

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

) )  
Algonquin Gas Transmission, LLC ) Docket No. CP14-96-000  
) )

**REQUEST OF WESTCHESTER COUNTY LEGISLATOR PETER B. HARCKHAM  
FOR REHEARING OF FERC ORDER ISSUED MARCH 3, 2015**

Pursuant to Section 717r(a) of the Natural Gas Act (“NGA”),<sup>1</sup> and Rule 713 of the Federal Energy Regulatory Commission (“FERC” or “Commission”) Rules of Practice and Procedure,<sup>2</sup> I hereby request rehearing and rescission of the Commission’s March 3, 2015 Order<sup>3</sup> (“Order”) granting a certificate of public convenience and necessity (“Certificate”) to Algonquin Gas Transmission, LLC (“Company”) to construct the proposed Algonquin Incremental Market Project expansion of the existing Algonquin pipeline (“AIM Project”). I seek rehearing and rescission of the Commission’s Order because it is contrary to the requirements of the Clean Water Act (“CWA”),<sup>4</sup> the Natural Gas Act (“NGA”),<sup>5</sup> the National Environmental Policy Act (“NEPA”),<sup>6</sup> and NEPA’s implementing regulations<sup>7</sup>, and the Order is not required by the public convenience and necessity.

**I. STATEMENT OF RELEVANT FACTS**

On June 18, 2013, Algonquin Incremental Markets, LLC, (“Algonquin”) filed a request with the Federal Energy Regulatory Commission (“FERC”) to initiate pre-filing review under the Natural Gas Act. During the pre-filing period, I submitted comments, as did many interested public members, municipal corporations, and elected officials in Westchester, Putnam and Rockland counties in New York. On September 13, 2013, FERC issued a Notice of Intent to prepare an environmental impact statement (“EIS”) for the AIM Project. On February 28, 2014, Algonquin filed an application with FERC to construct the AIM Project. The Westchester County Board of Legislators (“WCBOL”) enacted and filed with FERC Resolution No. 80-2014,

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<sup>1</sup> 15 U.S.C. § 717r(a) (2012).

<sup>2</sup> 18 C.F.R. § 385.713 (2014).

<sup>3</sup> FERC, Algonquin Gas Transmission, LLC, Docket No. CP14-96-000, Order Issuing Certificate and Approving Abandonment, 150 FERC ¶ 61,163 (issued Mar. 3, 2015).

<sup>4</sup> 33 U.S.C. 1251 *et seq.* (2012).

<sup>5</sup> 15 U.S.C. 717 *et seq.* (2012).

<sup>6</sup> 42 U.S.C. 4321 *et seq.* (2012).

<sup>7</sup> 40 C.F.R. Pts. 1500-08 (2014).

which identified the need for an independent health impact assessment as well as more stringent measures to mitigate the environmental impacts of the AIM Project.<sup>8</sup>

On August 6, 2014, FERC staff issued a Draft Environmental Impact Statement (“DEIS”) for the AIM Project. During the comments period, hundreds of individuals, municipal corporations, and elected officials (myself included) submitted comments on the inaccuracies and omissions of the DEIS and requested FERC prepare a Supplemental DEIS or revise and reissue the DEIS. Notwithstanding the voluminous comments on the DEIS, FERC staff issued a Final Environment Impact Statement (“FEIS”) on January 23, 2015. On March 3, 2015, FERC issued an Order to approving a Certificate of Public Convenience and Necessity (“CPCN”) to Algonquin for the AIM Project.<sup>9</sup>

For the reasons set forth below, I seek a rehearing and rescission of the FERC’s decision to approve the AIM Project on the grounds that FERC violated the CWA in issuing the Order before the New York Department of Environmental Conservation (“NYSDEC”) finalized a Water Quality Certification, failed to comply with NEPA in its analysis of the AIM Project, and that the AIM Project is not in the public convenience and necessity.

## **II. BASIS FOR REHEARING**

The Commission failed to meet its obligations under NEPA by preparing an inadequate FEIS that fails to evaluate the AIM Project’s potentially significant impacts on human health and the environment. The Commission also violated the CWA by authorizing the AIM Project prior to issuance of New York’s Water Quality Certification. The AIM Project is also not required by the public convenience and necessity.

### **A. Concise Statement of the Alleged Errors in the Order**

1. *The Commission violated the Clean Water Act by issuing the Certificate prior to the issuance of New York State’s Section 401 Water Quality Certification.* The CWA prohibits FERC from issuing the Order in advance of the grant of the required Section 401 certification, and the Commission does not have the authority to curtail the states’ power provided by the CWA.

2. *The Commission violated the National Environmental Policy Act by issuing a flawed Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS).* FERC issued a DEIS and FEIS that do not comply with NEPA and its implementing regulations.

3. *The Commission erred in issuing the Order because the AIM Project is not required by the public convenience or necessity.* The AIM Project is not in the public interest because the project’s adverse effects outweigh its alleged benefits.

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<sup>8</sup> WCBOL Resolution No. 80-2014.

<sup>9</sup> 150 FERC ¶ 61,163 (issued Mar. 3, 2015).

## B. Statement of Issues

### 1. The Certificate May Not Be Issued Without Required NYSDEC Approvals.

At the time FERC issued the Order, Algonquin had not yet obtained the New York Section 401 Water Quality Certificate pursuant to the Clean Water Act (“CWA”). Section 401 of the CWA plainly requires “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.”<sup>10</sup> The Supreme Court has stated that, consistent with the State’s primary enforcement responsibility under the CWA, Section 401 “requires States to provide a water quality certification before a federal license or permit can be issued....”<sup>11</sup> Nevertheless, the Order issues a certificate of public convenience and necessity, a blanket construction certificate, and a blanket transportation certificate to Algonquin while acknowledging that the required Section 401 certification has not been obtained from New York. FERC’s authorization, which provides Algonquin an opportunity to begin construction activities, is premature under the unambiguous terms of Section 401 as this approval remains outstanding.

The fact that the Order conditions upon Algonquin’s ability to commence construction on the future receipt of the Section 401 certification does not cure the Commission’s violation of the CWA.<sup>12</sup> The clear language of the CWA prohibits the granting of *any* license or permit.<sup>13</sup> The statute does not make exceptions for licenses or permits that are conditioned on the subsequent grant of the 401 Certification. Moreover, it is unreasonable to allow some of the activities authorized by the Order to proceed, including eminent domain proceeding, or certain earthmoving or tree clearing activities, when the AIM Project could be prohibited from moving forward if New York refuses to provide a Section 401 certification for the project.

FERC’s issuance of even a conditional license is incompatible with the design and intent of the CWA, which assigns to the States the role of primary regulator under the statute. Section 401 allows states to condition Water Quality Certifications on measures designed to ensure compliance with effluent limitations and other state regulations.<sup>14</sup> The state’s conditions, in turn, are required to “become a condition on any Federal license or permit subject to the provisions of this section.”<sup>15</sup> In order for New York to play this primary role, the Section 401 Certification therefore must come before the Order.

