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NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

August 20, 2010

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National Park Service
Denver Service Center-Planning
P.O. Box 25287
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Via FedEx and electronic mail

Re: Potomac-Appalachian Transmission Highline (PATH) Right-of-Way — Public Scoping

Dear Ms. Elmer:

Thank you for considering the following comments on the necessary scope of the Environmental Impact Statement (“EIS”) for the proposed Potomac-Appalachian Transmission Highline (“PATH”) project. On behalf of the Sierra Club, we are writing to urge you to undertake the comprehensive analysis that is required under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370f. Based on conversations with you and others at the Public Scoping Meeting in Frederick, we are concerned that the PATH EIS Planning Team may be intending to focus exclusively on impacts from development within federal right-of-ways (“ROWS”) and jurisdictional wetlands. However, granting the requested ROWs and Clean Water Act § 404 permits would enable the larger PATH project to go forward, causing profound environmental impacts that extend well beyond federal lands and affected wetlands.

Because the PATH project cannot be built as proposed without authorizations from the National Park Service, the National Forest Service, and the Army Corps of Engineers, the project as a whole must be subject to NEPA review. Clearing, construction, and road-building in the Parks and on the Monongahela National Forest has no independent utility apart from the PATH line. Nor does the filling of wetlands along the 276-mile length of the proposed PATH route. All of this proposed development is part and parcel of a multi-billion dollar transmission project that would degrade regional air quality, increase greenhouse gas emissions, and undercut regional clean energy initiatives. These are far-reaching environmental consequences that require thorough consideration in an EIS.

Specifically, building the PATH line would allow some of the dirtiest coal plants in the country to ramp up production, profits, and pollution. The express intent of the PATH project, as originally stated in testimony submitted by PJM Interconnection (“PJM”) to the Federal Energy Regulatory Commission (“FERC”), is to reduce transmission congestion in order to bring coal-

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fired power from western PJM to lucrative markets in the East.¹ With PATH in service, coal would displace cleaner-burning natural gas and further discourage new renewable generation projects in the East. As a result, experts estimate conservatively that the PATH line would result in increased carbon emissions of 15.5 million tons per year, effectively canceling out the environmental gains of the Regional Greenhouse Gas Initiative. In addition, the PATH line would result in significantly increased emissions of criteria and hazardous air pollutants, exacerbating health risks, especially in areas that are already in nonattainment with national ambient air quality standards (“NAAQS”).

Increased pollution is not a necessary price to pay for reliable electric service. While PJM now justifies the PATH line on grounds that it is needed imminently to maintain grid reliability, the in-service date for the line has been pushed back every year since 2006, and due to peak load reductions achieved by demand side management (“DSM”) and energy efficiency programs, PATH’s backers (Allegheny Energy and American Electric Power (“AEP”)) were forced last December to abandon claims that the line would be needed in 2014. In the meantime, other utilities have proposed more modest and cost-effective fixes for the alleged reliability issues that PATH purports to address. In short, there are many less damaging and less costly alternatives to PATH that could ensure electric demand is met within PJM.² As the Department of Energy (“DOE”) emphasized in its most recent national congestion study, “alternatives other than transmission, such as increased local generation (including distributed generation), energy efficiency, energy storage and demand response may be more economic than transmission expansion in relieving congestion” — and more environmentally friendly as well.³

These alternatives demand serious consideration, but they are in danger of being ignored. If the lead federal agencies do not consider the big-picture implications of PATH in the EIS, the project will go forward without the benefit of *any* comprehensive environmental analysis. There is no transparent state or regional planning process in place to help decision-makers and the public understand the environmental costs and benefits of investing in major new transmission projects. In preparing its Regional Transmission Expansion Plans, PJM Interconnection does not consider environmental impacts or evaluate non-transmission alternatives to maintain electric reliability, and the same is generally true of the state commissions charged with granting certificates of public convenience and necessity (“CPCNs”). The NEPA process provides the only reliable check on transmission build-outs that cause needless environmental damage and hold back progress on national policy imperatives including attainment of healthy air quality,

¹ See Testimony of Karl Pfirrmann, President PJM Western Region PJM Interconnection, L.L.C., filed in FERC Docket No. AD05-3-000 (May 12, 2005) (“Pfirrmann Testimony”) (attached as Exhibit 1).

