

**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY**

**National Interest Electric Transmission Corridor,
Mid-Atlantic Area**

Docket No. 2007-OE-01

PETITION FOR REHEARING BY THE STATE OF NEW YORK

Pursuant to the Federal Power Act (“FPA”) Section 313, 16 U.S.C. § 8251, the State of New York hereby petitions for rehearing of the October 5, 2007 Order designating the Mid-Atlantic Area National Interest Electric Transmission (“NIET”) Corridor (hereinafter “Designation Order”). For the reasons set forth below, rehearing should be granted and the Designation Order should be vacated.

A. New York’s Interest

New York’s interest in this proceeding is set above in its motion to intervene in this proceeding, and is incorporated here. *See* Attorney General’s November 5, 2007 Motion to Intervene.

B. Applicable Statutory Provisions

The FPA, as amended by the Energy Policy Act of 2005 (“EPAAct”), changed the balance of power between State and Federal jurisdiction in the field of energy transmission. FPA Section 216, 16 U.S.C. § 824*p*, creates a new scheme of federal regulation over traditionally-exercised State authority related to the siting and approval of electric transmission lines, including those located wholly within a State. Section 216(a) provides that within one year of EPAAct’s passage, and every three years thereafter, DOE shall conduct a study of electric transmission congestion

(“Congestion Study”) in consultation with affected States. 16 U.S.C. § 824p(a). Section 216(a) further provides that after considering alternatives and providing an opportunity for public comment, DOE shall issue a report based on the Congestion Study that may designate as a NIET Corridor any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers. 16 U.S.C. § 824p(a).

Following DOE’s corridor designation, Section 216(a) provides that FERC then may assert federal siting and permitting jurisdiction over electric transmission projects located within the Corridor under certain circumstances, including if a State fails to act on a project application within one year. FERC may authorize the construction and operation of transmission facilities, even if such projects are located wholly within a State. *See* 16 U.S.C. § 824p(b).

The Administrative Procedure Act (“APA”), 5 U.S.C. § 553, 554, 556 and 557, prescribes the procedural requirements that must be followed by federal agencies in the issuance of regulations and adjudicatory orders. These procedures are mandatory and govern all federal actions.

The National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 *et seq.*, sets forth the policy of the United States with respect to protection of the environment, and prescribes the procedural and substantive requirements that each federal agency must follow when taking any action, including those involving the issuance of an order or the promulgation of a regulation. These procedures are mandatory and govern all federal actions that may affect the environment. 42 U.S.C. § 4332.

The Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.*, sets forth the policy of the United States to protect endangered and threatened species, and requires that each federal

agency undertaking an action, including those involving issuance of an order or promulgation of a regulation, consult with other federal agencies having jurisdiction under the ESA to insure that the action is not likely to jeopardize the continued existence of any endangered or threatened species. The ESA's consultation requirement is mandatory and applies to all federal actions that may adversely impact protected species. 16 U.S.C. § 1536.

The Hudson River Valley National Heritage Area Act of 1996 ("HRVNHA"), Section 908, designates a three million-acre area in New York's Hudson River Valley as a National Heritage Area. The designation requires preparation of a Management Plan, which is designed to protect the natural, cultural, historic and recreational resources of the Area. Section 908 of the HRVNHA requires any federal agency conducting or supporting an activity that may affect the designated area to consult with the Department of Interior and certain other State entities with respect to the proposed activity, to evaluate alternatives, and to ensure that the activity is consistent with the Management Plan. The consultation requirement is mandatory and applies to all Federal activities affecting the HRVNHA. P.L. 104-333, Division II, § 908, 110 Stat. 4275 (1996).

C. Background

In August 2006, DOE issued its "National Electric Transmission Congestion Study," which proposed to designate a massive geographic area in New York and several other States as an area purportedly "experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" within the meaning of FPA Section 216(a). 71 Fed. Reg. 45,047 (August 8, 2006). DOE solicited comments on the Congestion Study from interested parties.

On October 6, 2006, the NYSPSC submitted comments on the Congestion Study, asserting that there were unexplained discrepancies between the data utilized in the Congestion Study and prior findings of the New York Independent System Operator (“NYISO”); that inconsistent methodologies utilized in the Study skewed its results to favor an unreasonably broad Corridor designation; that the Study failed to consider new and proposed generation projects that could be more cost effective than transmission lines; that the Study had failed to consider and analyze alternatives such as new generation and transmission upgrades; that the Study had not considered adverse economic impacts on energy markets from the Corridor designation; and that technical consultation with the State and additional studies were necessary prior to DOE’s designation of a NIET Corridor in New York.

