No. 15-926

United States Court of Appeals
for the
Second Circuit

IN RE STOP THE PIPELINE

PETITION FOR WRIT OF MANDAMUS
-AND-
REQUEST FOR EXPEDITED BRIEFING SCHEDULE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Stop the Pipeline hereby states that it is an unincorporated association of citizens and landowners, and that it has never issued stock. As such, Stop the Pipeline has no parent corporations or publicly held corporations owning 10% or more of any of its stock.

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INTRODUCTION

Stop the Pipeline ("STP") respectfully petitions this Court to issue a writ of mandamus compelling the Federal Energy Regulatory Commission ("FERC" or "Commission") to grant, deny or otherwise act on the merits of STP's January 2, 2015 request for rehearing (the "Request") of FERC's December 2, 2014 Order granting a certificate of public convenience and necessity (the "Certificate Order") to Constitution Pipeline Company, LLC (the "Company").[1]

The Natural Gas Act states that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." 15 U.S.C. § 717r(a) (2012). As will be demonstrated

[1] Order Issuing Certificates and Approving Abandonment to the Constitution Pipeline Company, LLC, 149 FERC 61,199 (2014), Exhibit 1 hereto. In its request for rehearing, STP raised five issues. The first issue challenges the Commission's authority to issue the Certificate Order prior to the issuance of a Clean Water Act section 401 water quality certificate by the New York State Department of Environmental Conservation ("DEC"). The problem is one of timing, as section 401 of the Clean Water Act, 33 U.S.C. 1341(a)(1), plainly states that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived . . . ." *See, e.g.*, *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (explaining that FERC "may not act based on any certification the state **might** submit; rather, [FERC] has an obligation to determine that the specific certification 'required by [section 401] has been obtained,' and **without that certification, FERC lacks authority to issue a license**.") (citation omitted) (emphasis added). DEC has been critical of the pipeline project, and without a 401 water quality certificate the project plainly cannot proceed. Yet the project ***is*** currently proceeding, despite FERC's blatant violation of the plain requirements of the Clean Water Act. The other four issues raised in STP's Request for Rehearing involve violations of the Natural Gas Act, the National Environmental Policy Act, and the United States Constitution. *See* STP, Request for Rehearing (January 2, 2015), Exhibit 2 hereto.

below, Congress clearly contemplated that FERC's "act" upon a timely application for rehearing would address **the merits** of such a request, and that a party that wishes to seek judicial review of a FERC order would have to wait no longer than thirty days after requesting rehearing from FERC to seek such relief. Here, however, instead of acting on the merits of STP's Request within thirty days, the Commission, purporting to "grant" STP's Request, instead only "granted" itself additional time to act on the merits at some undefined and unlimited later date.[2]

Not only does FERC's Tolling Order constitute a failure to "act[] upon the application for rehearing[,]" as envisioned by Congress, it also operates to indefinitely extend FERC's time to make a decision on STP's Request in violation of the Natural Gas Act. Moreover, it places STP in an untenable state of administrative limbo, as an order on a request for rehearing is a condition precedent to seeking judicial review of an initial FERC order such as the Certificate Order. 15 U.S.C. § 717r(b). By placing STP in this bind, FERC has acted unfairly, and contrary to the plainly expressed intent of Congress.

Notably, FERC also declined to issue a stay of the Certificate Order when it granted itself an indefinite period of time to later "act" on the merits of STP's Request. This inequity has allowed the Company to proceed with the project while blocking STP from seeking judicial review of the Certificate Order, causing grave

[2] Order Granting Rehearing For Further Reconsideration, (Jan. 27, 2015) ("Tolling Order"), Exhibit 3 hereto.

injury to STP's members. Relying on the Certificate Order, the Company commenced over 120 eminent domain proceedings in the Northern District of New York between December 12 and December 23, 2014.[3] These actions were filed by the Company before the DEC had even deemed the Company's application for a federal Clean Water Act section 401 water quality certificate to be complete.[4] By February 21, 2015, the district court had begun granting the Company the right to condemn the properties of STP's members,[5] as well as the right to immediate possession of those properties,[6] after signing an Order to Show Cause with an extremely aggressive schedule.[7]

Thus, by failing to act on the merits of STP's Request by February 1, 2015, the Commission has caused, and continues to cause, significant injury to STP's members, and to abet the violation of their constitutional right to exclude others from their property before it has even been determined that the pipeline project will

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[3] *See Constitution Pipeline, Co. v. Certain Permanent & Temporary Easements*, 1:14-cv-02000-NAM-RFT — 3:14-cv-02120-NAM-RFT (N.D.N.Y. Dec. 12-23, 2014), Exhibit 4 hereto.

[4] *ENB - Statewide Notices 12/24/2014*, N.Y. ST. DEP'T ENVTL. CONSERVATION (Dec. 24, 2014), http://www.dec.ny.gov/enb/20141224_not0.html (Notice of Complete Application), Exhibit 5 hereto. As of the date of filing this Petition, DEC has not issued a section 401 water quality certification.

[5] *Constitution Pipeline, Co. v. A Permanent Easement for 1.80 Acres & Temporary Easement for 2.09 Acres Davenport, Del. Cnty., N.Y.*, 3:14-cv-02049-NAM-RFT (N.D.N.Y. Feb. 21, 2015), ECF docket entry no. 21, Exhibit 6 hereto.

