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November 5, 2007

Via Hand Delivery

ATTN: Docket No. 2007-OE-01

Office of Electricity Delivery and
Energy Reliability, OE-20
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: National Electric Transmission Congestion Report, Docket No.: 2007-OE-01,
Mid-Atlantic Area National Interest Corridor, 72 Fed. Reg. 56, 992 (October 5,
2007)

Dear Sir or Madam:

Attached is an original of **Toll Bros., Inc.'s Petition for Rehearing regarding the Mid-Atlantic National Interest Electric Transmission Corridor** for filing in **Docket No. 2007-OE-01**, together with a copy of same to be date-stamped and returned to me in the enclosed hand-delivery envelope.

I thank you for your assistance in this regards. If you have any questions, please call me at (202) 293-8141.

Very truly yours,

Sean M. Sullivan

SMS/mmr
Enclosure(s)

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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY

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IN RE: MID-ATLANTIC NATIONAL |
INTEREST ELECTRIC TRANSMISSION | DOCKET NO. 2007-OE-01
CORRIDOR |

**PETITION FOR REHEARING OF TOLL BROS., INC. REGARDING MID-ATLANTIC
NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDOR**

Toll Bros., Inc., on behalf of itself and its entities and affiliates (collectively “Toll Brothers”) hereby requests that the United States Department of Energy (“DOE” or the “Department”) grant rehearing of its designation of a National Interest Electric Transmission Corridor for the Mid-Atlantic (the “Corridor”). In support of its petition, Toll Brothers alleges that the Department committed the following errors:

- (1) The Department violated the express terms of Section 1221 of the 2005 Energy Policy Act (the “2005 EAct”) in its designation of the Corridor and in its conduct of the August, 2006 National Electric Transmission System Congestion Study (the “Congestion Study”);¹
- (2) The Department’s designation of the Corridor is arbitrary and capricious and unsupported by the evidence; and
- (3) The Department has violated Section 102 of the National Environmental Policy Act (“NEPA”) by failing to develop either an Environmental Assessment or an Environmental Impact Statement (“EIS”) prior to promulgating the Corridor.

Therefore, Toll Brothers requests that DOE: (1) rescind its designation of the Corridor; (2) conduct a Congestion Study that complies with the 2005 EAct; (3) evaluate whether the designation of a National Interest Electric Transmission Corridor (“NIETC”) is warranted in a manner consistent with the 2005 EAct; and (4) comply with NEPA prior to re-issuing a proposed Corridor, if the Department concludes that designating a National Interest Electric Transmission Corridor (“NIETC”) is still warranted.

¹ Toll Brothers hereby incorporates by reference its comments regarding the Congestion Study (Doc. No. 448) and its comments regarding the Proposed Mid-Atlantic National Interest Electric Transmission Corridor (Doc. No. 81264). Citations to the “comments” of parties other than Toll Brothers within this document refer to comments submitted to DOE regarding the Congestion Study.

I. Background

A. Toll Brothers

Toll Brothers develops residential communities in states within the Corridor, including the Dominion Valley development (“Dominion Valley” or the “Development”), located in Prince William County, Virginia. Thus, the company has a significant interest in both the availability of electricity for the residents of its existing and planned residential developments, and in the potential effects on the environment, including scenic vistas and property values, from the designation of an NIETC.

B. Dominion Valley

Dominion Valley is located approximately forty miles west of Washington, DC. The Development lies within the Allegheny Corridor, a region labeled in the Congestion Study as a “Critical Congestion Area”.² The Development is well within the boundaries of the Corridor. At present, construction of Dominion Valley is approximately sixty percent complete, and the community is home to almost 2,000 families. Once complete, Dominion Valley will be home to more than 8,000 people and contain more than 3,400 homes.

PJM Interconnection, LLC (“PJM”) serves as the electric transmission system operator for the transmission system that supplies Dominion Valley with electricity. Residents of Dominion Valley purchase their electricity from Northern Virginia Electric Cooperative, which purchases its power from Dominion Virginia Power (“Dominion Power”).

C. The Proposed 500 Kilovolt Transmission Line in Northern Virginia

Since March 2006, PJM and Allegheny Power (“Allegheny”) have sought designation of an NIETC in Northern Virginia,³ to facilitate the construction of a new 500-kilovolt electric transmission line connecting Dominion Power’s Meadow Brook Substation and its Loudoun Substation.⁴ Though Dominion Power has not formally requested DOE to designate an NIETC in the Allegheny Corridor, it has publicly expressed its support for such a designation on several occasions. In their comments on the Congestion Study, both PJM and Allegheny indicate that the new line will aid the transmission of electricity from nuclear and coal-fired generation stations located to the west of metropolitan Washington, DC, and that the new line will reduce

² Congestion Study at viii.

³ See Allegheny Power, Comments and Request for Early Designation of National Interest Electric Transmission Corridor (Mar. 6, 2006); PJM Interconnection, LLC, Request for Early Designation of National Interest Electric Transmission Corridor (Mar. 6, 2006).

⁴ As DOE is aware, designation of an NIETC would allow PJM, Allegheny, and Dominion Power to seek approval for a new transmission line from the Federal Energy Regulatory Commission (“FERC”), if they do not receive approval for such a line from Virginia’s State Corporation Commission (“SCC”) within one year from the date of their application for a certificate of convenience and necessity. See 16 U.S.C. § 824p(b).

the potential for localized electricity demands to cause power failures within the region.⁵ Further, both PJM and Allegheny have claimed that there is no feasible alternative to the new transmission line, and that due to the excessive congestion in the area, DOE should designate an NIETC in this region by no later than December 31, 2006.⁶ Dominion Power and Allegheny filed their applications for the new transmission line with the SCC on April 19, 2007.

