

**IN THE  
UNITED STATES DISTRICT COURT FOR  
MIDDLE DISTRICT OF PENNSYLVANIA**

PIEDMONT ENVIRONMENTAL )  
COUNCIL )  
45 Horner St. )  
Warrenton, VA 20186, )

PENNSYLVANIA LAND TRUST )  
ASSOCIATION )  
105 Locust Street, Suite 300 )  
Harrisburg, PA 17101, )

BRANDYWINE CONSERVANCY )  
U.S. Route 1 and Creek Road )  
Chadds Ford, Pennsylvania 19317, )

NATURAL LANDS TRUST )  
Hildacy Farm Preserve )  
1031 Palmers Mill Road )  
Media, PA 19063, )

NATIONAL PARKS CONSERVATION )  
ASSOCIATION )  
1300 19<sup>th</sup> St., N.W. )  
Suite 300 )  
Washington, D.C. 20036, )

**Civ. No.**\_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

PENNSYLVANIA CLEAN AIR	)
COUNCIL	)
107 North Front Street	)
Suite 113	)
Harrisburg PA 17101,	)
	)
CIVIL WAR PRESERVATION	)
TRUST	)
1331 H St. NW	)
Suite 1001	)
Washington, D.C. 20005,	)
	)
CATSKILL MOUNTAINKEEPER	)
P.O. Box 381	)
Youngsville, NY 12791,	)
	)
Plaintiffs,	)
	)
v.	)
	)
U.S. DEPARTMENT OF ENERGY	)
1000 Independence Avenue, S.W.	)
Washington, D.C. 20585,	)
	)
SAMUEL BODMAN, Secretary,	)
U.S. Department of Energy	)
1000 Independence Avenue, S.W.	)
Washington, D.C. 20585,	)
	)
Defendants.	)

**INTRODUCTION**

1. On October 5, 2007, the U.S. Department of Energy (“DOE”) issued an order (“Order”) designating the Mid-Atlantic Area National Interest Electric

Transmission Corridor (“Corridor”) 72 Fed. Reg. 56,992. The Corridor covers broad areas of Virginia, West Virginia, Maryland, Pennsylvania, New York, New Jersey, Delaware, Ohio, and the District of Columbia.

2. As a result of the Order, proposed utility and transmission line projects within the Corridor will be subject to “fast-track” federal approval, bypassing state-level processes for locating transmission infrastructure, overriding federal environmental laws, and enabling federal condemnation of private land and diversion of public land for new high voltage transmission lines.

3. By facilitating utility right-of-way creation and transmission line construction without a detailed analysis of the associated environmental impacts and without full consultation with the appropriate resource and land management agencies, DOE’s proposed corridor designation will have avoidable impacts on ecosystems, wildlife habitats and populations, historic resources and water quality.

4. As discussed in detail below, DOE has violated the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (“NEPA”), the National Historic Preservation Act, 16 U.S.C. § 470f (“NHPA”), the Energy Policy Act 2005 (“EPAAct”); Pub. L. 109-58,<sup>1</sup> and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* (“APA”), in the following respects:

(a) DOE designated the Corridor, which will adversely impact threatened and endangered species, without consulting with the U.S. Fish and Wildlife Service (“FWS”) as required by the Endangered Species Act.

*(Count 1 – Violation of the ESA § 7(a)(2) and APA § 706).*

(b) DOE designated the Corridor, which will significantly affect the environment, without preparing an Environmental Impact Statement or making a “finding of no significant impact” in an Environmental

Assessment). *(Count 2 – Violation of NEPA § 102(2) and APA §706).*

(c) DOE’s Order violated the requirements of § 1221 of the EPAct in the following ways:

(a) the Order defined Corridor boundaries which extend far beyond the areas where transmission congestion or capacity constraints are alleged to occur and far beyond the defined Critical Congestion Areas identified in the “Congestion Study” on which it was purportedly based, *see* 71 Fed. Reg. 45,057 (August 8, 2006);

(b) the above-referenced “Congestion Study” was procedurally flawed because DOE failed to consult with the affected states before finalizing it; and

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<sup>1</sup> Section 1221 of the Energy Policy Act of 2005 was codified at 16 U.S.C. § 8251 of the Federal Power Act.