² PJM itself has recently acknowledged that alternatives to PATH have not yet been fully evaluated. See PJM Newsletter, *Inside Lines*, August 2, 2010, at <http://insidelines.pjm.com/html/2010/inside-lines-august.html#highlights2> (“PJM will continue to evaluate the feasibility and effectiveness of alternatives to the PATH and MAPP lines, and the various combinations of those alternatives, to determine the best options for the grid overall.”)

³ DOE, *National Electric Transmission Congestion Study* viii (Dec. 2009), http://congestion09.anl.gov/documents/docs/Congestion_Study_2009.pdf.

development of renewable energy resources, promotion of energy efficiency and conservation, and delivery on our Copenhagen commitments to reduce greenhouse gas emissions.

As a succession of new transmission proposals threaten to criss-cross the Appalachian Trail and other treasured Park and Forest lands with high-voltage power lines, the Park Service, the Forest Service, and the Corps inevitably will be at the center of high-stakes debates about the future of the electric grid. Grappling with these momentous issues in the context of the NEPA process is indispensable to honoring the expressed commitment of Secretary Salazar and Secretary Vilsack to implement responsible energy policies.

Here, the Park Service, the Forest Service, and the Corps are well positioned to fulfill this critically important NEPA obligation. The Planning Team has hired a contractor with the apparent capacity to undertake the sophisticated analysis that is needed, and the timing of state commission proceedings, given the recent submission of new or substantially revised applications to build the PATH line, will allow the EIS to inform not only the ROW and wetlands permitting decisions but also the states' decisions whether to issue CPCNs. For all of these reasons, we are confident that your planning team can steward the development of an EIS that helps to preserve the integrity of federal lands and wetlands and to promote a sustainable energy future.

We look forward to participating in the process and appreciate your consideration of the more detailed comments below.

A. The EIS Must Consider the PATH Project in Its Entirety

As stated above, it is essential that the EIS consider the proposed PATH project in its entirety. NEPA does not permit the lead agencies to constrain their analysis to portions of the PATH line that cross federal lands and wetlands. Because the ROWs and the wetlands fill are integral to the larger PATH project, the EIS must assess the environmental implications of — and alternatives to — the whole line and its associated substations and other infrastructure.

As NEPA's implementing regulations make clear, agencies must consider major federal actions, such as ROW approvals and Section 404 permits, in conjunction with other "connected actions." 40 C.F.R. § 1508.25 (2010) (mandating that agencies "*shall* consider" connected actions "[t]o determine the scope of environmental impact statements") (emphasis added). "Actions are connected if they . . . [c]annot or will not proceed unless other actions are taken previously or simultaneously" or if they "[a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id.* §§ 1508.25(a)(1)(ii)-(iii); *see also Alpine Lakes Protection Soc'y v. U.S. Forest Serv.*, 838 F.Supp. 478, 482 (W.D. Wash. 1993) (affirming that the requirement to consider connected actions "extends to non-federal actions undertaken exclusively by private parties if the federal actions are so interrelated as to constitute 'links in the same bit of chain'" (quoting *Morgan v. Walter*, 728 F.Supp. 1483, 1493 (D. Idaho 1989) (quoting *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989))).

In practice, the courts “use an ‘independent utility’ test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations.” *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000). Under this test, a federal agency may “limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other.” *Id.* at 1116. Thus, related federal and private actions are not “connected” if the respective “projects would have taken place with or without the other.” *Id.* at 1118 (quoting *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 580 (9th Cir. 1998)). Conversely, a federal action that has no independent purpose of its own is necessarily connected to the private project that it serves. *See, e.g., Alpine Lakes Protection Soc’y v. U.S. Forest Serv.*, 838 F.Supp. at 482.

