

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

In the Matter Of)	Docket No. CP16-22
NEXUS Gas Transmission, LLC)	October 17, 2016
)	

***MOTION OF INTERVENOR SUSTAINABLE MEDINA COUNTY
FOR IMMEDIATE SUPPLEMENTATION OF DRAFT ENVIRONMENTAL IMPACT
STATEMENT, FOR ADDITIONAL PUBLIC COMMENT PERIOD
AND FOR A PUBLIC COMMENT HEARING***

Now comes Sustainable Medina County (“SMC”), Intervenor herein, by and through counsel, and pursuant to the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. §§ 385.212 and 385.217(c), moves for an order from the Commission requiring supplementation of the Draft Environmental Impact Statement in the particulars set forth below.

Intervenor SMC further moves the Commission to establish a new general public comment period on the requested supplemental DEIS, and to convene a second round of public comment plenary hearings for the public to weigh in on the new information received from NEXUS during and since the public comment period.

October 17, 2016

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A. The Chippewa D Alternative Pipeline Re-Route

The staff of the Federal Energy Regulatory Commission issued a Draft Environmental Impact Statement (“DEIS” or “Draft EIS”) for the proposed NEXUS gas mega-pipeline project on July 8, 2016. Section 3.4.10 of the DEIS identified potential environmental advantages and disadvantages associated with three alternative pipeline routes which deviate from the original route near Chippewa Lake in Medina County, Ohio. FERC Staff recommended that NEXUS closely examine the “Chippewa C Alternate Route” with an eye to possibly selecting that alternative. In response, NEXUS evaluated the Chippewa C Alternate Route for constructability concerns and landowner issues (Figure 3.4.10-4 of the Draft EIS). NEXUS modified the Chippewa C Alternate Route in four areas, ostensibly to avoid construction constraints and further minimize impacts to the natural and human environments. This altered Chippewa C route is variously referred to as the “Optimized Chippewa Lake C Route Variation,” “Chippewa D Alternate Route” or “Chippewa D.”

By letter directed to affected landowners dated October 6, 2016, FERC for the very first time requested public comments on Chippewa D, which diverges from the originally proposed route at milepost 66.0 and generally runs north and east of it, rejoining the original route at milepost 72.5. Chippewa D deviates from the original route just west of the Interstate 71 crossing and proceeds northwest for approximately 1 mile before turning due west and crossing Wooster Pike. On the west side of Wooster Pike, Chippewa D turns north and crosses Chippewa Road and Maplewood Farm Drive. Approximately 800 feet north of Maplewood Farm Drive, the route

proceeds WNW, bisecting the Medina Country Club golf course turning north and crossing Wedgewood Road. The Chippewa D Alternative Route continues west on the north side of Wedgewood Road for 0.6 mile crossing Lake Road and Technology Lane, then proceeding NNW, crossing Deerview Lane and running parallel to the CSX transportation railway for approximately 0.7 mile, crossing Lafayette Road and turning west, crossing Columbia Road where it intersects with the CSX railway. Finally, Chippewa D converges with the original route just east of the intersection of Carlton Road and Egypt Road.

In the October 6 letter, FERC Staff solicited public comments from a very narrow portion of the public regarding Chippewa D. FERC seeks comments only from landowners whose property would be crossed by the pipeline, and from adjacent property owners. Those groups have been given only until November 7, 2016 to “provide . . . specific comments or concerns about these alternative routes.” FERC October 6 letter, p. 2 (complete letter attached).

According to information from the Medina County Engineer, approximately 50 households are found in the 150' footprint of Chippewa D, while perhaps 700 households are found within one-half mile on either side of the proposed right-of-way of Chippewa D. Hundreds of new stakeholders now find themselves within a short distance of the proposed pipeline, easily more than 1,000 people.

Chippewa D has not been published nor analyzed within the DEIS. The first mention of it appeared in the docket of this proceeding in NEXUS’ “Responses to FERC Staff Recommended Mitigation in the July 8, 2016 Draft Environmental Impact Statement for NEXUS Gas Transmission Project (VOLUME II-A – PUBLIC),” dated July 26, 2016.¹ That document is not a

¹Found at http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14480643

part of the Draft EIS, but is merely Spectra Energy, as project applicant's, record responses to questions put to it by the FERC Staff in the DEIS. FERC, as federal lead agency for purposes of the NEPA, appears to be treating the NEXUS response document as part of the DEIS. But the public was not properly given notice of the Chippewa D re-route by the DEIS. Nor is the narrowly-limited grouping from which FERC seeks comments by November 7, 2016 properly the "public" from which comments should be sought, under NEPA.

