

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

In the Matter of)
Rockies Express Pipeline, LLC)
Zone 3 East-to-West Project)

Docket No. CP14-498-000

**ALLEGHENY DEFENSE PROJECT AND FRESHWATER ACCOUNTABILITY
PROJECT MOTION TO ANSWER AND ANSWER TO ROCKIES EXPRESS PIPELINE**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213, Allegheny Defense Project (“Allegheny”) and FreshWater Accountability Project (“FWAP”) hereby submit their motion for leave to answer and answer to Rockies Express Pipeline’s (“REX”) January 29, 2015 “Answer in Opposition to the Late Motion to Intervene of FreshWater Accountability Project and the Comments of Allegheny Defense Project and FreshWater Accountability Project.”

I. MOTION FOR LEAVE TO ANSWER

Allegheny and FWAP respectfully request leave to answer REX’s answer. While FERC generally does not permit answers to answers,¹ it will do so when it assists FERC in its decision-making process. *See, e.g., ANR Pipeline Company*, 143 FERC § 61,225, at P 12 (2013). In this case, FERC should permit this answer because FWAP demonstrated good cause for late intervention and because it will assist FERC in its decision-making process. In particular, REX’s misrepresentation of the National Environmental Policy Act’s (“NEPA”) implementing regulations demonstrates the need for Allegheny’s and FWAP’s participation in this proceeding so that FERC’s ultimate decision is based on a robust environmental analysis and consideration of the public interest. Therefore, FERC should grant this motion to answer.

II. ANSWER

A. FWAP’S Motion for Late Intervention Should Be Granted.

REX claims that FWAP’s motion for late intervention should be denied because 1) FWAP provided no justification for missing earlier comment deadlines, 2) REX has been prejudiced, 3) FWAP did not demonstrate that other parties cannot represent its interests, and 4) public policy. None of these claims hold water. Therefore, FERC should grant FWAP’s motion for late intervention.

¹ Rule 213(a)(2) provides that “[a]n answer may not be made to....and answer..., unless otherwise ordered by the decisional authority.” 18 C.F.R. § 385.213(a)(2).

In support of its contention that FWAP allegedly did not show cause for late intervention, REX cites two cases where FERC denied intervention. These cases, however, were quite different than the situation presented by FWAP's motion. For example, REX quotes *Northern Natural Gas Co.*, 127 FERC ¶ 61,038 (2009), to explain that "[a] key purpose of the intervention deadline is to determine, early on, who the interested parties are and what information and arguments they can bring to bear." Answer at 5. This quote is incomplete and taken out of context. The full quote and context is as follows:

The Commission has previously explained that "[a] key purpose of the intervention deadline is to determine, early on, who the interested parties are and what information and arguments they can bring to bear. Interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene when events take a turn not to their liking." Allowing late intervention *at this point in the proceeding* brings very little benefit to the proceeding and potentially would create prejudice and additional burdens on the Commission, other parties, and the applicants.

Northern Natural Gas Co., 127 FERC ¶ 61,038 at P 11 (2009) (citation omitted) (emphasis added). In *Northern Natural Gas*, FERC issued the order on October 30, 2008 while the party seeking late intervention filed its motion on January 26, 2009, nearly three months *after* the date of the order. *Id.* at PP 1 and 7. That is a very different procedural posture than here where FWAP filed its motion for late intervention *before* FERC issued an order.

The other case that REX cites, *Cal. Dep't of Water Res.*, 122 FERC ¶ 61,150 (2008), offers no assistance. In the petition for review, the Ninth Circuit Court of Appeals noted that, although the parties seeking late intervention were aware of the proceeding and had even submitted comments, the motions for late intervention were not filed until *nearly two years after* the deadline for comments. *Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009) (noting that the motions for late intervention were filed "twenty-one months after" and "twenty-three months after" the deadline for comments, respectively). Here, FWAP only recently became aware of the underlying proceeding and took immediate steps to intervene to protect its interests. While FWAP's motion was filed approximately five months after the deadline for scoping comments, that is well before the lapse of time that existed in *Cal. Dep't of Water Resources*.

REX next claims that it "has already been prejudiced given the delay and disruption with [FWAP's intervention] while it remains under the Commission's consideration and given the time and expense spent by [REX] in responding to the intervention at this late hour." Answer at 6. The first part of REX's argument is nonsensical since it implies that any motion for late intervention would delay and disrupt a proceeding where FERC is still considering the underlying application. If that were the case, then there would be no purpose at all in having a process for filing a motion for late intervention.