(c) in the Order DOE failed to consider non-transmission or other alternatives;

*(Count 3 – Violation of EPLA § 1221(a)(2) and APA § 706).*

(d) DOE designated the Corridor without taking into account the potential effects of the undertaking on historic properties or engaging in the consultations mandated by Section 106 of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470f, and the associated implementing regulations, 36 C.F.R. Part 800.

*(Count 4 – Violation of NHPA § 106 and APA §706)*

### **JURISDICTION AND VENUE**

5. This court has subject matter jurisdiction over the claims set forth in this complaint under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory relief), 28 U.S.C. § 1346(a)(2) (United States as defendant), 42 U.S.C. § 7192 (DOE Organization Act), 16 U.S.C. § 1540(c) (actions arising under the ESA), and 5 U.S.C. §§ 701-706 (judicial review of agency action).

6. On November 7, 2007, Plaintiffs Piedmont Environmental Council and Pennsylvania Clean Air Council gave written notice of ESA violations to Defendants in compliance with the requirements of 16 U.S.C. § 1540(g)(2)(A)(i).

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

## **PARTIES**

8. Piedmont Environmental Council (“PEC”) is a not-for-profit (IRS § 501(c)(3)) organization headquartered in Warrenton, Virginia. Organized in 1972, PEC’s goals are to protect the rural economy, culture, and natural and historic resources of the Piedmont region of northern Virginia, including specifically the counties of Clarke, Loudon, Fauquier, Rappahannock, Culpeper, Madison, all of which have been included in the Mid-Atlantic NIETC. It brings this action on behalf of its 4,500 members. PEC has assisted landowners to donate close to 200,000 acres of conservation easements within these counties to protect a wide variety of publicly-defined natural resource, scenic and agricultural values.

9. The Pennsylvania Land Trust Association seeks to protect Pennsylvania’s special places and landscapes for today and for generations to come. The Association is made up of 80 member organizations committed to conserving recreational areas, wildlife habitat, productive farmland and forest, and other open spaces important to Pennsylvanians. Its members are based in communities across Pennsylvania and count tens of thousands of citizens as contributors and members.

10. The Brandywine Conservancy, a non-profit organization, has been a leader since 1967 in the protection of more than 42,000 acres of natural, agricultural, cultural, scenic, and clean water resources in southeastern Pennsylvania and northern Delaware. The Conservancy has assisted more than 600

landowners in managing, improving, and preserving their lands through conservation and agricultural easements.

11. Natural Lands Trust is the greater Philadelphia region's largest land trust, saving thousands of acres of forests, fields, streams and wetlands each year. Since 1953, the organization has helped to preserve over 130,000 acres of open space including more than 21,000 of nature preserves that provide critical wildlife habitat, scenic beauty, and unique opportunities for the region's residents to experience nature.

12. The nonpartisan, nonprofit National Parks Conservation Association ("NPCA") has, since 1919, been the leading voice of the American people in protecting and enhancing our National Park System. NPCA, its 330,000 members, and partners work together to protect the park system and preserve our nation's natural, historical, and cultural heritage for generations to come.

13. The Pennsylvania Clean Air Council is a non-profit corporation organized and existing under the laws of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania. The Council, a membership organization dedicated to protecting public health and the environment by reducing air pollution, has approximately 7,000 members residing throughout the Commonwealth.

14. The Civil War Preservation Trust (“CWPT”), with 65,000 members, is the largest nonprofit battlefield preservation organization in the United States. Its mission is to preserve our nation's remaining Civil War battlefields. Since 1987, the organization has saved more than 25,000 acres of hallowed ground.

