
**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 13-1015

DELAWARE RIVERKEEPER NETWORK, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**RESPONDENT'S OPPOSITION TO
PETITIONERS' MOTION FOR AN ORDER
ENFORCING THIS COURT'S JUDGMENT**

ROBERT H. SOLOMON
SOLICITOR

BETH G. PACELLA
DEPUTY SOLICITOR

KARIN L. LARSON
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

JANUARY 15, 2016

TABLE OF CONTENTS

	PAGE
BACKGROUND	2
ARGUMENT	5
I. RIVERKEEPER PREMATURELY SEEKS JUDICIAL REVIEW OF FERC’S REMAND ORDER.....	5
II. THE COMMISSION COMPLIED WITH THE COURT’S MANDATE BY CONSIDERING THE ADDITIVE AND CUMULATIVE IMPACTS OF THE UPGRADE PROJECTS IDENTIFIED IN THE COURT’S DECISION	8
A. New Pipeline Projects That Post-Date The Court’s Decision Are Outside The Scope Of The Court’s Mandate.....	10
B. FERC Provided A Reasonable Opportunity To Comment On The Supplemental Environmental Analysis.....	14
C. FERC Reasonably Considers Non-Compliance Issues Under Its Monitoring And Enforcement Authority	17
CONCLUSION	20

TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army</i> , 398 F.3d 105 (1st Cir. 2005).....	15
<i>Atlantic City Elec. Co. v. FERC</i> , 329 F.3d 856 (D.C. Cir. 2003).....	7
<i>Blumenthal v. FERC</i> , 613 F.3d 1142 (D.C. Cir. 2010).....	16
<i>BNSF Ry. Co. v. Surface Transp. Bd.</i> , 453 F.3d 473 (D.C. Cir. 2006).....	15-16
<i>Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs</i> , 524 F.3d 938 (9th Cir. 2008)	15
<i>Butte County, Cal. v. Hogan</i> , 613 F.3d 190 (D.C. Cir. 2010).....	12
<i>City of Cleveland, Ohio v. FPC</i> , 561 F.2d 344 (D.C. Cir. 1977).....	10
<i>Clifton Power Corp. v. FERC</i> , 294 F.3d 108 (D.C. Cir. 2002).....	6
* <i>Del. Riverkeeper Network v. FERC</i> , 753 F.3d 1304 (D.C. Cir. 2014).....	1, 4, 7, 8, 9, 10
<i>Fund for Animals, Inc. v. Rice</i> , 85 F.3d 535 (11th Cir. 1996)	15
<i>Greater Yellowstone Coalition v. Flowers</i> , 359 F.3d 1257 (10th Cir. 2004)	15

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>Habitat Educ. Ctr. v. U.S. Forest Serv.</i> , 609 F.3d 897 (7th Cir. 2010)	12
<i>Heartland Regional Medical Center v. Leavitt</i> , 415 F.3d 24 (D.C. Cir. 2005).....	8
<i>Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs</i> , 702 F.3d 1156 (10th Cir. 2012)	12
<i>In re Am. Rivers and Idaho Rivers United</i> , 372 F.3d 413 (D.C. Cir. 2004).....	13
<i>Jepsen v. FERC</i> , 420 Fed. Appx. 1 (D.C. Cir. 2011)	16
<i>LaFlamme v. FERC</i> , 945 F.2d 1124 (9th Cir. 1991)	18
<i>Marsh v. Or. Nat. Res. Council</i> , 490 U.S. 360 (1989).....	12
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	16
<i>Minisink Residents for Envtl. Pres. & Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	11, 16
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015).....	11, 15
<i>Northern States Power Co. v. U.S. Dept. of Energy</i> , Nos. 97-1064, <i>et al.</i> , 1998 WL 276581 (D.C. Cir. May 5, 1998)	17
<i>Papago Tribal Util. Auth. v. FERC</i> , 628 F.2d 235 (D.C. Cir. 1980).....	6

TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>Pogliani v. U.S. Army Corps of Eng’rs</i> , 306 F.3d 1235 (2d Cir. 2002)	15
<i>Save Our Sebasticook v. FERC</i> , 431 F.3d 379 (D.C. Cir. 2005).....	13
<i>Tennessee Gas Pipeline Co. v. FERC</i> , 9 F.3d 980 (D.C. Cir. 1993).....	6
<i>Theodore Roosevelt Conservation P’ship v. Salazar</i> 616 F.3d 497 (D.C. Cir. 2010).....	11, 14
<i>Tillamook County v. U.S. Army Corps of Eng’rs</i> , 288 F.3d 1140 (9th Cir. 2002)	18
<i>TOMAC, Taxpayers of Mich. Against Casinos v. Norton</i> , 433 F.3d 852 (D.C. Cir. 2006).....	14, 15
<i>Town of Winthrop v. FAA</i> , 535 F.3d 1 (1st Cir. 2008).....	12
<i>Village of Bensenville v. FAA</i> , 457 F.3d 52 (D.C. Cir. 2006).....	12
<i>Watkins v. Washington</i> , 511 F.2d 404 (D.C. Cir. 1975).....	8
<i>Wetlands Action Network v. U.S. Army Corps of Eng’rs</i> , 222 F.3d 1105 (9th Cir. 2000)	18
 ADMINISTRATIVE CASES:	
<i>Tenn. Gas Pipeline Co., L.L.C.</i> , 139 FERC ¶ 61,161 (2012).....	3, 18, 19

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: PAGE

**Tenn. Gas Pipeline Co., L.L.C.*,
142 FERC ¶ 61,025 (2013)..... 3, 17, 18, 19

**Tenn. Gas Pipeline Co., L.L.C.*,
153 FERC ¶ 61,215 (2015)..... 4, 5

STATUTES:

Declaratory Judgment Act

28 U.S.C. §§ 2201-02 5

Natural Gas Act

15 U.S.C. § 717f(c)..... 2

15 U.S.C. § 717r(a)..... 6, 16

15 U.S.C. § 717r(b)..... 6

National Environmental Policy Act

42 U.S.C. §§ 4321, *et seq.* 3

REGULATIONS:

18 C.F.R. § 380.9 15

40 C.F.R. § 1506.6 15

40 C.F.R. § 1508.7 14

40 C.F.R. § 1508.25 14

GLOSSARY

Certificate Order	<i>Tennessee Gas Pipeline Co., L.L.C.</i> , 139 FERC ¶ 61,161 (2012)
Commission or FERC	Federal Energy Regulatory Commission
Motion	Riverkeeper’s Motion for an Order Enforcing this Court’s Judgment
NEPA	National Environmental Policy Act
Pipeline	Tennessee Gas Pipeline Company, L.L.C., sponsor of the Northeast Upgrade Project
Project	Tennessee Gas Pipeline Company’s Northeast Upgrade Project
Remand Order	<i>Tennessee Gas Pipeline Co., L.L.C.</i> , 153 FERC ¶ 61,215 (Nov. 19, 2015)
Riverkeeper	Petitioners Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter
Upgrade Projects	The Northeast Upgrade Project, along with the 300 Line, MPP, and Northeast Supply Diversification Projects

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 13-1015

DELAWARE RIVERKEEPER NETWORK, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**RESPONDENT’S OPPOSITION TO
PETITIONERS’ MOTION FOR AN ORDER
ENFORCING THIS COURT’S JUDGMENT**

Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) opposes the motion of petitioners Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter (together, “Riverkeeper”) for a declaratory order enforcing the Court’s judgement.

The Commission’s Order on Remand that is the subject of Riverkeeper’s motion reflects the Commission’s continuing commitment to comprehensive environmental reviews of natural gas infrastructure projects, especially with respect to the four upgrade projects that were the subject of the Court’s decision in *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014). The Commission fully complied, on remand, with the Court’s directives. Recognizing this, Riverkeeper’s ever-evolving challenges now raise new arguments focused

primarily on new projects that post-date the Court's decision and have yet to be reviewed by the Commission.

Thus, Riverkeeper's Motion is premature. It raises arguments that the Commission has not yet had an opportunity to address in the normal course of administrative review (whether in the underlying proceeding or in the new FERC proceedings for the new projects). And Riverkeeper raises arguments that, once addressed by the Commission, can be heard by this Court in the normal course of appellate review. Riverkeeper has not identified any legitimate reason for interlocutory review by the Court at this time.