In May 2007, DOE issued a notice and opportunity to comment on the draft Corridor Designation Report that established two NIET Corridors, one in the Mid-Atlantic Area and the other in the Southwestern Area. 72 Fed. Reg. 25,838 (May 7, 2007). DOE conducted a limited number of public informational hearings on the proposed Corridor designations. Interested stakeholders submitted hundreds of comments to DOE expressing widespread opposition to the proposed Corridor Designation Report.

On June 8, 2007, New York Governor Eliot Spitzer submitted comments to DOE opposing the proposed designation on the grounds that there is no need for the designation or the exercise of federal jurisdiction because New York has an effective transmission facility siting law, Public Service Law, Article VII. The Governor recited the NYSPSC’s efficient approval of numerous transmission projects under the State siting law and the efforts undertaken to improve reliability. The Governor urged DOE to exclude New York from the NIET Corridor.

On July 6, 2007, the NYSPSC submitted formal comments on the proposed Corridor Designation Report and also challenged the inclusion of New York in the proposed Mid-Atlantic Corridor. NYSPSC reiterated its earlier comments on the Congestion Study, disputed certain factual findings in the Report, challenged the legal basis of the Corridor Designation under FPA Section 216(a), asserted that the Designation is contrary to established economic principles, and confirmed New York's primary jurisdictional authority over the siting and construction of transmission lines.

On July 3, 2007, the NYSDEC submitted formal comments on the Corridor Designation Report, asserting that the inclusion of most of New York would have adverse environmental impacts on numerous protected natural, cultural and historic resources. The NYSDEC detailed the adverse impacts of the action on the State's economic resources and energy policy. The NYSDEC asserted that DOE's action usurped traditional State authority and promoted the use of aging, dirty power sources. The NYSDEC also asserted that DOE had failed to comply with NEPA in designating the Corridor, which represented the first step to implementation of a federal program for the development of transmission lines in the State. NYSDEC also asserted that DOE had failed to consult with appropriate agencies under the ESA.

In October 2007, DOE issued the final Order designating two NIET Corridors ("Designation Order"), one in the Mid-Atlantic Area and the other in the Southwestern Area. 72 Fed. Reg. 56,992 (October 5, 2007). The Mid-Atlantic Corridor includes 47 counties in New York, all of New Jersey, Delaware, Maryland, and the District of Columbia, and large portions of Pennsylvania, Ohio, Virginia and West Virginia.

Prior to issuing the Designation Order, DOE did not prepare or issue for public notice and comment an environmental assessment ("EA") describing the proposed designation as required

by its own NEPA regulations, 10 C.F.R. § 1021.320. Nor did DOE prepare an environmental impact statement (“EIS”) as required by NEPA and its own regulations. 42 U.S.C. § 4332; 10 C.F.R. § 1021.310. DOE did not conduct any NEPA review prior to issuance of the Designation Order, nor did it consult with other federal agencies having jurisdiction over endangered and threatened species and National Heritage Area preservation.

D. Statement of the Issues, Specification of Errors, and Legal Argument

The State joins in the petitions for rehearing submitted by the NYSDEC and NYSPSC, and hereby incorporates the issues, arguments, factual assertions, and specification of errors set forth therein. In addition, pursuant to Section 313 of the FPA, 16 U.S.C. § 8251, the State seeks rehearing and consideration of the following issues and specifies the following additional errors of law in DOE’s issuance of the Designation Order.

1. DOE lacks the authority under Section 216 and the APA to issue an adjudicatory order or a rule designating the NIET Corridor.

FPA Section 216(a) contains clear and unambiguous language requiring DOE to conduct a study and issue a report on electric transmission congestion.

- (1) ...[T]he Secretary of Energy..., in consultation with affected States, *shall conduct a study* of electric transmission congestion.
- (2) After considering alternatives and recommendations from interested parties, ... the Secretary *shall issue a report, based on the study*, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

FPA 216(a), 16 U.S.C. 824p(a) (emphasis added). Section 216(a) does not provide DOE with the authority to issue an adjudicatory order or rule like the Designation Order issued here, which makes factual findings related to congestion and adverse impacts on consumers and is binding on affected States. FPA Section 309, 16 U.S.C. § 824h, also does not provide DOE with the

authority to issue the Designation Order at issue here. Although DOE has some latitude and discretion in performing its regulatory functions pursuant to Section 309, (*Niagara Mohawk Power Corporation v. Federal Power Commission*, 379 F.2d 153, 159 (D.C. Cir. 1967)), the fact finding function underlying the Designation Order and its binding affect on the States stands in a different light. The APA, 5 U.S.C. §§ 554, 556 and 557, does not authorize DOE's issuance of the Designation Order, nor the "informal" process DOE followed in issuing it. The APA requires clear notice of the administrative action being taken, whether by adjudication or rulemaking, and strict compliance with detailed procedural requirements. Thus, the Designation Order is beyond DOE's authority under Section 216 and the APA.