The terms of the Order also attempt to further erode the state’s power under the CWA by providing that “[a]ny state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate.”<sup>16</sup> This provision

<sup>10</sup> 33 U.S.C. § 1341(a)(1); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (“without [Section 401] certification, FERC lacks authority to issue a license.”). *See also City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) [“without [Section 401] certification, FERC lacks authority to issue a license.”].

<sup>11</sup> *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 707 (1994).

<sup>12</sup> Order, ¶ 73.

<sup>13</sup> 33 USC § 1341(a)(1).

<sup>14</sup> 33 U.S.C. § 1341(d).

<sup>15</sup> *Id.*

<sup>16</sup> Order, ¶ 151.

impermissibly curtails New York's ability to exercise its authority under Section 401 of the CWA, including by refusing to grant the Certification if it determines that the Project pose an unacceptable risk to New York's water quality.

The Order thus was not only issued prematurely, but also contains terms that conflict with the CWA.<sup>17</sup> FERC therefore lacked the authority to issue the Order without New York's water quality certification. FERC must correct its error by rescinding the Order until such time as the Applicants are able to obtain a Section 401 Certification from New York.

## **2. The Environmental Impact Statement (DEIS, FEIS) Is Flawed.**

### **a. The DEIS Did Not Provide Sufficient Information for Public Review and Comment.**

The DEIS did not provide sufficient information to allow adequate public review and comment. The issued DEIS contained numerous gaps in information, and FERC staff requested Algonquin to provide substantial environment and public safety-related details.<sup>18</sup> Algonquin filed a response to many of requested details on the last day of the DEIS comment period, allowing no time for public review and comment.<sup>19</sup> This approach deprived the public with meaningful opportunity to review and comment on numerous environment impacts, which is contrary to the NEPA review process.

### **b. The FEIS Should Include a Baseline Analysis of Air Quality and Public Health Impacts.**

During scoping and on the DEIS, there were numerous comments stating that a baseline analysis of existing emissions and public health is necessary to properly characterize the project impacts. This is particularly salient for air-quality impacts, in which exposure to air pollutants through inhalation and through skin (dermal) occurs. Neither the DEIS nor the FEIS contain a baseline analysis of air quality or public health impacts, except to provide the Title V Permit emission limits from the compressor stations, such as at Stony Point and Southeast, New York. Simply referencing the Title V permit emission limits from the compressor stations is not adequate to properly characterize air quality impacts that actually occur. The permit limits do not account for emissions from blowdown events and fugitive sources (leaks), which can be

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<sup>17</sup> See *City of Tacoma v. Federal Energy Regulatory Commission*, 460 F.3d 53 at 68 (D.C. Cir. 2006) (“The Clean Water Act gives a primary role to states to block... local water projects ... FERC's role [under CWA Section 401] is limited to awaiting, and then deferring to, the final decision of the state.”) (internal quotations omitted).

<sup>18</sup> See, e.g., DEIS Section 5.2, ¶14 [site-specific crossing plan for the Catskill Aqueduct], ¶16 [trench dewatering details], ¶18 [site-specific information on wetlands], ¶22 [survey results on Indiana and northern long-eared bats], ¶23 [FWS consultations on migratory birds, including mitigation measures], ¶24 [FWS, NYSDEC consultations on bald eagles], ¶ 27 [site-specific residential construction plans], ¶29 [site-specific construction plans for St. Patrick's church and other locations], ¶30 [proposed construction schedule at Norfolk Golf Club], ¶31 [consultations with National Grid to avoid impacts to St. Theresa school and parish], ¶33 [procedures on discovery of cultural resources and human remains], ¶35 [updated air permitting requirements for M&R stations], ¶36 [fugitive dust control plan].

<sup>19</sup> Algonquin Gas Transmission, LLC, Supplemental Information for the Algonquin Incremental Market Project, Response to FERC Staff's Recommended Mitigation Conditions Draft Environmental Impact Statement Prior to the End of Comment Period of 9/29/2014, Volume 1 - Public, (Sep't. 29, 2014).

substantial.<sup>20</sup> Without a proper characterization of baseline air quality and public health, it is not possible to evaluate incremental and cumulative impacts that are associated with the proposed AIM project.

**c. The FEIS Should Include a Health Impact Assessment.**

The Board of Legislators Resolution No. 80-2014 called for a comprehensive and transparent Health Impact Assessment (HIA), as outlined by the Centers for Disease Control and National Academy of Sciences.<sup>21</sup> In the FEIS, FERC staff states that an HIA is not necessary.<sup>22</sup> The FEIS noted that an HIA is unwarranted, but it does not provide a comparable analysis for these impacts.<sup>23</sup> While it may not be convenient for applicants or agency staff, an HIA is an important assessment that should be conducted to properly evaluate impacts from natural gas facility upgrades such as the AIM Project. Natural gas transmission facilities transport natural gas containing toxic compounds that can have acute and chronic effects on communities and sensitive receptors.<sup>24</sup> A Health Impact Assessment determines the public health effects of such project emissions, with an emphasis on the entire project life cycle. These impacts are not adequately assessed by conventional dispersion modeling and published emission factors, which do not account for peak impacts, site-specific conditions, sensitive populations, and the characteristics of the Marcellus Shale natural gas that is being transported.

**d. The Evaluation of Impacts on Blue Mountain Reservation Is Incomplete.**

The FEIS provides limited discussion on the impacts at the Blue Mountain Reservation (“the Reservation”).<sup>25</sup> Westchester County acquired the area at the Reservation in 1926 with the express intent of preserving open space for natural appreciation and recreation.<sup>26</sup> Westchester County residents have enjoyed the serene character and active recreation facilities at the 1500-plus acres of preserved forest at the Reservation.

The Order provides only a limited response to the comments that I recently submitted in January 2015, but FERC’s response does not address the central concerns that other legislators,

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<sup>20</sup> The Southeast Compressor Station Permit Application, Appendix B, Table B-7 lists blowdown emissions at 7,100, 000 scf/yr. The Stony Point Compressor Station Application, Appendix B, Table B-6 lists blowdown emissions at 14,200, 000 scf/yr.

<sup>21</sup> WCBOL Resolution No. 80-2014.

<sup>22</sup> See, e.g., FEIS Vol. II – Comments on the Draft Environmental Impact Statement and Responses, at SA-13, LA-11 [asserting that the AIM project would result in federal and state air quality compliance].

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Compilation of Health Impacts of Gas and Oil Development: Key Resources, appended to Jan. 31, 2014 Legislator Peter B. Harckham comments submitted to FERC Secretary Kimberly Bose, FERC Docket PF-13-16-000.

<sup>25</sup> FEIS, at 3-33, 4-89, 4-160 to 161.