15. Catskill Mountainkeeper is a non-profit, membership organization whose mission is to protect the ecological integrity of the Catskill Mountain range and the quality of life of all those who live there. Through a network of concerned citizens, it works to promote sustainable economic growth and the protection of natural resources essential to healthy communities.

16. Many of Plaintiffs’ members reside within the boundaries of the Corridor and use and appreciate these lands for their scenic beauty and for hiking, watching birds, viewing wildflowers and other flora and fauna, as well as other outdoor recreational and educational activities. Many of Plaintiffs’ members revere the historic resources within the boundaries of the Corridor, including national Civil War battlefields and national historic districts. They visit such places regularly, and intend to continue doing so for the foreseeable future. In fact, many of them have donated conservation easements in their property to protect these conservation values.

17. Defendant United States Department of Energy is the agency of the United States government responsible for implementing the relevant provisions of

the EAct, in compliance with the laws established by Congress regarding such implementation.

18. Defendant Samuel Bodman is the Secretary of the U.S. Department of Energy; he is sued in his official capacity. Defendant Bodman is legally responsible for all decisions of the DOE, including those decisions implementing NEPA, the NHPA, the ESA, and the EAct, and complying with the APA. Defendants Bodman and United States Department of Energy are hereinafter referred to collectively as “DOE.”

## **STATUTORY FRAMEWORK**

### **The Energy Policy Act of 2005**

19. Section 1221 of the EAct amends the Federal Power Act to add a new § 216, codified at 16 U.S.C. § 824(p), directing DOE to do two principal things:

-- conduct an analysis of electric transmission “congestion” and submit a study thereof to the Congress; and

-- “after considering alternatives ... ,” “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.” EAct § 1221(a)(2).

20. Within the designated Corridor, the EAct gives the Federal Energy Regulatory Commission (“FERC”) authority to permit the construction or enlargement of a transmission line where state and/or local authorities have:

(1) rejected such requests,

(2) placed what FERC deems to be inappropriate restrictions on such requests, or

(2) failed to grant such requests within a 12-month period. EAct § 1221(b).

21. Within the designated Corridor, the EAct grants applicants for transmission line authorization are given federal eminent domain authority to acquire rights-of-way, thus preempting traditional state prerogative and applicable review requirements. EAct § 1221(e).

22. Where an applicant for transmission line siting authority has invoked FERC’s permitting authority, FERC is charged by § 1221 with conducting the required environmental, historic preservation, and similar regulatory reviews, and with bringing in other federal agencies with specific regulatory jurisdiction, *e.g.*, the Army Corps of Engineers, the Advisory Council on Historic Preservation, etc.

23. Where FERC or the other regulatory agencies with jurisdiction over transmission lines fail to meet deadlines established by DOE, in its discretion, an applicant may “appeal” to the President for expedited issuance of the desired

permit. 16 U.S.C. § 216 (h)(6)(A). In effect, an applicant may end-run both state and federal regulatory programs.

24. Although § 1221 (*see* 16 U.S.C. § 216(h)(6)(D)) provides that in the event that an “appeal” is taken to the President he must comply with the “applicable” provisions of several specific federal environmental statutes before issuing any such transmission line permit, the President is generally not subject to the requirements of these laws.

25. Therefore, DOE’s corridor designation opens a new pathway by which a power company may receive authorization to construct a transmission line without complying with state regulatory requirements, state law rules regarding eminent domain, or federal regulatory requirements that would normally apply to decisions by DOE, FERC, or other federal agencies with jurisdiction over such authorizations. DOE’s action creates, in effect, a fast-track to transmission line construction or enlargement that potentially bypasses the state or federal regulatory reviews that are customarily required for similar actions.

### **The National Environmental Policy Act**

26. “NEPA . . . makes environmental protection a part of the mandate of every federal agency and department,” *Calvert Cliffs Coord. Com. v. United States*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), and is the “basic national charter for protection of the environment,” 40 C.F.R. § 1500.1(a). Its purpose is “to help

public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”

*Id.* § 1500.1(c).