The second part of REX's argument is that it has been prejudiced because it drafted and filed an answer "at this late hour." First, the hour is not late since FERC has not issued an order and it has only been two months since the EA was published. Second, if an applicant could demonstrate prejudice simply by pointing out that it filed an answer, then there would hardly be a case where prejudice would not be found.

As noted in FWAP's motion, FERC has typically held that untimely intervention will not cause prejudice if the intervention is sought prior to the final decision. FWAP Motion for Late Intervention at 3 (*citing Cent. Hudson Gas & Elec. Corp.*, 41 FERC ¶ 61,313 (1987)). Moreover, FERC has previously found that the *lack of prejudice itself* demonstrated "good cause shown" without examining the reason for the delay in filing. *Id.* (*citing Superior Offshore Pipeline Co.*, 68 FERC ¶ 61,089 (1994), *E. Am. Energy Corp. et al.*, 68 FERC ¶ 61,087 (1994)).²

REX next claims that FWAP failed to demonstrate that it possesses any interest in this proceeding that cannot be represented by other parties. Answer at 6. As stated in its motion, however, FWAP works to protect "the water, reservoirs, streams, and natural water habitats, ecological systems and wetlands in Southeast Ohio" and no other party in the proceeding represents those interests. FWAP Motion for Late Intervention at 5. Knowing its argument has no merit, REX cites to the fact that FWAP signed onto comments with Allegheny as evidence of adequate representation. The fact that FWAP and Allegheny filed joint comments does not mean that each organization could represent the interests of the other. As stated in Allegheny's motion to intervene, "no parties represent environmental interests related to public lands *in Pennsylvania.*" Allegheny Motion for Late Intervention at 5 (emphasis added). The interests of FWAP and Allegheny are distinct and neither organization adequately represents the interests of the other.

Finally, REX makes a public policy argument for denying FWAP's motion. This argument, however, is built on the shaky foundation of the previous arguments. As explained above, FWAP has demonstrated good cause for intervention, particularly since FERC has not issued an order in this proceeding. No other party in this proceeding adequately represents FWAP's interests in protecting Southeast Ohio's waterways and wetlands. Finally, REX failed to show any prejudice from FWAP's motion. In other words, there is no public policy argument to be made for denying FWAP's motion. Therefore, FWAP respectfully requests that FERC grant its motion for late intervention.

B. Allegheny's and FWAP's Joint Comments Should Be Accepted and Considered

1. FERC Failed to Notify Allegheny of Filings in this Proceeding.

According to REX, FERC should dismiss the Joint Comments filed by Allegheny and FWAP as untimely and unsupported. Answer at 7. As will be explained below (and as explained in the Joint Comments), there is ample support for accepting and giving careful consideration to the comments. First, however, it is necessary to address the timeliness issue. REX claims that when FERC issued the environmental schedule on October 27, 2014, no one

² In *Superior Offshore Pipeline Co.*, FERC granted the party's motion for late intervention simultaneous to granting rehearing for further consideration. 68 FERC ¶ 61,089 (1994). In other words, the party sought intervention *after* the order had been issued and FERC granted the motion without even examining the reason for the delay. FWAP should not be held to a higher standard when an order has not even been issued.

objected to the schedule. That may be but what REX may not appreciate is the fact that not all parties are being properly notified of filings in this docket.

For example, on September 4, 2014, Allegheny filed its motion for late intervention in this proceeding.³ Accession No. 20140905-5016. No parties objected to Allegheny's motion. As a result, Allegheny should have been included on the Service List and/or Mailing List for the Project.

According to FERC, "officials and individuals who have been recognized by FERC as official parties (intervenors) to specific docket and project numbers" are included on the Service List. FERC, eService, <http://www.ferc.gov/docs-filing/eservice.asp>. (Attachment 1). The Mailing List includes "the names and mailing addresses of contacts on the Service List and contacts that have been added to the Mailing List (non-intervenors) for a specific docket or project number. *Id.* At a minimum, Allegheny should be included on the Mailing List but Allegheny is not listed on *either* the Mailing List or the Service List. *See* Attachments 2-3. Thus, Allegheny should not be faulted for allegedly "untimely" comments when FERC failed to include it on the lists that provide the means for notification of docket filings.

