

**WATER AND POWER  
LAW GROUP PC**

2140 SHATTUCK AVENUE, STE. 801  
BERKELEY, CA 94704-1229  
(510) 296-5588  
(866) 407-8073 (E-FAX)

October 19, 2015

Via Electronic and First Class Mail

Ann F. Miles, Director  
Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426  
[Ann.miles@ferc.gov](mailto:Ann.miles@ferc.gov)

Thomas L. Tidwell, Chief  
United States Forest Service  
1400 Independence Avenue SW  
Washington, DC 20250-1111  
[fsm2500@fs.fed.us](mailto:fsm2500@fs.fed.us)

**Re: Improving FERC and Forest Service NEPA Review of Proposed Pipelines to Transport Natural Gas from the Marcellus Shale through Joint Preparation of Programmatic Environmental Impact Statement (PEIS)**

Dear Ms. Miles and Mr. Tidwell:

On behalf of the conservation organization Preserve Craig, this letter and attached memorandum address the question of how the Federal Energy Regulatory Commission (FERC) and the United States Forest Service (Forest Service) can work collectively to improve their environmental review of applications for Marcellus Shale natural gas pipelines pursuant to the National Environmental Policy Act (NEPA).

FERC has regulatory authority over pipelines that carry natural gas in interstate commerce, and the Forest Service has authority over the approval of pipelines (both interstate and intrastate) that traverse national forest lands.<sup>1</sup> In the past decade, there has been an exponential increase in the number of applications to FERC and the Forest Service for approval of pipelines in Greater Appalachia to transport natural gas extracted from the Marcellus Shale. There has been a corresponding rise in concern about the environmental impacts of such

---

<sup>1</sup> We note that, pursuant to Clean Water Act section 404, 33 U.S.C. § 1344, the U.S. Army Corps of Engineers (Army Corps) has authority over pipelines that cross waters of the United States. Like the Forest Service, it is a Cooperating Agency for purposes of FERC's preparation of an Environmental Impact Statement for the Mountain Valley Pipeline Project (PF15-3).

pipelines by individuals and organizations based in or near the proposed pipeline locations. FERC and Forest Service's respective review and approval of such pipelines are subject to NEPA's environmental impact assessment requirements, and the NEPA review process has been a focus of conservation stakeholders.

To date, the agencies have approached NEPA compliance for natural gas pipelines within the Greater Appalachia region on a project-by-project basis, without the benefit of a regional programmatic environmental impact statement (PEIS) off of which project-specific NEPA documents could tier. As discussed in the attached memorandum, given the surge in pipeline proposals within this region, the reliance on project-by-project NEPA review has become increasingly ineffective and inadequate. FERC and Forest Service Staffs' review is complicated by duplicative and potentially inconsistent information regarding baseline conditions, cumulative impacts, connected actions, indirect effects, and mitigation protocols provided by the applicants and stakeholders. This contributes to concerns regarding the timing and adequacy of the analysis.

Many of the shortcomings of the current NEPA-review approach could be remedied by FERC and the Forest Service jointly preparing a PEIS focused on Marcellus Shale natural gas pipelines located in the Greater Appalachia region. As discussed in the attached memorandum, we recommend a PEIS that includes the following focus and parameters:

- Geographic Scope – Natural gas pipelines subject to FERC and/or Forest Service approval that are intended to transport natural gas extracted from the Marcellus Shale in Greater Appalachia (relying on the United States Geological Survey designation of the Marcellus Shale area);
- Temporal Scope – Cumulative impact analysis of natural gas pipelines constructed in the last decade and currently pending proposals for new pipeline construction to transport natural gas extracted from the Marcellus Shale;
- Baseline Conditions – Overview of the natural resource, scenic/viewshed, and historic resource conditions in the Greater Appalachia region where Marcellus Shale natural gas pipelines have been and are proposed to be located, with particular attention on waterways and water supplies;
- Connected Actions/Indirect Effects – Analysis of the construction of intrastate gathering lines needed to transport Marcellus Shale natural gas from well-heads to the new proposed pipelines subject to FERC and Forest Service approval;
- Regional Need for Additional Pipeline Capacity – To guide project-specific pipeline project review by FERC and the Forest Service, determination of needed regional increase in pipeline capacity to meet anticipated development of Marcellus Shale natural gas development in coming decades; and

- Uniform Pipeline Route and Watercourse Crossing Criteria – Based on regionally-specific criteria related to impacts on natural resources, viewsheds, and drinking water supplies, development of “preferred” and “not-preferred” new pipeline routes across private/non-federal lands and national forests, and development of uniform criteria for environmental assessment of pipeline crossings over watercourses.<sup>2</sup>

By addressing issues such as these in a regional PEIS, FERC and the Forest Service would not create a substitute for the project-specific NEPA review of particular pipeline projects. Rather, through use of a joint PEIS, FERC and the Forest Service would establish a uniform set of regional analysis, data, and mitigation approaches to improve and streamline subsequent, project-level NEPA review. The result would be greater certainty, clarity and efficiency for agency staff, applicants, and stakeholders, as well as greater protection of natural resources and the environment in the region (by consolidating pipeline capacity expansion projects and siting them in areas that minimize environmental impacts).

We request an opportunity to meet with FERC’s Office of Energy Projects and Forest Service Staffs to discuss the advantages of the PEIS in these circumstances. In our view, the PEIS process provides an opportunity for FERC and the Forest Service to be proactive in the creation of uniform data, analysis, and criteria that will shape the project-specific pipeline applications the agencies receive. Agency staff, project applicants, and other stakeholders would all benefit under this approach.

Sincerely,



---

Paul S. Kibel  
Richard Roos-Collins  
Julie Gantenbein  
WATER AND POWER LAW GROUP PC  
2140 Shattuck Ave., Ste. 801  
Berkeley, CA 94708  
(510) 296-5588  
[pskibel@waterpowerlaw.com](mailto:pskibel@waterpowerlaw.com)  
[rrcollins@waterpowerlaw.com](mailto:rrcollins@waterpowerlaw.com)  
[jgantenbein@waterpowerlaw.com](mailto:jgantenbein@waterpowerlaw.com)

Attorneys for PRESERVE CRAIG

---

<sup>2</sup> We recommend that FERC and Forest Service consult and cooperate with the Army Corps in the development of these uniform criteria.