In the October 6 notification letter, FERC Staff included the pointed suggestion that landowners consider quickly negotiating right-of-way easements with Spectra Energy, or face the potential that Spectra will be conferred eminent domain powers by FERC to sue any laggards. FERC has telegraphed the message to landowners that Chippewa D has been effectively selected even before there has been a completed Final Environmental Impact Statement - or even a lawfully-promulgated Draft EIS.

Intervenor Sustainable Medina County states that the FERC Staff's decision to not include Chippewa D within the Draft Environmental Impact Statement, coupled with the deliberate curtailment of "public" from which comments are being sought, violates the National Environmental Policy Act. Moreover, Chippewa D is not the first instance of the FERC Staff's violation of NEPA-required public notice and comment at the Draft EIS stage.

B. Multiple Staff Requests for Additional Information in DEIS

In the Draft EIS, the FERC Staff listed 47 proposed conditions necessary to mitigate the environmental effects of the pipeline project. For thirteen (13) of the conditions, including the Chippewa Lake reroute (Condition #14), FERC set a deadline for NEXUS to respond by the end of the public comment period (on or before August 29, 2016). FERC ordered NEXUS to respond

to the following conditions by August 29:

13. Prior to the end of the draft EIS comment period, NEXUS should file with the Secretary:

a. a specific compressor station site on the City of Green Route Alternative between Mps 1.8 and MP 98.7. NEXUS should attempt to avoid or minimize impacts on environmental resources while adequately meeting the requirements of the proposed pipeline system. NEXUS should identify the range of engineering and hydraulic flexibility it has in moving the compressor station site on the route alternative; and

b. minor route adjustments and realignments to the City of Green Route Alternative in order to minimize impacts on residences, forests, and other environmental resources (*Section 3.3.3*)

14. Prior to the end of the draft EIS comment period, NEXUS shall incorporate into the NGT Project route:

a. the Chippewa Lake C Route Variation between MPs 66.1 and 72.5, as depicted in figure 3.4.10-4 of the draft EIS. NEXUS shall file with the Secretary revised alignment sheets and updated land use and resource tables. NEXUS should also provide documentation that newly affected landowners have been notified in accordance with 18 CFR 157.6(d). (*Section 3.4.10*)

b. the Reserve Road Route Variation between MPs 94.6 and 96.0, as depicted in figure 3.4.12-1 of the draft EIS. NEXUS shall file with the Secretary revised alignment sheets and updated land use and resource tables. NEXUS should also provide documentation that newly affected landowners have been notified in accordance with 18 CFR 157.6(d). (*Section 3.4.12*)

15. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary an analysis indicating:

a. whether the proposed Hanoverton Compressor Station site at MP 1.4 could be developed without permanently filling or altering the water body on the site, and if not, the types of permanent water body impacts that would be required; and

b. whether Alternative Site A to the Hanoverton Compressor Station, as depicted on figure 3.5.1-1 of the draft EIS, could be purchased and developed without forest clearing, and what impacts would be associated with realigning the proposed pipeline to the site or building suction/discharge lines from the site to the proposed pipeline (*Section 3.5.1*)

16. Prior to the end of draft EIS comment period, NEXUS shall file with the Secretary geotechnical feasibility studies for the Nimisila Reservoir (MP 41.1), Tuscarawas River (MP 48.1), West Branch of the Black River (MP 92.4), and the U.S. Highway 12/RACER site (MP 254.3). (*Section 4.3.2.2*)

17. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary an assessment of why HDD is the preferred crossing method for the Sandusky

River (MP 145.9), Maumee River (MP 181.2), and Huron River (MP 250.9), as opposed to an alternative crossing method, such as winter wet trench construction or direct pipe installation. (Section 4.3.2.2)

29. Prior to the end of the draft EIS comment period, NEXUS shall provide revised *RCPs* that accurately show the distance and direction from the construction workspace and pipeline centerline of all structures on Drawings HANO-P-8004-1B (MP 6.3) and WADS-P-8033-1B (MP 113.2). (Section 4.9.4.1)

31. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary site specific Organic Farm Protection Plans developed in coordination with organic farm landowners and applicable certifying agencies for each certified organic farm that would be crossed or immediately adjacent to the Project that has the potential to experience direct and indirect effects as a result of construction or operation (e.g., pesticide drift, water migration, weeds). The plans shall, at a minimum, identify:

- a. prohibited substances (both during construction and operation);
- b. soil handling procedures;
- c. buffer zones;
- d. noxious invasive species control;
- e. erosion control;
- f. off right-of-way water migration;
- g. restoration methods, including seeding and preventing introduction of disease vectors; and
- h. operation and maintenance practices, including avoidance of herbicides or other agency or landowner approved methods.