The *Alpine Lakes* case is directly on point. There, the Forest Service was proposing to build an access road across National Forest land in order to allow a private timber company to carry out logging operations on privately owned property. As the Court noted, “[t]here [was] no dispute that the sole purpose of the Big Boulder access road [was] to facilitate Plum Creek’s timber management activities.” *Id.* Nevertheless, the Forest Service maintained that it could focus its NEPA analysis exclusively on the access road, which was the only federal portion of the larger logging project. The court disagreed, holding that the agency was required to consider the “impact of the logging activities for which the proposed access road [was] to be built.” *Id.* Because it “depend[ed] solely on Plum Creek’s logging activities for its justification and [was] an interdependent part of Plum Creek’s Big Boulder timber management activities, the Boulder Creek access road and the timber management activities [were] connected actions.” *Id.* (citation and internal quotation marks omitted).⁴

Similarly here, the federal ROWs and wetlands filling depend solely on the PATH line for their justification and are interdependent parts of the larger project. Just as the Forest Service was required to consider the impacts of logging when it paved the way (literally) for Plum Creek, the lead agencies must consider the entire transmission line that would be built courtesy of federal ROWs and Section 404 permits. *See id.*; *Thomas v. Peterson*, 753 F.2d 754, 761 (9th Cir. 1985) (requiring EIS to consider both a Forest Service access road and the federal timber sales that the road would facilitate); *Port of Astoria v. Hodel*, 595 F.2d 467, 480 (9th Cir. 1979) (requiring EIS to consider both a federal power supply and a proposed private aluminum

⁴ The court in *Alpine Lakes* emphasized that it was guided not only by established case law but also “the language of the [NEPA] regulations themselves.” 838 F.Supp. at 482. Specifically, the court cited the definition of “cumulative impact,” which 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.” *Id.* (emphasis added) (quoting 40 C.F.R. § 1508.7). Given that “connected actions . . . may result in cumulative impacts,” the court reasoned that “where a cumulative impact is involved, the question whether the environmental impact of the related action must be considered does not turn on whether that action is federal or non-federal in nature.” *Id.* In other words, the requirement to consider cumulative impacts entails a requirement to consider connected *private* actions.

reduction plant that would rely on that power supply); *Morgan v. Walter*, 728 F. Supp. at 1493 (requiring EIS to consider both the grant of a federal ROW for construction of a creek diversion and the private fish hatchery it was designed to accommodate); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985) (requiring EIS to consider both the Army Corp's of Engineers' approval of river bank stabilization and the private housing development it would enable).

B. The EIS Must Assess the Direct, Indirect, and Cumulative Environmental Harms Threatened by the PATH Line

The EIS must address the full suite of environmental impacts, both direct and indirect, that will flow from construction of the PATH line together with the cumulative impact of similar projects. See 40 C.F.R. §§ 1508.25(c). As defined by NEPA's implementing regulations, "direct effects" are impacts "caused by the action and occur at the same time and place." *Id.* § 1508.8(a).⁵ "Indirect effects" are impacts caused by the proposed action but "are later in time or farther removed in distance." *Id.* § 1508.8(b). "Cumulative impact" means "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 action." *Id.* § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

As the EIS Planning Team has recognized already, significant adverse impacts will flow directly from construction of the PATH Line — e.g., surface disturbance, habitat fragmentation, loss of wetlands, increased noise, wildlife disturbance, landscape degradation, and intensification of electric magnetic fields along the length of the line. In addition, this new high-voltage power line will have profound indirect and cumulative impacts that must be considered as well. See *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 816-17 (9th Cir. 1987) (finding it "imperative that the [agency] evaluate the reasonably foreseeable significant effects which would be proximately caused by implementation of the proposed action") (citation omitted), *rev'd on other grounds*, 490 U.S. 332 (1989).

By facilitating the export of coal-fired power to the East Coast, the PATH line will have the indirect (but intended) effect of helping coal to displace cleaner generation in the East. This will promote dependence on dirty power plants that are the country's largest contributors to global warming, increasing harmful air pollution and likely water pollution as well.⁶ Because these effects are "reasonably foreseeable" and "causally linked" to the PATH project, they must be assessed in the EIS. *South Fork Band Council of W. Shoshone of Nevada v. U.S. Dept. of*

⁵ The words "effect" and "impact" are used synonymously in NEPA's implementing regulations. 40 C.F.R. § 1508.8.

⁶ See Direct Testimony of Christopher James, filed in *Application of PATH Allegheny Virginia Transmission Corp. for Approval and Certification of Electric Transmission Facilities under Va. Code § 56-46.1 and the Utility Facilities Act, Va. Code § 56-265.1 et seq.*, Case No. PUE-2009-00043 (Va. S.C.C. Oct. 14, 2009) (attached as Exhibit 2).