II. Statement of Issues

As required by 18 C.F.R. § 385.713(c)(3), Toll Brothers provides the following Statement of Issues in support of its Petition for Rehearing in Docket Number 2007-OE-01:

1. Whether the Department violated the express terms of Section 1221 of the 2005 EPAAct in its designation of the Corridor and in its conduct of the Congestion Study by:
 - a. Applying the term “Congestion” in a manner inconsistent with Section 1221 of the 2005 EPAAct;
 - *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984).
 - *Knott v. FERC*, 386 F.3d 368, 372 (1st Cir. 2004).
 - *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001).
 - *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).
 - *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998).
 - *Int’l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992).
 - b. Ignoring the consultation requirements contained in Section 1221 of the 2005 EPAAct;
 - *Mt. Lookout-Mt. Nebo Prop. Prot. Ass’n v. FERC*, 143 F.3d 165, 171 (D.C. Cir. 1998).
 - c. Failing to consider properly alternatives to designating the Corridor;
 - *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).
 - *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998).
 - d. Failing to conduct a proper study of electric transmission congestion; and
 - *Nat’l Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990).

⁵ See Allegheny Power, Comments Concerning Designation of National Corridors (Oct. 10, 2006); PJM Interconnection, LLC, Comments on Designation of National Interest Electric Transmission Corridors (Oct. 10, 2006).

⁶ See *id.*

- *Friends of the River v. FERC*, 720 F.2d 93, 112 n.8 (D.C. Cir. 1983).
- e. Failing to provide a meaningful opportunity for interested parties to submit alternatives and recommendations regarding the Congestion Study and the Corridor.
- *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002).
 - *Am. Coke & Coal Chem. Inst. v. EPA*, 452 F.3d 930, 937 (D.C. Cir. 2006).
 - *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995).
 - *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977).
 - *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).
2. Whether the Department's designation of the Corridor is arbitrary and capricious and unsupported by the evidence due to DOE's failure to: (A) consider alternatives to the designation of the Corridor; (B) address foreseeable changes to electricity markets as a result of stricter environmental controls; and (C) consider state-based initiatives aimed at resolving electric transmission congestion.
- *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).
 - *Nat'l Ass'n of Mfrs. v. U.S. Dept. of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998).
 - *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm*, 463 U.S. 29, 43 (1983).
 - *Columbia Falls Aluminum Co. v. EPA*, 138 F.3d 914, 923 (D.C. Cir. 1998).
3. Whether the Department violated Section 102 of NEPA by failing to prepare and consider either an Environmental Assessment or an Environmental Impact Statement ("EIS") prior to designating the Corridor.
- *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).
 - *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985).
 - *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).
 - *Robertson v. Methaw Valley Citizens Council*, 490 U.S. 332, 349 (1989).
 - *Friends of the Earth, Inc. v. USACE*, 109 F. Supp. 2d 30 (D.D.C. 2000).

III. DOE's Designation of the Corridor and its Conduct of the Congestion Study Violate Section 1221 of the 2005 EPAct

DOE's development of the Corridor and its conduct of the Congestion Study violate the express terms of Section 1221 by: (1) considering improper factors in determining whether "congestion" exists within the Corridor; (2) failing to consult with the States during the conduct of the Congestion Study; (3) failing to consider alternatives to the designation of the Corridor; (4) failing to conduct a sufficiently independent analysis of electric transmission congestion; and

(5) failing to provide sufficient time for interested parties to offer alternatives and recommendations. As such, the Department must rescind its designation of the Corridor.⁷

A. DOE’s Application of the Term “Congestion” is Impermissible Under the 2005 EPAct

Section 1221(a)(1) of the 2005 EPAct provides:

Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy ... shall conduct a study of *electric transmission congestion*.⁸

The 2005 EPAct does not define the term “congestion.” In both the Congestion Study and its decision to designate the Corridor (the “Decision”), however, DOE offers a vague definition of “congestion” as:

The condition that occurs when transmission capacity is not sufficient to enable safe delivery of all scheduled or desired wholesale electricity transfers simultaneously.⁹

While this definition does not offer much insight into what the Department is intending to study and possibly alleviate, DOE’s actions speak more clearly. Overwhelmingly, DOE is attempting to identify areas where electric transmission capacity is insufficient to supply all customers, at all times, with low-cost power. The Department’s understanding of congestion, as evinced by its actions, is impermissible because Congress never intended for DOE to consider economic factors when attempting to identify electric transmission congestion.

Other portions of Section 1221(a) provide important evidence of Congress’ understanding of the term “congestion,” and that understanding does *not* include economic factors. Specifically, Section 1221(a)(2) states:

After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), 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.¹⁰

When Sections 1221(a)(1) and 1221(a)(2) are read together, they indicate that the Department must study the *physical* ability of the nation’s transmission system to meet the demand for

⁷ See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984); *Knott v. FERC*, 386 F.3d 368, 372 (1st Cir. 2004) (applying two step *Chevron* analysis to legal conclusions of FERC); *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001) (“This Court reviews FERC’s orders ... under the Administrative Procedure Act (“APA”).”).

⁸ 16 U.S.C. § 824p(a)(1) (emphasis added).

⁹ Congestion Study at 67; 72 Fed. Reg. 56,992 n.1 (Oct. 5, 2007).