[6] *Id*. at ECF docket entry no. 22.

[7] *Id*. at ECF docket entry nos. 6 & 7.

ultimately be authorized to proceed. Several STP members objected to the use of FERC's December Order in the eminent domain proceedings, but the District Court held that their arguments have to be addressed by this Court:

> Defendants contend that the FERC Order herein is invalid or insufficient because a certificate under section 401(a)(1) of the CWA (CWA 401 certificate) has not yet been obtained or waived; indeed**, it is undisputed that Constitution's reapplication for a CWA 401 certificate is still pending**. In response to defendants' argument, plaintiff correctly points out that **once a FERC certificate is issued, judicial review of the FERC certificate itself is only available in the circuit court**.

Constitution Pipeline, Co. v. A Permanent Easement for 1.80 Acres & Temporary Easement for 2.09 Acres Davenport, Del. Cnty., N.Y., 3:14-cv-02049-NAM-RFT (N.D.N.Y. Feb. 21, 2015), ECF docket entry no. 20, at 5 (emphases added), Exhibit 7 hereto. FERC's delay also makes it likely that most, if not all, of the issues STP seeks to raise in a future petition to this Court will be rendered moot by the time STP will be permitted to challenge the Certificate Order on its merits. FERC's failure to act on the merits of STP's Request leaves STP no recourse other than to file this petition, and to pray for equitable relief from the escalating injuries its members are suffering.

To rectify the ongoing injuries to STP's members described herein, STP respectfully requests a writ of mandamus directing FERC to act on the merits of STP's request for rehearing on or before May 1, 2015. To meet this timeline, STP respectfully requests that the Court set an expedited briefing schedule limiting

FERC's time to file an answer to the Petition to eight (8) days, with STP's reply due four (4) days thereafter.

JURISDICTION

Pursuant to the Natural Gas Act, this Court has jurisdiction to review an order issued by FERC. 15 U.S.C. § 717r(b) (2012) ("Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located . . . ."). STP intervened in the underlying administrative proceedings, and filed a timely request for a rehearing. Thus, it is a "party . . . aggrieved by an order issued by the Commission."

The Company is "located" in New York State pursuant to 15 U.S.C. § 717r(b), as it is registered with the New York State Department of State, has been issued ID Number 4216816,[8] and maintains at least three offices within the state.[9]

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[8] *See NYS Department of State Division of Corporations Entity Information*, N.Y. ST. DEP'T OF ST., http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=4220772&p_corpid=4216816&p_entity_name=Constitution%20Pipeline&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0 (last visited Mar. 23, 2015).

[9] They are: (1) PO Box 14139, Albany, NY 12212 (518 982-1637); (2) PO Box 340, Kirkwood, NY 13795; and (3) 296 Morris Road, 2nd Floor, Schenectady, NY 12303. *See* Letters from Jim Wallace, Constitution Pipeline Co., to Robert Lidsky, Landowner (Nov. 28, 2012, Feb. 20, 2013, May 21, 2013) (on file with STP).

In addition, approximately eighty percent of the Company's proposed 124-mile pipeline route would be located in New York State. Thus, this Court is authorized to review the Commission's Certificate and Tolling Orders. *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984) ("[W]here a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review."). This Court has the authority to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 (2012).

STATUTORY BACKGROUND

The Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (2012), regulates the transportation and sale of natural gas in interstate and foreign commerce. To construct and operate an interstate natural gas pipeline, a company must apply for a certificate of public convenience and necessity. 15 U.S.C. § 717f(d). In considering any application for a certificate, the Commission is required to "comply with applicable schedules established by Federal law." *Id.* § 717n(c)(1)(B). Once a certificate is granted, "[a]ny person [who] is a party may apply for a rehearing within thirty days after the issuance of such order." *Id.* §§ 717f(e), 717r(a). "Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts

upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id*. § 717r(a).

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Id. § 717r(b). A holder of a valid certificate of public convenience and necessity may acquire the necessary land through eminent domain. *Id*. § 717f(h).

In 1972, Congress passed the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (2012), with the objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *Id*. § 1251(a). To achieve this lofty goal, it was mandated that, except as in compliance with enumerated sections of the Act, "the discharge of any pollutant by any person shall be unlawful." *Id*. § 1311(a). Congress integrated an existing state role into the federal regime, granting states the authority to develop and enforce water quality standards. *Id*. § 1313. State water quality standards were considered so critical to the success of cleaning up our Nation's waters that Congress provided states with a decision-making role concerning projects with potential to negatively affect water quality:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall

> provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . .

Id. § 1341(a)(1). The Clean Water Act specifies that a section 401 water quality certificate must be issued **before** a federal license or permit is issued: "No license or permit shall be granted **until** the certification required by this section has been obtained or has been waived . . . ." *Id*. (emphasis added). Importantly, the text of the Natural Gas Act makes plain that it does not preempt the rights of states under the Clean Water Act. *See* 15 U.S.C.§ 717b(d)(3); *see also, e.g.*, *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143-44 (2d Cir.) (noting that when FERC issues a certificate of public convenience and necessity for a gas pipeline, it "must ensure that the proposed project complies with all requirements of federal law, including, but not limited to, those established by the Clean Water Act . . . ."), *cert. denied*, 555 U.S. 1046 (2008).