Interior, 588 F.3d 718, 725-26 (9th Cir. 2009) (explaining that the “air quality impacts associated with transport and off-site processing of the five million tons of refractory ore” that could be mined as a result of a federally approved mine expansion were “prime examples of indirect effects that NEPA requires be considered”); *Border Power Plant Working Group v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1016-18 (S.D. Cal. 2003) (requiring DOE to consider emissions consequences of issuing a permit for a transmission line that would import coal-fired power from a Mexican power plant into the United States).

The EIS must further consider the cumulative impact of the PATH line in conjunction with several other proposed transmission lines in the same region — specifically the Susquehanna-to-Roseland Transmission Line, the Trans-Allegheny Interstate Line (“TrAIL”), and the Mid-Atlantic Power Pathway (“MAPP”). Together, these lines comprise an overarching project within PJM — the so-called “Project Mountaineer” — that is meant to give coal a new foothold in lucrative eastern power markets.⁷ By design, these lines will have cumulative impacts on the grid and on the generation mix within PJM that must be considered holistically in a single EIS. Of course, these lines also would have serious cumulative impacts on the National Parks and National Forest lands that they threaten to carve up. For all of these reasons, the EIS must consider the PATH project in conjunction with other existing and proposed transmission projects including the TrAIL, MAPP, and Susquehanna-to-Roseland lines. *See, e.g., Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005) (finding NEPA analysis deficient where agency insisted that one pipeline project did not need to be analyzed in light of other existing and proposed pipelines).

In summary, it will be especially important to address the following direct, indirect, and cumulative impacts in the EIS:

- **Enduring impairment of National Park and National Forest resources and Wetlands from the siting of multiple power lines across federal lands:** Existing transmission lines already diminish the experience of the Appalachian Trail and other federal lands that are treasured for their scenic, natural, and historic values. Under NEPA, agencies have an affirmative duty to locate, describe, and consider other existing and reasonably foreseeable development that could have cumulative impacts when combined with the project under consideration. *See, e.g., Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1160-61 (9th Cir. 1997).
- **Declines in regional air and water quality due to increased reliance on coal-fired power plants served by the PATH Line:** As discussed above, Project Mountaineer and the PATH line would give coal-fired power plants that are now operating below capacity the ability to reach new markets in the East. As a result, experts anticipate that coal plants will ramp up production and pollution as well. This translates into increased emissions of sulfur dioxide, nitrogen oxides, fine

⁷ *See* Pfirmann Testimony; *see also* John Rogers, Chris James & Robin Maslowski, *Importing Pollution: Coal’s Threat to Climate Policy in the U.S. Northeast* 15 (2008) (attached as Exhibit 3).

particulates, and hazardous air pollutants including mercury that could severely impact: (1) downwind communities, many of which are located in areas that are already in non-attainment with the NAAQS; (2) visibility in Class I areas including National Parks; and (3) aquatic ecosystems that are impaired already by acid rain and mercury deposition.

- **Increased greenhouse gas emissions from coal-fired power plants that are the PATH line's intended beneficiaries:** For the same reasons set forth in the paragraph above, Project Mountaineer and the PATH line will result in significantly increased greenhouse gas emissions annually. Based on conservative analyses, building the PATH line is by itself the equivalent of building several new coal-fired power plants from the standpoint of increased carbon dioxide ("CO₂") emissions. Moreover, exporting coal-fired power into the Mid-Atlantic is flatly at odds with the Regional Greenhouse Gas Initiative ("RGGI"). Increased CO₂ emissions attributable to PATH would essentially zero out the gains of the multi-state RGGI program.
- **Decreased investment in renewable energy and energy efficiency and demand-side management ("DSM") programs:** Transmission lines such as the PATH line that boost profits for coal plants and flood eastern power markets with artificially cheap coal-fired power create a powerful disincentive to develop renewable energy generation and other clean energy solutions in the East.
- **Increased risks of black-outs associated with long-distance power transport:** When East Coast cities rely on generators that are increasingly far away, they necessarily become dependent on high-voltage lines that cannot be repaired quickly in the event of accidents and malfunctions.