¹⁰ 16 U.S.C. § 824p(a)(2) (emphasis added).

electricity to determine if congestion exists at all, and that the Department should not evaluate the *economic* effects of any such congestion until it makes a decision regarding designation of an NIETC. Indeed, the words Congress chose evince a distinction between “constraints or congestion” and whether constraints or congestion “adversely affects consumers.” Along the same lines, Section 1221(a)(4) lists the factors that DOE may consider *at the later stage* when deciding whether to designate an NIETC.¹¹ They are:

- (1) Whether the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or *reasonably priced* electricity;
- (2) Whether *economic growth in the corridor*, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and
- (3) Whether a diversification of supply is warranted;
- (4) Whether the energy independence of the United States would be served by the designation;
- (5) Whether the designation would be in the interest of national energy policy; and
- (6) Whether the designation would enhance national defense and homeland security.¹²

Once again, the statute distinguishes between the existence of congestion versus its effects, and it indicates that considerations of electricity pricing and economic growth are relevant to whether DOE should designate an NIETC, not to whether congestion exists in a particular area.

Throughout the Congestion Study, however, DOE relied upon a “cost of congestion” metric to conclude that there is congestion in a particular area. For example, regarding the PJM region, DOE stated:

Transmission constraints are causing significant congestion in both western and eastern PJM, *because there is more low-cost Midwest coal-based and nuclear power available* for delivery eastward than the grid can accommodate.¹³

Similarly, regarding DOE’s modeling efforts to identify the “most constrained pathways,” DOE stated:

¹¹ 16 U.S.C. § 824p(a)(4).

¹² *See id.* (emphasis added).

¹³ Congestion Study at 23 (emphasis added). It is unclear how the existence of excess low-cost generation resources in the Midwest evinces the existence of congestion. Rather, the presence of unnecessary generation in that region suggests that Midwestern utilities may have simply constructed too many power plants.

[F]uel prices – translated through the geographic distribution of power plants consuming those fuels – *were the principal drivers of transmission congestion and costs as they varied between scenarios.*¹⁴

DOE’s understanding of “congestion” remains essentially unchanged in the Federal Register Notice announcing the Proposed Corridor (the “Proposal”) and in its Decision.¹⁵ In fact, the Decision explicitly lists several of the impermissible metrics that DOE used to determine that there is congestion within the mid-Atlantic region. They include:

- (1) “all-hours shadow price (the marginal cost of generation redispatch required to accommodate a given constraint averaged across all hours in the year)”;¹⁶
- (2) “binding hours shadow price (average shadow price over only those hours during which the constraint is binding)”;¹⁷ and
- (3) “congestion rent (shadow price multiplied by flow, summed over all hours the constraint is binding).”¹⁸

While the ultimate decision as to whether the Department should designate an NIETC turns on the existence of “congestion that adversely affects consumers”, a proper understanding of “congestion” – and a permissible methodology for identifying it – are prerequisites to that determination. By mixing the consideration of factors such as “binding hours” and “U90” with factors such as “shadow price” and “congestion rent”,¹⁹ the Department has blurred which areas are designated as congested due to economic considerations and which areas are designated as congested due to reliability concerns.

If the words of a statute are plain on their face, an agency must abide by the statutory language.²⁰ The language of Sections 1221(a)(2) and 1221(a)(4) is clear – DOE should only consider the economic effects of congestion when it determines whether an NIETC designation is appropriate, not before. Furthermore, an agency must interpret a statute so as to give each word meaning.²¹ An interpretation that renders statutory provisions superfluous is arbitrary and capricious.²² By including the economic effects of congestion within the determination of

¹⁴ *Id.* at 26 (emphasis added).

¹⁵ 72 Fed. Reg. 25,838 (May 7, 2007).

¹⁶ 72 Fed. Reg. at 56,995.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (defining binding hours as number of hours per year a transmission path is loaded to its safe limit and defining U90 as number of hours per year a transmission path is loaded to ninety percent of its safe limit).

²⁰ See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

²¹ See *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (rejecting agency interpretation of statute that “runs afoul of the cardinal canon of statutory construction that ‘we must read statutes to give effect to each [word] if we can do so while preserving their sense and purpose’”) (internal citations omitted).

²² See *Nat’l Ass’n of Mfrs. v. U.S. Dept. of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998) (“As we have repeatedly counseled, such an interpretation, which essentially deprives one provision of its meaning and effect so that another

whether congestion exists at all, DOE renders the requirement to consider the economic effects of congestion only if congestion is found to exist superfluous. Further, by merging economic factors into the determination of whether congestion exists, DOE's analysis is heavily biased in favor of finding congestion. Thus, consideration of the "cost of congestion" is inappropriate when DOE is determining if congestion exists. At this stage, the Department should attempt to determine whether the existing transmission system can physically meet the anticipated demands for electricity over the coming years while still complying with the applicable reliability standards. If it can, there is no congestion. If it cannot, there is a congestion issue, and DOE must then analyze whether the considerations expressed in Sections 1221(a)(2) and 1221(a)(4) justify designating an NIETC.