<sup>26</sup> Westchester County Park Commission, Eighth Report Recommending the Acquisition of Park Lands (Dec. 31, 1925) [describes the acquisition of a large forest reservation as part of a proposed parkway; “This reservation will comprise approximately 1500 acres and is one of the finest tracts of picturesque rugged woodland in the County. It includes three small lakes, a large brook and several smaller ones, and if approved, will help to supply the increasing public demand for camping places.”]

myself and the public have articulated in numerous comments and in Resolution No. 80-2014.<sup>27</sup> Specifically, the FEIS fails to adequately evaluate all of the impacts that will occur at the Reservation as a result of the AIM Project. Moreover, the FEIS does not evaluate the necessity for Algonquin to use Additional Temporary Workspace Area (“ATWA”) within the Reservation, as opposed to working within the existing seventy-five (75) foot easement that Algonquin already has for its twenty-six inch pipeline.

The Order acknowledges the report by Hudsonia scientist Erik Kiviat, Ph.D., that I submitted on the potential AIM Project impacts within the Reservation.<sup>28</sup> Dr. Kiviat’s report highlights a central concern that the assessments of the natural and biological resources in the Reservation, as well as the estimated AIM Project impacts, are inadequate and inaccurate. Our comments to FERC had described some of the deficiencies.<sup>29</sup> The FEIS provides a minimal evaluation of the actual resources within the Reservation. Dr. Kiviat described the applicant’s inventory of plants and wetlands within the Reservation as minimal and inadequate. The Blue Mountain Reservation is well known as a biodiversity ‘hub’ within this part of the lower Hudson Valley. But, the FEIS does not provide a specific inventory of the flora and fauna within the Reservation. In addition, the applicant will remove large quantities of mature trees within the Reservation that provide habitat to numerous wildlife species and give unique character to the park. However, Algonquin has not shown that such removals are necessary nor shown that the AIM Project cannot proceed without such removals, as Algonquin already has a substantial right-of-way width at this location (seventy-five feet).

The rugged terrain in Blue Mountain Reservation poses many challenges for an expansion of the pipeline, as the construction has significant potential to produce sediment loading, erosion, and non-point source runoff which would damage the wetlands and vernal pool found within the Reservation. During the construction of a different pipeline by the Millennium Pipeline Company, hundreds of violations of federal and state regulations occurred. The Reservation is of similar character to the area where the Millennium pipeline is located. The potential for such damage to occur within the Reservation during the AIM Project is therefore quite plausible. The Blue Mountain Reservation is one of the few locations within Westchester County and surrounding counties that remains undeveloped. It is of paramount importance to protect the unique resources and character that Blue Mountain Reservation provides, and an accurate assessment of its resources and a limit on project impacts is essential.

The FEIS incorrectly omits the approval required by the Westchester County Board of Legislators for the work that Algonquin seeks to perform in the ATWA. The FEIS simply states that Algonquin is undertaking “consultation” with Westchester County for “encroachment” on County lands.<sup>30</sup> Algonquin has described the County of Westchester’s approval for the use of

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<sup>27</sup> Order, ¶¶ 138-143.

<sup>28</sup> Erik Kiviat, Ph.D., Hudsonia, Preliminary Biodiversity Assessment of the Algonquin Gas Pipeline at Reynolds Hill and Blue Mountain Reservation, City of Peekskill and Town of Cortlandt, Westchester County, New York (Jan. 12, 2015), appended to Legislator Peter B. Harckham comments submitted to FERC on January 14, 2015.

<sup>29</sup> See, e.g., Nov. 13, 2014 Letter to FERC Secretary Kimberly Bose, Significant Concerns on Project Impacts to Blue Mountain Reservation, Westchester County, by Legislators Peter B. Harckham, MaryJane Shimsky, Catherine Parker, Majority Leader Catherine Borgia, Bernice Spreckman, Chairman Michael B. Kaplowitz.

<sup>30</sup> Table 1.3-1, Major Permits, Approvals, and Consultations for the AIM Project, FEIS, at 1-9; FEIS, at 4-161.

ATWA within the Reservation as a revocable license, but the County's approval cannot be considered revocable. As the FEIS describes, the Certificate provides Algonquin with eminent domain authorization to obtain use of lands for the AIM Project.<sup>31</sup> Having a Certificate, Algonquin may employ this authority as needed (through federal court), and, against such authority, the County would be powerless to enforce a revocation of any County-issued license. The license is thus *de facto* "non-revocable". Furthermore, Algonquin's use of the ATWA would be exclusive, as others would be prevented from using this area. In New York State, a non-revocable right to use property is considered an easement rather than a license, and an exclusive right is considered a lease, rather than a license.<sup>32</sup> The Laws of Westchester County provide different types of County authorization for easements, leases, and licenses, with easements and leases requiring the approval of the legislative body, the Westchester County Board of Legislators.<sup>33</sup> The FEIS should clarify that approval by the Westchester County Board of Legislators is necessary to allow Algonquin's use of the ATWA in Blue Mountain Reservation. Additionally, as further described below, the grant of an easement, lease, or a license for the AIM Project triggers parkland alienation under New York law, which would also require a home rule request by the Westchester County Board of Legislators to the New York State Legislature.

**e. Parkland Alienation in New York State for the AIM Project Is Not Properly Described.**

In New York State, legislative approval is required for the diversion of parkland for non-park purposes.<sup>34</sup> This common law requirement is known as parkland alienation in New York, and it derives from the well-known Public Trust Doctrine.<sup>35</sup> The proposed expansion of the twenty-six inch Algonquin pipeline in Blue Mountain Reservation is a clear example of parkland use for a private, non-park purpose, and approval by the New York Legislature (and Governor) for the parkland alienation is required before Algonquin can begin construction. The home rule request for parkland alienation must come from the municipal legislative body that seeks alienation. FERC erred by failing to properly describe the scope of this requirement in the FEIS and to identify the necessary approvals.

A proper park purpose is one that "contribute[s] to the use and enjoyment" of the park and facilitates "public means of pleasure, recreation and amusement."<sup>36</sup> A project that is for some purpose other than enhancement of park use, or in which a park purpose is only incidentally served, constitutes a diversion of dedicated parkland for non-park purposes, and

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<sup>31</sup> FEIS, at 4-143.

<sup>32</sup> See generally, Chapter 85, License, Warren's *Weed New York Real Property* (5th Ed.).

<sup>33</sup> Laws of Westchester County, Chapter 104.11, available at [https://www.municode.com/library/ny/westchester\\_county/codes/code\\_of\\_ordinances?nodeId=PTICH\\_CH104COP\\_O\\_S104.11POCO](https://www.municode.com/library/ny/westchester_county/codes/code_of_ordinances?nodeId=PTICH_CH104COP_O_S104.11POCO)

<sup>34</sup> *Friends of Van Cortlandt Park, et al. v. City of New York*, 95 N.Y.2d 623, 630 (2001).