Allegheny even took the additional step of subscribing to docket number associated with the Project. *See* Attachment 4. According to FERC, "[w]hen you register for eSubscription and subscribe to a specific docket, you'll be notified via email about all future submittals and issuances." FERC, eSubscription, <http://www.ferc.gov/docs-filing/esubscription.asp> (Attachment 5). In other words, Allegheny has exhausted every avenue in order to receive timely notification of filings in this docket. Despite this, Allegheny did not receive notification of FERC's environmental review schedule or the publication of the EA. In fact, the last email notification that Allegheny received prior to submission of the Joint Comments was on October 10, 2014 when Clinton Fuhrer submitted comments.⁴ *See* Attachment 6.

FERC's failure to provide timely notice of filings to Allegheny in this proceeding is further supported by REX itself. For example, on January 29, 2015, REX provided a "courtesy copy" of its Answer because it "did not see [Allegheny's] name on the service list in [Docket No. CP14-498-000]." *See* Attachment 7. There would be no need for REX to provide Allegheny with a "courtesy copy" of its Answer if FERC included Allegheny on the Service List.⁵

It should also be noted that this is not the only proceeding in which FERC failed to properly notify Allegheny of important filings. For example, Allegheny intervened in Columbia Gas Transmission's East Side Expansion Project (Docket No. CP14-17, Accession No. 20131206-5198), Texas Eastern Transmission's Ohio Pipeline Energy Network Project (Docket

³ While the motion was filed on September 4, 2014, it was after FERC's business hours. Therefore, the motion was not accepted and entered into the docket until September 5, 2014.

⁴ The fact that Allegheny initially received notifications of filings and then no further notifications after October 10, 2014 indicates that Allegheny was included on the Service List and subsequently removed for some reason.

⁵ Allegheny received no such "courtesy copies" from either REX or FERC when the Schedule of Environmental Review and EA were published.

No. CP14-68, Accession No. 20140922-5128), Texas Eastern Transmission's Uniontown to Gas City Project (Docket No. CP14-104, Accession No. 20140415-5010) and Transco's Leidy Southeast Expansion Project (CP13-551, Accession No. 20140910-5004). Despite intervening and commenting in all of these proceedings, FERC failed to notify Allegheny that it issued certificate orders in all of these proceedings in December 2014. See *Texas Eastern Transmission*, 149 FERC ¶ 61,198 (Dec. 2, 2014); *Texas Eastern Transmission*, 149 FERC ¶ 61,259 (Dec. 18, 2014); *Transcontinental Gas Pipe Line Co.*, 149 FERC ¶ 61,258 (Dec. 18, 2014); and *Columbia Gas Transmission*, 149 FERC ¶ 61,255 (Dec. 18, 2014). FERC failed to notify Allegheny even though it granted Allegheny's intervention in each proceeding. See *Texas Eastern Transmission*, 149 FERC ¶ 61,198 at P 9 (2014); *Texas Eastern Transmission*, 149 FERC ¶ 61,259 at P 8 (2014); *Transcontinental Gas Pipe Line Co.*, 149 FERC ¶ 61,258 at P 8 (2014); and *Columbia Gas Transmission*, 149 FERC ¶ 61,255 at P 8 (2014). As a result of FERC's failure to notify Allegheny that it issued these certificate orders, Allegheny missed the deadlines for filing rehearing requests in three of the dockets.⁶

It should also be noted that Allegheny has contacted FERC by email and phone to determine why it is not being notified of filings in these and several other dockets. For example, on November 20, 2014, Allegheny Executive Director Ryan Talbott sent an email to FERC explaining that despite the fact that Allegheny had "subscribed to several docket proceedings," we were not "receiving notifications when documents are filed in these dockets." Attachment 8. After receiving no response, Mr. Talbott called FERC around the end of November to inquire further. The FERC representative acknowledged receipt of Mr. Talbott's email and said that a response would be forthcoming. To date, Allegheny has not received any response or explanation from FERC.

Therefore, Allegheny and FWAP respectfully request that the Joint Comments be accepted and considered by FERC. Allegheny further requests that FERC provide it with timely notification of documents filed in proceedings that it has intervened in and subscribed to.

2. The EA Did Not Appropriately Address Indirect Effects from Induced Production.

REX cites several cases to support its argument that the indirect effects of induced production are neither "causally-connected" to the Project nor "reasonably foreseeable." Answer at 8. REX further claims that the Joint Comments "fail to offer evidence that the Project would facilitate the alleged drilling or provide specificity on the impacts." *Id.* None of REX's arguments are convincing.