Ultimately, Section 1221 is intended to ensure that there is sufficient transmission capacity to meet demand. It is not intended to grant DOE authority to make findings that congestion exists and to repeatedly designate NIETCs until there is sufficient transmission capacity to wheel low-cost power throughout the country. If Congress had wanted to grant DOE such broad authority, it would have done so explicitly.²³ DOE's inclusion of the costs of congestion at the congestion identification stage, however, does exactly that. Notably, Toll Brothers raised this issue in its comments regarding both the Congestion Study and the Proposal, but DOE has yet to respond.²⁴

B. DOE Ignored Consultation Requirements Contained in the 2005 EAct

Section 1221(a)(1) of the 2005 EAct requires the Department to conduct the Congestion Study "in consultation with affected states".²⁵ DOE has failed to do so. Indeed, comments submitted by the Virginia Attorney General regarding the Congestion Study, as well as the text of the Decision itself, reflect the fact that DOE failed to comply with this mandate. On November 15, 2006, the Virginia Attorney General wrote:

It has come to my attention that the Department's August, 2006 transmission congestion study... apparently was conducted without this required consultation with Virginia.²⁶

In fact, the Decision indicates that DOE failed to consult with Virginia until May 30, 2007 – more than ten months after the Department completed the Congestion Study.²⁷ Similarly, the

provision can be read as broadly as its language will permit, is inconsistent with the Congress' intent as well as our *Chevron* analysis.")

²³ The premise of DOE's approach for the Corridor and the Congestion Study is that if a higher cost generation station currently meets the demand for a particular area and there is insufficient transmission capacity to deliver less expensive power from a remote location to that demand center, then transmission "congestion" exists. On this basis, according to the Department's logic, designation of an NIETC may then be appropriate, and FERC may eventually be able to disregard state law and issue a permit for the construction of a new transmission line to alleviate this "congestion." This scheme would effectively circumvent the power of state commissions to set electric rates.

²⁴ See *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) (an agency "is required to give reasoned responses to all significant comments in a rulemaking proceeding."). Indeed, the Department has failed to respond meaningfully to many of Toll Brothers comments regarding the Congestion Study and the Proposal.

²⁵ See 16 U.S.C. § 824p(a)(1).

²⁶ Letter from Robert F. McDonnell, Attorney General, to Samuel Bodman, Secretary of Energy (Nov. 16, 2006).

²⁷ See 72 Fed. Reg. at 56,996 n.18.

Department failed to consult with affected Virginia localities regarding the Congestion Study.²⁸ DOE is not free to simply ignore this statutory requirement for consultation.²⁹ And DOE's belief that performing the required consultations could be "difficult" does not excuse the Department from complying with this mandatory requirement.³⁰ As the Department recognized in its Decision:

The Department has an obligation to act consistent with the terms of FPA section 216(a) as written and enacted into law.³¹

Moreover, the Department's error in this regard has likely deprived it of substantive information relevant to the Congestion Study and the Corridor. For example, Virginia planned to release a comprehensive energy strategy for the state in June of 2007, but the Congestion Study did not even mention the existence of this strategy, let alone the substance.³² Undoubtedly, the Department's analysis of transmission congestion within PJM would benefit from an understanding of this strategy. The existence of similar strategies in other states would likely inform the Department's conclusions regarding both PJM and other regions of the country.

In addition to the consultation requirements imposed by Section 1221 of the 2005 EPA Act, both DOE and FERC should be advised that the state certification requirements of Section 401 of the Clean Water Act will apply to any transmission line permit issued by FERC.³³ Section 401 provides, in relevant part, that:

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*, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

(emphasis added).³⁴ Because the construction of transmission lines will likely result in the destruction of wetlands subject to Section 404 of the Clean Water Act, as well as stormwater discharges associated with construction activity, a state certification is required before FERC can

²⁸ See Letter from R. Graham, Chairman, Fauquier County Board of Supervisors to S. Bodman (Oct. 6, 2006) ("Fauquier County Comments").

²⁹ Indeed, an agency's compliance with mandatory consultation requirements is a proper topic for judicial review. See *Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. FERC*, 143 F.3d 165, 171 (D.C. Cir. 1998) (evaluating FERC compliance with Federal Power Act consultation requirements).

³⁰ 72 Fed. Reg. at 25,850.

³¹ 72 Fed. Reg. at 56,997.

³² See Herring Letter; Letter from S. Pierce, President, Rappahannock County Conservation Alliance to S. Bodman, U.S. Department of Energy (Oct. 10, 2006) ("RCCA Comments").

³³ 33 U.S.C. § 1341. See 16 U.S.C. § 824p(j) (stating obligation to comply with environmental laws unaffected by Section 1221 of 2005 EPA Act).

³⁴ 33 U.S.C. § 1341.

issue a permit to build a transmission line. If the Department had engaged in the required consultations with the states, DOE and FERC could have developed a more coherent procedure for permit applicants to obtain Section 401 certifications.

C. DOE Failed to Consider Alternatives to Designating an NIETC

Section 1221(a)(2) of the 2005 EPAct provides:

After considering alternatives and recommendations from interested parties ... the Secretary shall issue a report ... which may designate [an NIETC].

(emphasis added).³⁵ Curiously, the Decision concludes that the word “alternatives” is ambiguous and interprets it to mean that DOE need only consider alternatives and recommendations that fall into one of two categories: (1) designation of an NIETC is appropriate; or (2) designation of an NIETC is inappropriate.³⁶ This approach is contrary to plain meaning of Section 1221(a)(2).

As noted above, an agency must interpret a statute so as to give each word meaning,³⁷ and an interpretation that renders statutory provisions superfluous is arbitrary and capricious.³⁸ If DOE’s obligation to consider “alternatives and recommendations from interested parties” were limited strictly to considering statements of “yeah or nay” regarding the Corridor, the requirement to consider “alternatives and recommendations” would be rendered meaningless.

