

March 12, 2010

DEWA PPL EIS
Planning Team, Denver Service Center – Planning
P.O. Box 25287
Denver, CO 80225-0287

Re: Susquehanna to Roseland 500kV Transmission Line — Public Scoping

Dear Superintendents Donahue and Underhill:

Please accept these comments on behalf of Earthjustice and the Sierra Club regarding the proper scope of the Environmental Impact Statement (“EIS”) for the proposed Susquehanna to Roseland 500kV Transmission Line (“S-R Line”). We urge you to expand your analysis to consider the full extent of harm threatened by the S-R Line as the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, requires. Apparently, the National Park Service is intending to focus its analysis on environmental impacts in the immediate area of the requested right-of-ways and proposed road construction (collectively “ROWs”). Yet the ROWs are an integral part of a far larger project, the S-R Line, which cannot go forward as planned without federal approvals. Under these circumstances, your agency must look beyond the boundaries of National Park Service units to consider the adverse environmental impacts that will flow from construction of the S-R line as a whole and evaluate a full range of alternatives to avoid or mitigate those impacts. While we are encouraged by your expressed intent to consider alternative routes that may prevent impairment of park resources, the EIS also must consider alternatives that avoid construction of this billion-dollar, high-voltage transmission line.

A. The National Park Service Must Broaden the Scope of the EIS to Consider the Whole S-R Line

The Park Service cannot constrain its analysis to the portions of the S-R Line that cross public lands. The EIS must assess the environmental implications of — and alternatives to — the entire S-R Line. As NEPA’s implementing regulations make clear, agencies must consider major federal actions, such as ROW approvals, in conjunction with other “connected actions.” 40 C.F.R. § 1508.25 (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). Here, construction of the S-R Line cannot proceed as planned (and approved by the Pennsylvania Public Utility Commission and Maryland Public Service Commission) unless the Park Service grants the requested ROWs. Moreover, the ROWs are interdependent parts of the larger S-R project and necessarily depend on the entire transmission line for their justification. Thus, approval of the ROWs and construction of the S-R Line are “connected actions.”

The fact that the S-R Line’s developers are private as opposed to federal actors does not give the Park Service license to ignore the big-picture consequences of granting the requested ROWs. 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.’” *Alpine Lakes Protection Soc’y v. U.S. Forest Service*, 838 F.Supp. 478, 482 (W.D.Wash. 1993) (quoting *Morgan v. Walter*, 728 F.Supp. 1483, 1493 (D. Idaho 1989) (quoting *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989))). As explained by the Ninth Circuit Court of Appeals, 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 Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000).¹ Under this test, related federal and private actions are not “connected” if the respective “projects would have taken place with or without the other.” *Id.* (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998)). Conversely, a federal action — for instance, the grant of a ROW — that has no independent purpose of its own, is necessarily connected to the private project that it serves. *See, e.g., Alpine Lakes*, 838 F.Supp. at 482-83.

Alpine Lakes is illustrative. 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 still maintained that it could focus its NEPA analysis exclusively on the access road. 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 was “dependent 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.* (internal quotations omitted).

In reaching this decision, the court emphasized that it was guided not only by established case law but also “the language of the [NEPA] regulations themselves.” *Id.* 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.* (quoting 40 C.F.R. § 1508.7 (emphasis added)). Given that “connected actions . . . may result in cumulative impacts,” the court reasoned that

¹ The “independent utility” test has been applied most commonly to determine the scope of the EIS that the U.S. Corps of Army Engineers (“Corps”) must prepare in issuing Clean Water Act § 404 permits for the filling of wetlands. Importantly, the Corps is governed by scoping regulations that narrowly define the obligation to consider private actions related to the grant of § 404 permits. *See* 33 C.F.R. Part 325, Appendix B § 7(b). These regulations do not govern the Park Service, and they are not compelled by NEPA. *See Sylvester*, 884 F. 2d at 398 (explaining that NEPA itself is silent on how federal agencies “determin[e] whether their actions, when combined with private actions, come within the mandate of [42 U.S.C.] § 4332(2)(C)”).

“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.

The court’s reasoning in *Alpine Lakes* applies here and must guide the Park Service’s ultimate scoping determination. Just as the Forest Service was required to consider the logging that a federal access road would facilitate, the Park Service must consider the impact of the transmission line that will be built courtesy of federal ROWs. *See id.*; *see also Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 480 (9th Cir. 1979) (requiring EIS to consider both a federal power supply and a proposed private magnesium 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 Full Extent of Environmental Harm Threatened by the S-R Line

The EIS must address the full suite of environmental impacts that will flow from construction of the S-R Line. Based on the Internal Scoping Meeting Report that the Park Service has very helpfully shared with the public, it appears that the agency has identified the appropriate categories of impacts that merit study in the EIS. *See National Park Service, Internal Scoping Meeting Report for the Susquehanna to Roseland Line Proposal and Right of Way Request Environmental Impact Statement*, 29-36 (Oct. 2009) (“Scoping Report”). However, the proposed scope of analysis is uniformly constrained to the direct impacts of construction in or around the affected National Park units. This myopic focus does not pass muster under NEPA. Again, the agency cannot ignore the far-reaching impacts of this major transmission project. The EIS must address the direct, indirect, and cumulative impacts of the S-R Line as a whole. *See* 40 C.F.R. §§ 1508.25(c)(1)-(3). To the extent these impacts will occur outside of the boundaries of the arbitrarily defined “study area” presented in the Scoping Report, the Park Service must expand the geographic scope of its analysis.