REX places particular emphasis on the Second Circuit's unpublished decision in *Coalition for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 2012 WL 1596341 (2d Cir. 2012) to support its claim that FERC need not address the indirect impacts of gas drilling in the Marcellus and Utica shale formations. Answer at 8-11. REX's reliance on this decision, which is not binding precedent, is misplaced. As explained in the Joint Comments, the Second Circuit

⁶ Allegheny was able to file a rehearing request regarding Columbia Gas Transmission's East Side Expansion Project. Docket No. CP14-17, Accession No. 20150120-5523.

simply accepted FERC's arguments at face value and did not discuss any of the underlying case law.⁷ Joint Comments at 2. The Joint Comments proceeded to explain why FERC erred by ignoring the indirect effects of shale gas production in the EA. *Id.* at 2-8.

REX claims that the Project "is a relatively minor construction project" and that, although "the shippers who have executed precedent agreements do produce gas from the Marcellus and Utica Shales, there is no certainty that the gas they ship on Rockies Express will come from those areas." Answer at 10-11. This is simply not the case. For example, according to FERC, REX's Project is one of the largest pending projects targeting the Marcellus and Utica shales in terms of takeaway capacity. FERC, *A View From the Beltway*, p. 8 (Attachment 9). Moreover, as explained in the Joint Comments, each of four shippers is actively operating in the Marcellus and Utica shales and has disclosed the amount of mineral rights they control and estimated the number of wells they expect to drill. Joint Comments at 6-7. Thus, REX's notion that neither it nor FERC "can estimate or predict with any specificity" where the natural gas intended to flow west through REX's pipeline will come from is spurious.

REX's claim that FERC need not consider the indirect effects of shale gas production because "Congress elected to forgo regulation by the Commission of the 'production and gathering' of natural gas" is similarly unpersuasive. Although indirect effects are caused by the action, they "are later in time or farther removed in distance." 40 C.F.R. § 1508.8(b). Nothing in this regulation suggests that the effect must be under the jurisdiction of a particular agency in order to be considered by that agency. Indeed, the fact that such effects "may include growth inducing effects" including "induced changes in the pattern of land use" and "related effects on air and water and other natural systems, including ecosystems," suggests that CEQ intended action agencies to take an expansive view of indirect effects, including effects outside their jurisdiction.

Next, REX tries to distinguish the current proceeding from the Ninth Circuit's decision in *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011). Answer at 11-12. REX's arguments, however, only serve to demonstrate how similar the Project is to the situation in *Northern Plains*. For example, REX notes that the railroad in *Northern Plains* "was designed to serve specific coal mines in Southeastern Montana and connect to a main line railroad." *Id.* REX then claims that its Project, on the other hand, "is not specifically *designed* to transport gas (shale or otherwise) from any particular source." *Id.* at 12 (emphasis in original). This is contradicted by REX's own filings.

For example, in its resource reports, REX claims that:

The purpose of the Project is to serve the public interest by efficiently deploying existing pipeline assets to meet the growing market need *to transport natural gas supplies out of the Appalachian production basin of Ohio, West Virginia, and Pennsylvania....* The modification of REX's Zone 3 facilities will create economic and strategic benefits for the United States' energy portfolio *by linking increased domestic natural gas supplies*

⁷ It should be noted that the issue in *Coalition for Responsible Growth* was cumulative impacts under 40 C.F.R. § 1508.7, not indirect effects under 40 C.F.R. § 1508.8(b).

produced from the Utica and Marcellus Shale regions to attractive Midwest on- and off-system markets currently served by REX.

REX, Resource Report 1 at 1-2 (emphasis added). In other words, contrary to REX's new assertion in its Answer, the Project is clearly designed to transport gas from a specific production region, just as the railroad in *Northern Plains* was designed to transport coal from a specific production region. Therefore, FERC has an obligation to consider the indirect effects of induced production that is likely to result once the 1,200,000 Dth/d of east-to-west firm transportation service comes online.

3. The EA Did Not Appropriately Address Cumulative Impacts.

According to REX, FERC properly concluded that "cumulative impacts would be minor [and] temporary." Answer at 13 (quoting EA at 32). The quoted reference, however, demonstrates FERC's fundamental misunderstanding of what is required by CEQ's regulations. Therefore, FERC did not appropriately address cumulative impacts.