Moreover, by ignoring a vast array of alternatives to designating an NIETC, DOE has rendered the Decision itself arbitrary and capricious. The Department is not obligated to designate an NIETC if it finds that there is congestion adversely affecting consumers.³⁹ Rather, the Department has discretion to designate a corridor if it makes the findings listed in Section 1221(a)(4). In its previous comments to the Department, Toll Brothers has suggested that DOE consider the following alternatives and recommendations:

- a. Strategic placement of generation facilities throughout the PJM region to address localized demand centers;⁴⁰
- b. Energy efficiency initiatives;⁴¹
- c. Re-powering of existing generation facilities located within the PJM region that are scheduled for retirement;⁴²

³⁵ 16 U.S.C. § 824p(a)(2).

³⁶ 72 Fed. Reg. at 57,010.

³⁷ See *supra*, note 21.

³⁸ See *supra*, note 22.

³⁹ See 16 U.S.C. § 824p(a)(2) (stating DOE “may” designate an NIETC); 72 Fed. Reg. at 57,004 (“The Department emphasizes that while a finding of congestion that adversely affects consumers provides the Department with the discretion to designate a National Corridor, it does not mean that the Department will choose to exercise that discretion in all instances.”).

⁴⁰ See Comments of the National Association of Regulatory Utility Commissioners at § IV (Oct. 10, 2006) (“NARUC Comments”).

⁴¹ See *id.*; Letter from Brook Cressman, Conservation Chair for Sierra Club, Virginia Chapter to Samuel Bodman, U.S. Department of Energy (Oct. 6, 2006) (“Virginia Sierra Club Comments”).

⁴² See PEC Appendix at § III.C.

- d. The strategies described in the 2007 Virginia Energy Strategy;
- e. The potential for regulatory and economic forces to substantially alter the desirability of wheeling power from certain generation facilities;
- f. Diversification of generation fuel sources;⁴³ and
- g. The planned expansion of North Anna Nuclear Station.⁴⁴

To be sure, the existence and effect of state-based initiatives, as well as economic and regulatory variables, are relevant to the factors listed in Section 1221(a)(4) and to whether the designation of an NIETC is warranted – even if DOE lacks the authority under Section 1221 to implement them. Turning a blind eye to their existence and effect is simply unreasonable.

D. DOE Has Not Studied Electric Transmission Congestion

Section 1221(a)(1) of the 2005 EPAct requires *DOE* to perform a study of electric transmission congestion. The content of the Congestion Study, however, is primarily a repetition of analyses performed by other entities such as PJM, rather than an independent evaluation by the Department.⁴⁵ Though an agency may rely on data and studies submitted by private parties, it must exercise independent judgment and discretion in formulating policy.⁴⁶

The Department’s reliance on analyses and data from PJM and other members of the electric generation and transmission industries is particularly troubling, as these entities are not charged with the responsibility to balance the competing public interests related to construction of electric transmission facilities. Rather, companies such as PJM and Allegheny are ultimately responsible for maximizing profit for their shareholders and members, and this obligation creates an inherent bias in any studies performed by such groups. For example, electric generators with lower generation costs have a vested interest in increasing their access to higher-rate, and therefore more profitable markets. Similarly, transmission system operators who wheel power for low-cost providers into higher priced markets stand to profit as well. The Congestion Study did not recognize this bias and it did not explain why analyses performed by such interested parties are treated as correct or credible in spite of that bias. Nor does the Decision.

At a minimum, DOE must carefully scrutinize the data and conclusions of such interested parties, and the Department must explain why this information is credible in spite of the inherent biases of the entities providing it. Neither the Congestion Study nor the Decision do so, and as

⁴³ See Virginia Sierra Club Comments.

⁴⁴ See Letter from F. Douglas Whitehouse, President, Blue Ridge Mountain Civic Association (Oct. 5, 2006) (“BRMCA Comments”).

⁴⁵ See Congestion Study at 97-99 (listing sixty-five documents considered by DOE regarding congestion in within the Eastern Interconnection, two of which were authored by the Department); Edward D. Tatum, Comments of Old Dominion Electric Cooperative (Oct. 10, 2006) (urging independent and open analysis of transmission congestion rather than closed approach taken by regional transmission organizations).

⁴⁶ See *Nat’l Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (affirming FERC reliance on data submitted by private parties where FERC “noted that it was aware of the inherent bias in party-submitted information, but explained that it had *independently* confirmed the reasonableness of the analysis....”) (emphasis added); *Friends of the River v. FERC*, 720 F.2d 93, 112 n.8 (D.C. Cir. 1983) (finding that failure of FERC to independently assess validity of data submitted by license applicant “may well have violated NEPA.”)

such, they do not represent the independent analysis of electric transmission congestion required by the 2005 EPA Act.

E. DOE has not Provided a Meaningful Opportunity for Interested Parties to Submit Alternatives and Recommendations regarding the Congestion Study or the Corridor

Section 1221(a)(2) clearly contemplates that the public will have an opportunity to submit comments on the Congestion Study and any proposed NIETC.⁴⁷ It is a fundamental premise of administrative law that an agency must inform the public of the basis for its conclusions in order to provide a meaningful opportunity to comment. As the U.S. Court of Appeals for the D.C. Circuit has noted:

An agency may not turn the provision of notice into a bureaucratic game of hide and seek... To allow an agency to play hunt the peanut with technical information... is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.⁴⁸

The importance of a meaningful exchange between the public and an agency is clear. Simply put, the

Administrative Procedure Act requires the agency to make available to the public, *in a form that allows for meaningful comment*, the data that the agency used [to make its decision].⁴⁹