BACKGROUND

In the underlying FERC orders that were the subject of Riverkeeper's appeal, the Commission issued a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Tennessee Gas Pipeline Company, L.L.C. ("Pipeline"), authorizing it to build and operate the Northeast Upgrade Project ("Project"). The Project is a 40.3-mile upgrade of a portion of an existing pipeline: the "300 Line." The Northeast Upgrade Project was one of four projects proposed by the Pipeline in separate applications between July 2009 and December 2011 to upgrade the 300 Line. The projects are, in chronological order based on the date the applications were filed: (1) the 300 Line

Project; (2) the Northeast Supply Diversification Project; (3) the Northeast Upgrade Project; and (4) the MPP Project (together the “Upgrade Projects”).

Pursuant to its procedural obligations under the National Environmental Policy Act, 42 U.S.C. § 4332, *et seq.* (“NEPA”), the Commission issued an environmental assessment of the Northeast Upgrade Project that considered direct, indirect, and cumulative impacts of the Project. That assessment found that, as mitigated, the Project would not result in significant environmental impacts. After completing its environmental review, the Commission determined that the Northeast Upgrade Project, with the imposition of numerous environmental conditions, was consistent with the public convenience and necessity and issued a certificate authorizing the construction and operation of the Project. *Tenn. Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (2012) (“Certificate Order”), *on reh’g*, 142 FERC ¶ 61,025 (2013).

On appeal, Riverkeeper alleged three deficiencies in FERC’s environmental assessment: (1) unlawful segmentation of the environmental review of the Northeast Upgrade Project and the other three Upgrade Projects on the “Eastern leg” of the 300 Line; (2) failure to adequately consider the cumulative impacts of these other three Upgrade Projects; and (3) insufficient analysis of wildlife and wetlands impacts and inadequate mitigation measures to support the Commission’s finding of no significant impact.

On June 6, 2014, this Court granted Riverkeeper’s petition for review on the first two of the challenged issues. *Del. Riverkeeper*, 753 F.3d 1304. The Court remanded the case to FERC “for further consideration of these two issues:” “FERC’s segmentation of its NEPA review of the Northeast Project, and its failure to adequately address the cumulative impacts of the four upgrade projects on the Eastern leg of the 300 Line.” *Id.* at 1320. The Court did not upset the Commission’s finding of no significant environmental impact; nor did it vacate the Commission’s 2012 certificate order. The challenged Project was constructed and has been in operation since November 1, 2013. Environmental restoration of the construction area is virtually complete, and applicable environmental conditions have been satisfied. *See Tennessee Gas Pipeline, L.L.C.*, FERC Field Inspection Report, Docket No. CP11-161-000 (Aug. 10, 2015) (no problem areas or instances of non-compliance found; no follow-up inspection needed).

On November 19, 2015, the Commission issued an Order on Remand, coupled with its Supplemental Environmental Analysis appended thereto. *Tennessee Gas Pipeline, L.L.C.*, 153 FERC ¶ 61,215 (2015) (“Remand Order”). The Commission explained that, in response to the Court’s remand, FERC directed its staff to prepare a supplemental environmental analysis that: (1) examined the additive environmental impacts of the four Upgrade Projects (i.e., the combined direct and combined indirect impacts); and (2) incorporated the other three

Upgrade Projects into the cumulative impacts analysis performed in the environmental assessment for the Northeast Upgrade Project. *Id.* at PP 21-22.

Based on the Supplemental Environmental Analysis, the Commission concluded that, “when considered additively, impacts from the Northeast Upgrade Project and Tennessee’s three other projects are not significant,” and “when the projects are considered cumulatively . . . there are no significant cumulative impacts.” Remand Order PP 1, 23-25.