“Direct effects” are impacts “caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). “Indirect effects” are impacts caused by the proposed action but “are later in time or farther removed in distance.” *Id.* § 1508.8(b).² As set forth above, a “cumulative impact” is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other action.” *Id.* § 1508.7. “Cumulative

² The words “effect” and “impact” are used synonymously in NEPA’s implementing regulations. *See* 40 C.F.R. § 1508.8.

impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

In addition to the direct impacts that inevitably will flow from construction of the S-R Line — *e.g.*, surface disturbance, habitat fragmentation, wetlands filling, increased noise, landscape degradation, and intensification of electric magnetic fields along the length of the line — this new high-voltage power line will have profound indirect and cumulative impacts. It will be especially important to address the following such impacts in the EIS:

- **Enduring impairment of Park resources from the siting of multiple power lines on National Park Lands:** Existing power lines already diminish the experience of the Delaware Water Gap and the Appalachian Trail. Additional siting of power lines in and around Park lands should not be permitted. Significantly, in addition to the S-R Line, there is at least one additional high-voltage power line, the Potomac Appalachian Transmission Highline (“PATH”), that is currently slated to cross the Appalachian Trail. The Park Service should consider the S-R Line in conjunction with PATH and any other new lines that may foreseeably result in cumulative impacts to park resources. Under NEPA, agencies have an affirmative duty to locate, describe, and consider other projects that could have cumulative impacts when combined with the project under consideration. *See Carmel-by-the-Sea v. United States 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 S-R Line:** The S-R Line is designed to bring power from west to east, primarily from coal-fired power generators in Pennsylvania and the Ohio River Valley. Currently, northeastern states including New Jersey import very little coal-fired power. *See* John Rogers, Chris James & Robin Maslowski, Importing Pollution: Coal’s Threat to Climate Policy in the U.S. Northeast 15 (2008), available at http://www.ucsusa.org/clean_energy/technology_and_impacts/impacts/importing-pollution.html. However, new transmission lines, such as the S-R Line, would give Appalachian power plants that are operating well below full capacity access to lucrative new markets on the East Coast. *See id.* at 12-13. As a result, experts anticipate that some of the nation’s dirtiest old coal plants will ramp up production and pollution too. Increased emissions of sulfur dioxide, nitrogen oxides, fine particulates, and hazardous air pollutants could severely impact: (1) downwind communities, many of which are located in areas that are already in non-attainment with National Ambient Air Quality Standards; (2) visibility in Class I areas including National Parks; and (3) aquatic ecosystem that are impaired already by acid rain and mercury deposition.
- **Increased greenhouse gas emissions at coal-fired power plants served by the S-R Line:** Increased pollution from coal-fired power plants also means increased

emissions of carbon dioxide, the principal driver of global warming and associated climate change.

- **Decreased investment in renewable energy and energy efficiency and demand-side management (“DSM”) programs:** Transmission lines such as the S-R 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.
- **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 Park Service Must Evaluate a Full Range of Alternatives in the EIS

The EIS must evaluate a range of alternatives to building the proposed S-R Line as planned and to building the S-R Line at all. NEPA requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E); *see also* 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 at the heart of the environmental impact statement.” 40 C.F.R. § 1502.14; *see also* *Natural Resources 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 environmental analysis.”) (internal quotations 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 Park Service and the “alternative of no action.” *Id.* §§ 1502.14(a),(c),(d) (emphasis added).

In order to satisfy this core NEPA requirement, the Park Service 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. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999). Here, the agency must take care not to constrain its alternatives analysis through “wholesale acceptance” of the applicant’s definition of the project objective; the Park Service “has the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.” *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997). While the applicant may prefer to build an expensive new

transmission line, which will yield a substantial rate of return on investment, construction of the S-R 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, to maintain reliability of the electric grid. *Id.* (emphasis added) (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir.1986)). Thus, the “agency cannot restrict its analysis to those “alternative means by which a particular applicant can reach [its] goals.” *Id.* It must examine a variety of alternatives that could feasibly maintain electric reliability. *See id.* (finding 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”).