Once the Department is able to correct the substantive and procedural deficiencies of the Congestion Study and the Decision, it is likely that a revised Congestion Study will contain significant amounts of new information and analysis that the public has not seen previously. For example, a revised version of the Congestion Study would likely contain an analysis of issues such as Virginia's 2007 Energy Plan and a discussion of the credibility and reliability of congestion analyses performed by potentially biased parties. To the extent that a revised Congestion Study addresses these or other issues for the first time, the public will not have had a prior opportunity to comment on this discussion. The public is entitled to such an opportunity, and DOE's examination of these points would likely benefit from additional public comment.⁵⁰

⁴⁷ 16 U.S.C. § 824p(a)(2) (requiring DOE to consider alternatives and recommendations from interest parties). DOE's characterization of its action in this matter as informal adjudication, rather than informal rulemaking, is irrelevant to the obligation to solicit and consider alternatives and recommendations regarding the Congestion Study and a proposed NIETC.

⁴⁸ *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (internal citations omitted).

⁴⁹ *Id.* (internal citations omitted).

⁵⁰ *See Am. Coke & Coal Chem. Inst. v. EPA*, 452 F.3d 930, 937 (D.C. Cir. 2006) ("notice requirements are designed ... to give affected parties an opportunity to develop evidence in the record to support their objections ... and thereby enhance the quality of judicial review."); *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) ("Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful comment."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) ("From a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public ... and that generated internally in an agency: each may be biased, inaccurate, or incomplete, failings which adversary comment may illuminate.").

In addition, the Department has ignored repeated requests by members of the public, business interests, and members of Congress to provide additional time for public comments. Similarly, DOE has ignored requests for a substantial number of additional public meetings regarding the Corridor. The complex nature of designating an NIETC demands additional effort on the part of DOE to disseminate information about the Corridor, and it requires additional time for public comments. Refusing to do either denies interested parties the chance to participate meaningfully in this process.⁵¹

IV. Designation of the Corridor is Arbitrary and Capricious Because it is not Supported by the Evidence

As noted by other commenters regarding the Congestion Study, both the Decision and the Congestion Study rely on inaccurate and/or incomplete data and information to conclude that congestion exists within the PJM system. These deficiencies include:

(1) The failure of the Congestion Study, the Proposal, and the Decision to consider viable alternatives to a new transmission line, such as:

- Strategic placement of generation facilities throughout the PJM region to address localized demand centers;⁵²
- Energy efficiency initiatives;⁵³
- Re-powering of existing generation facilities located within the PJM region that are scheduled for retirement;⁵⁴
- Diversification of generation fuel sources;⁵⁵ and
- The planned expansion of North Anna Nuclear Station.⁵⁶

(2) In part, DOE bases its conclusion that congestion exists within PJM on the need to move electricity from generation facilities in the Midwest to the Washington, DC region. The Congestion Study fails to address the fact that many of these Midwestern facilities are older units that will likely be retired in the coming years, reducing the need for additional west to east transmission capacity.⁵⁷ In addition, the Congestion Study fails to consider the possibility that increased restrictions on traditional air pollution emissions from coal-fired power plants and future regulation of greenhouse gas emissions could increase the costs associated with electricity from these facilities

⁵¹ See *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (noting agency commits “serious procedural error” when agency does not afford interested parties sufficient time to comment).

⁵² See Comments of the National Association of Regulatory Utility Commissioners at § IV (Oct. 10, 2006) (“NARUC Comments”).

⁵³ See *id.*; Letter from Brook Cressman, Conservation Chair for Sierra Club, Virginia Chapter to Samuel Bodman, U.S. Department of Energy (Oct. 6, 2006) (“Virginia Sierra Club Comments”).

⁵⁴ See PEC Appendix at § III.C.

⁵⁵ See Virginia Sierra Club Comments.

⁵⁶ See Letter from F. Douglas Whitehouse, President, Blue Ridge Mountain Civic Association (Oct. 5, 2006) (“BRMCA Comments”).

⁵⁷ See PEC Appendix at § III.E.

in a carbon-constrained economy,⁵⁸ further reducing the need for west to east transmission capacity. The Department has claimed that considering such issues would be “inappropriately speculative” but failed to explain this assertion in a meaningful way.⁵⁹

- (3) The Congestion Study fails to consider state-based initiatives designed to address transmission congestion and localized electricity demand.⁶⁰

The Department’s failure to consider these substantial, and relevant issues in the Decision renders its substantive conclusion regarding the need for an NIETC is unreasonable.⁶¹

In addition, Toll Brothers notes that the geographic scope of the Corridor is much broader than is supportable by the Congestion Study. As noted above, Section 1221 authorizes the Department to designate an NIETC in areas that are actually “experiencing” congestion.⁶² Neither the Congestion Study nor the Decision contains sufficient justification for the Department to designate an NIETC of the size of the Corridor.

V. DOE’s Failure to Develop an EIS for the Corridor Violates NEPA

Unfortunately, DOE chose not to issue an EIS along with the Proposal, in spite of its earlier statement that the Department would do so when proposing an NIETC.⁶³ In the Decision, DOE contends that the designation of an NIETC has no environmental impact, but the Department’s own statements in the Decision, as well as the judicial decisions interpreting NEPA, belie that conclusion.

NEPA requires federal agencies to issue an EIS for any major federal action significantly affecting the quality of the human environment at the time the agency proposes the action.⁶⁴ “Actions” can fall into one of several categories and include:

- (1) Adoption of official policies such as rules, regulations, and interpretations ... [or] formal documents establishing an agency’s policies which will result in or substantially alter agency programs;

⁵⁸ See Virginia Sierra Club Comments.