<sup>35</sup> See 9 N.Y. Prac., *Environmental Law and Regulation in New York* (2d ed.), Sec. 1:10.50, The parkland public trust doctrine (Sep't. 2014).

<sup>36</sup> *Williams v. Gallatin*, 229 N.Y. 248, 254 (1920).

authorizing legislation should be sought.<sup>37</sup> The AIM Project is clearly not a proper park purpose, as it will remove portions of Blue Mountain Reservation from public use and enjoyment during construction. The AIM Project will also cause the removal of hundreds of trees, including old-growth hemlock, destroy protected wetlands, and remove important habitat for conservation of animal and plant species.<sup>38</sup> In no way can the AIM Project activities be construed to be an enhancement of park use.

The FEIS cites a leading case from New York's highest court, *Friends of Van Cortlandt Park v. City of New York*<sup>39</sup>, which held that parkland alienation applied for the construction and operation of a proposed water treatment plant in a New York City park.<sup>40</sup> *Friends of Van Cortlandt Park* is instructive because the facilities were to be constructed underground, similar to the proposed AIM Project facilities in the Blue Mountain Reservation. In holding that alienation applied, the New York Court of Appeals found that the proposed underground water treatment plant would deprive the public of the enjoyment of the park for a period of years and that future uses of the land would be inhibited by the presence of the underground structure.<sup>41</sup> The Court of Appeals also declined to look at de minimis exceptions.<sup>42</sup>

When viewed through the lens of *Friends of Van Cortlandt Park* and precedent New York case law, the AIM Project meets the criteria requiring parkland alienation. As described above, the AIM Project is not a proper park purpose or an enhancement of park use. The AIM Project will impact public use and enjoyment of the park for a period of years. The FEIS states that the AIM Project will affect 18.8 acres of workspace, which includes 1.1 acres along the existing permanent right-of-way.<sup>43</sup> Although the FEIS deems this workspace to be 'temporary', the FEIS itself acknowledges that forest land, such as in Blue Mountain Reservation, would experience "long-term impacts because of the time required to restore the woody vegetation to its preconstruction condition".<sup>44</sup> The required time for such restoration to preconstruction condition will exceed the lifetime of most public members that now enjoy the use of Blue Mountain Reservation and will further impact the park's use by future public members. As described above, the AIM Project impacts at Blue Mountain Reservation extend beyond large scale tree clear-cutting to also include the habitat and species of conservation concern that exist in this area. The substantial area of park that is affected<sup>45</sup> and the long duration of these impacts bring the AIM project within the scope of required parkland alienation.

The FEIS cites *Schneidewind* and *National Fuel Gas Supply* in stating that the alienation process can not prohibit or unreasonably delay AIM Project construction; however, these

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<sup>37</sup> *Williams v. Hylan*, 223 A.D. 48 (1st Dep't 1928) (lease to private vendor primarily served vendor's interest and was prohibited alienation).

<sup>38</sup> See Kiviat Report at note 34.

<sup>39</sup> *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630 (2001).

<sup>40</sup> FEIS, at 4-163.

<sup>41</sup> *Friends of Van Cortlandt Park*, at 631-32.

<sup>42</sup> *Id.*

<sup>43</sup> FEIS, at 4-160, 4-161.

<sup>44</sup> FEIS, at 4-155.

<sup>45</sup> The AIM Project construction will occur over a 1 mile length within the Reservation.



authorities are distinguishable.<sup>46</sup> Both *Schneidewind* and *National Fuel Gas Supply* involved the regulation of the natural gas facilities by state public service commissions.<sup>47</sup> The New York requirement on parkland alienation is unrelated to the regulation of natural gas facilities or the involvement of the state public service commission; these authorities are inapposite. New York's parkland alienation requirement does not constitute a regulatory scheme to regulate interstate or intrastate natural gas facilities.

The FEIS also cites administrative decisions in *Iroquois Gas*, on federal pre-emption<sup>48</sup>; however, it is FERC's authorization for the Iroquois project that precisely captures the many concerns that myself and others have raised regarding the AIM Project. As the Commission will recall, the construction of the Iroquois pipeline resulted in substantial environmental damages and Clean Water Act violations, with estimated penalties of up to \$115 million, according to the United States Army Corps of Engineers.<sup>49</sup> Iroquois ultimately entered guilty pleas, agreed to a \$22 million civil settlement, and admitted to FERC that it had violated environmental conditions in its certificate.<sup>50</sup> The Iroquois project highlights the inadequacy of relying on FERC certificate conditions to avoid environmental harms.

The Tenth Amendment reserves undelegated powers to States<sup>51</sup> and the people, and the States' traditional role to regulate their lands, waters, and public places is widely accepted, including the cooperative federalism structure employed in environmental statutes like the CWA and CAA. The States' role in these areas needs not be confused with pre-emption and authority granted to FERC on interstate natural gas transmission.

#### **f. The Alternatives to the AIM Project Are Not Adequately Evaluated.**

NEPA requires an analysis of alternatives to proposed projects.<sup>52</sup> The FEIS examines renewable energy and energy conservation as alternatives; however, the analyses do not provide a fair comparison with the AIM Project. I identified this shortcoming in comments submitted during the project Pre-Filing period.<sup>53</sup> The AIM Project proposes to make 342,000 dekatherms per day of firm natural gas capacity available to entities to utilize beginning in November 2016.<sup>54</sup>

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<sup>46</sup> FEIS, note 3 at 4-164, citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990).

<sup>47</sup> *Schneidewind*, 485 U.S. 293, 294 [finding Michigan statute on issuance of securities in order to maintain gas rates is "a regulation of the rates and facilities of natural gas companies used in transportation and resale of natural gas in interstate commerce"]; *National Fuel Gas Supply*, 894 F.2d 571, 575-77 [finding New York regulatory scheme on natural gas transmission line construction to be pre-empted by FERC regulations].

<sup>48</sup> FEIS note 3 at 4-164, citing *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

<sup>49</sup> *Iroquois Gas v. FERC*, 145 F.3d 398, 399 (D.C.Cir. 1998).

<sup>50</sup> *Id.*

<sup>51</sup> U.S. Constitution, Tenth Amendment.

<sup>52</sup> 42 U.S.C. § 4332(C)(iii); 40 C.F.R. §§ 1502.14, 1508.25.

<sup>53</sup> October 14, 2013 Legislator Peter B. Harckham, Scoping Comments, Algonquin Incremental Market Project, FERC Docket PF-13-16-000.

<sup>54</sup> Algonquin Gas Transmission, LLC, Abbreviated Application for a Certificate of Public Convenience and Necessity and for Related Authorizations, at 2 (Feb. 28, 2014).