On December 18, 2015, Riverkeeper concurrently filed a request for rehearing of the Remand Order with the Commission (appended hereto as Attachment A) and its Motion with this Court. Riverkeeper’s rehearing request alleges the same three errors that are the basis for its Motion. Indeed, Riverkeeper’s rehearing request merely incorporates by reference all of the arguments contained in its Motion in lieu of an argument section in its rehearing pleading. Thus, Riverkeeper has lodged identical challenges to FERC’s Remand Order before the Court and the Commission.

ARGUMENT

I. RIVERKEEPER PREMATURELY SEEKS JUDICIAL REVIEW OF OF FERC’S REMAND ORDER

Riverkeeper’s motion seeking a declaratory order by this Court regarding the adequacy of the Commission’s Remand Order (Motion at 1, 7 (citing the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02)) should be rejected as an invalid

attempt to circumvent the jurisdictional requirements of section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). Riverkeeper simultaneously seeks Commission rehearing and Court review of the Remand Order, raising new issues primarily focused on new infrastructure projects that are not the subject of the Court’s 2014 decision. Its Motion, therefore, is incurably premature and should be dismissed. *See* 15 U.S.C. § 717r(b) (Court’s jurisdiction limited to objections that the petitioner “urged before the Commission in [an] application for rehearing” unless there are reasonable grounds for petitioner’s failure to do so);¹ *see also, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 110-12 (D.C. Cir. 2002); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 980-81 (D.C. Cir. 1993). If Riverkeeper remains aggrieved after the Commission issues an order on rehearing, it can then file a petition for review of that rehearing order and the Remand Order. *See Clifton Power*, 294 F.3d at 110; *see also Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980) (noting the importance of finality, the Court stated: “When the courts intervene in the midst of agency proceedings, they often disrupt the administrative process and unnecessarily burden their dockets”).

¹ Natural Gas Act section 19(a) requires any person aggrieved by a Commission order to seek rehearing within 30 days and to “set forth specifically” the ground(s) upon which rehearing is being sought. 15 U.S.C. § 717r(a). If that person remains aggrieved, it may then petition for judicial review within 60 days of issuance of the order on rehearing. *Id.* § 717r(b).

Further, the Court does not, as Riverkeeper suggests, automatically retain, under D.C. Circuit Rule 41(b), jurisdiction over cases that have been remanded back to the Commission. *See* Motion at 2 (citing Circuit Rule 41(b) to support jurisdiction). Circuit Rule 41(b) states: “If the case is remanded, this court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand.”

Notwithstanding Circuit Rule 41(b), the Court has, at least in one case since Circuit Rule 41(b) was adopted in 1994, found that it retained residual jurisdiction to enforce its mandate. *See Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 857 (D.C. Cir. 2003) (enforcing mandate to require FERC to excise from its order the action that the Court previously determined was outside FERC’s statutory authority). In *Atlantic City*, the Court’s mandate left FERC no discretion on what action to take on remand, as the Court found that “FERC simply lacked jurisdiction under the statute to make the order it had purported to enter in the original proceeding.” *Id.* at 858. In contrast, here the Court’s 2014 decision “remand[ed] the case to FERC for further consideration. . . .,” which necessarily conveys to FERC some discretion in the manner in which it complies with the Court’s directive to not segment its environmental analysis of the “four projects [that] functioned as one unified upgrade of the Eastern leg,” and “address the cumulative impacts of the four upgrade projects on the Eastern leg of the 300 Line.” *Del.*

Riverkeeper, 753 F.3d at 1319-20. Absent the Commission disavowing the need to conduct any additional environmental review of the four Upgrade Projects – a clear violation of the Court’s mandate, not present here – there is no basis for the Court to assert its residual jurisdiction at this juncture and interrupt the administrative process.

Should the Court decide to exercise its residual jurisdiction and treat Riverkeeper’s Motion as a petition to enforce the court’s mandate in *Delaware Riverkeeper*, as discussed in detail below, the Motion should be denied because FERC fully complied with the mandate and the issues Riverkeeper now raises are outside the scope of the Court’s mandate.