27. “Agencies shall integrate the NEPA process with other planning at the *earliest possible time* to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” *Id.* § 1501.2 (emphasis added).

28. To accomplish this purpose, NEPA requires that all federal agencies prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This statement, known as an environmental impact statement (“EIS”), must, among other things, describe the “environmental impact of the proposed action,” any evaluate less environmentally harmful alternatives to the proposal. 42 U.S.C. § 4332.

29. To determine whether a proposed action significantly affects the quality of the human environment, and whether an EIS is therefore required, regulations promulgated by the Council on Environmental regulations provide for preparation of an environmental assessment (“EA”). Based on the EA, a federal agency either decides to prepare an EIS or decides not to do so -- based on a finding of no significant impact (“FONSI”). 40 C.F.R. § 1501.4.

30. NEPA also requires that every agency must “study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . . .” 42 U.S.C. § 4332(2)(E). The alternatives evaluation “is the heart of the environmental impact statement.” It should “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1508.9.

31. Section 1221 of the EPLA provides that “Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

### ***Endangered Species Act***

32. The ESA is the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)). The U.S. Fish and Wildlife Service (“FWS”) administers the law as it relates to terrestrial and freshwater species. See 50 C.F.R. § 402.01(b).

33. The ESA protects plant and animal species that are listed as “endangered” or “threatened.” A species is “endangered” if it “is in danger of

extinction throughout all or a significant portion of its range . . . .” 16 U.S.C. § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

34. Section 7(a)(2) of the ESA requires that, “in consultation with and with the assistance of [FWS],” each federal agency shall “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence” of a listed species or “result in the destruction or adverse modification of” the species’ critical habitat. 16 U.S.C. § 1536(a)(2). DOE’s designation of the Mid-Atlantic Corridor is an “action” within the meaning of ESA § 7(a)(2). *See* 50 C.F.R. § 402.02.

35. Section 7(a)(2) of the ESA requires a federal agency to determine if its activities “may affect” a listed species. 50 C.F.R. § 402.14(a). If so, the “action agency” must engage in “formal consultation” with FWS, unless FWS determines, based on the best available scientific evidence, that the action is “not likely to adversely affect” the species. *Id.* § 402.14(b). If a formal consultation is conducted, the process culminates in FWS’s issuance of a biological opinion addressing, among other things, whether the activity is likely to jeopardize the species’ existence. 16 U.S.C. § 1536(b)(3)(A). The conclusion is referred to as a “jeopardy” or “no jeopardy” finding

36. ESA § 7(a)(2) has a substantive aspect that imposes a duty on all federal agencies to ensure that, among other things, its actions do not jeopardize a species' existence. According to ESA regulations: “Jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to *reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild* by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (emphasis added).

### **The National Historic Preservation Act**

37. The National Historic Preservation Act (“NHPA”) contains congressional findings, among others, that the nation’s historic resources should be preserved; that the preservation of this irreplaceable heritage is in the public interest; that encouragement of preserving our historic resources will improve the planning and execution of federal projects and will assist economic growth and development; and that it is necessary and appropriate for the federal government to accelerate its preservation programs and activities. 16 U.S.C. § 470(b).

38. Section 106 of the NHPA, 16 U.S.C. § 470f, prohibits federal agencies from engaging in any federal undertaking (or federally assisted, licensed or permitted undertaking) unless the agency first (1) takes into account the potential effects of the undertaking on historic properties; and (2) affords the Advisory

Council a reasonable opportunity to comment on the undertaking. Section 106 of the NHPA states:

The head of any Federal agency . . . having authority to license any undertaking shall, . . . prior to the issuance of any license . . . , take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f .

39. The Advisory Council on Historic Preservation (“ACHP”) is an independent federal agency responsible for the implementation and enforcement of the NHPA in its entirety. 16 U.S.C. §§ 470i, 470j, 470k, 470s. The ACHP is responsible for promulgating regulations implementing Section 106 of the NHPA. *Id.* § 470s. These regulations are binding on all federal agencies, including the Department of Energy.