The proposed AIM Project would provide capacity for ten local distribution companies and municipal utilities.<sup>55</sup> According to Algonquin’s application, the AIM Project would satisfy unmet heating needs, satisfy state energy objectives, reduce spot price volatility, and alleviate constraints.<sup>56</sup> In a separately-announced project titled “Access Northeast”, Spectra Energy intends to provide additional capacity in order to meet electric demands in New England states.<sup>57</sup> Presumably, the Access Northeast project will address unsatisfied electric demand in this region.

The incongruity in the FEIS is that alternatives are presented and discarded regarding power generation, but the AIM Project capacity is not designated for power generation, as Algonquin has stated “to date no commitment by the electric market has been made to the AIM project”.<sup>58</sup> Rather, the stated AIM Project objective is to satisfy residential and commercial gas consumption, which is primarily for heating needs.<sup>59</sup> The FEIS does not provide a clear presentation of alternatives for residential and commercial gas consumption, which is the stated objective of the AIM Project. Energy conservation is one possible alternative to new capacity, which the FEIS discusses to a limited degree.<sup>60</sup> However, an adequate evaluation of alternatives requires a more thorough review than presented in the FEIS. Council on Environmental Quality (“CEQ”) regulation 40 C.F.R. § 1502.14(a) provides that agencies shall “rigorously explore and objectively evaluate all reasonable alternatives”.<sup>61</sup>

As also discussed below, there are other proposals to provide new natural gas capacity to the same New England region to be served by the AIM Project. For example, the Northeast Direct (“NED”) proposal by Kinder Morgan will provide natural gas to New England, as noted in the FEIS; although the FEIS states that different consumers would be served by this project.<sup>62</sup> The FEIS does not present a sufficient review of the alternative projects that can provide gas capacity to the AIM Project customers. For example, gas capacity can be exchanged among transmission providers at several points before delivery to the gates of local distribution companies or utilities.<sup>63</sup> This would allow capacity from other existing facilities or proposed projects to reach AIM Project customers, as an alternative to the AIM Project. Another alternative would be to utilize liquefied natural gas (“LNG”) storage facilities to help meet peak demands and reduce constraints, but the FEIS does not explore this alternative.<sup>64</sup> A further alternative would be LNG delivery to import facilities in the Boston area. The FEIS does not thoroughly examine these alternatives, contrary to the ‘rigorous exploration’ that NEPA requires, and must be revised.

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<sup>55</sup> *Id.*, note 4.

<sup>56</sup> *Id.*, at 5-6.

<sup>57</sup> FEIS, at 4-290.

<sup>58</sup> June 18, 2013 Letter of Berk Donaldson, Director, Rates and Certificates, Spectra Energy, to FERC Secretary Kimberly Bose.

<sup>59</sup> Abbreviated Application, at 5-6.

<sup>60</sup> FEIS, at 3-2, 3-3.

<sup>61</sup> 40 C.F.R. 1502.14(a).

<sup>62</sup> FEIS, at 3-12.

<sup>63</sup> *See, e.g.*, <http://www.iroquois.com/natural-gas-pipeline-services.asp>. In southern and western Connecticut, the Algonquin pipeline has interconnections with both the Iroquois and Tennessee gas transmission pipelines.

<sup>64</sup> FEIS, at 1-4.

### **g. The Cumulative Impacts of the AIM Project Are Not Properly Evaluated.**

During the scoping and the DEIS phases, I requested a review of the cumulative impacts of the AIM Project.<sup>65</sup> NEPA's implementing regulations require an evaluation of cumulative impacts and indirect effects.<sup>66</sup> The cumulative impacts analysis is critically important because of the concentration of energy-related infrastructure in the area of AIM Project construction in Westchester County, as well as the Atlantic Bridge project construction. The indirect effects of the AIM Project and other gas transmission projects are significant because these transmission projects have the effect of stimulating extraction and production in the Marcellus Shale, which is the source of natural gas for these projects.

While the FEIS includes a subsection<sup>67</sup> containing a limited discussion of some of the cumulative impacts of the Projects, its treatment of cumulative impacts falls short of what is required by NEPA—namely, a comprehensive analysis of the incremental impacts of the Projects when considered in addition to other past, present, and reasonably foreseeable future actions.<sup>68</sup> A cumulative impacts analysis requires an analysis of the baseline conditions, as well as an incremental analysis of the impacts created by the project.<sup>69</sup> As already described above, the FEIS does not provide an adequate assessment of baseline conditions. Without such assessment, it is not possible to properly evaluate incremental impacts from the AIM Project and Atlantic Bridge projects.

The FEIS provides a limited comparison between the air emissions from the AIM Project and the Atlantic Bridge project and expresses its belief that regional air quality impacts would not be significant.<sup>70</sup> However, the FEIS does not provide an analysis to support its conclusion, and relies on state permitting authorities to impose conditions that prevent cumulative impacts.<sup>71</sup> NEPA requires that FERC engage in a detailed and useful analysis of cumulative effects, not just a recitation of impacts.<sup>72</sup> The FEIS incorrectly relies on presumed compliance with permitting requirements to justify its conclusion that no cumulative impacts will result from the Projects. This conclusion finds no support in the facts. Indeed, other FERC-authorized pipeline projects

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<sup>65</sup> October 14, 2013 Legislator Peter B. Harckham, Scoping Comments, Algonquin Incremental Market Project, FERC Docket PF-13-16-000.

<sup>66</sup> 40 C.F.R. §§ 1508.25(a)(2), (c)(3); 40 C.F.R. §§ 1502.16(b), 1508.8(b), 1508.25(c)(2).

<sup>67</sup> FEIS, at 4-282 to 4-304.

<sup>68</sup> See 40 C.F.R. § 1508.7; see also *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1132–33 (9th Cir. 2007) (“One of the specific requirements under NEPA is that an agency must consider the effects of the proposed action in the context of all relevant circumstances, such that where ‘several actions have a cumulative . . . environmental effect, this consequence must be considered . . . .’”) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998)).

<sup>69</sup> See *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994–996 (9th Cir. 2004); *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 343 (D.C. Cir. 2002).

<sup>70</sup> FEIS, at 4-300.

<sup>71</sup> *Id.*

<sup>72</sup> See *Brong*, 492 F.3d at 1133, n. 19 (“[An agency] cannot fulfill its responsibility to conduct a cumulative effects analysis by merely reciting what effects have occurred, no matter how many pages it fills by doing so . . . . [T]he time, type, place, and scale of past activities must be included.”).

for which state permits were granted have caused adverse impacts to water resources, as discussed further below.