II. THE COMMISSION COMPLIED WITH THE COURT’S MANDATE BY CONSIDERING THE ADDITIVE AND CUMULATIVE IMPACTS OF THE UPGRADE PROJECTS IDENTIFIED IN THE COURT’S DECISION

Riverkeeper improperly seeks to expand the scope of the remand proceeding to include matters that were not the subject of this Court’s 2014 decision. “Success on a motion to enforce a judgment gets a plaintiff only ‘the relief to which the plaintiff is entitled under its original action and the judgment entered therein.’” *Heartland Regional Medical Center v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) (quoting *Watkins v. Washington*, 511 F.2d 404, 406 (D.C. Cir. 1975)). Notably, Riverkeeper does not question the Commission’s compliance with the Court’s mandate with respect to FERC’s supplemental environmental review of the four

Upgrade Projects that were the subject of the Court’s decision. *See* Motion at 7-20. Rather, for the first time, Riverkeeper questions: (1) whether the environmental analysis should be further supplemented to consider three new 2015 pipeline project applications; (2) the timing of the opportunity for public comment; and (3) whether notices of violations must be analyzed in the environmental assessment.

All three arguments, on their face, fall outside the parameters of the Court’s 2014 decision, which encompasses only FERC’s treatment of the four Upgrade Projects. The Court’s decision addresses segmentation and the cumulative impacts analysis of the four identified Upgrade Projects based on the Court’s findings of fact regarding the relationship between these four projects. *Del. Riverkeeper*, 753 F.3d at 1319 (environmental assessment “deficient in its failure to include any meaningful analysis” of the “three Eastern leg upgrade projects preceding and following the Northeast Project”). The Court directed FERC on remand to consider the environmental effects of the four Upgrade Projects together (*id.* at 1319), and to “assess cumulative impacts by analyzing the Northeast Project in conjunction with the other three projects.” *Id.* at 1320; *see also id.* (Brown, J., concurring) (joining portion of majority opinion “granting the petition for FERC’s failure to adequately address the cumulative impacts of the four upgrade projects”). The Commission has satisfied that mandate, and this Court need not address

Riverkeeper’s new arguments unless and until they are properly brought before it in a timely petition for review following final agency action.

A. New Pipeline Projects That Post-Date The Court’s Decision Are Outside The Scope Of The Court’s Mandate

Riverkeeper now claims that the Commission “ignor[es] the cumulative impacts of” three new proposed pipeline projects: the Susquehanna West, Triad Expansion, and Orion projects. Motion at 9. Each of these project applications post-date the Court’s 2014 decision and were filed, respectively, on April 2, 2015, June 19, 2015, and October 9, 2015 (41 days before the Remand Order issued). Riverkeeper does not even attempt to argue that the Court’s mandate expressly obligates FERC to consider these new pipeline projects – projects that were unknown at the time of the underlying agency proceeding. *See* Motion at 7-8. Rather, Riverkeeper argues that the Commission has “undermine[d] . . . the intent of this Court’s decision.” Motion at 8. The Commission’s duty on remand was to follow what had been decided by the Court “either expressly or by necessary implication.” *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 348 (D.C. Cir. 1977).

Here, the only question expressly decided by the Court was the extent to which the Commission had to include the three identified Upgrade Projects in its environmental review of the challenged Northeast Upgrade Project. *See Del. Riverkeeper*, 753 F.3d at 1308, 1314-20 (Court’s discussion limited to whether the MPP, Northeast Supply Diversification, 300 Line, and Northeast Upgrade Projects

were “connected” actions); *see also Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015) (explaining that Court held in *Delaware Riverkeeper* “that the Commission unlawfully segmented its environmental review [of] four other pipeline projects”); and *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 113 n.11 (D.C. Cir. 2014) (noting that, in *Delaware Riverkeeper*, the Court “held that FERC improperly segmented and failed to consider the cumulative impacts of four . . . projects”). To succeed on its Motion to Enforce, Riverkeeper therefore must – and is unable to – demonstrate that the Court impliedly resolved issues related to FERC’s consideration of future, unknown infrastructure projects, and did so in a manner that imposed an obligation on the Commission to continually revise and update its environmental assessment on an ongoing, rolling basis. No such implication can be found in the Court’s decision, nor does Riverkeeper cite to any language from *Delaware Riverkeeper* to support its request.