Ann F. Miles and Thomas L. Tidwell  
October 19, 2015  
Page 4

Attachment 1: *Improving FERC and Forest Service NEPA Review of Proposed Interstate Pipeline to Transport Natural Gas from the Marcellus Shale* (Memorandum prepared by Water and Power Law Group PC)

Cc:

Hon. Tim Kaine  
U.S. Senate  
231 Russell Senate Office Building  
Washington, D.C. 20510

Hon. Bob Goodlatte  
U.S. House of Representatives  
10 Franklin Road, S.E., Suite 540  
Roanoke, VA 24011

Norman C. Bay, Chairman  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Jacqueline S. Holmes, Associate General Counsel  
Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

John Wood, Director  
Division of Pipeline Certificates  
Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426  
[john.wood@ferc.gov](mailto:john.wood@ferc.gov)

Terry Turpin, Director  
Division of Gas Environment and Engineering  
Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426  
[terryturpin@ferc.gov](mailto:terryturpin@ferc.gov)

Paul Friedman, Project Manager

Ann F. Miles and Thomas L. Tidwell  
October 19, 2015  
Page 5

Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426  
[Paul.friedman@ferc.gov](mailto:Paul.friedman@ferc.gov)

Tony Tooke, Regional Forester  
Southern Region - Region 8  
U.S. Forest Service  
1720 Peachtree Road NW  
Atlanta, GA 30309  
[MailroomR8@fs.fed.us](mailto:MailroomR8@fs.fed.us)

Kathleen Atkinson, Regional Forester  
Eastern Region - Region 9  
U.S. Forest Service  
626 East Wisconsin Ave  
Milwaukee, WI 53202

H. Thomas Speaks, Jr., Forest Supervisor  
George Washington and Jefferson National Forests  
U.S. Forest Service  
5162 Valleypointe Parkway  
Roanoke, VA 24019-3050  
[comments-southern-georgewashington-jefferson@fs.fed.us](mailto:comments-southern-georgewashington-jefferson@fs.fed.us)

Jennifer Adams, Special Project Coordinator  
George Washington and Jefferson National Forests  
U.S. Forest Service  
5162 Valleypointe Parkway  
Roanoke, VA 24019-3050  
[jenniferpadams@fs.fed.us](mailto:jenniferpadams@fs.fed.us)

Clyde Thompson, Forest Supervisor  
United States Forest Service  
Monongahela National Forest  
200 Sycamore Street  
Elkins, West Virginia 26241  
[cnthompson@fs.fed.us](mailto:cnthompson@fs.fed.us)

Colonel Bernard R. Lindstrom Commander  
US Army Corps of Engineers, Pittsburgh District  
1000 Liberty Avenue  
Pittsburgh, PA 15222-4186

Ann F. Miles and Thomas L. Tidwell

October 19, 2015

Page 6

Joshua Shaffer

US Army Corps of Engineers, Pittsburgh District

1000 Liberty Avenue

Pittsburgh, PA 15222-4186

[Joshua.d.shaffer@usace.army.mil](mailto:Joshua.d.shaffer@usace.army.mil)

Gregory Buppert and Kathryn Boudouris

Southern Environmental Law Center

201 West Main Street, Suite 14

Charlottesville, Virginia 22902-5065

[gbuppert@selcva.org](mailto:gbuppert@selcva.org)

[kboudouris@selcva.org](mailto:kboudouris@selcva.org)



**WATER AND POWER  
LAW GROUP PC**

2140 SHATTUCK AVENUE, STE. 801  
BERKELEY, CA 94704-1229  
(510) 296-5588  
(866) 407-8073 (E-FAX)

To: Preserve Craig

From: Paul Stanton Kibel  
Julie Gantenbein

Cc: Richard Roos-Collins

Date: October 19, 2015

Re: **Improving NEPA Review of Proposed Interstate Pipelines to Transport Natural Gas from the Marcellus Shale**

Preserve Craig asked the Water and Power Law Group to prepare a memorandum regarding the use of a Programmatic Environmental Impact Statement (PEIS or programmatic EIS) under the National Environmental Policy Act (NEPA) to analyze the environmental impacts of proposed interstate pipelines within Virginia and the Greater Appalachia region. You intend that this memo will be a basis for engaging with regulatory agencies and other stakeholders to assure an effective approach to the cumulative impacts of these pipelines. Our conclusion is that a programmatic EIS is permitted in these circumstances, and that there are significant precedents for preparation of such documents in the energy and natural resources sector that are instructive here

**I. Introduction**

1. Over the past decade, there has been ever-increasing interest in natural gas development in portions of such states as New York, Pennsylvania, Virginia, and West Virginia in the Greater Appalachia region that overlie the Marcellus Shale. The development includes the installation of new wells to extract natural gas from the Marcellus Shale, and the construction of gathering lines and interstate pipelines to transport Marcellus Shale natural gas from the wells to further points for distribution and consumption.

2. The Federal Energy Regulatory Commission (FERC) has jurisdiction over the construction of interstate natural gas lines. In recent years FERC has received an increasing number of applications for the construction of interstate pipelines in Greater Appalachia.

3. Some of the recent applications submitted to FERC for the construction of interstate pipelines in Greater Appalachia involve pipelines that would traverse national forests

managed by the United States Forest Service (Forest Service). The placement of natural gas pipelines on national forest land is subject to the review and approval of the Forest Service.

4. Many of the applications also propose multiple water crossings that are subject to the U.S. Army Corps of Engineers (Army Corps) permitting authority under Clean Water Act section 404(a).<sup>1</sup>

5. The construction of new interstate pipelines in Greater Appalachia will have environmental impacts, including: clearance of woodlands, vegetation and potential species habitat from pipeline corridors; effects on the landscapes; and threats to water quality and drinking water supplies, fish and recreational uses of streams, rivers, creeks and wetlands that will be crossed by new interstate pipelines. There also will be environmental impacts from the new gathering lines that will be constructed to transport Marcellus Shale natural gas from new wells to the interstate pipelines.