CEQ states that:

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 (emphasis added). It is the italicized language that seems to be lost on FERC. For example, the EA states that:

As previously concluded in this EA, impacts associated with the Project would be relatively minor, and therefore, when considered with past, present, and reasonably foreseeable projects within the potential region of influence, we conclude that cumulative impacts would be minor and temporary.

EA at 32. In other words, FERC concludes that because the Project-specific impacts "would be relatively minor," it necessarily follows that "cumulative impacts would be minor and temporary." Sometimes, however, "the total impact from a set of actions may be greater than the sum of their parts." *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004). It may be that REX's actions specific to reversing the flow of its pipeline may be relatively minor but the flow reversal "carrie[s] a high risk of degradation when multiplied by many projects and continued over a long time period[.]" *Kern v. BLM*, 284 F.3d 1062, 1077 (9th Cir. 2002). When an agency "disregards [the effects of individual projects] as 'localized' when they can have significant aggregate effects, it acts arbitrarily and capriciously." *Id.* That is precisely what FERC did in the EA.

For example, regarding cumulative impacts on wildlife, FERC states that other projects "would likely also affect wildlife" but "due to the limited impacts associated with the Project any

cumulative impacts on wildlife are anticipated to be minor.” EA at 31. At no point does FERC actually analyze the aggregate effects of other projects in addition to the Project’s impacts. “General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Klamath-Siskiyou*, 387 F.3d at 994 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)). FERC has provided no justification regarding why more definitive information could not be provided. As explained in the Joint Comments, there are significant aggregate effects associated with the Project. For example, Allegheny and FWAP cited research discussing the impacts that shale gas drilling has on wildlife. Joint Comments at 12-14. These impacts are anything but minimal. Therefore, FERC’s three-sentence cumulative impact analysis on wildlife does not constitute a hard look. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Finally, it is worth noting the importance of analyzing cumulative impacts in an EA as opposed to an EIS. As the Ninth Circuit has explained:

The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. [CEQ] noted in a recent report that “in a typical year, 45,000 EAs are prepared compared to 450 EISs....Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully.” [quoting 1997 CEQ guidance on cumulative effects].

Kern, 284 F.3d at 1076. This is particularly relevant in the context of FERC’s review of gas infrastructure projects. In fact, the D.C. Circuit Court of Appeals recently admonished FERC for its failure to take seriously its duty to consider cumulative impacts in an EA. See *Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014) (“It is apparent that FERC did not draft these pages with any serious consideration of the cumulative effects”). Unfortunately, it appears that FERC would rather continue forcing parties to challenge its failure to consider cumulative impacts in court than comply with its regulatory duty to consider such impacts before decisions are made.

4. The EA Did Not Appropriately Address Connected, Cumulative, and Similar Actions.

REX claims that “none of the three projects identified by ADP and FWAP are connected, cumulative, or similar actions.” Answer at 16. REX then baldly asserts that “[j]ust because the projects....are ‘near the REX pipeline’ does not mean those project must be considered in conjunction with the very limited impacts of the Project.” *Id.* This necessarily ignores, however, the fact that geographic proximity is one of the factors that indicates the need for an agency to consider “similar” actions in the same analysis. 40 C.F.R. § 1508.25(a)(3).

One of the projects that Allegheny and FWAP indicated should have been included in the EA is Columbia Gas Transmission’s proposed Leach Xpress Project. Joint Comments at 15. The Leach Xpress Project is much closer to the REX Pipeline for most of its length than Equitrans’ proposed Rover Pipeline, yet FERC included the latter in the EA but not the former. This is an arbitrary decision for which FERC provides no rationale.

Additionally, FERC should have included Natural Gas Pipeline Company's ("NGPL") proposed Chicago Market Expansion Project in the EA. According to NGPL, the Chicago Market Expansion Project is dependent upon the "NGPL/REX Moultrie interconnect...expansion in the FERC filing by [REX] in Docket No. CP14-498." NGPL, Notice of Binding Open Season, p. 1 (Attachment 10). NGPL then asserts that:

With the addition of these facilities [in the Zone 3 East-to-West Project], NGPL expects to be able to provide incremental northbound firm transportation capacity of approximately 280,000 Dth/d to 450,000 Dth/d from the REX Moultrie interconnect to markets in and near Chicago, IL in its Market Deliver Zone, that includes major LDCs (Nicor Gas, Peoples Gas Light & Coke, North Shore, Ameren, Northern Indiana Public Service Company) and interstate pipelines, direct connect power plants and industrial customers.