DOE characterizes the Designation Order as an "informal adjudication under the APA." 72 Fed Reg. at 57,001. In passing Section 216(a), Congress did not direct DOE to adjudicate anything. Nor did Congress in Section 216 allow DOE to unilaterally abrogate the APA's adjudicatory hearing and due process requirements. 5 U.S.C. §§ 554, 556-557.

Under the APA, an adjudicatory order is significantly different than the Congestion Study and Designation Report authorized by Section 216(a). An adjudicatory order adjudicates contested issues after an evidentiary hearing, contains factual findings, and is binding on affected parties. An adjudicatory order therefore carries far greater weight and effect than a study or report. Such an order is issued only after a formal hearing process that comports with the APA's due process requirements. If DOE intended to issue an adjudicatory order, even a so-called "informal" one like the Designation Order here, it was required to comply with the APA's hearing requirements, 5 U.S.C. § 554, as well as its *own* hearing regulations, 10 C.F.R. § 385.501 *et seq.* DOE did not conduct such an adjudicatory hearing here. The record contains no statutory

or factual basis to support DOE's "informal" adjudicatory Designation Order.¹

The Designation Order alternatively may be reviewed as the equivalent of a rule making within the meaning of APA 5 U.S.C. § 553, particularly since DOE intends to bind the States to the Corridor established in the Order for a period of 12 years. DOE did not comply with the APA's procedural requirements and, in fact, never notified the States that it intended to promulgate a functional rule establishing the Corridor, rather than issuing a report recommending the Corridor, as Section 216(a) envisions.

In making its findings of fact on transmission congestion and related adverse impact on consumers in the Designation Order, DOE relied on the Congestion Report. DOE seems to adopt wholesale the underlying data and report of its consultants, CRA International, Inc. DOE did not question CRA's report, despite the specific factual and technical objections to the Congestion Report asserted by numerous commentators, including the NYSPSC, that called the Report into question.² When the NYSPSC credibly challenged the data, information and assumptions contained in the Congestion Report, DOE had a duty to independently verify the factual basis on which it was relying. *See Sierra Club v. Flowers*, 423 F.Supp. 2d 1273, 1338 (D. Fla. 2006) (Corps of Engineers reliance on applicant's reports during NEPA review was erroneous; once credibly challenged as inaccurate, Corps was required to investigate and to subject reports to independent verification); *see also* 40 C.F.R. § 1506.5(a); *Sierra Club v. Sigler*, 695 F.2d 957,

¹ There also is no statutory differentiation between "formal" and "informal" orders under the APA to support DOE's characterization. It is unclear from the Designation Order itself what the term "informal" means and whether DOE intends by the lack of formality not to bind the States affected by the Corridor.

² *See* NYSPSC's October 2006 Comments related to the Congestion Report.

979 (5th Cir. 1983) (NEPA requires objective analysis and independent verification of information federal agency relies upon); *Sierra Club v. Marsh*, 701 F.Supp. 886, 912 (D. Me. 1988) *appeal dismissed*, 907 F.2d 210 (1990) (same). The record does not reflect that DOE conducted any independent verification of the information on which it relied, nor did DOE adequately address the apparent conflicts in the Designation Order.

DOE's approach fails to consider relevant economic factors, including whether new transmission will cost consumers more. This approach is entirely inconsistent with objectives of the FPA, which are designed to favor the consumer. The Designation Order binds New York to an energy plan that is contrary to the State's approach with respect to capacity. *See* NYSPSC November 2, 2007 Petition for Rehearing. New York is keenly aware of its own energy needs and is in the best position to determine a State energy policy after balancing a number of relevant factors. The Designation Order improperly encroaches on the State's right to determine and implement a balanced energy policy with appropriate solutions to energy needs, including those related to congestion.

Had Congress intended to give DOE the authority under the FPA to issue either an adjudicatory order containing factual findings or a rulemaking, both of which would bind the States for a period of 12 years, it would have expressly stated as much in Section 216. Congress did not. Even if Congress intended DOE to issue a binding adjudicatory order or a rule, DOE was required to comply with the procedural requirements of the APA, and to make clear to States the precise action it was taking. Consequently, DOE lacks the authority to issue the Designation Order at issue here.