6. The Greater Appalachia region where the Marcellus Shale natural gas development is taking place and where new related interstate natural gas pipelines are being proposed has certain unique characteristics and resources. It is a region known for its network of pure streams, creeks and rivers; abundant woodlands, pastoral bluegrass landscapes and hillside ecosystems; and legendary whitewater rafting; numerous historical sites relating to the civil war period. These region-specific resources may be impacted by the proposed new interstate natural gas pipelines in Greater Appalachia subject to FERC's review and approval.

7. Pursuant to NEPA, FERC must prepare an environmental impact statement (EIS) prior to issuing a certification for a new interstate natural gas pipeline.<sup>2</sup> The Forest Service must conduct an environmental impact assessment prior to approving the construction and operation of natural gas pipelines on national forest lands. Similarly, the U.S. Army Corps of Engineers (Army Corps) must prepare an environmental impact assessment for certain categories of dredge and fill permits required for projects that cross waterways or wetlands. To encourage more consistent and streamlined review of projects subject to approval by multiple federal agencies, NEPA provides for something called "tiering."

- a. With NEPA tiering, federal agencies can prepare a programmatic EIS for a series of anticipated projects in a specific region with similar environmental impacts, and then rely on the analysis in the PEIS in subsequent project-specific EISs prepared for particular projects.
- b. A federal agency's use of a PEIS does not substitute for site-specific EISs for particular projects, rather it allows the site-specific EIS to "tier" off of the PEIS to promote more uniform analysis for all stakeholders involved and avoid unnecessary duplication and delay in the agency's environmental review.

---

<sup>1</sup> 33 U.S.C. § 1344(a). Section 404 requires a federal permit for the discharge of dredge and fill into navigable waters.

<sup>2</sup> 42 U.S.C. §4332(2)(C).

8. To date FERC’s approach to NEPA compliance for applications for new interstate pipelines in Greater Appalachia, and the Forest Service’s approach to NEPA compliance for applications to locate such pipelines on national forest lands, has been to conduct site-specific/project-specific EISs without tiering off of a programmatic EIS.

9. In early 2015, FERC issued a notice that it was preparing a project-specific EIS for the proposed Mountain Valley Project in Virginia and West Virginia. The Mountain Valley Project proposes a new interstate pipeline to transport natural gas extracted from the Marcellus Shale.

- a. On June 16, 2015, the Southern Environmental Law Center, Appalachian Mountain Advocates, and the Center for Biological Diversity submitted written comments to FERC recommending that FERC prepare “a single, regionally-focused EIS – a programmatic EIS – that addresses the impacts of the MVP, as well as the Atlantic Coast Pipeline, the Appalachian Connector Pipeline, and the WB Express Project, and is a comprehensive examination of the impacts of pipeline development in the Blue Ridge and Appalachia Mountain region of Virginia and West Virginia ... because of the similarity in their objectives and their routes, the alternatives analysis that FERC must evaluate for each of the four projects will significantly overlap.... Unless FERC undertakes its alternatives analysis in a single regional EIS, it runs the risk of selecting an alternative for the Mountain Valley Project that has the unanticipated effect of compounding the environmental impacts of the projects or forecloses an important alternative to the other three.”<sup>3</sup>
- b. On June 30, 2015, the project applicant, Mountain Valley Pipeline LLC, responded by letter to FERC, stating: “a programmatic EIS is not necessary or appropriate to evaluate the Project. With the exception of the Equitrans Expansion Project ... MVP and the other pipeline projects in the region are not **connected actions**. MVP is not **dependent** upon, and does not **trigger**, those other pipeline projects .... There is no basis for FERC to evaluate the environmental impacts for such fact-intensive projects in a single programmatic EIS.”<sup>4</sup>

10. As explained in this memo, Mountain Valley Pipeline LLC’s arguments are based on a misunderstanding of NEPA tiering, as well as a lack of distinction between NEPA provisions concerning connected actions and provisions concerning preparation of a programmatic EIS. When these concepts are properly understood, it is clear that FERC’s preparation of a programmatic EIS for Marcellus Shale Pipelines in Greater Appalachia (*Marcellus Shale Pipelines PEIS*) is appropriate under NEPA and its implementing regulations.

---

<sup>3</sup> Letter from Southern Environmental Law Center et al. to FERC, eLibrary no. 20150617-5044 (June 16, 2015).

<sup>4</sup> Letter from Mountain Valley Pipeline LLC to FERC, eLibrary no. 20150630-5383 (June 30, 2015).

Furthermore, given that many of the interstate Marcellus Shale natural gas pipeline applications being reviewed by FERC propose routes that traverse national forest lands, there are compelling reasons why FERC and the Forest Service should jointly prepare this *Marcellus Shale Pipelines PEIS*.

11. To date, FERC has conducted NEPA review of interstate natural gas pipeline applications in Greater Appalachia on a project-by-project basis, without the benefit of a regional programmatic EIS to inform each project review. With the recent exponential increase in applications to FERC for new interstate pipelines to transport Marcellus Shale natural gas, FERC's traditional project-by-project NEPA review has proven increasingly ineffective. Time and resources are unnecessarily spent in project-specific EISs on duplicative and inconsistent environmental assessment of regional baseline conditions, cumulative impacts, connected actions, and indirect effects; such assessment could be more efficiently and uniformly addressed in a regional programmatic EIS from which subsequent project-specific EISs could then tier. The result would be greater certainty, clarity and efficiency for pipeline project applicants and FERC staff, and greater protection of natural resources and the environment in the Greater Appalachia region.

## **II. NEPA Regulations and Guidance on When Use of a Programmatic EIS is Appropriate**

12. The Council on Environmental Quality (CEQ) is responsible for promulgating regulations to guide federal agencies in their compliance with and implementation of NEPA. It has issued regulations that explain when a Programmatic EIS is appropriate.

