www.berkeleywater.org/sites/default/files/news/prelimengrpt_jan2020_wo_appendices.pdf; see also Matthew Umstead, *Water district moves ahead with projects to provide service to P&G*, Herald-Mail Media (Oct. 3, 2018), available at https://www.heraldmillmedia.com/news/tri_state/west_virginia/water-district-moves-ahead-with-projects-to-provide-service-to-p-g/article_dd9cd8b2-c775-11e8-952b-5fa5968c2de7.html.

The Commission claimed it would be inappropriate to use the Social Cost of Carbon to assess the significance of downstream greenhouse gas emissions.⁷⁵ As demonstrated by recent federal and state government practice, the Commission’s purported concerns with the methodology are unfounded. One of the principal bases the Commission cited for its refusal to use the Social Cost of Carbon to assess the Project’s climate impacts was that “no standard methodology, including the Social Cost of Carbon tool, exists to determine how a project’s contribution to greenhouse gas emissions would translate into physical effects on the environment for purposes of evaluating the project’s impacts on climate change.”⁷⁶ However, as Commissioner LaFleur stated when concurring with the Certificate Order:

The order finds that there is no standard methodology to determine how a project’s contribution to GHG emissions would translate into physical effects on the environment for purposes of evaluating the Project’s impacts on climate change. But that is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.

To the extent such consensus was lacking in 2017 and early 2018, consensus among expert agencies now exists around the use of the Social Cost of Carbon. EPA and the U.S. Department of Transportation, in their April 2020 rollback of vehicle fuel economy and greenhouse gas emissions standards, applied a 3 percent discount rate to future climate-related economic damages.⁷⁷ Separately, in January 2020, the U.S. Department of Energy adopted four new energy efficiency standards using the original Interagency Working Group estimates of the Social Cost of Carbon.⁷⁸ Further, at least nine states have started incorporating the Social Cost of Carbon into their decision-making processes on a more regular basis since the EA issued.⁷⁹ These developments undercut the

⁷⁵ CPCN at 26.

⁷⁶ *Id.*

⁷⁷ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,735 (Apr. 30, 2020).

⁷⁸ See Energy Conservation Program: Energy Conservation Standards for Portable Air Conditioners, 85 Fed. Reg. 1378, 1421-26 (Jan. 10, 2020); Energy Conservation Program: Energy Conservation Standards for Uninterruptible Power Supplies, 85 Fed. Reg. 1447, 1477-80 (Jan. 10, 2020); Energy Conservation Program: Energy Conservation Standards for Air Compressors, 85 Fed. Reg. 1504, 1562-67 (Jan. 10, 2020); Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592, 1649-53 (Jan. 10, 2020).

⁷⁹ U.S. Gov’t Accountability Office, *Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies’ Recommendations Could Strengthen Regulatory Analysis*, GAO-20-254 30-38 (June 2020), available at <https://www.gao.gov/assets/710/707776.pdf>.

Commission's suggestion that it could not use the Social Cost of Carbon because it is not a generally accepted method of evaluating climate impacts.

b. New developments in climate change science

Scientific understanding about the projected scope and severity of the impacts of climate change has expanded substantially since the Commission issued the EA and Certificate Order. The EA acknowledged that construction and operation of the Project would result in the direct and indirect release of GHGs to the atmosphere.⁸⁰ New information materially changes the EA's discussion of climate impacts, rendering the EA's conclusions stale. The Commission cannot rely on the EA to approve the Extension Request.

In its Fourth National Climate Assessment, published in November 2018, the U.S. Global Change Research Program ("USGCRP") reports that "[o]ur understanding of and experience with climate science, impacts, risks, and adaptation in the United States have grown significantly since the Third National Climate Assessment," which reflected the state of understanding at the time the EA was issued.⁸¹ Among the USGCRP's new findings is the projection that average temperatures in the United States could increase by as much as 12°F by the end of the century compared to pre-industrial temperatures if substantial reductions in emissions do not occur.⁸² In contrast, the Third National Climate Assessment projected a 5°F to 10°F average temperature rise without substantial emissions reductions.⁸³

Scientific analysis also provides a more detailed picture today of how climate change threatens the region to be served by the Project. As the Fourth National Climate Assessment explains, scientific advances have enabled projections of future climate from global models at finer scales, resulting in enhanced local and regional information about sea-level rise and other climate impacts than was previously available.⁸⁴ Among other new information that did not appear in either the Third National Climate Assessment or the EA, the Fourth National Climate Assessment

⁸⁰ EA at 75-77.