C. The EIS Must Evaluate a Full Range of Alternatives

The EIS must evaluate a full range of alternatives to building the PATH line as proposed, including alternatives that do not involve constructing the PATH line at all. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). Because an EIS is meant to identify not only environmental impacts but also the means of avoiding or mitigating environmental harms, the alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14; *see also* *Natural Res. Def. Council v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) ("It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement . . . characterized as the linchpin of the entire impact statement.") (citation and internal quotation marks omitted). Accordingly, NEPA's implementing regulations direct the agency to "rigorously explore and objectively evaluate *all* reasonable alternatives" including "alternatives not within the jurisdiction of the lead agency" and the "alternative of no action." 40 C.F.R. § 1502.14(a), (c), (d) (emphasis added).

In order to satisfy this core NEPA requirement, the lead agencies must “take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.” *Colorado Envtl. Coal. v. Dombek*, 185 F.3d 1162, 1175 (10th Cir. 1999). Where, as here, the question presented is whether or not to grant approvals for a project that implicates serious energy and climate issues, the alternatives analysis cannot be framed as a choice between permitting and not permitting the project as proposed. The EIS process that is now underway for a State Department cross-border permit for an oil sands pipeline is illustrative. There, the Environmental Protection Agency has objected to the Draft EIS for reducing the range of alternatives to a “go” or “no go” decision on the requested permit:

We are concerned that the Draft EIS uses an unduly narrow purpose and need statement, which leads to consideration of a narrow range of alternatives. The Draft EIS considers issuance of a cross-border permit for the proposed project and to a limited extent, the no-action alternative (i.e. denying the permit). By using a narrow purpose and need statement, the Draft EIS rejects other potential alternatives as not meeting the stated project purpose. While we recognize that an objective of the applicant’s proposal is to construct a pipeline to transport oil sands from Canada to Gulf Coast refineries in the United States, we believe the purpose and need to which the State Department is responding is broader. Accordingly, *EPA recommends that the State Department frame the statement of purpose and need more broadly to allow for a robust analysis of options for meeting national energy and climate policy objectives.*⁸

Here, too, the lead agencies must define purpose and need broadly in order to allow for a robust alternatives analysis that accounts properly for national energy and climate policy objectives.

It is worth emphasizing that EPA’s recent statements regarding the necessary scope of alternative analysis are well-grounded in the statute and governing case law. Federal agencies cannot constrain the alternatives analysis through “wholesale acceptance” of the applicant’s definition of the project objective. *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997) (explaining that agencies have “the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project”) (citation omitted). While PATH’s backers may prefer to build an expensive new transmission line, which will yield a substantial (14.3 percent) rate of return on investment, construction of the PATH line is not the goal that should guide formulation of alternatives for study in the EIS. As the courts have made clear, “the evaluation of ‘alternatives’ mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action” — in this case, maintaining reliability of the electric grid. *Id.* (emphasis added) (citations omitted) (holding that the Corps had “ruined its environmental impact statement” by focusing solely on the type of solution favored by the applicant and “never look[ing] at an entire category of reasonable alternatives”).

⁸ Letter from Cynthia Giles to Jose W. Fernandez and Keri-Ann Jones (July 16, 2010) (emphasis added) (attached as Exhibit 4).

Specifically, the alternatives that require consideration in the EIS include not only alternative routes and specifications for the PATH line — *e.g.*, siting the PATH line to avoid sensitive areas, placing portions of the line underground, building less intrusive direct current (DC) lines — but also alternatives to ensure electric reliability without building the PATH line at all. There are many viable ways to meet electric demand in the eastern population centers that PATH purportedly is intended to serve. For instance, DSM and energy efficiency programs have been shown to reduce demand very dramatically. Last December, modeling ordered by the Hearing Examiner in the Virginia CPCN proceedings revealed that available DSM and energy efficiency resources were sufficient to eliminate the alleged need for the PATH line in 2014.⁹ This year, DSM and energy efficiency capacity has increased by 32 percent, which should eliminate any alleged need for the PATH line for several additional years to come. Continued emphasis on DSM and energy efficiency could eliminate the need for the PATH line entirely.