- a. CEQ Regulation 1502.4(c) provides: "When preparing statements on broad actions ... agencies may find it useful to evaluate the proposal(s) in one of the following ways: (1) **Geographically**, including actions occurring in the **same general** location, such as body of water, **region** or metropolitan area; (2) **Generically**, including actions which have relevant similarities, such as **common timing, impacts**, alternatives...."<sup>5</sup>
- b. CEQ Regulation 1502.20 provides: "Agencies are encouraged to **tier** their environmental impact statement to **eliminate repetitive discussion** of the same issue and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action."<sup>6</sup>

---

<sup>5</sup> 40 CFR §1502.4 (bold added).

<sup>6</sup> 40 CFR §1501.20 (bold added).

- c. CEQ Regulation 1508.28 provides: “Tiering refers to the coverage of general matters in **broader** environmental impact statements (such as national program or policy statements) with subsequent narrow statements or environmental analyses (such as regional or basin-wide program statements or ultimately **site-specific** statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analysis is: (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of a lesser scope or to **a site-specific** statement or analysis....”<sup>7</sup>
- d. In 1981, the CEQ published a document in the federal register titled “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations.” Question 24b asked: “[w]hen is an **area-wide** or overview EIS appropriate?” CEQ answered: “[t]he preparation of an **area-wide** or overview EIS may be particularly useful when **similar actions**, viewed with other reasonably foreseeable or proposed agency actions, share **common timing or geography**. For example, when a variety of **energy projects** may be located in a single watershed ... the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions ... **within that geographical area**.”<sup>8</sup>
- e. Question 24c asked: “[w]hat is the function of **tiering** in such cases?”<sup>9</sup> CEQ answered: “[t]iering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope .... In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the **energy activities reasonably foreseeable in a particular geographic area** .... This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.”<sup>10</sup>
13. In 1983, CEQ issued *Guidance Regarding NEPA Regulations*, which explained in part:

---

<sup>7</sup> 40 CFR §1508.28 (bold added).

<sup>8</sup> 46 Fed. Reg. 18026 (1981) (bold added).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (bold added).

“Tiering of environmental impact statements refers to the process of addressing a **broad**, general program, policy or proposal in an initial environmental impact statement (EIS), and analyzing a narrower **site-specific** proposal related to the initial program, plan or policy in a subsequent EIS .... If tiering is utilized, the **site-specific** EIS contains a summary of the issues discussed in the first statement. Thus, the second, or **site-specific** statement, would focus primarily on the issues relevant to the specific proposal, and would not duplicate material found in the first EIS and the agency will incorporate by reference discussions from the first statement. It is difficult to understand, given this scenario, how tiering can be criticized for adding an unnecessary layer to the NEPA process; rather, it is intended to **streamline the existing process.**”<sup>11</sup>

14. In December 2014, CEQ issued a memorandum to the heads of all federal agencies and departments titled *Effective Use of Programmatic NEPA Reviews*, which provides:

- a. “In geographic settings where **several Federal actions are likely to have effects on the same environmental resources** it may be advisable for the lead Federal agencies to provide historical or other baseline information relating to the resources. This can be done ... through a programmatic NEPA analysis ....”<sup>12</sup>
- b. “A well-crafted programmatic NEPA review provides the basis for decisions to approve such broad or high-level decisions such as identifying geographically bounded areas within which future proposed activities can be taken or **identifying broad mitigation and conservation measures that can be applied to subsequent tiered reviews** .... Using programmatic NEPA reviews allows an agency to subsequently tier to this analysis, and analyze narrower, site- or proposal-specific issues. This **avoids repetitive broad level analyses in subsequent tiered NEPA reviews** and provides a more comprehensive picture of the consequences of multiple proposed actions.”<sup>13</sup>
- c. “A programmatic NEPA review may be appropriate when the action being considered is subject to NEPA requirements and falls into one of the four major categories of actions to which NEPA can apply .... Approving Multiple Actions: Decision to proceed with multiple projects that are temporally or spatially connected .... Programmatic examples include: **Several similar actions or projects in a region** or nationwide ... or [a] suite of **ongoing, proposed or reasonably foreseeable actions that share a common geography or timing**, such as multiple activities within a defined boundary....”<sup>14</sup>

---

<sup>11</sup> 48 Fed. Reg. 34263 (1983) (bold added).

<sup>12</sup> CEQ, *Effective Use of Programmatic NEPA Reviews* (2014), p. 9 (bold added), available at <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/programmatic-reviews>.

<sup>13</sup> *Id.*, p. 10 (bold added).

<sup>14</sup> *Id.*, p. 12 (underline in original, bold added).

- d. “Alternatives in a programmatic NEPA review are expected to reflect the level of the Federal action being proposed .... In situations where there is an existing program, plan, or policy, CEQ expects that the **no-action alternative** in an EIS would typically be the **continuation of the present course of action** until a new program, plan, or policy is developed and decided upon.”<sup>15</sup> As noted below, this approach is reflected in several of the programmatic EISs prepared in the energy/natural resource sector. In those cases the programmatic EIS analyzed the environmental effects of tiering subsequent site-specific review off a programmatic analysis versus undertaking site-specific/project-specific environmental review without tiering.
- e. “[A]gencies may propose **standard mitigation protocols** and/or operating procedures in a programmatic NEPA review and thereby provide a framework and scope for the subsequent tiered analysis of environmental impacts. For example, proposals for **long range energy or transportation infrastructure** programs are potentially good candidates for PEAs and PEISs .... By identifying potential program impacts early, **particularly cumulative and indirect impacts**, programmatic NEPA reviews provide opportunities to modify program components in order to avoid or mitigate adverse impacts when developing subsequent proposals.”<sup>16</sup>

### **III. Distinguishing “Connected Actions” from “Tiering” under NEPA**

15. Separate and distinct from the NEPA provisions relating to “tiering” and the use of programmatic EISs, there are other CEQ Regulations that pertain to “**connected actions.**” These are actions that are “closely related and therefore should be discussed in the same impact statements ... Actions are connected if they: (i) **Automatically trigger** other actions which may require environmental impact statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) Are **interdependent parts** of a larger action and **depend** on the larger action for their justification.”<sup>17</sup>

- a. Regulation 1508.25(c) makes no mention of programmatic EISs, and more specifically does not indicate that a programmatic EIS is only appropriate when connected actions are involved. Rather, CEQ Regulation 1508.25 simply clarifies that when connected actions are involved, the EIS needs to acknowledge this in some fashion. This could be accomplished, for instance, by expanding the project description for a site-specific EIS to include all of the connected actions. This could also be accomplished by analyzing the impacts of these connected actions in a single site-specific EIS either as cumulative impacts or as indirect impacts.