The Administrative Procedure Act ("APA") provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (2012). "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704. A reviewable agency action is defined, *inter alia*, as a "failure to act[,]" *id.* § 551(13), and if a legally required agency action is either "unlawfully withheld or unreasonably delayed" as a result of such a failure to act,

an aggrieved party may ask a court to "compel" the agency to take that action. *Id.* § 706(1).

FACTUAL BACKGROUND

STP is an unincorporated association formed in June 2012. Its goals are to preserve and enhance the rural heritage and pristine environment of central New York State and north central Pennsylvania by ensuring the purity of its air, water, and soil; the health of its inhabitants; the resilience of its ecosystems; and the capacity of the area to be self-sustaining. Some of STP's members own land along the proposed route, while others live, work, or recreate in the area. STP and its members have been actively involved in the complex regulatory proceedings associated with the proposed pipeline since the spring of 2012, and have submitted thousands of comments on the scope of work for the environmental review and on FERC's Draft Environmental Impact Statement ("DEIS"). STP and approximately 400 of its members intervened and are now parties in FERC's proceedings.

The Company pre-filed an application in April 2012, and filed an application on June 13, 2013, which were assigned docket numbers PF12-9 and CP13-499, respectively. FERC issued a DEIS on February 12, 2014, which included information showing the proposed project would require the destruction of a thousand acres of trees, many on steep slopes, and the crossing of hundreds of streams and wetlands with open cut trenches. No gas customers in the purported

end markets were identified, no market studies were included, and although the Company claimed the project was "fully subscribed," there was no requirement to ship any gas.

At least six state and federal agencies commented that FERC's environmental review was insufficient and requested a revised or supplemental environmental impact statement.[10] FERC did not comply, and instead issued its Final Environmental Impact Statement on October 24, 2014, and the Certificate Order on December 2, 2014. STP filed a timely request for rehearing of the Certificate Order, which challenged its validity under the Clean Water Act, the Natural Gas Act, the National Environmental Policy Act, and the United States Constitution. Exhibit 2.

Despite its lack of several mandated federal and state certificates and permits, upon issuance of the Certificate Order by FERC, the Company quickly filed over 120 eminent domain complaints in the Northern District of New York. Exhibit 4. Many of these actions involve land owned by STP's members. The Company acted with great haste, bombarding landowners with thick packages of legal papers. An Order to Show Cause with a very aggressive schedule was signed

[10] These included the United States Environmental Protection Agency, the United States Department of Interior/Fish and Wildlife Service, United States Army Corps of Engineers, New York State Department of Environmental Conservation, New York State Office of the Attorney General, and New York State Public Service Commission.

by the district court on January 15, 2015, long before many defendants had even been served with process. Furthermore, many landowners were not personally served, as required by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 71.1(d)(3)(A), 4(e)(2)(A). Instead, papers were taped to doors of homes, some of which are vacant for the winter.

Within a few weeks, orders granting the Company the right to condemn land, and the right to immediate access to private property, were signed and entered by the district court.[11] Easements signed by the judge have been recorded before it is known if the project will ever be authorized to be constructed. Total strangers may now enter property owned by STP's members, and these landowners have no recourse to stop them from trespassing. Soon, their trees may be cut, and their land torn asunder, while STP waits for FERC to issue an order on the merits of its request for rehearing.

The DEC issued a notice of a complete application for a section 401 water quality certificate on December 24, 2014. Exhibit 5. On January 12, 2015, DEC extended the public comment period to February 27, 2015.[12] Upon information and belief, approximately 8,000 written comments were submitted to the DEC by

[11] *See* Exhibit 6, ECF docket entry nos. 21 & 22.

[12] Press Release, N.Y. St. Dep't of Envtl. Conservation, DEC Extends Public Comment Period On Proposed Constitution Pipeline to FEB. 27th (Jan. 12, 2015), *available at* http://www.dec.ny.gov/press/100284.html, Exhibit 8 hereto.

citizens from around the State. Many of these comments explained how the project would violate New York State water quality standards. DEC voiced many concerns during FERC's environmental review that went unanswered, and as the state agency charged with the administration and implementation of the Clean Water Act, DEC is authorized to deny the section 401 water quality certificate. If that were to occur, it is unclear whether the easement agreements signed by a federal Judge could be undone, and who would be liable for the legal expenses associated with such actions.

On January 27, 2015, FERC issued its Tolling Order "Granting Rehearing for Further Consideration." Exhibit 3. Despite the confusing title, FERC neither granted nor denied STP's request for rehearing; rather, FERC simply granted **itself** unlimited time to make a decision on the merits of the STP's Request.

ARGUMENT

I. *STP Has Exhausted its Administrative Remedies*

In order to obtain a writ of mandamus, a petitioner must have "exhausted all other avenues of relief." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Here, STP was an active participant in the federal environmental review process. Over the past three years, it submitted substantive comments on the scope of work, the draft resource reports, and the DEIS. STP also testified at public hearings and wrote

letters to the Commissioners. In addition, it filed a motion to intervene on July 17, 2013, and thus is a party to the proceedings.

> Any person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order.

15 U.S.C. § 717r(a) (2012). STP filed a request for rehearing on January 2, 2015, within the mandatory thirty days. Exhibit 2.

> Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.