2. DOE improperly included areas in the NIET Corridor that do not meet the criteria of Section 216.

FPA Section 216(a)(2) sets forth the criteria that DOE must meet in order to include a geographic area as part of the designated NIET Corridor. First, DOE must find that a geographic area is experiencing electric energy transmission capacity constraints or congestion. Second, the constraints or congestion must be adversely affecting consumers in those areas. 16 U.S.C. § 824p(a). DOE must find both criteria met before including a geographic area as part of the NIET Corridor. 16 U.S.C. § 824p(a). DOE's Designation Order purports to make factual findings of capacity constraints and adverse affects on consumers, but lacks proper support in the record for those findings.

a. There is nothing in the record to support DOE's factual finding that consumers in the Corridor are adversely affected within the meaning of Section 216(a).

The Designation Order summarily claims that simply because there may be congestion as little as 5% of the time, consumers are adversely impacted. 72 Fed.Reg. at 57,005. DOE assumes adverse effects on consumers without a factual basis showing such effects. There simply is no evidence in the record that all consumers throughout the massive geographic area designated as the Mid-Atlantic Corridor are adversely impacted. DOE merely speculates and theorizes that congestion must cause adverse impacts. 72 Fed. Reg. at 57,007. DOE's result-oriented speculation is insufficient to support DOE's finding that such an enormous geographic area is both constrained and adversely affected. Section 216(a) requires a *finding* of adverse impacts, not speculation, in order for a geographic area to be designated as part of the Corridor.

DOE improperly uses the so-called "source and sink" approach to the Corridor designation. 72 Fed. Reg. at 57,007. Under this approach, DOE has included in the Corridor

both the “sources” of electric power generation and the “sinks” representing the end-use consumers that presumably are constrained and affected. This approach is contrary to the express language of Section 216(a), which directs DOE to include in the Corridor *only* those geographic areas found to be experiencing constraints that adversely affect consumers in the retail consumer end markets or “sinks” of congestion. 16 U.S.C. § 824p(a)(2) and (a)(4)(A). Inclusion of “sources” and all the areas in between is simply not authorized by Section 216(a).

DOE justifies its “source/sink” approach by characterizing as ambiguous Congress’ use of the words “... any geographic area experiencing electric transmission capacity constraints or congestion that adversely affects consumers...” 16 U.S.C. § 824p(a). This characterization is DOE’s veiled attempt to insulate its regulatory action from more probing judicial review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The language of Section 216(a) is not ambiguous and focuses on consumers, not on power generators. This reading of Section 216(a) is consistent with the FPA’s objectives, which are to protect the consumer, not the power industry. *See New England Power Company v. Federal Power Commission*, 467 F. 2d 425, 429 (D.C. Cir. 1972), *aff’d sub nom.*, 415 U.S. 345 (1974) (FPA’s purpose in regulation of power is to benefit the public and there is “something fundamentally wrong” in regulating to benefit the industry).

DOE also fails to provide a basis in the record for setting the boundaries of the Corridor. DOE reasons that in setting the boundaries of the Corridor by using existing county borders, the Order provides “certainty.” 72 Fed.Reg. at 57,008. DOE’s does not provide any other basis for the boundaries. This too is not consistent with either the plain language of Section 216(a).

b. DOE included areas in the NIET Corridor that are not currently experiencing more than minimal transmission constraints or congestion.

DOE has included parts of New York in the Corridor that are simply not currently congested. Indeed, DOE included areas in the Mid-Atlantic Corridor that may have congestion less than 5% of the time, since that is the threshold in the Order. 72 Fed. Reg. at 57,005. The sheer size of the geographic area included in the Corridor, which covers some of the least populated areas of New York where there simply is no real congestion, graphically illustrates DOE's error.

DOE also asserts that the boundaries of the Corridor "are not based on any proposed transmission project." 72 Fed. Reg. at 56,999. This is not necessarily the case, however. Well before DOE issued the Congestion Study, at least one New York transmission line developer requested that DOE designate a specific and extensive area as part of the Corridor. In a March 6, 2006 letter, the New York Regional Interconnect, Inc. ("NYRI") requested that DOE designate approximately 190 miles as a transmission corridor, running from the Edic substation in the Town of Marcy, Oneida County, to the Rock Tavern substation in New Windsor, Orange County. With apparently no information related to actual adverse impacts on consumers in that 190-mile area, DOE simply incorporated NYRI's requested designation in the Congestion Report, (72 Fed. Reg. 25,838, 25,860), clearing the way for the exercise of FERC jurisdiction - and likely approval - of the project if the State does not act on the project within one year of the application. 16 U.S.C. § 824p(b). The NYSPSC will review and determine NYRI's application once it is complete. It is not clear that the NYRI project as proposed will actually relieve congestion in the areas in New York with the most significant constraints. The efficacy of the NYRI project remains at best a significant open question that will be resolved by the NYSPSC.