---

<sup>15</sup> *Id.*, pp. 21-22 (bold added).

<sup>16</sup> *Id.*, p. 23 (bold added).

<sup>17</sup> 40 CFR § 1508.25(c) (bold added).

- b. As discussed above (*see* ¶ 9b), Mountain Valley Pipeline LLC urged FERC not to prepare a programmatic EIS because the Mountain Valley Project and other pending projects were not connected actions.<sup>18</sup> Even if this characterization were true, it is not controlling for purposes of determining whether a programmatic EIS is appropriate to address common environmental issues affecting multiple interstate pipeline proposals in the same region. Further, it does not support the applicant’s claim that FERC’s preparation of a programmatic EIS under these circumstances would be improper.
- c. Further, Mountain Valley Pipeline’s concerns regarding the “evaluation of **fact-intensive projects** in a single programmatic EIS” reveals a misunderstanding of how NEPA tiering works. The fact-intensive environmental analysis of project-specific/site-specific pipeline projects would be done in the subsequent EISs that tier off of the programmatic EIS, not in the programmatic EIS itself. This confusion may relate back to the applicant not distinguishing between connected actions and tiering under NEPA.

16. NEPA requires that all EISs, whether programmatic or project-specific, include analysis of any connected actions and cumulative impacts.<sup>19</sup> However, the existence of connected actions or cumulative impacts is often relied upon by federal agencies as a primary reason for preparation of a programmatic EIS because it avoids undertaking duplicative analysis for each project-specific EIS.

#### **IV. Precedent for Use of Programmatic EISs in Energy and Natural Resources Sector**

17. Based on our review, FERC has not previously prepared programmatic EISs for multiple pipeline projects in the same geographic region. However other federal agencies (including the Forest Service) have used programmatic EISs to streamline environmental analysis for multiple energy and/or natural resource projects proposed for the same geographic region in other circumstances.

18. In November 2008, the U.S. Department of Energy and the U.S. Department of the Interior prepared a final *Programmatic Environmental Impact Statement on Designation of Energy Corridors on Federal Land in the 11 Western States*.<sup>20</sup> The purpose of the energy corridor designation was to streamline agency review and ensure consistency in applications to construct oil and natural gas pipelines in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. More specifically, the proposed energy corridor designation process would identify appropriate areas for the siting of

---

<sup>18</sup> June 30, 2105 Letter to FERC from Mountain Valley Pipeline LLC Re Mountain Valley Pipeline Project. (bold added).

<sup>19</sup> “Cumulative impact is the impact 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

<sup>20</sup> DOE/EIS-0386, available at <http://corridoreis.anl.gov/eis/guide/index.cfm#voll>.

oil and natural gas pipelines due to concerns regarding adverse impacts on wildlife, endangered species, water quality, scenic, and cultural/historical resources.

- a. The *Western Energy Corridors PEIS* explained: “Information presented in this PEIS would be used to assist in developing the guidance by ... providing information that can be used to tier to site-specific environmental reviews.”<sup>21</sup> It added that, “[b]y analyzing and presenting project-related impacts from future actions, the PEIS provides invaluable information for future site-specific environmental reviews.”<sup>22</sup>
- b. The *Western Energy Corridors PEIS* compared the proposed action (energy corridor designations) to the “No Action Alternative” and found as follows: “Under the No Action Alternative, there would be no designation of energy corridors on federal lands in the West, and the siting and development of future energy transport projects would continue following existing federal authority and agency-specific permitting practices .... ROWs [Right-of-Ways] would similarly be conducted on a project-by-project and agency-by-agency basis, and there would be **no assurance of consistency** in siting or evaluation of proposed energy transport projects crossing federal lands.”<sup>23</sup> By contrast, “[c]orridor designation would likely reduce the proliferation of ROWs across the landscape, and concentrate development to some extent within the corridors ... [and would provide] both **streamlined** administrative procedures and best practices for environmental compliance and protection.”<sup>24</sup>
- c. The rationale provided for the *Western Energy Corridors PEIS* was not that the designated oil and natural gas pipeline corridor or exclusion areas constituted connected actions, or that the individual oil and gas pipeline projects proposed in the several states constituted connected actions under NEPA. Rather, the rationale was that environmental review of site-specific oil and natural gas pipeline projects that tiered off of the *Western Energy Corridors PEIS* would be streamlined and likely result in better planning and a reduction in the proliferation of pipeline ROWs across the landscape in the region (by concentrating additional pipelines in pre-designated corridors).

19. In 2012, the U.S. Department of the Interior and the U.S. Bureau of Land Management prepared a final *Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States*.<sup>25</sup> The proposed action evaluated in this programmatic

---

<sup>21</sup> *Id.*, p. S-6.

<sup>22</sup> *Id.*, p. S-11.

<sup>23</sup> *Id.*, p. S-17.

<sup>24</sup> *Id.*, p. S-25.

<sup>25</sup> FES 12-24; DOE/EIS-0403, available at <http://solareis.anl.gov/documents/fpeis/>.

EIS included the following: establish an initial set of 17 “Solar Energy Zones” on 285,000 acres across the states of Arizona, California, Colorado, Nevada, New Mexico and Utah; protect natural and cultural resources by excluding 78.6 million acres from solar energy development (through creation of “Right-of-Way Exclusion Areas”); and establish a framework for mitigation plans to offset anticipated environmental impacts in this region from solar development.