Riverkeeper would make compliance with NEPA a moving target. But NEPA does not require agencies to reopen their environmental review to include every new project. *See Theodore Roosevelt Conserv. P’ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (“An agency need not revise an almost complete environmental impact statement to accommodate new proposals submitted to the agency, regardless of the uncertainty of maturation.”). Supplementation is not

required every time new information comes to light – otherwise, agency decisionmaking would be rendered “intractable, always awaiting updated information only to find the new information [is] outdated by the time a decision is made.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989); *cf. Butte County, Cal. v. Hogan*, 613 F.3d 190, 204 (D.C. Cir. 2010) (“agency need not restart its analysis whenever a new report is submitted”); *Village of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C. Cir. 2006) (recognizing “that an unyielding avalanche of information might overwhelm an agency’s ability to reach a final decision”). “There will always be more data that could be gathered; agencies must have some discretion when to draw the line and move forward with decisionmaking.” *Hillsdale Env’tl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1169-70 (10th Cir. 2012) (quoting *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 531 (7th Cir. 2012), and *Town of Winthrop v. FAA*, 535 F.3d 1, 11 (1st Cir. 2008)).

Riverkeeper’s attempt to raise these issues to the Court is premature. Riverkeeper is pursuing its arguments regarding the 2015 projects through its request for rehearing of the Remand Order that is currently pending at FERC. Thus, the Commission will have, as the Natural Gas Act mandates, the opportunity to consider the arguments raised before judicial review is sought. There is no compelling reason for this Court to engage in an interlocutory review of the issue

prior to FERC having an opportunity to act on Riverkeeper's rehearing request. *Cf. Save Our Sebasticook v. FERC*, 431 F.3d 379, 381-82 (D.C. Cir. 2005) (very purpose of rehearing is to allow the agency a chance to correct any mistakes). Rehearing has been pending before the Commission for only one month, and Riverkeeper cannot claim that the agency is not acting in a timely manner. *See, e.g., In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (mandamus for agency inaction measured in terms of years, not months or weeks).

Moreover, Riverkeeper has intervened in and raised its concerns about these three 2015 projects in the Commission proceedings on those applications. *See, e.g., Tennessee Gas Pipeline Co., L.L.C., Delaware Riverkeeper Network Motion for Leave to Intervene* at 3, Docket No. CP16-4-000 (Oct. 20, 2015). In each of the 2015 project proceedings, the Commission will issue environmental assessments and has invited comments on environmental issues.² *See Tennessee Gas Pipeline Co., L.L.C., Notice*, Docket No. CP15-148-000 (June 10, 2015) (Susquehanna West Project); *Tennessee Gas Pipeline Co., L.L.C., Notice*, Docket No. CP15-520-000 (Aug. 5, 2015) (Triad Expansion Project); and *Tennessee Gas*

² The Commission intends to issue an environmental assessment for the Susquehanna West and Triad Expansion projects on February 23, 2016 and April 6, 2016, respectively. *See Tennessee Gas Pipeline Co., L.L.C., Notice of Schedule for Environmental Review of the Susquehanna West Project*, Docket No. CP15-148-000 (Nov. 24, 2015); *Tennessee Gas Pipeline Co., L.L.C., Notice of Schedule for Environmental Review of the Triad Expansion Project*, Docket No. CP15-520-000 (Dec. 9, 2015).

Pipeline Co., L.L.C., Notice, Docket No. CP16-4-000 (Nov. 23, 2015) (Orion Project). In these environmental assessments, the Commission will consider the past, present, and reasonably foreseeable actions in the cumulative impact analysis, as required by 40 C.F.R. § 1508.7, as well as any “connected actions,” or “cumulative actions,” as required under 40 C.F.R. § 1508.25(a)(1)-(3). Those proceedings are the appropriate venue for Riverkeeper to challenge, and FERC to answer, any perceived deficiencies in the respective environmental analyses.

B. FERC Provided A Reasonable Opportunity To Comment On The Supplemental Environmental Analysis

Next, Riverkeeper contends that it has had no opportunity to review and comment on the Supplemental Environmental Analysis and, therefore, that the Remand Order “fails to comply with NEPA and the Court’s mandate.” Motion at 10-11; *see also id.* at 11-15 (same). Riverkeeper’s contention is mistaken.