40. The Section 106 regulations make clear that the purpose of the Section 106 process is “to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties. . . , commencing at the early stages of project planning.” 36 C.F.R. § 800.1(a).

41. The first step in the Section 106 process is for an agency to determine whether the proposed action is an undertaking as defined in § 800.16(y) and, if so,

“whether it is a type of activity that has the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a)

42. The NHPA and the Section 106 regulations define “undertaking” as follows:

“Undertaking” means *a* project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including --

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with Federal financial assistance;
- (C) *those requiring a Federal permit, license, or approval*; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. 16 U.S.C. § 470w(7); *see* 36 C.F.R. § 800.16(y).

## **FACTUAL BACKGROUND**

### *DOE’s Action Summarized*

43. Pursuant to § 1221 of the EPAct, DOE submitted to Congress its study of regional electric transmission grid “congestion” on August 8, 2006, 71 Fed. Reg. 45,057.

44. On May 7, 2007, DOE proposed to designate two NIET corridors, one covering most of the northern Mid-Atlantic. 72 Fed. Reg. 25837. That action touched off a public controversy that continues unabated to this day.

45. DOE received almost two thousand sets of comments on this proposal, from state public utility commissions, environmental and historic preservation advocacy organizations, land trusts, members of Congress, municipalities,

corporations, federal agencies, state agencies, universities, affected landowners, and many others.

46. On October 5, 2007, DOE designated two such corridors, including the one that is the subject of this civil action. 72 Fed. Reg. 56992. These designations were made effective immediately.

### *The Implications for Electricity Generation in the Mid-Atlantic Region*

47. The geographic area falling within the boundaries of the Corridor extends far beyond the area in which DOE had previously identified transmission “congestion” – the Corridor also encompasses non-congested areas in western Pennsylvania, West Virginia and Ohio in which are located a large number of major coal-fired generating plants that are now operating well below their maximum generating capacity.

48. The above-referenced coal-fired power plants were built before August 18, 1972; they are therefore “grandfathered” under (*i.e.*, exempt from) the “new source performance standards” of the Clean Air Act. As a result these plants lack many of the modern pollution control features (e.g., stack gas scrubbers) that substantially reduce emissions of air pollution. They emit far more air pollution per unit of generated electricity than either gas-fired plants, modern coal-fired plants or, obviously, renewable sources of electricity such as wind turbines.

49. These power plants, because of their age and their minimal pollution-control systems, produce electricity at a significantly lower cost than new or proposed plants located near the principal Mid-Atlantic electrical demand centers, such as Philadelphia, northern New Jersey and New York City. Therefore, power produced at the older, more western plants enjoys a competitive advantage over power from newer, cleaner sources.

50. The intent and effect of the corridor designation is therefore to facilitate the transmission of low-cost coal-fired electricity produced in the western portion of the Corridor (and neighboring areas to the west) to demand centers located in the northern and eastern portions of the Corridor.

51. DOE acknowledges as much. *See* the proposed corridor designation, 72 Fed. Reg. at 25,848, 25,896-99 (referring to “underused generation capacity” in western Pennsylvania, Ohio, West Virginia and areas lying immediately to the west). *See also id.* at 25,873, noting the need to address “transmission constraints that prevent lower-priced electricity from the western portion of the [region] from reaching load centers in the eastern portion...”.

52. Augmented transmission of dirtier and cheaper coal-fired power from west to east within the Corridor will lead to increased generation of said dirtier and cheaper coal-fired power, along with the associated adverse environmental effects, described below.

*Adverse Effects of Transmission Line Construction And/Or Enlargement on  
Historic, Wildlife and Other Environmental Resources*

53. The Corridor designation lays the foundation for expedited approval of transmission line construction and/or enlargement projects – by FERC or the President -- without full review of the associated adverse effects on environmental, wildlife, and historic preservation resources under state or federal law.