To the extent that some maintenance of the grid is warranted in the near term, there are many smaller “fixes” that would avoid the need to build PATH. For instance, this past June, Dominion Virginia Power (“Dominion”) proposed alternatives to the PATH line that would reduce costs by roughly a billion dollars or more and “provid[e] flexibility in allowing for staged construction over [a] multi-year timeframe.”¹⁰ By installing reactive support and rebuilding two existing lines, Dominion’s proposal has the potential to address all of the reliability issues identified by PJM for a total cost of \$620 million, as opposed to \$2.22 billion for the PATH line. Also this past June, Northeast Transmission Development, LLC (“Northeast”) presented PJM with yet another alternative to the PATH line. Instead of a 765-kV line, Northeast would construct a 500-kV line and eliminate the need for any new substations or other equipment such as transformers, reducing costs by “several hundred million dollars” and reducing PATH’s overall footprint as well.¹¹ Like the Dominion alternative, Northeast’s project could be phased in over time as needed.

These comparatively modest proposals suggest that PATH is, at best, an overkill response to limited reliability issues. Pursuing cheaper alternatives, including non-transmission alternatives, that can be implemented if and when they are needed makes sense in light of the precipitous drop-off in electricity demand that followed the current recession — and that is widely viewed among energy analysts as an enduring phenomenon.

As DOE has recognized, the appropriate solution to congestion and associated reliability issues often is *not* a major new transmission project:

⁹ See *Report of Alexander F. Skirpan, Jr., Application of PATH Allegheny Virginia Transmission Corp. for Approval and Certification of Electric Transmission Facilities under Va. Code § 56-46.1 and the Utility Facilities Act, Va. Code § 56-265.1 et seq.*, Case No. PUE-2009-00043 (Va. SCC Jan. 6, 2010) (attached as Exhibit 5).

¹⁰ *DVP Alternatives for Consideration to Resolve 2015 RTEP Issues* (June 9, 2010) (attached as Exhibit 6).

¹¹ Letter from Sharon K. Segner to Steven Herling and Paul McGlynn (June 10, 2009) (attached as Exhibit 7).

In some cases, transmission expansion might simply move a constraint from one point on the grid to another without materially changing the overall costs of congestion. In other cases, the cost of building new facilities to remedy congestion over all affected lines may exceed the cost of the congestion itself, and, therefore, remedying the congestion would not be economic. In still other cases, alternatives other than transmission, such as increased local generation (including distributed generation), energy efficiency, energy storage and demand response may be more economic than transmission expansion in relieving congestion.¹²

Here, the lead agencies have an opportunity and an obligation to ensure that the types of solutions encouraged by DOE are given meaningful consideration.

In summary, the EIS planning team should explore and evaluate the following alternatives to maintain electric reliability in PJM:

- DSM programs, including “smart grid” programs, to reduce peak electricity demand in the areas that would be served by the PATH line
- Energy efficiency programs to reduce electricity demand in the same areas
- Tailored upgrades of existing transmission infrastructure (*e.g.*, substations, capacitors, conductors) and existing lines to improve grid reliability
- Operational improvements to ensure grid reliability
- Increased generation capacity, including development of renewable energy projects in areas that create alleged reliability issues
- Locally distributed generation to eliminate alleged reliability issues
- Solutions that employ a combination of the above strategies to ensure electric reliability
- More modest, phased transmission proposals including those put forward by Dominion and Northeast

D. The EIS Analysis Must Reflect the Park Service’s Preservation Mandate

The Park Service’s preservation mandate must inform its evaluation of the requested ROWs. The Park Service has a duty to “minimize to the greatest extent practicable, adverse impacts on park resources and values.” NPS Management Policies § 1.4.3. If there is any feasible way to avoid harm to Park resources, the Park Service must deny the requested ROWs. *See Bluewater Network v. Salazar*, No. 08-841(GK), 2010 WL 2680823, at *12 (D.D.C. 2010) (observing that “the overriding aim of the [National Park Service] Organic Act, as well as the

¹² DOE, *National Electric Transmission Congestion Study* at vi.

purpose of NPS' oversight and management of the park system, is to conserve the natural wonders of our nation's parks for future generations"); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 191-93 (D.D.C. 2008); *Nat'l Rifle Ass'n of Am. v. Potter*, 628 F.Supp. 903, 909-10 (D.D.C. 1986)