⁸¹ U.S. Global Change Research Program, *Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States* 65 (Nov. 2018), available at https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf ("Fourth National Climate Assessment").

⁸² *Id.* at 74.

⁸³ U.S. Global Change Research Program, *Climate Change Impacts in the United States* 8 (May 2014), <https://bit.ly/3316vLi>.

⁸⁴ Fourth National Climate Assessment at 65.

projects that by 2100 the Northeast⁸⁵ will experience more extreme weather events and an increased number of lost labor hours and premature deaths due to heat-related illnesses due to climate change, in addition to other consequences.⁸⁶

Further, at the time of the EA's publication, limited knowledge existed about the projected global impacts of 1.5°C of warming and the feasibility of limiting global warming to 1.5°C.⁸⁷ In May 2018, the Intergovernmental Panel on Climate Change ("IPCC") presented that information for the first time in its special report *Global Warming of 1.5°C*. The report concluded that "[w]ithout . . . a sharp decline in greenhouse gas emissions by 2030, global warming will surpass 1.5°C in the following decades, leading to irreversible loss of the most fragile ecosystems, and crisis after crisis for the most vulnerable people and societies."⁸⁸ The IPCC's findings were dire:

- Global warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.⁸⁹
- Climate-related risks for natural and human systems are higher for global warming of 1.5°C than at present. These risks include increases in mean temperatures; hot temperature extremes; heavy precipitation; the probability of drought; sea-level rise; ecosystem impacts (including species loss and extinction); ocean temperature and acidity; and risks to health, livelihoods, food security, water supply, human security, and economic growth.⁹⁰
- There are clear benefits to keeping global warming to 1.5°C (2.7°F) rather than 2°C (3.6°F) or higher, as each of these risks is higher at 2°C than at 1.5°C.⁹¹
- Limiting global warming to 1.5°C is possible but would require unprecedented transitions in all aspects of society, with deep emissions reductions in all sectors.⁹²

Lastly, a very recent study released through the World Climate Research Programme supplemented this information by indicating that the Earth's climate is likely more sensitive to

⁸⁵ The report considers Pennsylvania, Maryland, and West Virginia to be part of the Northeast. *See id.* at 671.

⁸⁶ *Id.* at 671-72, 675-76, 682, 697-700.

⁸⁷ IPCC, *Global Warming of 1.5°C* at v (May 2018), <https://bit.ly/39viGkH>.

⁸⁸ *Global Warming of 1.5°C* at vi.

⁸⁹ *Id.* at 4 (emphasis in original).

⁹⁰ *Id.* at 5, 7-9.

⁹¹ *Id.* at v-vi.

⁹² *Id.* at v, 15.

increased levels of carbon dioxide than was previously suspected.⁹³ This new study refined the prior approximations of climate sensitivity in place at the time of the EA, which had not been modified for forty years.⁹⁴ The study also concluded that “it now appears extremely unlikely that the climate sensitivity could be low enough to avoid substantial climate change (well in excess of 2°C warming) under a high-emissions future scenario.”⁹⁵

These significant developments in our understanding of climate change did not emerge until after the EA’s publication. New scientific consensus around the likely impacts of climate change, its specific impacts on areas in the Project’s vicinity, and the importance of reducing GHG emissions over the short term (that is, by 2030) compel the Commission to deny the Extension Request. This new information has undermined the Commission’s prior conclusion that the Project is an environmentally acceptable action.

III. CONCLUSION

For these reasons, the Commission must deny Columbia’s request for a three-year extension of time to construct the Eastern Panhandle Expansion Project and place it into service.

Respectfully submitted,

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⁹³ See generally S. Sherwood, et al., *An assessment of Earth’s climate sensitivity using multiple lines of evidence*, *Reviews of Geophysics* (July 22, 2020), available at https://climateextremes.org.au/wp-content/uploads/2020/07/WCRP_ECS_Final_manuscript_2019RG000678R_FINAL_200720.pdf.

⁹⁴ See, e.g., National Research Council, *Carbon Dioxide and Climate: A Scientific Assessment* (1979), available at <https://doi.org/10.17226/12181>.

⁹⁵ Sherwood, *supra* note 93, at 1.

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Dated: July 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have on July 30, 2020, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Anne Havemann

Anne Havemann

Chesapeake Climate Action Network