Id. Thus, the Chicago Market Expansion Project is clearly a connected, cumulative, and/or similar action to the Project and should have been included in the EA. Moreover, these Projects, in addition to the other mentioned projects, indicate the need for an EIS.

Finally, the Chicago Market Expansion Project underscores the importance of considering the indirect and cumulative effects of gas drilling in the Marcellus and Utica shales. For example, NGPL states that:

Increased gas production from the *Utica and Marcellus Shales*, combined with unique access to markets in Chicago, Joliet and northwest Indiana, make this Project the most affordable and economic choice to meet the needs of producers, local distribution companies, marketers and end use customers.

Id. (emphasis added). In other words, if FERC approves the Project and the Chicago Market Expansion Project, gas drilling companies operating in the Marcellus and Utica shales will have increased access for their production to the Chicago metropolitan area, the third largest city in the United States. This will undoubtedly place an even greater burden on the people, landscapes, wildlife, watersheds, and airsheds of Pennsylvania and Ohio where large portions of the Marcellus and Utica shales are located. FERC has an obligation to consider and disclose the burden that the people in Pennsylvania and Ohio are expected to shoulder as FERC and the gas industry scramble to rapidly and dramatically expand infrastructure that connects supply areas to market areas.

5. A Programmatic EIS Is Required and Necessary.

Finally, REX argues that a programmatic EIS is neither required nor necessary. Answer at 16. First, REX claims that "CEQ regulations provide that while an agency *may* provide an EIS for 'broad Federal actions such as the adoption of new agency programs or regulations,' it is not required to do so." *Id.* (citing 40 C.F.R. § 1502.4(b) (emphasis in original)). Contrary to REX's assertion, however, that regulation provides that programmatic EISs "are sometimes

required.” 40 C.F.R. § 1502.4(b). Thus, there are clearly situations in which an agency must prepare a programmatic EIS for broad Federal actions.

Second, REX cites to the Supreme Court’s decision in *Kleppe v. Sierra Club*. As REX notes, the Court declined to require the Department of Interior to prepare a programmatic EIS for coal development in the Northern Great Plains region but that was because the Court relied on the District Court’s express finding that there was no “plan or program to develop or encourage development” by the Department of Interior. As explained in the Joint Comments, FERC *is* engaged in regional development and planning with the gas industry to expand infrastructure capacity targeting the Marcellus and Utica shales. Joint Comments at 20-23.

REX next claims that is “absurd” to consider the multiple proceedings addressing natural gas-electric coordination as evidence of a long-term regional gas infrastructure planning and development program. Answer at 17-18. Rather, REX claims that these proceedings are simply “a forum to discuss existing issues of common concern regarding operations between the two industries to insure reliability of *existing* infrastructure.” *Id.* at 18 (emphasis added). This is woefully inaccurate.

For example, FERC specifically noted in Docket AD12-12, that one of the issues that “spurred significant discussion and concern” was “whether electric market incentives are adequate to ensure gas-fired generator performance or otherwise signal *the need for pipeline infrastructure to meet growing needs*.” Joint Comments at 20 (citing *Coordination Between Natural Gas and Electricity Markets*, 141 FERC § 61,125 at P 3, n. 2 (2012)). Thus, FERC and the natural gas and electric industries are not just concerned with the “reliability of existing infrastructure” but with the need for additional infrastructure “to meet growing needs.” As explained by the Natural Gas Supply Association in Docket No. RM14-2, “additional gas infrastructure must be in place to transport and store natural gas from the wellhead to the point of consumption.” Accession No. 20141128-5031.

In a recent interview, FERC Chairman Cheryl LaFleur noted that “additions to both the gas and electric infrastructure will be needed to carry out the [EPA’s Clean Power Plan (CPP)].” Charlie Passut, FERC Chairman Defends NatGas Infrastructure Expansion as a Climate Plus, Natural Gas Intelligence, Jan. 27, 2015 (Attachment 11). Chairman LaFleur further explains that utilizing more natural gas to meet the goals of the CPP “will *require the expansion and construction of gas infrastructure, both pipelines and compressor stations*, to get [the gas] where it needs to be to keep the lights on.” *Id.* (emphasis added). Finally, Chairman LaFleur flatly states that “I think that our nation is going to have to grapple with our *acceptance* of gas generation and gas pipelines” and that “permitting gas infrastructure is going to be *essential* to the successful implementation of the CPP[.]” *Id.* (emphasis added).