The FEIS does not contain an assessment of baseline air quality, water quality, wildlife or habitat conditions in the Marcellus Shale, or an evaluation of the impact of natural gas extraction and production that will supply the AIM Project consumers. This omission prevents an accurate evaluation of cumulative impacts. The FEIS also does not describe or quantify the incremental impacts that the AIM Project will produce in the Marcellus Shale region associated with additional gas production because the Marcellus Shale region is over 10 miles from the AIM Project.<sup>73</sup> FERC concludes that the AIM Project is not causally related to the Marcellus Shale development and potential environmental impacts are not reasonably foreseeable.<sup>74</sup> In its comments on the FEIS, EPA Region I states that such arbitrary definitions of proximity are not appropriate.<sup>75</sup>

The Town of Cortlandt submitted comments on the DEIS identifying numerous locations where cumulative impacts are possible because of the AIM Project and other projects, such as the Champlain Hudson Power Express transmission line and the West Point Partners transmission line.<sup>76</sup> The FEIS purports to assess the impacts of other past, present, or reasonably foreseeable actions in the area around the AIM Project, but fails to provide sufficiently detailed analysis or data to support its conclusions. Instead, FERC asserts that project impacts will be ‘highly localized’ and temporary.<sup>77</sup> Even if FERC concludes that the amount of resources (wetlands, habitat, vegetation, biological diversity, etc.) lost because of the AIM Project’s construction does not constitute a significant adverse impact, the additive impact of this loss along with the destruction of resources caused by past, present, or reasonably foreseeable gas development activities and other development activities in the region could constitute an adverse impact. This is precisely the analysis that NEPA requires agencies to undertake and that FERC has failed to perform.

#### **h. The Indirect Effects of the AIM Project Are Not Properly Evaluated.**

The Order and FEIS erroneously conclude that an indirect effects analysis under NEPA need not include an evaluation of the project’s impacts on shale gas development, such as the Marcellus Shale.<sup>78</sup> The indirect effects of a project that the agency must factor into the NEPA review include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>79</sup> Under this standard, agencies are routinely

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<sup>73</sup> FEIS, at 4-290.

<sup>74</sup> Order, ¶128.

<sup>75</sup> March 2, 2015, Letter of EPA Regional Administrator H. Curtis Spalding to FERC Secretary Kimberly Bose, at 5 [“Geographic proximity is not in and of itself the standard for NEPA’s requirement to consider impacts that have a reasonably close causal relationship to the proposed federal action.”].

<sup>76</sup> September 29, 2014, Town of Cortlandt Comments on DEIS for AIM Project, FERC Docket No. CP14-96-000.

<sup>77</sup> FEIS, at 4-291, 4-299.

<sup>78</sup> Order, ¶¶ 127-130; FEIS, at 1-5, 4-290, 4-291.

<sup>79</sup> 40 C.F.R. § 1508.8(b).

required to consider the environmental consequences induced by approval of an infrastructure project.<sup>80</sup>

FERC incorrectly asserts that potential environmental effects of the Marcellus Shale gas development from the AIM Project are not reasonably foreseeable.<sup>81</sup> Even if it cannot know the exact consequences at each and every wellhead, FERC is obligated under NEPA to undertake an evaluation of reasonably foreseeable natural gas development induced by the availability of the proposed pipeline's transportation capacity. To meet NEPA's goal of ensuring that decision-making goes forward in full view of the environmental consequences, agencies are required to engage in "[r]easonable forecasting and speculation."<sup>82</sup> FERC, thus, has an obligation to forecast the consequences of additional natural gas production and transportation infrastructure that is reasonably foreseeable in light of the approval of the AIM Project.<sup>83</sup>

FERC dismisses the potential causal link between the AIM Project and the additional use of hydraulic fracturing because other pipelines may also carry natural gas in the same area.<sup>84</sup> The existence of other pipelines does not alter the fact that the 342,000 dekatherms per day of additional capacity created by the AIM Project has the potential to induce additional natural gas production and infrastructure development, especially over the undefined, but likely decades-long, life of the AIM Project. Although the FEIS states that the AIM Project "does not depend on additional shale gas production that may occur for reasons unrelated to the [AIM] project", the FEIS provides no basis for this assertion and why it would be true.<sup>85</sup>

It is reasonably foreseeable that the AIM Project will require additional natural gas development to satisfy its capacity during its lifetime and that additional gathering lines will be constructed to link new extraction wells to the AIM Project. This is precisely the type of indirect effect that FERC is required to analyze under NEPA.<sup>86</sup> The FEIS therefore must be revised to account for the fact that the AIM Project will induce natural gas production in the Marcellus

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<sup>80</sup> See, e.g., *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1081–82 (9th Cir. 2011) (finding that NEPA review must consider induced coal production at mines, which was a reasonably foreseeable effect of a project to connect two rail lines that would carry coal, especially where the company proposing the railway line anticipated induced coal production in justifying its proposal); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003) (environmental effects of increased coal consumption due to construction of a new rail line to reach coal mines were reasonably foreseeable and required evaluation under NEPA).

<sup>81</sup> Order, ¶¶127-130.

<sup>82</sup> *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

<sup>83</sup> *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1158 (N.D. Cal. 2013) (quoting *Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988)) ["The government's inability to fully ascertain the precise extent of the effects of [the activity] is not . . . a justification for failing to estimate what those effects might be before irrevocably committing to the activity."].

<sup>84</sup> FEIS, at 1-5.

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., *Border Power Plant Working Group v. Dept. of Energy*, 260 F. Supp. 2d 997, 1013 (S.D. Cal. 2003) (noting that, in authorizing an electric transmission line, an agency was required to consider the environmental consequences of generating the additional electricity to be carried on those lines); *City of Davis*, 521 F.2d at 674–77 (stating that environmental review for highway project needed to analyze impact of induced development despite uncertainty about pace and direction of development).

Shale and cause reasonably foreseeable changes to pipeline infrastructure to transport gas to the AIM Project.

**i. The Public Safety Risk of the AIM Project Is Not Adequately Evaluated.**

The AIM Project will include over 3,900 linear feet of construction near the Indian Point Energy Center (“IPEC”) property, which currently consists of 2 active nuclear reactors and 1 inactive reactor. As detailed in substantial comments by United States Senators Kirsten Gillibrand and Charles Schumer, Congresswoman Nita Lowey, New York Attorney General Eric Schneiderman, New York Assembly Member Sandra Galef, and experts Paul Blanch and Richard Kuprewicz, the FEIS does not address several key AIM Project impacts upon IPEC. By improperly assessing the impacts and risk of the construction and operation of a high pressure natural gas pipeline adjacent to the IPEC nuclear plant, the FEIS has failed to evaluate impacts to human health and the environment contrary to NEPA.