15 U.S.C. § 717r(a). Unfortunately, the Commission did not actually "grant or deny rehearing or [] abrogate or modify" its Certificate Order as authorized by Congress. Instead of "act[ing] upon the application for rehearing within thirty days after it [wa]s filed," FERC granted itself more time to decide. Exhibit 3. ("[R]ehearing of the Commission's order is hereby granted for the limited purpose of further consideration. . . . Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order."). Delaying a decision is not an option allowed by Congress in the statute. The Commission is only empowered "to grant or deny rehearing or to abrogate or modify its order."

STP is now in an untenable bind, as the Natural Gas Act makes clear that STP may not seek review of FERC's Certificate Order until the Commission actually issues an order on the request for rehearing:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . by filing in such court, **within sixty days after the order of the Commission upon the application for rehearing**, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

15 U.S.C. § 717r(b) (2012) (emphasis added).

The APA provides that an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (2012). That is precisely the situation here, as FERC's action is reviewable by statute, yet "there is no other adequate remedy in a court." STP has been confined to administrative limbo with no way to seek a remedy, except through this writ of mandamus. *See NRDC v. Fox*, 93 F. Supp. 2d 531, 538 (S.D.N.Y. 2000) ("At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review.") (internal citations omitted), *aff'd in part, vacated on other grounds sub nom*. *NRDC v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). *See also Texas-Ohio Gas Co. v. Fed. Power Comm'n*, 207 F.2d 615, 617 (D.C. Cir. 1953) ("As a practical matter, a stage will be reached at which it should become amply clear that the Commission has in fact denied the application for rehearing. Before that point arrives the

applicant should aScertain [sic] by inquiry whether the (Commission) has acted.") (internal quotations omitted).

STP has followed the required avenues for redress of its members' escalating injuries prior to respectfully petitioning this Court to grant a writ of mandamus, and yet, FERC has refused to comply with congressional mandates, leaving STP with no other choice than to seek alternative means to protect and preserve its members' rights.

II. *FERC Has a Nondiscretionary Duty to Act on the Merits of STP's Request for Rehearing Within Thirty Days of the Request.*

The Natural Gas Act includes three time frames within Section 717r, and there is no reason to treat them differently. The first states that "a party may apply for a rehearing within thirty days after the issuance of such order," referring to an order issued by the Commission. 15 U.S.C. § 717r(a) (2012). When aggrieved parties have filed late requests for rehearing, in violation of the statute's thirty-day prescription, FERC has repeatedly stated that "[t]he statute does not give the Commission the discretion to waive this requirement." *AES Sparrows Point LNG, LLC Mid-Atlantic Express, LLC*, 129 FERC ¶ 61245, 62286 (2009). *See also Moreau v. FERC*, 982 F.2d 556, 563 (D.C. Cir. 1993) (holding that "'the time requirements of the statute are as much a part of the jurisdictional threshold as the mandate to file for a rehearing.'. . . Consequently, the time limit must be strictly

construed . . . and may not be waived by FERC or evaded by the courts." (quoting *Boston Gas Co. v. FERC*, 575 F.2d 975, 977 (1st Cir. 1978)). FERC recently emphasized that "[t]he 30-day deadline [for making a request for rehearing] has not been altered since the statute's enactment in 1938." *Cameron LNG, LLC, Cameron Interstate Pipeline, LLC*, 148 FERC ¶ 61237, at *2 n.6 (2014).

The second timing requirement applies to FERC:

> Upon such application the Commission ***shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing***. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.

15 U.S.C. § 717r(a) (emphasis added). This language is equally nondiscretionary; it does not allow FERC the option to treat its own statutory time limitation differently than that of an applicant seeking review of an order.[13] The thirty-day deadline for the Commission to "act upon" a request for rehearing, or "such application may be deemed to have been denied[,]" has also remained unaltered since its enactment in 1938. *See* The Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 831. FERC's own regulation also indicates that Congress intended to imbue this provision with a nondiscretionary effect. *See* 18 C.F.R. § 385.713(f)

[13] STP can only imagine how FERC would respond if STP had submitted a one page request for rehearing that did not address the merits of STP's objections to the Certificate Order, but rather simply stated that STP was requesting rehearing for the limited purpose of allowing it more time to address the merits in a future request for rehearing.

(2014) ("Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request ***is*** denied.") (emphasis added).[14]

The third timing requirement gives the aggrieved party sixty-days to file "a written petition praying that the order of the Commission be modified or set aside in whole or in part." 15 U.S.C. § 717r(b). Generally, this is not contested unless there is a question of what event triggers the sixty-day period.

Section 717r(a) is free of ambiguity and its plain language should be given full force and effect. *See Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013) ("In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning."). The third sentence of section 717r(a) enumerates the specific actions that the Commission may perform: "Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." 15 U.S.C. § 717r(a) (2012). The fourth sentence provides the allowable time frame within which the

[14] STP acknowledges that the First, Fifth, and D.C. Circuits have all generally accepted FERC's use of tolling orders in different contexts. In both *California Co. v. Fed. Power Comm'n*, 411 F.2d 720 (D.C. Cir. 1969) and *Gen. Am. Oil Co. of Texas v. Fed. Power Comm'n*, 409 F.2d 597 (5th Cir. 1969), the subject matter of the FERC orders involved rate proceedings, and in *Kokajko v. FERC*, 837 F.2d 554 (1st Cir. 1988), the relevant complaint involved "unreasonable fees" charged by a utility for access to a particular water body. In the context of economic regulation, agency delays may be more reasonable than in instances like this one, where the delay immediately results in deprivation of constitutionally protected property rights and harms human welfare. *See Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951) ("Agency inaction can be as harmful as wrong action.").

enumerated actions may be taken: "Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id*. The word "**acts**" in the fourth sentence plainly refers back to the specific **acts** that Congress authorized in the third.