The plan shall also describe how properties would be monitored for compliance with the provisions of the plan (e.g., use of an agricultural monitor) during construction. (Section 4.9.5.1)

33. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary a discussion of how construction and operation of the NGT Project would affect landowners continued participation in the *Conservation Reserve Program*. (Section 4.9.5.3)

34. Prior to the end of the draft EIS comment period, NEXUS shall file a revised FSA-enrolled lands table and ensure the table includes the mileposts, tract number, type of program, and acres affected. For any FSA-enrolled lands crossed, provide an update on NEXUS' consultations with landowners and local FSA and NRCS officials regarding the

landowners' continued participation in the program, and any requested mitigation measures. (Section 4.9.5.3)

37. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary an evaluation of the feasibility of crossing the Chippewa Rail Trail, Chippewa Inlet Trail, North Coast Inland Trail, and Creek Bend Farm using the bore method. If the bore method is not feasible, NEXUS shall file a site-specific alternate crossing plans that identifies the location(s) of a detour, public notification, signage, and consideration of avoiding days of peak usage. (Section 4.9.7.3)

38. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary an evaluation of the feasibility of extending the bore further west to avoid impacting forest/woodland on the west side of Highway 77. (Section 4.9.7.3)

41. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary results of file reviews for the 11 other sites identified by NEXUS and site-specific plans to properly manage any contaminated soil or groundwater in compliance with applicable regulations, if necessary. (Section 4.9.9)

43. Prior to the end of the draft EIS comment period, NEXUS shall file with the Secretary visual screening plans developed for the Hanoverton, Wadsworth, and Waterville Compressor Stations that would provide screening to nearby residences from the stations. (Section 4.9.10.2)

(Emphasis in original). DEIS at 5-22 to 5-26.

Each of these conditions required Spectra Energy to furnish detailed additional information, analyses and/or plans for the docket. Spectra responded to the Chippewa Lake alternate routes request from the Staff on July 26, 2016.² The company responded to the other DEIS conditions on August 26, 2016, which was the Friday before the end of the public comment

²“Responses to FERC Staff Recommended Mitigation in the July 8, 2016 Draft Environmental Impact Statement for NEXUS Gas Transmission Project (Volume II-A – Public),” http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14480643

period on Monday, August 29, 2016.³

None of these responses of Spectra have been included in the DEIS, nor has the DEIS been revised to include the new information. The public has not been accorded a chance to comment on a supplemented, more complete version of the DEIS. FERC evidently expects the public to have anticipated Spectra's responses would be filed in the docket sometime in the closing weeks of the NEPA process and to have treated them as part of the DEIS for purposes of commenting by August 29, 2016.

II. ARGUMENT

a. Belated responses provided by the Applicant in separately docketed documents are not components of a Draft EIS

The agency's expectations of the public are surrealistic, and violate the explicit and implicit requirements of NEPA. The Draft EIS is supposed to provide "a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 1845 (1989). Spectra Energy's responses were filed in the NEXUS docket as separate documents on a date selected by Spectra. Until the information provided in the responses is vetted and possibly included by FERC Staff in the DEIS, they are not in any way components of the DEIS for which the public may be held responsible for comment. Merely because the responses are in the public domain cannot bootstrap their presence in the FERC Docket into being considered as part of the Draft EIS. By not supplementing the DEIS and publishing a new notice of a second comment period for the public at large, FERC has stripped the general public but especially those directly-affected landowners and opponents of NEXUS of their statutory

³"Responses to Draft Environmental Impact Statement for the NEXUS Gas Transmission Project," <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14339477>

right to meaningful participation at this pre-final phase of NEPA proceedings.

“A public comment period is beneficial only to the extent the public has meaningful information on which to comment. . . .” *New Mexico ex. rel. Richardson v Bureau of Land Management*, 565 F.3d 683, 708 (10th Cir. 2009).

NEPA mandates that an agency “take a ‘hard look’ at the impacts of a proposed action.” *Citizens' Comm. to Save Our Canyons*, 513 F.3d at 1179 (10th Cir.2008) (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10th Cir.1997)); *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 681 (10th Cir. 2010) (NEPA “requires . . . that an agency give a ‘hard look’ to the environmental impact of any project or action it authorizes”). This examination “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir.2000)) (internal quotation marks omitted); *see also* 40 C.F.R. § 1502.2(g) (“Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”); *id.* 40 C.F.R. § 1502.5 (“The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.”).