Given this governing legal framework, the alternatives that require consideration in the EIS include not only alternative routes and specifications for the S-R Line — *e.g.*, siting the S-R Line so as to avoid Park resources, placing portions of the line underground, building less intrusive direct current (DC) lines — but also alternatives to ensure electric reliability without building the S-R Line. There are many viable ways to meet electric demand in the East Coast population centers that the S-R Line purportedly is intended to serve. For instance, DSM and energy efficiency programs have been shown to reduce demand very dramatically. To the extent some maintenance of the grid is needed, there may be many smaller “fixes” that would avoid the need to build a billion dollar transmission line that will entrench reliance on dirty coal-fired power. Crucially, the applicant has never analyzed the role that DSM and efficiency could play in eliminating the alleged need for the S-R Line, and the applicant has never considered whether there may be more modest electrical solutions to ensure grid reliability in light of the precipitous drop-off in energy demand that has resulted from the current recession, and which is widely viewed among energy analysts as an enduring phenomenon.

The NEPA process can and must produce analysis of reasonable alternatives that so far have been ignored in the planning process for the S-R Line. At a minimum, the Park Service should explore and evaluate the following alternatives in addition to the alternatives identified in the Scoping Report:

- DSM programs, including “smart grid” programs, to reduce peak electric demand in the areas that would be served by the S-R Line
- Energy efficiency programs to reduce electric demand in the same areas
- Tailored upgrades of existing transmission infrastructure (*e.g.*, substations, capacitors, conductors) 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
- Distributed generation to eliminate alleged reliability issues
- Solutions that employ a combination of the above strategies to ensure electric reliability

D. The Park Service Must Revisit the Asserted “Need” for the S-R Line

In order to ensure a meaningful analysis of alternatives, the Park Service must revisit the threshold question whether there is a legitimate need for the S-R Line. The “stated purpose for the project is to strengthen the reliability of the grid at the direction of the Regional Transmission Operator, PJM Interconnection (PJM),” and the asserted “need” for the project is based on PJM’s 2007 load forecast model, which “identified 23 projected reliability criteria violations, starting in 2012 and beyond.” *Id.* However, events have overtaken PJM’s “need” projections. Since 2007, electric demand has declined very significantly, and the advent of successful energy efficiency and DSM programs is responsible for further, permanent demand reductions. In light of this unprecedented shift, PJM has been forced to concede in litigation that the PATH line, which would serve the same mid-atlantic “load delivery area” as the S-R Line is no longer needed as originally anticipated by PJM. *See In re: Application of PATH Allegheny Virginia Transmission Corporation*, No. PUE-2009-00043, slip op. (Va. SCC Jan. 27, 2010), *available at* <http://docket.scc.state.va.us>. So far, PJM has been unwilling to update its modeling to determine whether the S-R Line is still needed, and in the absence of credible new modeling, the Park Service should not defer to PJM’s outdated “need” projections. *See Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d at 669 (requiring the agency to “to exercise a degree of skepticism” in evaluating an applicant’s definition of purpose and need).

E. The Park Service Must Avoid Harm to Park Resources

The Park Service’s preservation mandate must inform its evaluation of the no-action alternative. While it is clear from the Scoping Report that the Park Service is genuinely concerned about potential adverse impacts to Park resources, the agency’s discussion of governing “NPS Acts and Policies” does not mention the 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 the Delaware Water Gap National Recreation Area, the Middle Delaware National Scenic and Recreational River, and the Appalachian National Scenic Trail, the Park Service must choose the no-action alternative.

The National Park Service Organic Act of 1916 directs the Park Service “to conserve the scenery and the natural and historic objects and the wildlife 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. 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 Coalition v. Kempthorne*, 577 F.Supp.2d 183, 192 (D.D.C. 2008) (affirming that “the fundamental purpose of the national park system is to conserve park resources and values”).

If “necessary and appropriate to fulfill the purposes of a park,” the Park Service has “management discretion to allow impacts to park resource and values.” NPS Management Policies § 1.4.3. However, “[t]he 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.” *Id.* § 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; *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 100 (D.D.C. 2006). Necessarily, “[a]n 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; *Greater Yellowstone*, 577 F. Supp. 2d at 194 (quoting same).

It is clear even from the preliminary analysis presented in the Scoping Report that a decision to grant the requested ROWs would cause not only adverse impacts but impairment of Park resources and values in the Delaware Water Gap, the Middle Delaware, and the Appalachian Trail. These areas are national treasures in large part because they afford access to spectacular natural scenery that is increasingly short supply in the Northeast. Allowing the construction of 200-foot power lines that will rise well above tree-line will permanently mar the very scenic 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 analysis that can inform and support a decision to deny the requested ROWs.

Conclusion

We appreciate the Park Service's clear dedication to protecting the Delaware Water National Recreation Area, the Middle Delaware National Scenic and Recreational River, and the Appalachian National Scenic Trail. We also believe that the Park Service is well-positioned to undertake badly needed analysis of environmental impacts from and alternatives to building the S-R Line as NEPA requires.

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,

/s/ Abigail Dillen
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