The National Park Service Organic Act of 1916 directs the Park Service "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (2010). In 1978, Congress reaffirmed this core mandate with respect to all units within the National Park System, clarifying that "the promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by [the Organic Act], to the common benefit of all of the people of the United States." *Id.* § 1a-1. To this end, Congress directed that "[t]he authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established." *Id.*

In keeping with these governing statutes, the Park Service's Management Policies provide as follows:

The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. *NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values.*

NPS, MANAGEMENT POLICIES § 1.4.3 (2006) (emphasis added); *see also Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d at 192 (affirming that "the fundamental purpose of the national park system is to conserve park resources and values").

An "impairment of park resources and values may not be allowed by the Service unless directly and specifically provided for by legislation or by the proclamation establishing the park." NPS, MANAGEMENT POLICIES § 1.4.4 (further explaining that "[t]he relevant legislation or proclamation must provide explicitly (not by implication or inference) for the activity, in terms that keep the Service from having the authority to manage the activity so as to avoid the impairment"). Whether an adverse impact rises to the level of impairment "depends on the particular resources and values" that the National Park System unit was created to protect. *Id.* § 1.4.5; *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 99 (D.D.C. 2006) (quoting same). Necessarily, an impact is "more likely to constitute impairment to the extent that it affects a resource or value whose conservation is necessary to fulfill specific purposes identified in the establishing legislation or proclamation of the park." NPS, MANAGEMENT POLICIES § 1.4.5; *see also Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d at 194 (quoting same).

A decision to grant the requested ROWs would adversely impact and impair Park resources and values in all of the affected National Park Units. These areas are national treasures in large part because they afford access to spectacular scenery that is in increasingly short supply in the Northeast. Allowing the construction of power lines that will rise well above tree-line will permanently mar the very scenic and historic landscapes that these areas were established to protect. Moreover, the surface disturbance and noise associated with building, operating, and maintaining this high-voltage power infrastructure is plainly inconsistent with protecting natural resources and visitor experience in the Parks. Given this reality, the Park Service must take care from the outset to undertake NEPA analysis that can inform and support a decision to deny the ROW requests.

E. The EIS Analysis Must Reflect the Corps' Mandate to Preserve Wetlands

Like the Park Service, the Corps has a preservation mandate that must inform its consideration of alternatives in the context of Clean Water Act § 404 permitting. Regulations implementing the Clean Water Act require the Corps to ensure that there is no practicable alternative that will avoid or reduce harm to the aquatic ecosystem before approving any § 404 permit application. *See* 40 C.F.R. § 230.10(a). Where, as here, a proposed project is not water dependent, “practicable alternatives that do not involve special aquatic sites are *presumed* to be available, unless clearly demonstrated otherwise.” *Id.* § 230.10(a)(3) (emphasis added). This ensures that wetlands are not “destroyed simply because it is more convenient than not to do so.” *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982).

As explained by the Tenth Circuit Court of Appeals, the Clean Water Act’s policy for preserving wetlands, and the corresponding regulatory presumption against dredge-and-fill, is very strong. “[I]t is not sufficient for the Corps to consider a range of alternatives to the proposed project: the Corps must rebut the presumption that there are practicable alternatives with less adverse environmental impact.” *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1262 n.12 (10th Cir. 2003). Further, “the burden is on the Applicant . . . , with independent verification by the [Corps], to provide detailed, clear and convincing information *proving* impracticability.” *Utahns For Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1186 (10th Cir. 2002) (emphasis in original).

In light of this governing legal framework, it is essential for the Corps to undertake a rigorous analysis of alternatives to avoid building the PATH line and thus the extensive dredge-and-fill of wetlands that the 276-mile long project would entail.

Conclusion

We appreciate the clear dedication of the lead agencies to protecting the National Parks, National Forests, and waters of the United States. We are hopeful that the EIS planning team will assess the full extent of impacts from the PATH line and the full range of alternatives that are available to avoid environmental harm while still maintaining electric reliability.

We welcome the opportunity to participate in the NEPA process going forward. Please feel free to contact me at (212) 791-1881, ext. 221 or adillen@earthjustice.org with any questions regarding these comments.

Sincerely,

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