3. DOE violated the requirements of FPA Section 216(a) in failing to conduct a meaningful consultation with affected States.

Pursuant to Section 216(a), DOE was required to formally consult with affected States in the proposed designated Corridor. 16 U.S.C. § 824p(a). The requirement to consult triggers a greater obligation than simply providing notice in the Federal Register with an opportunity to submit comments. Consultation envisions a formal process in which affected States are heard on a wide range of issues (e.g., congestion, costs, environmental impacts, transmission line siting, and other technical, and policy issues).³ When Congress included the consultation requirement in Section 216(a), it intended a far more meaningful role for the States in the Corridor designation process than the one DOE has afforded here.

DOE failed to initially create a formal consultation process in which the States could pursue a dialogue about the Corridor. Instead, DOE relied on informal communications with affected States in which no real dialogue or substantive consideration of issues took place. Most importantly, DOE disregarded the positions offered by affected States, including New York, in their comments submitted in opposition to both the Congestion Study and the Corridor designation. For example, DOE entirely ignored the NYISO conclusion that there is no need for a Corridor designation from a reliability standpoint. 72 Fed.Reg. at 25,858 - 25,860.⁴ Indeed, DOE never changed its position on any issue as a result of a State's comments. This is not "consultation" within the meaning or intent of Section 216(a).

³ There are formal consultation processes established under numerous federal laws. *See, e.g.,* USFWS Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (March 1998).

⁴ NYISO's Reliability Needs Assessment states that "there is no need for a National Corridor [in New York] from a reliability standpoint."

DOE attempts to excuse its failure to consult with States by stating that “there are practical difficulties in conducting the level of consultation that some may prefer...” 72 Fed. Reg. at 57,002. DOE also points to the magnitude of the Congestion Study and the statutorily mandated deadlines as further reason why it failed to meaningfully consult with the States. 72 Fed. Reg. at 57,002. DOE essentially excuses its failure in this regard by stating that it “tried” to consult. In failing to properly consult with affected States, DOE has failed to comply with the Congressional mandate in Section 216(a).

4. DOE has violated the requirement of FPA Section 216(a) to consider alternatives to the transmission corridor, including other solutions to capacity constraints, upgrades to existing transmission lines, new generation, and a smaller or alternate geographic area for the Corridor.

DOE states that the requirement in FPA Section 216(a) to consider alternatives is “ambiguous” (72 Fed.Reg. at 57,010), again in a veiled attempt to insulate its actions under *Chevron*. DOE then interprets the term to mean that it is not required to consider *any* alternatives to the Corridor designation or any other solutions to the problem of congestion. 72 Fed.Reg. at 57,010. This position is entirely inconsistent with the plain language of Section 216(a), with Congressional intent in using the term “alternatives,” and with the use of that term of art in other federal laws and regulations. The term simply is not ambiguous and requires an evaluation of other options to the action.

In using the term “alternatives,” Congress obviously intended that NEPA would guide DOE’s consideration of the Corridor designation. The mandate to consider alternatives is an reference to NEPA’s identical mandate that all Federal agencies consider alternatives when undertaking an action. *See* 42 U.S.C. § 4332(2)(C)(iii) (all agencies of the Federal Government shall ... include ... a detailed statement by the responsible official on - ... alternatives to the

proposed action...). DOE's position is without merit in light of Congress' clear mandate in NEPA that *all* Federal laws "shall be interpreted and administered in accordance with the policies set forth in this chapter." 42 U.S.C. 4332(1); *see also* 40 C.F.R. § 1506.5. The term "alternatives" in Section 216 is not subject to any other interpretation.

Contrary to DOE's position, Section 216 requires DOE to consider alternatives, for example, to the size and location of the Corridor, and to review other solutions to capacity constraints besides new transmission lines, such as transmission line upgrades, local distribution, new generation, and other technologies. 16 U.S.C. § 824p(a). In refusing to consider and evaluate alternatives, DOE has failed to comply with the letter and spirit of both Section 216(a) and NEPA.

5. DOE violated NEPA and its own NEPA-implementing regulations in finding that the Designation Order did not constitute a "major federal action" subject to environmental review.

DOE states that the Designation Order does not constitute a "major federal action" subject to NEPA because "national corridor designations have no environmental impact" and "are only designations of geographic areas in which DOE has identified electrical congestion or constraint problems." 72 Fed.Reg. at 56,992. DOE mischaracterizes the adjudicatory nature and affect of the Designation Order, and ignores the express language of Section 216, NEPA and its own regulations. DOE also disregards the anticipated future federal action by FERC.