To date, FERC has not acted to "grant or deny" STP's application, nor has it acted to "abrogate or modify its order." Congress could have provided FERC with the authority to grant itself extensions of time, but instead limited the Commission's powers to the above-referenced "acts." That Congress stopped short of such an authorization in the specified list of powers the Commission "shall" have is indicative of its intent to exclude those that are reasonably related. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 370 (2d Cir. 2006) ("Our conclusion is supported by the cases in which a party relies on the Latin maxim '*expressio unius est exclusio alterius*,' that the express statutory mention of certain things impliedly excludes others not mentioned . . . [I]t 'applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded.'" (quoting *United States v. City of New York*, 359 F.3d 83, 98 (2d Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005))), *cert. denied*, 552 U.S. 985 (2007).

"Absent ambiguity, our analysis also ends with the statutory language." *Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013). *See Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000) ("[W]e must presume that the statute says what it means."). FERC should not be allowed to abandon the statutory scheme by acting outside the universe of the specific actions that Congress authorized, much less to do so *indefinitely*. Allowing more time for further consideration was simply not an option offered by Congress. "[C]ourts [have] jurisdiction to 'compel agency action unlawfully withheld or unreasonably delayed.'" *NRDC v. Fox*, 93 F. Supp. 2d 531, 542 (S.D.N.Y. 2000) (quoting 5 U.S.C. § 706(1) (2012)), *aff'd in part, vacated on other grounds sub nom. NRDC v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

In the Natural Gas Act, Congress plainly sought to balance the laudatory goal of allowing FERC an opportunity to correct erroneous orders prior to judicial review, against the competing (but arguably even more vital) goal of allowing aggrieved parties to obtain timely and prompt judicial review of such orders.[15] The balance that Congress struck was to prohibit judicial review of a FERC order unless a party first seeks rehearing of such order within thirty days, 15 U.S.C. § 717r(a) (2012), while also prohibiting FERC from taking more than thirty days "to

[15] Additional evidence of congressional intent to provide for prompt judicial review of agencies' decisions on gas pipeline projects can be found in section 717r(d)(5), which provides that "[t]he Court shall set any action brought under this subsection for expedited consideration." 15 U.S.C. § 717r(d)(5) (2012).

grant or deny rehearing or to abrogate or modify its order." *Id.* "[I]n honoring the text, we adhere to the balance that Congress has struck and remains free to change." *Catskill Mountains Chapter Of Trout Unlimited v. City of N.Y.*, 451 F.3d 77, 85 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007).

The facts at bar, and the prejudice to STP flowing from FERC's failure to timely act on the merits of the Request, amply demonstrate the wisdom of Congress' balanced approach to exhaustion of administrative remedies and judicial review under the Natural Gas Act. As noted above, FERC issued the Certificate Order on December 2, 2014. Despite the difficulties of having to prepare and file a request for rehearing within thirty days during the holidays, STP timely filed its Request on January 2, 2015. Exhibit 2. Congress' goal of allowing FERC an opportunity to correct erroneous orders before aggrieved parties may seek judicial review has thus been achieved, and upon STP's filing of the Request, it was up to FERC to "grant or deny rehearing or to abrogate or modify its order without further hearing," by February 1, 2015. 15 U.S.C. § 717r(a). FERC failed take any of these actions, and instead simply granted itself more time, which was plainly not one of the "acts" Congress authorized FERC to take in section 717r(a). Congress' goal of allowing for judicial review of FERC orders within thirty days of the issuance of a challenged order, has plainly been thwarted by FERC's issuance of the Tolling Order. Now, almost two months after FERC's missed deadline, the

unlawful delay continues to foreclose STP from seeking judicial review on behalf of its injured members, in direct contravention of statutorily expressed congressional intent. To find otherwise and allow FERC to extend the thirty-day statutory timeframe for an indefinite and unlimited period would render Congress' drafting a complete nullity. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) ("It therefore flouts the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009))).

III. *FERC's Delay Is Unreasonable and It Should Be Compelled to Act.*

The APA provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (2012). A "failure to act" is by definition an "agency action," 5 U.S.C. § 551(13), and if that failure creates an "unreasonabl[e] delay[]," an aggrieved party may seek a court to "compel" the agency to take the action "unlawfully withheld." 5 U.S.C. § 706(1); *NRDC v. U.S. Food & Drug Admin.*, 710 F.3d 71, 76 (2d Cir. 2013). This Court has endorsed the test, set forth by the United States District of Columbia Circuit in *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), for determining whether an agency action has been "unreasonably delayed." *See NRDC*, 710 F.3d at 84 (citing *TRAC* and stating that it "set[s] forth [the] test for

determining if agency action is unreasonably delayed"). The *TRAC* test considers six factors:

> (1) the time agencies take to make decisions must be governed by a rule of reason[;]
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;]
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;]
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay[;] and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80 (citations omitted) (internal quotation marks omitted).

a. FERC's Failure to Grant or Deny STP's Request for Rehearing Is Unreasonable.