⁵⁹ 72 Fed. Reg. at 25,860. An agency must articulate its reasoning in order to facilitate public comment and to provide a reviewing court with a sufficient record to conduct judicial review. See *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and *articulate a satisfactory explanation for its action.*”) (emphasis added).

⁶⁰ See Letter from Sen. Mark Herring, 33rd Virginia Senatorial District to Samuel Bodman (Oct. 10, 2006); (“Herring Letter”); Letter from Robert F. McDonnell, Attorney General, to Samuel Bodman, Secretary of Energy (Nov. 16, 2006).

⁶¹ See *Columbia Falls Aluminum Co. v. EPA*, 138 F.3d 914, 923 (D.C. Cir. 1998) (an agency “retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, noncapricious rule.”).

⁶² 16 U.S.C. § 824p(a)(2).

⁶³ See Virginia Lawmaker Opposes Special Designation for Line, Electric Power Daily (Sept. 18, 2006), available at 2006 WLNR 22189396 (reflecting statement of DOE spokeswoman Vernelia Johnson).

⁶⁴ See 42 U.S.C. § 4332(c); 40 C.F.R. § 1501.2 (requiring agencies to apply NEPA at the “earliest possible time”).

- (2) Adoption of formal plans ... which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based;
- (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive;
- (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision....⁶⁵

Thus, an EIS may evaluate the effects of a proposed action on a particular site, or it can evaluate the effects of an entire program, such as designation of an NIETC.

The Department's suggestion that designation of an NIETC has no effect on the environment is untrue. First, the Decision admits that the designation of an NIETC establishes the availability of a federal transmission line permit that is not otherwise available.⁶⁶ Interestingly, the approval of mining projects on lands administered by the Bureau of Land Management ("BLM") is similar to the designation of an NIETC – just as FERC cannot issue a transmission line permit until DOE designates an NIETC, BLM cannot issue permits for a specific mining project unless the Resource Management Plan ("RMP") for the area allows mining operations. If the RMP does not permit mining, BLM must first modify the RMP before it can issue a specific permit. Despite this two step process, BLM must conduct a NEPA analysis for the new or revised RMP,⁶⁷ even though BLM's regulations require it to go through a leasing and individual permitting process before the agency approves any specific project. Just as NEPA applies to the first step of the BLM mining approval process, it applies to the designation of an NIETC as well, even though neither procedure authorizes an individual project. Both actions are formal plans that will guide future agency actions.

Second, from a practical standpoint, the designation of an NIETC significantly curtails the authority of state agencies to issue permits for the construction of transmission facilities and their ability to condition those permits in ways that minimize environmental impacts. Pursuant to Section 1221(b)(1)(C), the applicant for a state law-based transmission line permit may take advantage of the FERC permitting procedure if either:

- (1) The party applies for a transmission line permit in an area designated as an NIETC, and the state has not approved the application within one year from the date of the application; or

⁶⁵ 40 C.F.R. § 1508.18(b).

⁶⁶ 72 Fed. Reg. at 56,998.

⁶⁷ See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (noting approval of RMP is major federal action requiring an EIS).

- (2) If a state agency conditions approval of a transmission line permit in an area designated as an NIETC in such a manner that construction of the line is “not economically feasible”.⁶⁸

Thus, within an NIETC, a state must issue a permit for a transmission line within a year, and it must not condition the permit so as to make it economically unfeasible, or the state faces the prospect of losing control over the siting process entirely. The creation of an NIETC within a state strongly encourages the state to approve new transmission lines and not to place conditions on their approval. The Department’s suggestion that the threat of losing jurisdiction will have no effect on the siting of transmission lines and generation facilities ignores this reality.

Furthermore, once FERC obtains jurisdiction over permitting for a transmission line, the legal authority and standards regarding approval of the application will differ from those under state law. For example, under Section 1221, FERC’s only options regarding a permit application are either to approve or to deny the proposed line.⁶⁹ Unlike many state transmission line siting statutes, Section 1221 does not authorize FERC to condition a federal transmission line permit on mitigating measures, such as demand side management or energy conservation requirements. In addition, Section 1221 does not authorize FERC to consider state conservation statutes, state conservation easements, or local land use planning when approving or denying a permit application.

The designation of an NIETC requires a programmatic EIS. A programmatic EIS is particularly appropriate if either: (1) it will be “sufficiently forward looking” to aid decision-makers with the basic planning for a program; or (2) decision-makers are impermissibly segmenting a program to limit the scope of environmental review.⁷⁰ To be sure, a forward looking analysis of the different legal criteria for issuing a transmission line permit under federal law versus state law would be helpful in deciding whether to designate an NIETC. Similarly, an analysis of the alternatives to designating a corridor, including those activities already underway in the states, would help to inform decision-makers as to the need for an NIETC. Furthermore, these and other issues may escape analysis in a FERC-led EIS regarding a specific location for a transmission line because FERC’s proposed action will be a permit for a specific route, not the creation of an NIETC.

Finally, Toll Brothers takes this opportunity to suggest certain issues for inclusion in DOE’s environmental analysis, and to caution DOE against taking actions that effectively truncate or foreclose consideration of any alternatives, including no-action alternatives, in the NEPA process.⁷¹

⁶⁸ 16 U.S.C. § 824p(b)(1)(C).

⁶⁹ See 16 U.S.C. § 824p(b)(1-6).

⁷⁰ *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985).