NEPA broadly defines "major federal actions" to include those that may be subject to Federal control and responsibility, as well as actions that are "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies or

procedures; and legislative proposals. 40 C.F.R. 1508.18(a).⁵ NEPA specifies actions that are subject to NEPA, including the “[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan;” and “...connected agency decisions allocating agency resources to implement a specific statutory program....” 40 C.F.R. 1508.18(b)(3). The entire scheme of Section 216 is such a program, plan or policy.

DOE’s own NEPA regulations incorporate the definition of “major federal action” that is forth in the main NEPA regulations, 40 C.F.R. 1508.18, and similarly define an “action” to include “a project, program, plan, or policy ... that is subject to DOE’s control and responsibility.” 10 C.F.R. § 1021.104. DOE’s regulations also contain a mandatory requirement to prepare an EA for purposes of determining whether the action is a “major federal action” *See* 10 C.F.R. §1021.320 (“DOE shall prepare and circulate EAs ... in accordance with the requirements of the CEQ regulations.”). DOE did not prepare an EA here. Once it prepares an EA, DOE then must determine whether the action is a major federal action. If it is, DOE then must determine whether the action will have a significant affect on the quality of the human environment warranting preparation of an EIS. 10 C.F.R. § 1021.320. DOE’s regulations require a determination of the level of NEPA review and whether an EIS will be prepared “as soon as possible” after DOE proposes an action. 10 C.F.R. §1021.200(b) and (c). DOE did not follow its own regulations in issuing the Designation Order.

The Congestion Report and the Designation Order here represent the commencement of a “project, program, plan or policy” that is “under DOE’s control and responsibility” within the meaning of NEPA and DOE’s regulations. *See* 10 C.F.R. § 1021.104 and 40 C.F.R. § 1508.18

⁵ The NEPA regulations, promulgated by the Council on Environmental Quality, govern all federal agencies. 40 C.F.R. § 1501 *et seq.*

(both broadly defining “major federal action”). Thus, the Designation Order constitutes a major federal action is because it sets the foundation for anticipated - and continuing - energy development in the NIET Corridor through the construction and operation of electric transmission lines, either under FERC’s or a State’s permitting authority. *See* 16 U.S.C. § 824p(a) and (b).

DOE attempts to justify its finding that the Designation Order is not a “major federal action” by stating that the Corridor designation itself has no environmental impact and that when specific transmission projects are proposed in the future, FERC will review the environmental impacts of those projects at that time under NEPA. 72 Fed. Reg. at. 57,021-23. DOE ignores the continuing nature of Section 216’s scheme to develop transmission in the Corridor. 16 U.S.C. § 824p(a) and (b). In doing so, DOE also ignores its own NEPA obligations. DOE disregards the anticipated development of transmission lines expected as a result of the Designation Order, and the unavoidable cumulative environmental impacts that flow from that development. Even though DOE concedes that FERC or the States will issue construction permits for major transmission projects in the Corridor, which are likely to have a significant adverse impacts on the environment, it nevertheless states that the necessary environmental review will be conducted at a later time. 72 Fed. Reg. at. 57,021-23. DOE’s deferral of its own NEPA obligation is contrary to the statute and to the practices of other federal agencies. *See, e.g., Arkansas Wildlife Federation v. United States Army Corps of Engineers*, 431 F.3d 1096 (8th Cir. 2005) (EIS for Demonstration Project properly included cumulative impact review of four existing projects, two pending projects, three unauthorized and unfunded projects, five other projects, and several potential projects which were not reasonably foreseeable).

The Designation Order itself states that it is “the first step in the process of determining

whether to provide a potential Federal forum that would examine whether addressing congestion through transmission expansion is in the public interest.” 72 Fed.Reg. at 57,004.⁶ The Order clearly contemplates subsequent federal action as a result of DOE’s Corridor designation. Congress designed NEPA to reach exactly this type of regulatory “first step” that the Designation Order represents, namely, the beginning of federal transmission siting authority within the Corridor under Section 216(b). 16 U.S.C. § 824p(b). NEPA requires federal agencies to apply NEPA at the earliest possible time and not wait for later review. *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979) (federal agency’s execution of power supply contract was “major federal action” under NEPA because it entailed further major federal actions, including construction of generation facility and transmission lines); *Environmental Protection Information Center v. United States Forest Service*, 2003 U.S. Dist. LEXIS 18241 (N.D.Ca. 2003) (Forest Service fire management plan covering one million acres of forest land was a decisionmaking document that determined rights and obligations and had legal consequences, and was therefore subject to NEPA’s requirements to prepare as EA and EIS). DOE’s finding that its Designation Order is not an action subject to NEPA because FERC may apply NEPA at a later time violates the letter and spirit of NEPA and is contrary to DOE’s implementing regulations.