First, providing parties an opportunity to comment on the Supplemental Environmental Analysis on rehearing of the Remand Order does not violate the Court’s mandate. The opinion remanding this case did not address whether parties must be given an opportunity to review and comment on the supplemental environmental analysis before the Commission issued its Remand Order.

Providing parties an opportunity to comment on the Supplemental Environmental Analysis through a rehearing request does not violate NEPA either. *Theodore Roosevelt Conserv. P’ship*, 616 F.3d at 518-19; *TOMAC, Taxpayers of*

Mich. Against Casinos v. Norton, 433 F.3d 852, 861 (D.C. Cir. 2006). “[N]othing in the [Council on Environmental Quality] regulations³ suggests that another comment round is necessary following an agency’s issuance of a supplemental environmental analysis.”⁴ *TOMAC*, 433 F.3d at 861; *see also* 40 C.F.R. § 1506.6 (regulation governing public involvement in agency’s NEPA review). The same is true for the Commission’s regulations. *See* 18 C.F.R. § 380.9 (FERC regulation governing public availability of NEPA documents). Rather, an “agency has significant discretion in determining when public comment is required with respect to [environmental analyses].” *TOMAC*, 433 F.3d at 861.

Moreover, “[d]ue process requires only a ‘meaningful opportunity’ to challenge new evidence.” *Myersville*, 783 F.3d at 1327 (quoting *BNSF Ry. Co. v.*

³ The Council on Environmental Quality was established by NEPA to enact regulations implementing the Act. *TOMAC*, 433 F.3d at 857.

⁴ Other circuits agree that circulation of a draft environmental assessment (“EA”) is not mandatory. *See Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 952 (9th Cir. 2008) (holding that circulation of a draft EA is not required in every case; to do so “would apply a level of particularity to the EA process that is foreign to the regulations”); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*, 398 F.3d 105, 114–115 (1st Cir. 2005) (concluding that “[n]othing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain ‘limited circumstances’”); *Pogliani v. U.S. Army Corps of Eng’rs*, 306 F.3d 1235, 1240 (2d Cir. 2002) (holding that a draft EA must be circulated only in certain limited circumstances); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004) (“NEPA’s public involvement requirements are not as well defined when an agency prepares only an EA and not an EIS.”); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996) (“[T]here is no legal requirement that an Environmental Assessment be circulated publicly and, in fact, they rarely are.”).

Surface Transp. Bd., 453 F.3d 473, 486 (D.C. Cir. 2006), and *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)). And, as this Court has held, rehearing provides parties that meaningful opportunity. *E.g.*, *Minisink*, 762 F.3d at 115; *Jepsen v. FERC*, 420 Fed. Appx. 1, 2 (D.C. Cir. 2011); *Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010). The absence of a discrete opportunity to comment on the Supplemental Environmental Analysis prior to the issuance of the Remand Order in no way adversely affected Riverkeeper’s rights; Riverkeeper was able to raise on rehearing any concerns it had about the Commission’s environmental review and it has.

Riverkeeper filed a request for rehearing of the Commission’s Remand Order the same day it filed the instant Motion, “incorporat[ing] by reference all of the arguments, evidence, and exhibits contained in [Riverkeeper]’s Motion to Enforce” Attachment A at 2.⁵ Once the Commission issues an order on rehearing, and if Riverkeeper persists in its claim that NEPA required the Commission to provide an opportunity for comment on the Supplemental Environmental Analysis before it issued the Remand Order, that claim can be

⁵ Under Natural Gas Act § 19(a), 15 U.S.C. § 717r(a), Riverkeeper had 30 days after the Remand Order issued to file its rehearing request. The Commission also typically provides 30 days for comment on an environmental analysis when it determines – in its discretion – that it is appropriate to provide a comment period. *See, e.g.*, Notice of Availability of the Environmental Assessment for the Proposed Northeast Upgrade Project under CP11-161-000 (Nov. 21, 2011) (establishing 30-day comment period).

addressed in the ordinary course of appellate review. It is not a matter to be addressed in a Motion to Enforce the Court's Mandate.