At the request of FERC staff, the Nuclear Regulatory Commission (NRC) reviewed a safety analysis of AIM Project impacts on the reactors and ancillary facilities IPEC.<sup>87</sup> Entergy, the IPEC licensee/owner/operator, had provided a report (site hazards analysis) to NRC to evaluate safety.<sup>88</sup> Numerous commenters, including experts, have identified deficiencies in the NRC/Entergy analyses, as described below:

- A severe accident mitigation alternatives analysis should be prepared. The site hazards analysis should include a cumulative impacts analysis that incorporates the impacts from the existing Algonquin pipelines that traverse the Indian Point site. The three existing Algonquin pipelines should be re-routed to the proposed southern route for the AIM Project.<sup>89</sup> [NYSOAG]
- A consultant with unknown qualifications prepared the report for Entergy ... The proposed concrete barrier could become a missile in the event of rupture ... The Entergy report incorrectly identifies the classification of the pipeline ... The probability of pipeline rupture is incorrectly cited ... The estimated closure time is an order of magnitude lower than determined by the National Transportation Safety Board (NTSB) during investigations ... The report does not evaluate proximity to nearby large fuel oil tanks, with potential for fire in the event of rupture.<sup>90</sup> [Paul M. Blanch]

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<sup>87</sup> Comments Provided by the Nuclear Regulatory Commission, Algonquin Gas Transmission, LLC, Docket No. CP14-96-000 (Sep’t. 29, 2014).

<sup>88</sup> Fred Dacimo, Entergy, Correspondence to U.S. NRC, 10 C.F.R. 50.59 Safety Evaluation and Supporting Analyses Prepared in Response to the Algonquin Incremental Market Natural Gas Project Indian Point Nuclear Generating Unit Nos. 2 & 3 (Aug. 21, 2014) [safety evaluation attached to correspondence].

<sup>89</sup> Comments of the New York State Office of the Attorney General on the Draft Environmental Impact Statement for the Algonquin Incremental Market Project (Sep’t. 29, 2014).

<sup>90</sup> Paul M. Blanch, 10 CFR 2.206 Petition Regarding Violation of Regulations (Oct. 15, 2014) [submitted to US NRC based on review of the Entergy safety evaluation for the AIM Project].

- An independent, thorough rupture transients analysis is needed ... Transient dynamics of pipeline rupture can cause confusion and delay response, allowing a very high heat flux energy release.<sup>91</sup> A three minute response time is not realistic for the pipeline operator to identify, acknowledge and close remote isolation valves in the event of rupture.<sup>92</sup> [R. Kuprewicz, Accufacts]

In addition to the risks of construction adjacent to the IPEC nuclear plant, the AIM Project adversely impacts public safety by its dangerous proximity to residences and popular community facilities. The FEIS and Order erroneously conclude that these risks are at acceptable levels.

Several of the roadways that will be impacted by the AIM Project are roadways which are vital parts of the evacuation plan in the event of a radiological emergency at Indian Point, in particular Routes 9 and 9A. The Radiological Evacuation Plan is critical to the safety of the hundreds of thousands of people who live in the vicinity of Indian Point and is carefully monitored by the Nuclear Regulatory Commission, and numerous other federal, state and municipal entities, as well as by Entergy, the operator of the plants. The FEIS does not include any discussion of the impact of construction upon the Radiological Evacuation Plan or evaluate any alternatives that might promote public safety.<sup>93</sup> The Order also does not provide any evaluation but simply references the FEIS and states that further information is needed.<sup>94</sup> This failure takes on added significance in the wake of elevated security levels during the last few years and since September 11. Indian Point has received additional protection from the Coast Guard and the National Guard, but has received that protection because it may be a highly attractive target to terrorists. In the event of an attack, or other emergency, at Indian Point, it is imperative that emergency equipment be able to reach the nuclear facilities and imperative that the public be able to safely evacuate. It would be irresponsible to permit significant construction to take place on needed safety routes without any analysis and discussion of the impact of construction on emergency evacuation plans.

#### **j. The Commission Approval Constitutes an Impermissible Segmentation.**

Algonquin has improperly split the overall expansion of its twenty-six inch pipeline system into smaller components – the proposed AIM Project, the Atlantic Bridge project, and the Northeast Access project – thus avoiding a more rigorous environmental review of its construction activity along its facility. The Commission violated NEPA by segmenting review of Algonquin's expansion of its twenty-six inch pipeline upgrade into separate projects. These projects are part of a unified whole with functional interdependence, common timing, and geographic proximity. Algonquin's upgrades to its twenty-six inch pipeline system are one master project divided into segments that have significant adverse environmental impacts and should be evaluated in a single NEPA document.

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<sup>91</sup> R. Kuprewicz, Accufacts, Inc., Correspondence to Hon. K. Bose, Secretary, FERC, at 1-2 (Dec. 30, 2014).

<sup>92</sup> R. Kuprewicz, Accufacts, Inc., Correspondence to T. Wood, Esq., Town of Cortlandt, New York, at 8-9 (Nov. 3, 2014).

<sup>93</sup> See, e.g., FEIS, at 4-186-87, 4-298 [no discussion of Radiological Evacuation Plan].

<sup>94</sup> Order, ¶ 147.

An agency should prepare a single Environmental Impact Statement for actions that are “connected,” “cumulative,” or “similar,” such that their environmental effects are best considered in a single impact statement.<sup>95</sup> “Actions are ‘connected’ or ‘closely related’ 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; [or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.”<sup>96</sup> Similar actions have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.<sup>97</sup> NEPA requires “agencies to consider the cumulative impacts of proposed actions.”<sup>98</sup> An agency must analyze the impact of a proposed project in light of that project’s interaction with the effects of “past, current, and reasonably foreseeable future actions.”<sup>99</sup>

“Piecemealing” or “segmentation” is the unlawful practice whereby a project proponent avoids the NEPA requirement that an EIS be prepared for all major federal actions with significant environmental impacts by dividing an overall plan into component parts, each involving action with less significant environmental effects.<sup>100</sup> Federal agencies may not evade their responsibilities under NEPA by “artificially dividing a major federal action into smaller components, each without a ‘significant’ impact.”<sup>101</sup> The general rule is that segmentation should be “avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.”<sup>102</sup> Without this rule, developers and agencies could “unreasonably restrict the scope of environmental review.”<sup>103</sup> In *Delaware Riverkeeper, et al. v. FERC*, the D.C. Circuit Court held that the Commission was required to assess the construction and operational impacts of four natural gas pipeline projects that were designed to upgrade a single pipeline in one environmental review because the projects were “connected, closely related, and interdependent[.]”<sup>104</sup>

Taken together, the Atlantic Bridge Project, AIM Project, Northeast Access Project would be considered “connected” actions, “cumulative” actions, or “similar” actions. The projects would be considered “similar” actions pursuant to § 1508.25(a)(3), as they are “reasonably foreseeable or proposed agency actions, [that] have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or

<sup>95</sup> *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008); 40 C.F.R. § 1508.25(a).

<sup>96</sup> *Hammond v. Norton*, 370 F. Supp. 2d 226, 247 (D.D.C. 2005) (quoting 40 C.F.R. § 1508.25(a)(1)).

<sup>97</sup> *Id.* at 246; 40 C.F.R. § 1508.25(a)(3).

<sup>98</sup> *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988) (“Hodel”). *See also TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006).