The first and second *TRAC* factors both involve timing considerations addressing the "rule of reason," and are considered together here. The first factor provides that the amount of time given to agencies to decide should be governed by a rule of reason, while the second factor states that a congressionally supplied timetable may inform the rule of reason. Congress has provided a statutory "timetable" in the Natural Gas Act, mandating that FERC act on a request for

rehearing within thirty days. *See* 15 U.S.C. § 717r(a) (2012). There is no exception to this thirty-day period, so the rule of reason is fixed to the statutory language. Moreover, this statutory deadline must be read in light of the APA's mandates. The Tenth Circuit has offered a rational and effective means to address agency delays in effectuating Congress' statutory deadlines, through the lens of the APA. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

> [W]hen an agency is required to act—either by organic statute or by the APA—within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable. However, when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers.

Id.; *see also Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 336 (E.D. La. 2011) ("Anything less would paralyze the established judicial review authority fashioned by the APA.").

STP has allowed almost three months to pass since filing its request for rehearing before pursuing any further action. This is sufficient leeway for a case with a fully developed record. The "rule of reason" may require some flexibility, but an agency acting with diligence and good faith is expected to adhere to Congress' timetable. *See In re Ctr. for Auto Safety*, 793 F.2d 1346, 1354 n.55 (D.C. Cir. 1986) (stating that "statutory deadlines" warrant a more limited

timeframe for determining what duration of time satisfies the "rule of reason"). *See also Forest Guardians*, 174 F.3d at 1191 (disagreeing with the District of Columbia Circuit's conclusion that a violation of a congressional deadline '"does not, alone, justify judicial intervention'" pursuant to "the clear command of § 706 [of the APA.]" (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir.))), *cert. denied*, 502 U.S. 906 (1991).[16]

The "rule of reason" must take into account the particular facts of the case, and here the impact of delay is not just economic. A delay of a few months may be reasonable when the decision involves rates and rules, yet unreasonable when constitutionally protected property rights are being trampled. Dozens of STP's members have already had their land taken from them as a result of eminent domain proceedings and, as a result, they can no longer exclude strangers from trespassing on their property. Moreover, this delay has blocked their avenues for judicial recourse and is indefinite in nature. *Ahmed v. Holder*, 12 F. Supp. 3d 747,

[16] On the other hand, at least one court has stated that "[t]he cases in which courts have afforded relief have involved delays of years, not months." *In re California Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001). However, that case, as well as all of the cases on which it relied, involved either the auctioning of electricity trading, rate disputes, or tariff revisions. *See id.* at 1114-15; *Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 276 (1st Cir. 1987); *TRAC*, 750 F.2d 70, 72 (D.C. Cir. 1984); *Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1027-28 (D.C. Cir. 1983); *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 324 (D.C. Cir. 1980); *Nader v. FCC*, 520 F.2d 182, 186-87 (D.C. Cir. 1975). Each of these matters required the completion of complex regulatory proceedings, while this one already has a fully developed record.

760 (E.D. Pa. 2014) ("Defendants' failure to provide any indication of when Ahmed can anticipate adjudication of his application is not reasonable.").

The injury to STP's members may soon include the cutting of trees and other vegetation, blasting, potential damage to drinking water supplies, and the irreparable altering of a place they call home. Many of them just spent thousands of dollars defending themselves in premature eminent domain proceedings while STP has been unable to challenge FERC's Certificate Order in court. Absent a prompt determination, FERC and the Company will remain immune from judicial challenge, and the continuing harm to STP's members will escalate.

b. FERC's Delay Imposes Significant Injury Upon Human Health and Welfare.

The third *TRAC* factor distinguishes between delays involving economic regulation versus those that could harm human health and welfare. Since this factor "overlaps" with the fifth factor, which considers "the nature and extent of the interests prejudiced by the delay," they are considered together here. *See Ahmed*, 12 F. Supp. 3d at 760; *see also Aslam v. Mukasey*, 531 F. Supp. 2d 736, 744 (E.D. Va. 2008); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 39 (D.D.C. 2000).

The third factor is a critical and decisive consideration that weighs in favor of granting a writ of mandamus. Human health and welfare is already being adversely impacted, and these impacts will continue in both the short- and long-

term if FERC's Certificate Order is not subject to judicial review this Spring. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) ("Third, and perhaps most critically, the court must examine the consequences of the agency's delay. The deference traditionally accorded an agency to develop its own schedule **is sharply reduced** when injury likely will result from avoidable delay.") (emphasis added). Indeed, the third factor may set the context for the unreasonable delay analysis. In a "companion case to *TRAC*,"[17] the court noted that a "question of reasonableness is closely tied to the particular facts of the case." *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (footnote omitted).

"The same is true of any analysis of a claim of unreasonable delay. Each case must be analyzed according to its own unique circumstances." *Id.* The D.C. Circuit focused on the harm to human welfare caused by the agency's failure to "adjudicate unemployment assistance payments." *Id.* Despite the fact that the respondent agency was slated to cease to exist in a matter of months, with its authority being transferred to the Department of Transportation, the court determined that none "of the relevant considerations in this case adequately excuse[d] the agency." *Id.* at 86-87. *See also* Miaskoff, *Judicial Review of Agency Delay*, *supra*, at 655 ("The result in *Air Line Pilots Association* suggests that a

[17] Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635, 654 (1987).

delay affecting human welfare may be unreasonable under section 706(1) even when the agency can present a convincing justification for its delay.") (footnote omitted).