DOE’s mischaracterization of the Congestion Study and Designation Order disregards settled case law in construing NEPA when an agency anticipates further federal actions. *See Port of Astoria, Oregon v. Hodel*, 595 F.2d at 477-78; *see also Environmental Defense Fund v. Higginson*, 655 F.2d 1244, (D.C. Cir. 1981) (Department of Interior may not delay NEPA review

⁶ Similarly, in the Congestion Report, DOE characterizes the Designation Order as a “necessary first step” in siting transmission lines in the Corridor. *See* DOE “National Electric Transmission Congestion Report and Final National Corridor Designations, Frequently Asked Questions,” p.1, § 2 (October 2, 2007).

of its region-wide plan for numerous federal water projects until specific project is proposed). It is plain that where, as here, a federal agency proposes a regional plan of development of electric transmission lines such as the NIET Corridor, that action is subject to NEPA. *Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976). DOE cannot avoid its NEPA objections by relying on another federal agency's future actions.

NEPA Section 102 does not permit delaying assessment of environmental impacts even if such impacts will be evaluated later in the context of a site-specific proposal. 42 U.S.C. § 4332; *Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1072 (9th Cir. 2002) (guidelines incorporated into regional plan was a major federal action requiring an EIS); *Port of Astoria v. Hodel*, 595 F.2d at 477-78. Only when a federal agency considers the environmental consequences of a potential series of future federal actions at the earliest possible time, can those actions be adequately evaluated at the point when alternatives are still available. *See Kleppe v. Sierra Club*, 427 U.S. at 401-02; *see also Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69-70 (2004) (federal land use plan of immense scope is a major federal action subject to NEPA when it is a preliminary step in the overall agency planning process that guides but not prescribe future action.

In determining whether to prepare an EIS, DOE is also required to consider the degree to which the Designation Order is highly controversial. 40 C.F.R. § 1508.27(b)(2). Where there is a substantial dispute regarding the size, nature or effect of the action, it is considered "major." *See, Cold Mountain v. Garber*, 375 F.3d 884, 893 (9th Cir 2004); *Hanley v. Kleindienst*, 471 F.2d 823, 830-31 (2nd Cir. 1972). With more than 2000 comments submitted in this proceeding, many vigorously disputing the factual and legal basis of the Order and questioning the sheer size of the Corridor, the highly controversial nature of DOE's action cannot seriously be disputed.

NEPA also requires DOE to assess whether the Designation Order establishes a precedent for further federal action with significant effects. 40 C.F.R. § 1508.27(b)(3). NEPA requires DOE to evaluate whether the action is related to other actions which may have cumulative impacts. 40 C.F.R. § 1508.27(b)(4).

DOE has violated both the statutory mandate in NEPA Section 102 and its own regulations in issuing the Designation Order, and has no support in the record for its claim that the Corridor designation is not “major federal actions.”

6. DOE has violated the ESA and the HRVNHA in failing to conduct the statutorily required consultation with appropriate federal agencies, in cooperation with the States, prior to issuance of the Designation Order.

a. The ESA

_____DOE erred in issuing the Designation Order without first consulting with the United States Fish and Wildlife Service (“USFWS”) with respect to the threatened and endangered species found within the Corridor. The ESA requires federal agencies to conserve and protect these species, and to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat” 16 U.S.C. 1536(a)(2). The ESA imposes a strict procedural consultation duty whenever a federal action may affect an ESA-listed species. *National Association of Homebuilders v. Defenders of Wildlife*, ___ U.S. __; 127 S. Ct. 2518, 2526; 168 L. Ed. 2d 467, 478 (2007); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). States are integrally involved in this process when species within the State will be affected by the federal action.⁷

⁷ See NYSDEC Petition for Rehearing, Nye Affidavit, ¶ 6.

The ESA applies to any “action” by a federal agency, is broadly defined to include “all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies in the United States. 50 C.F.R. § 402.02. The federal agency undertaking the action must consult with appropriate other agencies to ascertain whether the action will jeopardize the continued existence of endangered or threatened species. 16 U.S.C. § 1536(a)(3); 50 C.F.R. §§ 402.10-402.16. The agency undertaking the action initiates the consultation process by a formal written request to the consulting agency. After consultation, investigation, and analysis, the consulting agency then prepares a biological opinion and may make a “jeopardy determination” that the species will or will not be harmed by the action.⁸ *National Association of Homebuilders*, ___ U.S. ___; 127 S. Ct. at 2526; 168 L. Ed. 2d at 478. ESA compliance, including consultation, is not optional. *National Wildlife Federation v. National Marine Fisheries Service*, 481 F.3d 1224, 1235 (9th Cir. 2007).