C. FERC Reasonably Considers Non-Compliance Issues Under Its Monitoring And Enforcement Authority

Last, Riverkeeper faults FERC for not evaluating in the Supplemental Environmental Analysis violations of the environmental conditions that occurred during construction. Motion at 15-20. Like Riverkeeper's due process claims, this too is a new issue that falls outside the scope of the *Delaware Riverkeeper* mandate. See *Northern States Power Co. v. U.S. Dept. of Energy*, Nos. 97-1064, *et al.*, 1998 WL 276581, *2 (D.C. Cir. May 5, 1998) (unreported) (appended as Attachment B) (denying motions to enforce mandate where issues raised by movants fell outside scope of the mandate). The Court's opinion did not address whether the Commission must consider in its environmental review notices of the Pipeline's non-compliance with any federal, state or local permit or condition that may occur during construction. Indeed, this was not even an issue raised on appeal. The Court addressed this issue in the original agency proceeding. 142 FERC ¶ 61,025 at PP 90, 92-94 (rejecting Riverkeeper's contention that the Pipeline's past compliance record on the 300 Line Project requires stricter scrutiny in the environmental review to assess the likelihood of environmental impacts). Riverkeeper did not pursue this issue on appeal. Accordingly, *Delaware*

Riverkeeper does not expressly or impliedly impose any obligation on the Commission to consider notices of non-compliance in its NEPA review.

Moreover, NEPA does not require that an agency, when making a finding of no significant impact, conclude that the proposed action will cause no impacts or that the mitigation measures “completely compensate” for Project impacts.

Tillamook County v. U.S. Army Corps of Eng’rs, 288 F.3d 1140, 1144 (9th Cir. 2002). As the Commission explained, it “takes matters of non-compliance seriously but such matters must be addressed in the proper venue.” 142 FERC ¶ 61,025 at P 92. And that venue or forum is the Commission’s mandatory, on-going environmental inspection and monitoring authority. *See id.* at P 93; *see also LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (FERC did not err in permitting post-order monitoring and studies of environmental impacts); *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1121-22 (9th Cir. 2000) (upholding finding of no significant impact that relied on under-developed mitigation measures where license conditions ensured their enforcement).

The Commission’s approval of the Project was explicitly conditioned on the Pipeline submitting an implementation plan detailing the “procedures (including use of contract penalties) [Pipeline] will follow if noncompliance occurs,” along with weekly status reports throughout project construction and restoration activities. Certificate Order, Appendix B, Environmental Condition Nos. 6(g) and

7; *see also* 142 FERC ¶ 61,025 at P 93 (detailing inspection and monitoring requirements). The status reports list “all problems encountered and each instance of noncompliance” for both the environmental conditions imposed by FERC and any mitigation measures/permit requirements imposed by other federal, state, or local agencies,” along with a description of corrective actions taken and their effectiveness. Certificate Order, Appendix B, Environmental Condition No. 7(c)-(e). The Commission uses this information to determine whether to modify any of the environmental conditions and/or “implement additional measures . . . (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact[s]. . . .” *Id.* at Environmental Condition No. 2.

In short, FERC considers the Pipeline’s non-compliance issues under its continuing authority to “take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project.” *Id.*; *see also* 142 FERC ¶ 61,025 at P 93 (noting that Pipeline is subject to sanctions and/or penalties for non-compliance, the amount of which is tailored to the facts presented including the degree of non-compliance and resulting environmental impacts). To require FERC to also consider instances of non-compliance with mitigation measures in the Supplemental Environmental Analysis would be unnecessarily duplicative. In any event, these matters simply are not

relevant to the question of whether the Commission has complied with the Court's mandate.

CONCLUSION

For the foregoing reasons, Riverkeeper's Motion to Enforce should be denied.

Respectfully submitted,

Robert H. Solomon
Solicitor

Beth G. Pacella
Deputy Solicitor

/s/ Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8236
Fax: (202) 273-0901

January 15, 2016

Attachment A

Request for Rehearing of Delaware Riverkeeper Network,
Docket No. CP11-161-002 (filed Dec. 18, 2015)
(exhibit omitted)