FERC's premature Certificate Order and inexcusable delay have already caused substantial harm to one of the most treasured values of human welfare in this nation – private property rights. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (Physical takings of private property "eviscerate[] the owner's right to exclude others from entering and using her property-perhaps the most fundamental of all property interests."). FERC has unilaterally granted itself an indefinite period by which to decide whether to grant or deny STP's request for rehearing. Meanwhile, the Company has exercised its authority under an invalid FERC order to prosecute over 120 eminent domain proceedings. The federal Judge presiding over these actions has allowed them to advance, and has already granted the Company the right to condemn almost all of the parcels, as well as the right to immediate entry. Exhibits 6 & 7. STP seeks to challenge the validity of FERC's Certificate Order on several grounds, including that the Order (from which the Company purports to derive its eminent domain authority) is a nullity because it was issued prior to the satisfaction of a mandatory condition precedent, i.e., a section 401 water quality certificate. 33 U.S.C. § 1341(a)(1) (2012).

When the extraordinary power of eminent domain is impermissibly or inappropriately exercised, landowners face irreparable harm. *See Lingle*, 544 U.S. at 543 ("[I]f a government action is found to be impermissible – for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action."); *Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (noting that in an action for a preliminary injunction "to prevent the taking of [plaintiff's] real property[,] . . . [b]ecause real property is at issue and because [plaintiff] cannot raise its claim for injunctive relief to prevent the taking of its property in the valuation proceeding, [plaintiff] has shown a threat of irreparable injury.").

Thus, while STP is stuck in administrative limbo, its members have already been hauled to court and had their constitutionally protected property rights purloined – all based on an illegal order that FERC has endeavored to shield from judicial scrutiny. These injuries will soon worsen as the next stage of the pipeline project requires the felling of hundreds of thousands of trees, digging deep ditches across hundreds of streams and miles of wetlands, and blasting through bedrock in communities that rely upon shallow aquifers for their drinking water. All of this would occur in a geographic area that has become infamous in recent years for devastating floods. In addition, some of STP's members have been unable to build

homes or sell their property since the spring of 2012. Key to their physical and mental health and well-being is a determination as to whether the Certificate Order is valid. Thus, STP's members have been, and will continue to be, harmed by FERC's unreasonable delay.

The fifth *TRAC* prong considers "the nature and extent of the interests prejudiced by the delay." *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984). This factor draws on some of the same considerations as the third factor, *In re Barr Labs.*, *Inc.*, 930 F.2d 72, 75 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991), and likewise should be resolved in favor of STP. In measuring the prejudice, the Southern District of New York has applied a two-part balancing test. *NRDC v. Fox*, 93 F. Supp. 2d 531, 547 (S.D.N.Y. 2000), *aff'd in part, vacated on other grounds sub nom. NRDC v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). This test balances the impacts of compelling the administrative agency to action, against the impacts of declining to do so, and is intended to determine which action would be *less prejudicial* to a party. *See id.*

If this Court compels FERC to issue a final Order by May 1, 2015, the agency has little to do besides issue that order. No additional regulatory reviews or studies are needed, as the issues to be resolved are primarily legal in nature. Unlike most cases requesting mandamus, the record here has been fully developed over the past three years. However, if this Court does not compel FERC to issue a final

order by May 1, then STP and its members will be prejudiced, as the project would likely proceed to construction, and STP would be denied the right of having its appeal of FERC's Certificate Order heard in time to affect the outcome.

c. Compelling FERC to Issue an Order on STP's Request for Rehearing Will Not Compromise Competing Agency Priorities and Will Rectify FERC's Disregard for Congress' Mandate.

The fourth *TRAC* factor considers the impact of a writ of mandamus on other agency activities, while the sixth states that no impropriety needs to be found in order to compel agency action. These factors have been evaluated together in prior judicial decisions, and both are considered in this subsection. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir.) ("[T]he issue of impropriety intersects with item four's sensitivity to the agency's legitimate priorities. Where the agency has manifested bad faith, as by singling someone out for bad treatment or ***asserting utter indifference to a congressional deadline***, the agency will have a hard time claiming legitimacy for its priorities.") (emphasis added), *cert. denied*, 502 U.S. 906 (1991).

The commitments of time and resources required to issue an order on a fully developed record are miniscule compared to what is needed for the promulgation of regulations. *See Action on Smoking & Health (ASH) v. Dep't of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996). Nor does FERC's obligation here involve the complexities of determining *whether* to engage in a rulemaking process, which

could involve the redeployment of agency resources. *See Ctr. for Sci. in the Pub. Interest v. U.S. Food & Drug Admin.*, No. CV 14-375 (JEB), 2014 WL 6612146, at *5, *8 (D.D.C. Nov. 21, 2014) (Given that the U.S. FDA was currently in the process of working on a "revised advisory" for mercury consumption, and plaintiffs "[sought] to disseminate recommendations that [were] in the process of revision" the U.S. FDA was able to wait before responding to plaintiffs' petition for a rulemaking.). In any event, "generalized agency complaints about insufficient resources or staff do not alone suffice to justify delay." Miaskoff, *Judicial Review of Agency Delay*, *supra*, at 655-56. *See Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (granting mandamus even though the Civil Aeronautics Board was to cease to exist two months later, resulting in a steady decline in the agency's workforce).