DOE was required to consult with the USFWS because of the presence of endangered and threatened species throughout the Corridor.⁹ The USFWS and its State counterpart, the NYSDEC, were entitled to the opportunity to independently evaluate DOE’s Corridor designation action to determine if it could impact protected species. DOE’s failure to consult

⁸ The consulting agency evaluates the effects of the proposed action on the survival of species and any potential destruction or adverse modification of critical habitat in a biological opinion, based on “the best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2) and (b). The biological opinion includes a summary of the information upon which the opinion is based, a discussion of the effects of the action on listed species or critical habitat, and the consulting agency's opinion on “whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat” 50 C.F.R. § 402.14(h)(3).

⁹ See NYSDEC November 2, 2007 Petition for Rehearing, pp. 17-18 and Affidavit of Peter Nye listing the endangered and threatened species found in the New York portion of the Corridor.

with USFWS, or even notify it of the proposed Corridor designation is a clear violation of the ESA.

b. The HRVNHA

DOE also erred in issuing the Designation Order including over the area in the Hudson River Valley National Heritage Area, without first consulting with the Secretary of the Department of the Interior and the appropriate State entities,¹⁰ as required by the HRVNHA. In addition to the Hudson River Valley Area, the Designation Order also includes the Erie Canalway National Heritage Area and the Champlain Valley National Heritage Partnership, both of which are also protected under the National Heritage Act, 16 U.S.C. § 461, *et seq.*¹¹ Congress has declared that the national policy is to preserve and protect sites of national historical and cultural significance. 16 U.S.C. § 461. DOE's failure to comply with this policy through consultation is inconsistent with this policy.

The HRVNHA expressly requires consultation prior to a federal agency undertaking any activity that may affect the Hudson River Valley National Heritage Area. P.L. 104-333, § 908(b)(1) and (2). The geographic scope of the Order includes the more than three million-acres designated as protected by Congress in the HRVNHA and subjects to a management plan that both federal and state agencies formulated. The Designation Order plainly affects it. Moreover, the HRVNHA requires the consultation process to include an evaluation of alternatives to the

¹⁰ The State entities with jurisdiction under the Management Plan to consult with any federal agency proposing an activity in the designated Hudson River Valley National Heritage Area are the Hudson River Greenway Council and the Greenway Conservancy for the Hudson River Valley.

¹¹ Pub. No. 105-83, Title III, §§ 317 and 324, 111 Stat 1595, 1597 (1997); Pub. L. No. 106-176, § 206, 114 Stat. 23 (2000). *See* NYSDEC November 2, 2007 Petition for Rehearing, pp 16-17; 20-22.

activity, or a determination that there is “no practicable alternative” to the activity.¹² This requirement is consistent with Section 216’s mandate to consider alternatives, as well as with NEPA’s similar mandate. DOE ignored the special protection afforded the Hudson River Valley National Heritage Area in not consulting with proper Federal and State entities, and in failing to consider alternatives to the inclusion of the Area in the Designation Order.

Conclusion

DOE’s Designation is contrary to law and is otherwise arbitrary, capricious, an abuse of discretion, and without basis in the record. For the reasons set forth above, rehearing should be granted and the Designation Order should be vacated.

Date: November 5, 2007

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Attorney General of the
State of New York
New York State Department
Of Law
Environmental Protection Bureau

By: _____

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¹² The Department of Transportation must make a similar finding of “no prudent or feasible alternative” to using publicly owned parkland or historic sites for a transportation project, and requires “all possible planning” to minimize and mitigate harm to the resource. *See* Transportation Law § 4(f), 49 U.S.C. § 303(c); *see also, Stewart Park & Preserve Coalition, Inc. v. Slater*, 352 F.3d 543 (2d Cir. 2003).

CERTIFICATION

The undersigned hereby certifies that she is an Assistant Attorney General and is a duly authorized representative of the Office of the Attorney General of the State of New York for purposes of filing the petition for rehearing. The undersigned further certifies that the State's foregoing petition for rehearing of the October 5, 2007 Designation Order in this proceeding was filed with the Department of Energy at the address set forth in the Order, and as set forth below, by forwarding same by telefax, by hand delivery, and by electronic mail on the 5th day of November, 2007.

By Hand Delivery:

Office of Electricity Delivery and Energy Reliability, OE-20
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585
Attention: Docket No. 2007-OE-01

By Telefax: (202) 586-8008

By Electronic Mail:
The Office of Legal Counsel
Warren.Belmar@hq.doe.gov

Maureen F. Leary
Assistant Attorney General

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