<sup>99</sup> 40 C.F.R. § 1508.7.

<sup>100</sup> *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

<sup>101</sup> *Coal. on Sensible Transp. v. Dole*, 826 F. 2d 60, 68 (D.C. Cir. 1987). *See also* 40 C.F.R. § 1508.27(b)(7).

<sup>102</sup> *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988).

<sup>103</sup> *Fund for Animals v. Clark*, 27 F. Supp. 2d 9, 16 (D.D.C. 1998) (“Fund”).

<sup>104</sup> *Delaware Riverkeeper*, 753 F.3d 1304, 1309 (D.C. Cir. 2014).



geography.”<sup>105</sup> With regard to physical proximity, Algonquin’s projects are along the same linear geographic corridor, impact the same watershed and airshed, abut one another, and present overlapping construction zones. If not considered “connected actions” or “similar actions,” FERC still improperly segmented its review by failing to provide a meaningful analysis of the “cumulative actions” represented by Algonquin’s upgrade projects.

In the Order, FERC incorrectly avoids a NEPA segmentation analysis by simply stating that no proposal exists for the other Algonquin projects (Atlantic Bridge, Northeast Access).<sup>106</sup> However, as FERC acknowledges, Algonquin has already submitted the Atlantic Bridge project into pre-filing.<sup>107</sup> This alone requires a substantial commitment by Algonquin to the Atlantic Bridge project, as it includes submissions of comprehensive Resource Reports to FERC. Algonquin has already met with elected officials in municipalities along the Atlantic Bridge project. It is reasonably foreseeable that Algonquin will follow pre-filing with a formal application that FERC must review.

In addition, FERC cites CEQ regulation 40 C.F.R. § 1508.23 for its assertion that a proposal has not been advanced for the Atlantic Bridge project.<sup>108</sup> However, § 1508.23 states that a proposal “may exist in fact as well as by agency declaration that one exists”.<sup>109</sup> Algonquin’s activities thus far in entering pre-filing, engaging municipalities, and soliciting gas purchasers demonstrate that the Atlantic Bridge project exists in fact and that subsequent review by FERC is reasonably foreseeable.

The FEIS itself states that the Atlantic Bridge project will have impacts that are important, when considered in conjunction with the AIM Project.<sup>110</sup> For example, the FEIS states that combined impacts from the Atlantic Bridge and AIM Projects “would contribute to cumulative impacts on the air quality within the airsheds ... but ... the effect on regional air quality would be [in]significant.”<sup>111</sup> This assertion belies FERC’s contention that an Atlantic Bridge proposal does not exist, as FERC staff apparently have sufficient data with which to compare impacts of the AIM Project and Atlantic Bridge project and to conclude that cumulative impacts would exist from the two projects. The FEIS does not provide quantitative data or analysis to support its conclusion that regional air quality impacts from the AIM Project and Atlantic Bridge project would not be significant.

**k. The Commission violated NEPA by narrowly defining the Project’s purpose in order to reject all other alternatives.**

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<sup>105</sup> 40 C.F.R. § 1508.25(a)(3).

<sup>106</sup> Order, ¶¶ 109-111.

<sup>107</sup> Id., ¶ 110.

<sup>108</sup> Order, ¶ 109.

<sup>109</sup> 40 C.F.R. § 1508.23.

<sup>110</sup> FEIS, at 4-299 [“The one project that is likely to have a greater impact is the Atlantic Bridge Project.”].

<sup>111</sup> FEIS, at 4-300.

Although the FEIS articulates some broad purposes of the AIM Project<sup>112</sup>, FERC determined that to be considered feasible, all alternatives to the AIM Project must “be capable of meeting” the requirements of the entities that have signed precedent agreements with Algonquin for proposed gas volumes.<sup>113</sup> With this narrow purpose in mind, FERC rejected all available alternatives to the AIM Project, including the no action alternative, because no proposal except the AIM Project would suffice. FERC cannot interpret the AIM Project’s purpose and need so narrowly that every conceivable alternative is ruled out by definition.<sup>114</sup> Only Algonquin’s AIM Project offers the means of meeting the recipient entities’ requirements, and thus all alternatives are bound to fail in comparison. Such narrow statements of purpose and need undermine the NEPA process and will not be upheld.<sup>115</sup>

### 3. The Certificate Is Not in the Public Interest.

The NGA charges FERC with determining whether or not the construction and operation of the AIM Project is required by the public convenience and necessity.<sup>116</sup> In assessing whether the AIM Project will be in the public convenience and necessity, FERC must balance the stated public benefits from the Projects against their adverse impacts.<sup>117</sup> The stated interests must outweigh the adverse effects caused by the AIM Project for FERC to approve it.<sup>118</sup>

As discussed above, the AIM Project is likely to have significant adverse environmental impacts on water quality, forest habitats, imperiled species, and air quality (including GHG emissions). The AIM Project is likely to induce additional drilling for natural gas in the Marcellus Shale, with foreseeable negative consequences for air, water, land, and communities. In addition, the AIM Project, both directly and indirectly, will contribute to climate change.

FERC has not taken an adequately hard look at the AIM Project’s many impacts, and failed to justify its conclusion that the associated significant impacts will be mitigated sufficiently. The FEIS and the Order have not demonstrated that adverse effects on landowners and the surrounding communities are less than any alleged public benefits of the AIM Project. This analysis cannot support a conclusion that the AIM Project’s negative impacts are outweighed by their benefits.

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<sup>112</sup> FEIS, at 1-2, 3-1.

<sup>113</sup> *Id.*

<sup>114</sup> See *Simmons v. U.S. Army Corps of Eng’s*, 120 F.3d 664 (7th Cir. 1997) (cautioning agencies not to put forward a purpose and need statement that is so narrow as to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence)”; *Nat’l Parks & Cons. Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009) (finding a purpose and need statement that included the agency’s goal to address long-term landfill demand, and the applicant’s three private goals was too narrowly drawn and constrained the possible range of alternatives in violation of NEPA).

<sup>115</sup> *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App’x 440, 443 (9th Cir. 2007) (agencies cannot “define[] the objectives of the project so narrowly that the project [is] the only alternative that would serve those objectives”).

<sup>116</sup> See 15 U.S.C. § 717f(c).

<sup>117</sup> See *Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy*, 88 FERC ¶ 61,227, 61,748 (Sept. 15, 1999).

<sup>118</sup> See *id.* at 61,748, 61,750; see also *Millennium Pipeline Co.*, 141 FERC ¶ 61,198, 2012 WL 6067320, at \*4 (Dec. 7, 2012).

### III. COMMUNICATIONS


Communications and correspondence regarding this proceeding may be served to me as follows:

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### IV. CONCLUSION

Based on the foregoing, I respectfully request that the Commission grant this request for rehearing and rescission of the Order.

Respectfully submitted on this 1st day of April, 2015.



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