54. If new transmission lines are constructed or if existing transmission lines are enlarged, adverse effects on environmental, wildlife, and historic preservation resources are inevitable.

55. Transmission line construction and/or enlargement leads to fragmentation of wildlife habitat, as many types of wildlife are reluctant to cross utility rights-of-way, where increased predation is widely observed.

56. Transmission line construction and/or enlargement leads to avian mortality, as birds inevitably collide with towers and lines, especially at night and in bad weather.

57. Transmission line construction and/or enlargement leads to decreased ambient water quality, because the vegetation-clearing and earth-moving activities required in order to construct and/or enlarge transmission lines produces increased erosion and runoff of sediment-laden rain water.

58. Transmission line construction and/or enlargement will lead to surface water pollution from herbicides, which are commonly used to keep rights-of-way clear of vegetation.

59. Transmission line construction and/or enlargement has the potential to impair the scenic and historic integrity of numerous historic and cultural resources within the designated Corridor, including individual historic properties, historic districts, National Historic Landmarks, National Heritage Areas, National Monuments, and civil war battlefields. Indeed, on June 14, 2007, the National Trust for Historic Preservation named Historic Places in Transmission Line Corridors to its 2007 list of America's 11 Most Endangered Historic Places.

[http://press.nationaltrust.org/index.php?option=com\\_content&task=view&id=143&Itemid=69](http://press.nationaltrust.org/index.php?option=com_content&task=view&id=143&Itemid=69) (site viewed January 10, 2008).

60. Additionally, in correspondence to the Department of Energy dated January 10, 2007, the Advisory Council on Historic Preservation formally expressed its view that the National Historic Preservation Act required DOE, before designating NIET corridors, to conduct a review of the likely adverse effects on historic properties.

*Adverse Effects of DOE's Corridor Designation on Historic, Wildlife and Other Environmental Resources*

61. Leaving aside the adverse environmental effects associated with increased, expedited construction of transmission lines, DOE's corridor designation will itself have substantial adverse environmental effects.

62. Placing specific counties within the boundaries of the Corridor makes it more likely that open space within those counties will be traversed by transmission lines in the future. The risk of this happening makes it less likely that undeveloped land in such counties will be designated as new park land, or that existing parks and historic areas located in such counties will receive the same degree of support and protection as parks and historic areas located in counties not at risk from fast-track federal transmission line siting decisions.

63. DOE's designation of the Corridor serves to deter owners of land within the Corridor from donating easements across their property, because of the increased risk that the land will be traversed by electric transmission lines. It will also reduce the eligibility of particular historic resources to be designated as National Historic Landmarks or receive other protected status.

64. DOE's designation of the Corridor makes it more likely that power companies currently operating coal-fired power plants in the western portion of the Corridor will soon be able to boost output at these power plants because of the

prospect of enhanced capability for transmitting and marketing power to demand centers in the eastern portion of the Corridor. This will induce such companies to increase their capital investment in generating capacity, a commitment of resources that makes this Nation more likely to continue its reliance on coal-fired power supplies and less likely to turn to environmentally-preferable sources of electric power general such as solar power.

65. Power companies and state regulatory authorities operating in the eastern portion of the Corridor will be affected in the opposite way. Those who are contemplating investments in renewable energy sources will be deterred from making such commitments given the prospect that enhanced supplies of low-cost coal-fired electricity from the western portion of the Corridor will soon be flooding eastern markets. This will threaten the economic viability of environmentally-preferable energy sources – which are generally more expensive than grandfathered coal-fired power plants – and thus deter investment in new power sources that will have reduced environmental impacts.

## **COUNT ONE**

### **Violation of the ESA § 7(a)(2) and APA §706**

66. Plaintiffs incorporate by reference each and every other allegation in this Complaint.

67. Because this designation will lead to extensive loss of endangered and threatened species' habitat, the designation clearly may affect numerous species listed on the Endangered Species Act. As such, DOE had a duty under the ESA and its regulations to consult with FWS regarding the impacts of this designation before designating the Mid-Atlantic Corridor.