- a. The Executive Summary to the *Western Solar PEIS* explained how subsequent site specific project EISs would tier off of the document: “[t]he Solar PEIS will not eliminate the need for site-specific environmental reviews for future utility-scale solar energy development projects.... The BLM will make separate decision as to whether or not to authorize individual solar energy projects....”<sup>26</sup>
- b. In the alternatives section of the *Western Solar PEIS*, the proposed action was compared against the “no action” alternative of the U.S. Department of the Interior and U.S. Bureau of Land Management processing applications for utility-scale solar projects without the framework provided by the proposed action (*e.g.*, without the designation of the 17 Solar Energy Zones, without designation of the Right-of-Way Exclusion Area, without standard criteria for regional mitigation plans).
- c. The environmental analysis in the programmatic EIS found that the proposed action would enable the agencies to process applications for site-specific utility-scale solar projects in these six western states in a more streamlined manner that was likely to result in improved protection of natural resources and the environment over the current practice of processing such applications in the absence of these broader plans and policies.
- d. The rationale provided for preparation of this programmatic EIS did not rely on the existence of connected actions. Rather, the rationale was that the programmatic EIS would result in less duplicative environmental analysis of baseline conditions and cumulative/indirect impacts in subsequent project-specific EISs and more consistent and environmentally-protective siting decisions and mitigation policies.

20. In March 2013, the U.S. Department of Energy, federal Western Area Power Administration, the U.S. Department of the Interior and U.S. Fish and Wildlife Service jointly prepared a final *Upper Great Plains Wind Energy Programmatic Environmental Impact Statement*.<sup>27</sup> The document covered wind energy development projects in the Upper Great Plains Customer Service Region of the Western Area Power Administration, which encompasses all or parts of the states of Iowa, Minnesota, Montana, Nebraska, North Dakota and South Dakota.

---

<sup>26</sup> *Id.*, p. 1-17.

<sup>27</sup> DOE/EIS-0408, available at <http://plainswindeis.anl.gov/documents/index.cfm>.

- a. The *Upper Great Plains Wind PEIS* stated that, “[t]he proposed action is for Western [Western Area Power Administration] and the USFWS to streamline the environmental reviews for wind energy projects that will interconnect to Western’s transmission facilities or that would require consideration of an easement exchange to accommodate wind energy development that may affect easements managed by the USFWS. Under the proposed action, the agencies would identify **standardized environmental evaluation procedures, BMPs [best management practices], and mitigation measures** that would be applied to wind energy projects requesting interconnections or easement exchanges.”<sup>28</sup>
- b. Of particular significance in terms of FERC’s review of proposed natural gas pipelines that would be located on private/non-federal lands, the scope of the *Upper Great Plains Wind PEIS* was **not** limited to the siting of wind energy projects and transmission infrastructure on federal lands. This is because one of the lead federal NEPA agencies for the *Upper Great Plains Wind PEIS*, the Western Area Power Administration, had eminent domain authority to obtain easements on behalf of private utilities for power transmission facilities located on private/non-federal lands. The *Upper Great Plains Wind PEIS* therefore was also intended to establish standardized environmental evaluation procedures and BMPs for the Western Area Power Administration’s review of applications for the agency to exercise its eminent domain authority to secure easements on private/non-federal land.
- c. The approach taken with the *Upper Great Plains Wind PEIS* (in which the Western Area Power Administration jointly prepared the programmatic EIS with the Department of Interior that owned lands where wind energy infrastructure would be located) is therefore similar to the approach we have suggested for the *Marcellus Shale Pipelines PEIS* (in which FERC would jointly prepare the programmatic EIS with the Forest Service).
- d. With regard to the use of federal eminent domain powers to obtain easements on private/non-federal land, the *Upper Great Plains Wind PEIS* states: “[p]roject developers seeking to place wind energy facilities on easements managed by the USFWS shall consult with appropriate Federal, State and local agencies regarding specific projects as early in the planning process as appropriate .... Easements or portions of easements may be excluded from wind energy development on the basis of findings of unacceptable resource impacts that conflict with existing and planned conservation needs and/or cannot be suitably avoided or mitigated.”<sup>29</sup>
- e. The *Upper Great Plains Wind PEIS* stated that the benefits of the proposed action included, “[c]onsistency of the application and authorization process. Implementation of the proposed **standardized environmental review**

---

<sup>28</sup> *Id.*, p. ES-3 (bold added).

<sup>29</sup> *Id.*, p. ES-9.

**procedures**, BMPs, and mitigation measures would result in **greater consistency and efficiency** in the environmental reviews of applications for wind energy interconnections and for the environmental evaluation of requests for easement exchange to accommodate wind energy development on easements lands.”<sup>30</sup>

- f. The proposed action was compared against the No Action Alternative. The Executive Summary for the *Upper Great Plains Wind PEIS* explained, “[u]nder the No Action Alternative, requests for interconnection of wind energy projects to Western’s transmission systems would be processed, reviewed and evaluated in the current manner ... [¶] NEPA analyses would be prepared by each agency, as appropriate, on a project-by-project basis and BMPs, mitigation measures and monitoring requirements would be developed on a case-by-case basis only.”<sup>31</sup>
- g. In its discussion of the No Action Alternative, the *Upper Great Plains Wind PEIS* found: “Western and the Service would not establish programmatic environmental evaluation procedures for wind energy development projects under the No Action Alternative ... future wind energy projects would continue to be evaluated solely on an individual, case-by-case-basis, and there would be no programmatic process for environmental reviews ... [¶] Compared to the various alternatives for accomplishing the proposed action, the absence of a standardized environmental process for wind energy projects would likely result in a slower rate of interconnection of wind energy developments to Western’s transmission system and evaluations and approvals for easement exchanges to accommodate wind energy facilities that may affect USFWS easements.”<sup>32</sup> It further stated, “[t]he **potential adverse impacts on natural and cultural resources associated with the No Action Alternative could be greater** than under Alternatives 1 and 2 if effective BMPs and mitigation measures are not applied to individual projects .... The absence of a standardized programmatic process for environmental reviews of wind energy projects ... could result in **inconsistencies** in the types of BMPs and mitigation measures required for individual projects.”<sup>33</sup>
- h. The rationale provided for preparation of the *Upper Great Plains Wind PEIS* was not that standardized environmental BMPs and mitigation measures for wind energy projects in the region constituted connected actions under NEPA, or that all of the individual wind energy projects proposed in the various states constituted connected actions under NEPA. Rather, the rationale was that environmental review of site-specific wind energy projects that tiered off of the *Upper Great Plains Wind PEIS* would be streamlined and less duplicative, and

---

<sup>30</sup> *Id.*, p. 2-11 (italics in original, bold added).