⁷¹ Toll Brothers notes that additional analysis of environmental impact will likely be necessary once the parties select a specific route for the new line, either by tiering the Department’s analysis or by developing a supplemental EIS. See 40 C.F.R. §§ 1508.28 (tiering); 1502.9(c) (supplemental EIS). But, to the extent that DOE can evaluate the foreseeable impacts of a transmission line now, a programmatic EIS for the Corridor should address those impacts. See 40 C.F.R. § 1508.25(a)(1). For example, the Department could consider the effect of a transmission line through the scenic Shenandoah Valley or through the densely populated Washington metropolitan area without knowing the exact route that it will take.

A. Consideration of Alternatives

Within an EIS, the Department must consider a range of alternatives to designating an NIETC, including the “no action” alternative.⁷² DOE should carefully evaluate a host of alternative means to address transmission congestion, including the alternatives noted in Section II.C above.⁷³ Moreover, the Department must be sure to avoid prejudging the alternatives available to it before preparing and considering the EIS.⁷⁴ Indeed, DOE’s identification of the Northern Virginia region as a Critical Congestion Area within the Congestion Study, and its subsequent issuance of the Proposal, suggests that the Department had already made up its mind to designate an NIETC without considering other alternatives. Such an approach is impermissible under NEPA, and the Department should rescind the Decision.

B. Specific Environmental Considerations

NEPA requires an agency to evaluate both the direct and the indirect impacts of a proposed federal action. The preemption of state transmission line siting statutes and the construction of a new transmission line (the ultimate purpose for designating an NIETC) will require analysis of both types of impacts. In addition, the Department should consider the cumulative impacts associated with this line and with other projects located in the region.⁷⁵

1. Direct Impacts from Designation of an NIETC in Northern Virginia

Direct impacts are effects that are directly related to, and will immediately result from, the proposed action.⁷⁶ There are several direct impacts that DOE should consider in an EIS, including the following. First, DOE should anticipate substantial wetlands disturbances from the new line, and it must describe and consider the full extent of these impacts and of all alternatives in an EIS. Second, the western portions of Northern Virginia are filled with important historic and archaeological resources. The Department’s EIS should carefully evaluate the extent to which a new transmission line may destroy or otherwise impair these resources. Third, DOE should describe and reflect upon the amount of protected open space and scenic vistas present within this region of Virginia in the EIS and the effects of a new line on these spaces and vistas. Fourth, the EIS should describe the environmental effects of the construction work necessary to build a new line. In particular, DOE should evaluate the effects of increased noise, dust, and stormwater runoff related to the construction work on the environment and on surrounding communities. Finally, DOE should consider how permitting decisions will be affected by supplanting Virginia law.

⁷² See 40 C.F.R. § 1502.14(d).

⁷³ See 40 C.F.R. § 1506.1(a) (prohibiting agency action that has an adverse environmental impact or that forecloses an alternative until an EIS is complete); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (stating that courts must ensure agencies have “taken a hard look at environmental consequences”).

⁷⁴ See *Robertson v. Methaw Valley Citizens Council*, 490 U.S. 332, 349 (1989) (stating procedural requirements of NEPA are intended to ensure that agencies carefully consider detailed environmental information before making decisions).

⁷⁵ See, e.g., *Friends of the Earth, Inc. v. USACE*, 109 F. Supp. 2d 30 (D.D.C. 2000) (reversing Corps’ action for failure to properly evaluate and consider direct, indirect, and cumulative impacts).

⁷⁶ See 40 C.F.R. §§ 1502.16; 1508.8(a).

2. Indirect Impacts from Designation of an NIETC in Northern Virginia

Indirect impacts from a proposal are those effects that are not directly caused by a proposed action, but that are a reasonably foreseeable consequence of the proposal.⁷⁷ DOE should consider several indirect impacts in the EIS, including the following. First, the Department anticipates that a new transmission line will allow lower cost generation facilities in the Midwest to meet demand within the PJM region. DOE should consider the air quality effects of the additional running time for these units on surrounding areas, and it should consider the effects of the additional running time for these units on regional and downwind air quality. In addition, the Department should consider whether the additional transmission capacity could spur the construction of additional generating units, either in the Midwest or in Virginia, and it should describe the extent to which the construction of new generation capacity will affect the environment as well. Second, the Department should evaluate whether the new line will spur additional development within Northern Virginia, the environmental effects of such development, and the effects that additional development would have on already existing communities in the region. Third, DOE should consider the extent to which environmental and historic tourism may be adversely affected by the impairment of scenic and historic resources by a new transmission line. Fourth, the Department should evaluate the extent to which operation of additional coal-fired power plants will result in additional emissions of greenhouse gases and how those additional emissions will contribute to global warming. Finally, DOE should evaluate whether designation of an NIETC will discourage states from pursuing distributed generation as well as the development of alternative, renewable sources of energy.

3. Cumulative Impacts from the Proposed Designation of an NIETC in Northern Virginia

Cumulative impacts are the incremental impacts associated with a proposed action when added to the impacts associated with other past, present, or reasonably foreseeable future impacts.⁷⁸ DOE must afford careful consideration to the combined and synergistic effects that may result from already existing facilities, the proposed new transmission line, and the reasonably foreseeable consequences of the new transmission line. Furthermore, DOE should consider the extent to which Dominion Power can make use of existing transmission line rights of way to reduce cumulative impacts. The Department's EIS should address these effects throughout the region, including any cumulative impacts within Prince William County, the location of Dominion Valley.

⁷⁷ See 40 C.F.R. §§ 1502.16; 1508.8(b).

⁷⁸ See 40 C.F.R. § 1508.7.

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