Disclosures by Spectra which are aimed at filling in gaps in the DEIS but which do not appear in the Draft EIS itself are not publicly disclosed as required by NEPA for purposes of public comment. The fact that the public has been abandoned to sift for itself through the FERC docket on NEXUS during the comment period to find out whether there are new supplemental

disclosures thwarts the statutory right of the public to generate comments are timely, meaningful, and heard.

b. The circumstances require compilation and publication of a Supplemental DEIS

FERC must provide fundamental due process under both NEPA and the Natural Gas Act. *Louisiana Ass'n of Independent Producers and Royalty Owners v. F.E.R.C.*, 958 F.2d 1101, 2225 (D.C. Cir. 1992). NEPA requires that the public comment opportunity embodied in 42 U.S.C. § 4332 be used to help ensure that the government is aware of, and has considered all, significant environmental effects in formulating its proposed action. *Cf. Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271 (1st Cir. 1996). “NEPA's public comment procedures are at the heart of the NEPA review process” and reflect “the paramount Congressional desire to internalize opposing viewpoints into the decision making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision.” *California v. Block*, 690 F.2d at 770-71. “It is only at the stage when the draft EIS is circulated that the public and outside agencies have the opportunity to evaluate and comment on the proposal.” *Id.* at 771. “No such right exists upon issuance of a final EIS.” *Id.*

The predicament here is that there is an incomplete DEIS. FERC must supplement the DEIS and solicit the additional public information, public investigation, and comment via legal notification of the entire public. Otherwise, FERC's failures to disclose in a DEIS the Chippewa D reroute and information responsive to the Staff's other requests will defeat NEPA's goal of public participation during the decision making process. *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 847 F.2d 1389 1392-1393 (9th Cir. 1988). *See also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980) (purpose of input under NEPA is “to

further the statutory purpose of encouraging widespread discussion and consideration of the environmental risks and remedies associated with the pending project.”).

NEPA regulation 40 C.F.R. § 1502.09(a) requires that “The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.”

A supplemental DEIS is required if the agency “makes substantial changes in the proposed action that are relevant to environmental concerns,” or “[t]here are significant new circumstances or information relevant to environmental concerns.” 40 C.F.R. § 1502.9(c)(1). If the new information shows that the remaining action will affect the quality of the environment “in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374, 109 S.Ct. 1851, 1859 (1989). A “supplemental EIS is . . . required where new information ‘provides a seriously different picture of the environmental landscape.’” *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C.Cir. 2002).

“Circulation of a grossly inadequate statement as the draft of (an FEIS) could conceivably frustrate the goal of obtaining informed agency and public comment on the environmental consequences of a proposed project, and in some circumstances this could amount to a violation of the responsible agency's duty” under NEPA. *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (*en banc*). Actual prejudice may result from a deficiency in the DEIS, where, for example, “omissions leave the agency without public comment on a material environmental aspect of a project and leave the relevant public without information about a proposed project, such

deficiency may not be curable by the FEIS.” *National Committee for the New River v. F.E.R.C.*, 373 F.3d 1323, 1329 (D.C. Cir. 2004).

III. CONCLUSION: A SUPPLEMENTAL DEIS AND ADDITIONAL COMMENT OPPORTUNITY ARE OBLIGATORY

Where the information in the initial EIS is so incomplete or misleading that the decision-maker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide “a reasonable, good faith, and objective presentation of the subjects required by NEPA.” *Johnston v. Davis*, 698 F.2d 1088, 1095 (10th Cir.1983) (revision of EIS necessary where use of artificially low discount rate resulted in unreasonable comparison of alternatives to proposed project); *see also National Wildlife Federation v. Andrus*, 440 F.Supp. 1245, 1254 (D.D.C.1977) (EIS deficient where several alternatives were not treated in the EIS and the EIS did not set forth reasons why these alternatives were rejected).

Intervenor SMC moves the Commission to order supplementation of the Draft EIS and associated legal notice to the public for a renewed comment period, because the responses provided by NEXUS as to the Chippewa D reroute, the Staff’s analysis of Chippewa D, and the numerous other matters delineated in NEXUS’ August 26, 2016, 159-page response to FERC questions were omitted from the DEIS.

WHEREFORE, Sustainable Medina County prays the Federal Energy Regulatory Commission order the Staff immediately to compile and publish a Supplemental Draft Environmental Impact Statement in this matter; to provide legal notice of a second DEIS public comment period as required by NEPA regulations; and to schedule a second round series of public comment hearings without restriction as to those who may offer comments.

Respectfully,

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CERTIFICATE OF SERVICE

In accordance with the requirements of Section 385.2010 of the Commission's Rules of Practice and Procedures, I hereby certify that I have this day, October 17, 2016, caused a copy of the foregoing document to be served upon each person designated on the official service list compiled by the Commission's Secretary in this proceeding.

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