<sup>31</sup> *Id.*, p. ES-46.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (bold added).

would likely result in more uniform environmental BMP and mitigation measure policies on site-specific wind energy project applications in this region.

- i. On September 17, 2015, the Southern Environmental Law Center submitted a letter to the Forest Service recommending that the Forest Service prepare a programmatic EIS to address the siting of pipelines across national forest lands in Appalachia.<sup>34</sup> This recommendation highlights why, under the circumstances, a NEPA programmatic EIS to address Marcellus Shale pipelines should be prepared jointly by FERC and the Forest Service. This type of multi-federal agency programmatic EIS would be similar to the approach taken with the *Upper Great Plains Wind PEIS*, where the NEPA lead agencies included the Western Area Power Administration (which approves transmission lines across private/non-federal lands in much the same way as FERC approves interstate pipelines across non-federal lands) and the Department of the Interior (on whose lands some of the proposed wind energy generation facilities transmission lines would be located).

21. In 2004, the Forest Service prepared a programmatic EIS for the review of the proposed Sierra Nevada Forest Plan. The *Sierra Nevada Forest Plan PEIS* applied to 11 national forests that stretched from Southern California to the California-Oregon border.<sup>35</sup>

- a. The purposes of the Sierra Nevada Forest Plan included establishing limits of the total amount of timber (measured in board feet) to be logged in these 11 national forests, establishing limits on the total amount of new and reconstructed logging roads (measured in miles) allowed in the forests, and adopting uniform set-back criteria for logging proposed near streams, creeks and rivers. More specifically, the Sierra Nevada Forest Plan analyzed in the programmatic EIS set a collective cap of 90 million annual board feet of timber, and set a collective cap of 115 miles for new logging roads and 655 miles for the reconstruction of existing logging roads, for these 11 national forests.
- b. The adoption of a regional cap on the mileage of new logging roads and reconstruction of existing logging roads required the Forest Service to engage in better strategic planning and coordination in its review and approval of such roads (*e.g.*, identifying roads that could serve multiple logging sites rather approving separate roads to serve each separate logging site; *e.g.* more careful examination of whether an existing road could be repaired versus approval of construction of an entirely new road).
- c. The rationale provided for preparation of the *Sierra Nevada Forest Plan PEIS* was not that the timber board feet caps, logging road mileage caps, or consistent

---

<sup>34</sup> Letter from the Southern Environmental Law Center to H. Thomas Speaks Jr., Forest Supervisor for the George Washington and Jefferson National Forests (Sept. 17, 2015).

<sup>35</sup> Discussed in *Pacific Rivers Council v. United States Forest Service*, 689 F.3d 1012 (9th 2012), *vacated by* 133 S. Ct. 2843 (2013).

stream set-back criteria constituted connected actions under NEPA, or that individual logging projects proposed in these 11 national forests in the region constituted connected actions. Rather, the rationale was that environmental review of site-specific logging projects that tiered off of the *Sierra Nevada Forest Plan PEIS* would be streamlined and less duplicative, and would likely result in more uniform stream protection and forest protection policies on site-specific logging project applications.

V. **NEPA Law and Federal Agency Practice Supports FERC's and the Forest Service's Use of a Programmatic EIS for Review of Interstate Pipelines to Transport Marcellus Shale Natural Gas**

22. As noted above (*see* ¶ 5), the construction of new FERC-approved interstate pipelines to transport Marcellus Shale natural gas in Greater Appalachia will have numerous environmental impacts, and some of these FERC-approved interstate pipelines are proposed along routes that would traverse national forests lands subject to the Forest Service's jurisdiction.

23. As also noted above (*see* ¶ 6), the Greater Appalachia region where the Marcellus Shale natural gas development is taking place and where new related interstate natural gas pipelines are being proposed has unique characteristics and resources.

24. To better evaluate and address the significant environmental impacts on these unique resources, FERC and the Forest Service should jointly prepare a *Marcellus Shale Pipelines PEIS*.

25. As explained by CEQ, a programmatic EIS would provide functional benefits to FERC, the Forest Service and other regulatory agencies, which would contribute to streamlined and more consistent NEPA review of pipeline projects and better environmental outcomes. The scope of FERC and the Forest Service's *Marcellus Shale Pipeline PEIS* should address:

- a. Characterization of baseline conditions based on construction of previous interstate and gathering pipelines to transport Marcellus Shale natural gas in the region, as well as characterization of baseline conditions based on the previous construction of specific natural gas pipelines in the region's national forests (to avoid duplicative analysis of this information in subsequent pipeline project-specific EISs);
- b. Assessment of cumulative environmental impacts of previous and reasonably anticipated interstate and gathering pipelines to transport Marcellus Shale natural gas in the region, as well as assessment of cumulative impacts of pipelines on Forest Service lands in the region (to avoid duplication in subsequent pipeline project-specific EISs);
- c. Development of a uniform methodology for assessment "indirect impacts" and "connected actions" associated with proposed interstate natural gas pipelines (*e.g.*,

the gathering lines that would be constructed to transport natural gas from new well-heads to the new interstate pipelines);