68. When DOE designated the Mid-Atlantic Corridor without consulting under the ESA, it violated ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) and APA §706.

## **COUNT TWO**

### **Violation of NEPA §§ 102(2)(C) and (E) and APA §706**

69. Plaintiffs incorporate by reference each and every other allegation in this Complaint.

70. Designation of the Corridor was a “major Federal action” “significantly affecting the quality of the human environment,” thus requiring DOE to prepare an Environmental Impact Statement, or in the alternative, to make a Finding of No Significant Impact in an Environmental Assessment.

71. DOE designated the Mid-Atlantic Corridor without preparing either of these documents, and without considering either the environmental impacts of this major federal action or alternatives to it.

72. DOE's designation of the Mid-Atlantic Corridor without issuing an Environmental Impact Statement or making a Finding of No Significant Impact in an Environmental Assessment violated NEPA §§ 102(2)(C) and (E), 42 U.S.C. §§ 4332(2)(C) and (E) and APA §706.

### **COUNT THREE**

#### **Violation of EAct § 1221 and APA §706**

73. Plaintiffs incorporate by reference each and every other allegation in this Complaint.

74. DOE's Order violated the requirements of § 1221(a) of the EAct and APA §706 in the following ways:

(a) the Order defined Corridor boundaries which extend far beyond the areas where transmission congestion or capacity constraints are alleged to occur and far beyond the defined Critical Congestion Areas identified in the "Congestion Study" on which it was purportedly based, *see* 71 Fed. Reg. 45,057 (August 8, 2006);

(b) the above-referenced "Congestion Study" was procedurally flawed because DOE failed to consult with the affected states before finalizing it; and

(c) in the Order DOE failed to consider non-transmission or other alternatives.

## **COUNT FOUR**

### **Violation of the NHPA § 106 and APA §706**

75. Plaintiffs incorporate by reference each and every other allegation in this Complaint.

76. The Secretary's Order designating the Corridor is an "undertaking" within the meaning of 16 U.S.C. § 470w(7); *see* 36 C.F.R. § 800.16(y).

77. The Secretary's Order designating the Corridor has the potential to adversely affect historic resources, by, among other things, authorizing the federal preemption of state transmission line permitting processes that would otherwise afford stringent state-law protections to historic resources that may be affected by transmission lines, and by encouraging investment in energy sources likely to adversely affect historic resources

78. The Secretary's finding that "[t]he designation of National Corridors, in itself, is not an undertaking that has the potential to cause effects on historic properties, requiring NHPA review" is arbitrary, capricious, an abuse of discretion, and contrary to law, in violation of Section 106 and the ACHP's implementing regulations, 36 C.F.R. Part 800.

79. The Order therefore violates the NHPA and APA §706.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that this Honorable Court grant the following relief:

- A. Declare that the Corridor designation is invalid and in violation of NEPA, the ESA, NHPA §106, and EPO Act § 1221, and applicable regulations.
- B. Remand the Corridor designation so that DOE may prepare an EIS analyzing the impacts on the environment and environmentally preferable alternatives.
- C. Remand the Corridor designation until such time as DOE completes the consultations with the FWS as required by the ESA and takes into account the impact of the designations on historic sites and structures in consultation with the Advisory Council on Historic Preservation and other consulting parties.
- D. Remand the Corridor designation so that DOE may analyze alternatives and properly defined the Corridor boundaries in compliance with EPO Act § 1221 (a)(2).
- E. Stay the effectiveness of DOE's Corridor designation pending the requisite NEPA, NHPA, ESA, and EPO Act analyses.
- F. Award Plaintiffs their reasonable costs and attorney fees.
- G. Provide such further and additional relief as the Court deems just and proper.

Dated: January 14, 2008

Respectfully submitted,

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