Therefore, as stated in the Joint Comments, it is beyond dispute that FERC is deeply engaged in regional planning and development of gas infrastructure. Importantly, FERC’s actions regarding gas-electric coordination predated the EPA’s proposed CPP but that proposed rule, should it become final, will place even greater pressure to construct new and expand existing natural gas infrastructure. Therefore, FERC must prepare a programmatic EIS on natural gas infrastructure projects that are targeting the Marcellus and Utica shales.

Indeed, as explained in the Joint Comments, this is precisely the kind of situation that CEQ states should be analyzed in a programmatic EIS. *See* Joint Comments at 16 (explaining that a programmatic EIS should be prepared when “several energy development proposals in the same region of the country [have] similar proposed methods of implementation and similar best practice and mitigation measures that can be analyzed in the same document.”). Such an EIS was prepared by multiple Federal and state agencies in for mountaintop removal coal mining in Appalachia. *See* Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement (Oct. 2005), *available at* <http://www.epa.gov/region3/mtntop/eis2005.htm>. Importantly, the agencies analyzed “the scope of remaining surface-minable coal in the study area,” which included Kentucky, West Virginia, Tennessee, and Virginia. Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement, at III.O-1 (2003) (Attachment 12). The agencies were able to provide to the public information regarding the “demonstrated reserve base” of coal in each state and the “remaining years of production” for both underground and surface mining. *Id.* There is no reason why FERC, in cooperation with other agencies, cannot perform a similar analysis regarding gas production in the Marcellus and Utica shales.

As explained in the Joint Comments, in a 2014 report, the investment research firm Morningstar stated that there is “somewhere between 30 and 75 years of Marcellus resource potential at current production rates” and that “approximately 1,000 wells will need to be brought on line each year to hold gas production flat.” Joint Comments at 6. Additionally, Morningstar noted that several Marcellus producers have “identified between 10 and 30 years of drilling locations across the Marcellus.” *Id.* at 6. FERC’s recent presentation at the Maine Natural Gas Conference reveals numerous jurisdictional infrastructure projects targeting the Marcellus and Utica shales to connect this supply to market areas. FERC, *A View From the Beltway*, pp. 7-9 (Attachment 9). As explained by former Pennsylvania Governor Tom Corbett in another proceeding:

The significant increase in infrastructure development to transport natural gas to markets raises unique concerns and questions for communities who host these pipelines. I have heard from many citizens of Pennsylvania who live near or along the proposed corridor of the Atlantic Sunrise pipeline and are concerned about the potential environmental impact of this project....While your current review is focused specific to the proposed Atlantic Sunrise pipeline, I also strongly encourage FERC to seek coordination to the greatest extent possible among other proposed pipeline projects that seek to move natural gas to market. A recurring issue raised by local residents is whether we are efficiently deploying infrastructure – and the appropriate level of communication is occurring between potential project developers – in a manner that minimizes and mitigates overall disturbance on both the environment and local communities. Such coordination and efficiency has the advantage of maximizing benefit to consumers as well. Given the agency’s regulatory responsibility, and unique vantage point of being aware of other potential projects, I believe FERC is best suited to consider these factors as you continue your review of this proposed project.

Gov. Tom Corbett's comments on the Atlantic Sunrise Project, Aug. 18, 2014 (Attachment 13). Thus, it appears that the regional, programmatic planning and development of gas infrastructure is obvious to everyone but FERC and the gas industry. Contrary to REX's assertions, there is an urgent need for a programmatic EIS on natural gas infrastructure expansions that are targeting the Marcellus and Utica shale formations in order to connect gas supply to market areas.

III. CONCLUSION

For the reasons set forth above, FWAP respectfully requests that FERC grant its motion for late intervention. Allegheny and FWAP also request that FERC accept the Joint Comments on the EA and provide the relief sought in the Joint Comments. *See* pp. 23-24.

Dated: February 1, 2015

Respectfully submitted,

/s/ Ryan Talbott

Ryan Talbott
Executive Director
Allegheny Defense Project
117 West Wood Lane
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/s/ Lea Harper

Lea Harper
Managing Director
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P.O. Box 473
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CERTIFICATE OF SERVICE

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

Dated: February 1, 2015

Respectfully submitted,

/s/ Ryan Talbott

Ryan Talbott

Executive Director

Allegheny Defense Project

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