- d. Designation of specific areas/corridors in Greater Appalachia and Forest Service lands where siting of new Marcellus Shale natural gas pipelines would be inappropriate due to environmental concerns (such as threats to contamination of drinking water supplies), and/or the development of regionally specific criteria and procedures to be applied to site-specific natural gas pipeline applications for FERC to determine whether proposed routes of new pipelines across private/non-federal lands (and for the Forest Service to determine whether proposed routes across national forest lands) are inappropriate due to environmental concerns;
  - e. Development of uniform procedures/criteria for FERC, preferably in cooperation with the Army Corps, to evaluate and mitigate risks to waterways in Greater Appalachia that would be crossed by proposed new Marcellus Shale natural gas pipelines;
  - f. Establishing appropriate regional caps on the total amount of additional interstate pipeline capacity needed in Greater Appalachia to transport natural gas and/or on the total amount of additional interstate pipeline capacity to be permitted on Forest Service lands in the region; and
  - g. Development of uniform criteria for FERC and the Forest Service to evaluate and mitigate risks to wildlife and viewsheds/scenic resources in Greater Appalachia (and national forests in the region) that could be adversely impacted by proposed new Marcellus Shale natural gas pipelines.
26. FERC's preparation of a *Marcellus Shale Pipelines PEIS* would be consistent with CEQ Regulations, guidance, and precedent.
- a. It would be consistent with CEQ Regulations 1502.4(c), 1502.20, 1508.25, and 1508.28 in that it would focus on actions occurring in a particular geographical region with common environmental impacts and would reduce repetitive discussion of baseline conditions, cumulative impacts, and indirect impacts in project specific EISs.
  - b. It would be consistent with the 1983 *CEQ Guidance Regarding NEPA Regulations* and 2014 *CEQ Memorandum on Effective Use of Programmatic EISs under NEPA* in that it would avoid duplication of information/analysis in subsequent project-specific EISs, it would address multiple federal actions in a defined geographic region that are likely to have effects on similar environmental resources, and would help identify broad and consistent mitigation and conservation measures that could be applied in subsequent tiered NEPA reviews.
  - c. It would be consistent with and analogous to 2008 *Western Energy Corridors PEIS* and 2012 *Western Solar PEIS* in that it would likely result in a reduction in

the proliferation of Marcellus Shale natural gas interstate pipelines across the landscape of Greater Appalachia by regionally designating “exclusion areas” (or perhaps “non-preferred areas”) where the siting of such pipelines would generally be considered inappropriate due to environmental concerns.

- d. It would be consistent with and analogous to 2013 *Upper Great Plains Wind PEIS* in that it would establish standardized environmental evaluation procedures and mitigation measures that FERC and the Forest Service would then use in subsequent project-specific EISs for particular pipeline projects, resulting in more uniform/consistent decision-making at the project level and greater efficiency for Marcellus Shale natural gas pipeline project applicants throughout the Greater Appalachia region. This could include the development of appropriate regional criteria and procedures to determine whether proposed routes for pipelines across private/non-federal lands and Forest Service lands are inappropriate due to environmental impacts.<sup>36</sup>
- e. It would be consistent with and analogous to the 2004 *Sierra Nevada Forest Plan PEIS* in that it would establish caps on the total regional amount of additional interstate pipeline capacity needed in Greater Appalachia to transport Marcellus Shale natural gas. This would enable FERC and the Forest Service to better coordinate and plan new pipelines across the region rather than the current practice of assuming the need for additional capacity based on the representations made in the applications for each site-specific pipeline project (in the same way that the *Sierra Nevada Forest Plan PEIS* led the Forest Service to better coordinate and plan new logging roads across a multi-state region in reference to a regional mileage cap on new logging roads).
- f. It would be consistent with and analogous to the United States Environmental Protection Agency’s 2005 preparation of a programmatic EIS on Mountaintop Coal Mining in Appalachia (*Mountaintop Mining PEIS*).<sup>37</sup> Much like FERC’s approval of interstate pipelines on private/non-federal lands, the Environmental Protection Agency has regulatory authority over mountaintop coal mining activities that take place on private/non-federal lands. Through the use of the *Mountaintop Mining PEIS* for Appalachia, the Environmental Protection Agency was able to adopt uniform environmental review and mitigation measures for

---

<sup>36</sup> It should be noted that some of the federal agency programmatic EISs discussed in this memo focused on energy and natural resource projects that would be located primarily on federal lands, and therefore often involved federal agency land use/zoning decisions concerning the designation of certain federal lands where the siting of such energy and natural resource projects would generally be inappropriate due to environmental impacts. This type of direct programmatic regional zoning on federal lands may not be applicable in the case of FERC’s review and approval of interstate natural gas pipelines because such pipelines will generally be located on private/non-federal lands. However, as discussed above in the context of the *Upper Great Plains Wind PEIS* and the Western Area Power Administration’s eminent domain authority to obtain easements for transmission lines across private/non-federal lands, there can still be important advantages and benefits to uniform, regionally-tailored criteria and procedures regardless of land ownership.

<sup>37</sup> EPA Region 3 (Philadelphia, PA), EPA-9-03-R-05002, available at <http://www3.epa.gov/region03/mtntop/#eis>.

mountaintop mining throughout the region, and set forth baseline environmental conditions for the region in a single programmatic EIS that could later be tiered off of in subsequent site-specific EISs for particular proposed mountaintop mining activities.

27. For all of the reasons stated above, existing NEPA law and non-FERC federal agency practice in the energy and natural resources sector – by such agencies as Western Area Power Administration, Environmental Protection Agency, Forest Service, Bureau of Land Management, Department of Energy, and Department of Interior – support FERC and the Forest Service’s joint preparation of a *Marcellus Shale Pipelines PEIS*. FERC and the Forest Service’s joint preparation of a programmatic EIS along these lines would improve efficiency and reduce uncertainty for pipeline project applicants in the region while simultaneously reducing the adverse environmental effects of such pipeline projects.

28. Pursuant to the “tiering” approach recommended in CEQ regulations, the preparation of a *Marcellus Shale Pipelines PEIS* by FERC and the Forest Service would not be a substitute for project-specific NEPA review of particular pipeline projects. Rather, the proposed *Marcellus Share Pipelines PEIS* would establish a uniform set of regional analysis, data and mitigation approaches that would improve and streamline such project level NEPA review by FERC, the Forest Service, and other agencies with permitting authority over pipeline projects.