The fourth prong is also informed by the sixth *TRAC* factor, *see In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991), which states that agency "impropriety" is not necessary for a determination of unreasonable agency delay. *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984). However, agency bad faith, when present, appears to warrant an immediate conclusion of unreasonable delay. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). In addition, "if an agency's failure to proceed expeditiously **will result in harm or substantial nullification of a right conferred by statute**, '**the courts must act** to

make certain that what can be done is done.'" *Id.* (quoting *Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951)) (emphasis added).

By delaying a final decision on requests for rehearing, FERC ensures that pipelines get built whether or not the process the Commission has followed was legal. Construction activities, such as tree clearing, are frequently allowed to proceed well in advance of the issuance of a final "Order on Rehearing." *See, e.g.*, *Tennessee Gas Pipeline Co., LLC*, 142 FERC ¶ 61025, at *3, *7 (Jan. 11, 2013) ("*TGP*"). In *TGP*, FERC issued a certificate of public convenience and necessity on May 29, 2012,[18] which was followed by a timely request for rehearing.[19] In response, FERC issued an "Order Granting Rehearing for Further Consideration" that is virtually identical to the one issued to STP herein.[20] Over six months passed before FERC issued what it considered to be a "final" Order. *See TGP*, 142 FERC ¶ 61025 (Jan. 11, 2013).Thus, by the time the original May 29, 2012 order could be timely challenged in court, and a judgment rendered on the merits, the pipeline project had already been completed! *See Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308-09, 1311 (D.C. Cir. 2014). Thus, while the aggrieved parties

[18] *Tennessee Gas Pipeline Co., LLC*, 39 FERC ¶ 61161 (May 29, 2012).

[19] *See* Del. Riverkeeper Network et al., Request for Rehearing (June 28, 2012), *available at* http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20120628-5171.

[20] *See* FERC, Order Granting Rehearing for Further Reconsideration (July 9, 2012), *available at* http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20120709-3002.

prevailed on their legal arguments, their remedy was limited to a remand to FERC for some procedural adjustments. The fact that their case was found by the D.C. Circuit to be meritorious adds insult to their injury, and reveals the true impact of FERC's delay on STP's rights in this case.

By employing this delay tactic, FERC demonstrates disrespect for Congress' thirty-day timeframe, and for the statutory rights afforded to aggrieved parties who wish to seek judicial review under section 717r(b) of the Natural Gas Act. *See Heitmeyer v. FCC*, 95 F.2d 91, 100 (D.C. Cir. 1937) ("Proper administration of the law by governmental agencies . . . requires careful observance of the procedures established by Congress. **For the protection of the people generally**, to say nothing of the agencies themselves, convenience of administration **cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication**.") (emphases added).The thirty-day period in which FERC must act to "grant or deny rehearing or to abrogate or modify its order" is meant to balance agency priorities, and the respective rights of the parties. Once a timely request for rehearing is filed, in order to preserve an aggrieved party's rights to judicial review of the challenged order, FERC must make the application a priority due to the potential for prejudice arising from delay. FERC has demonstrated disregard for the balance of competing priorities set by Congress. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir.) ("Where the agency has manifested bad faith, as by

singling someone out for bad treatment or ***asserting utter indifference to a congressional deadline***, the agency will have a hard time claiming legitimacy for its priorities.") (emphasis added), *cert. denied*, 502 U.S. 906 (1991).

As noted above, while "impropriety" is not an essential element to support a conclusion of unreasonable agency delay, if there is a finding of agency bad faith, that is the end of the matter and the agency delay appears to be *per se* unreasonable. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). In addition, "if an agency's failure to proceed expeditiously will result in harm or substantial nullification of a right conferred by statute, 'the courts must act to make certain that what can be done is done.'" *Id.* (quoting *Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951)). This latter notion takes into account the fact that FERC's failure to act on STP's request for rehearing may "harm or substantial[ly] nullif[y] . . . [its] right conferred by" the Natural Gas Act to *meaningful* judicial review and redress. This was the practical effect of FERC's delay in the *Delaware Riverkeeper Network v. FERC* case, and it will be repeated here if FERC is not compelled by this Court to act.

CONCLUSION AND PRAYER FOR RELIEF

FERC has failed to comply with its nondiscretionary duty to issue an order within thirty days of STP's request for rehearing that grants or denies that request, or that abrogates or modifies its Certificate Order. As a result, the project has

advanced and STP's members have suffered property and due process injuries, which will continue unabated and escalate without prompt judicial action. All administrative remedies have been exhausted, and there is no recourse for relief other than the filing of this petition for a writ of mandamus. STP prays that this Court perceives the prejudice of delay, and grants this Petition, which would preserve STP's right to seek judicial review of the Certificate Order while a meaningful remedy is still available. For these, and the other reasons stated above, STP respectfully petitions this Court to direct FERC to issue an order on the merits of the Request, and to declare that failure by FERC to do so by May 1, 2015 will be deemed a denial of the Request.

Respectfully submitted,

s/ ***Daniel E. Estrin***
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Dated: March 27, 2015
White Plains, New York

CERTIFICATE OF COMPLIANCE

I, Daniel E. Estrin, one of the Attorneys of Record for the Petitioners herein, hereby certify that this Petition complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B), as it contains 9,064 words, excluding the portions of the Petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ *Daniel E. Estrin*