



March 4, 2020

Kimberly D. Bose
Federal Energy Regulatory Commission
Office of the Secretary
888 1st Street NE
Washington, DC 20428

**Re: PennEast Pipeline Company, LLC, Docket No. CP20-47-000
Comment in Opposition to the Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity**

Dear Ms. Bose,

The Delaware Riverkeeper Network (“DRN”) is providing the following comments to be considered by the Federal Energy Regulatory Commission (“FERC” or “Commission”) in opposition to the proposed PennEast Pipeline Project Amendment (“Phase 1 Project”), which would allow PennEast Pipeline Company, LLC (“PennEast”) to construct the full PennEast Pipeline Project (“PennEast Project”)¹ in two phases; amend the PennEast Project to include a new interconnection facility in Bethlehem, Pennsylvania (“Church Road Facility”); and charge new recourse rates. PennEast also requests that the Commission process its application using the shortened procedures set forth in Rules 801 and 802 of the Commission’s Rules of Practice and Procedure.² Clean Air Council and PennFuture join in these comments.

DRN opposes the Phase 1 Project because it is an unlawful segmentation of a new and expanded PennEast Project with interconnects (“New PennEast Project”), it fails to establish a public need for Phase 1 as a standalone project, it proposes to proceed with construction without the required approval of the Delaware River Basin Commission (“DRBC”), and it includes the new Church Road Facility, which will be a source of dangerous emissions within $\frac{3}{4}$ of a mile of both a high school and an elementary school. If FERC decides to proceed with processing the Phase 1 Project application, it should consider in its Environmental Review the cumulative impacts of the Phase 1 Project, including, but not limited to:

- the impact of the Adelpia Gateway, LLC Pipeline Project (“Adelpia”)³, which will interconnect with the Phase 1 Project at the Church Road Facility and is a significant underpinning of the needs claim;

¹ Order Issuing Certificates, Docket No. CP15-558-000, 162 FERC ¶ 61.053 (Jan. 19, 2018).

² 18 C.F.R. §§ 385.801, 385.802 (2019).

³ FERC Docket Nos. CP18-46-000 and CP18-46-001

- the fracking induced by the increased capacity of the Phase 1 Project/Adelphia Project/New PennEast Project;
- the social cost of carbon emissions⁴ resulting from the construction and operation of the Phase 1 Project/Adelphia Project/New PennEast Project; and
- the social cost of methane emissions⁵ resulting from the construction and operation of the Phase 1 Project/Adelphia Project/New PennEast Project.

Given that the Phase 1 Project is a major Federal action significantly affecting the quality of the human environment the Commission must issue an Environmental Impact Statement (“EIS”) pursuant to the National Environmental Policy Act,^{6,7} Because the Phase 1 Project has a different use and purpose than the PennEast Project, the Final Environmental Impact Statement prepared by FERC and issued April 2017 (“2017 FEIS”) for the PennEast Project cannot be mechanically applied to the Phase 1 Project.⁸ Accordingly, FERC must begin its Environmental Review as if the Phase 1 Project is PennEast’s first and only application.

DRN urges FERC to extend the public comment period. PennEast filed the Phase 1 Project application on January 30, 2020. FERC issued a Notice of Application on February 12, 2020. In that notice, FERC provided a commenting deadline of March 4, 2020. Twenty-one days is a grossly insufficient amount of time for the public to absorb all the new information included in PennEast’s application and to provide meaningful comments. The Phase 1 Project may utilize the same route as a portion of the PennEast Project, but the purpose of the Phase 1 Project is completely different. The proximate projects surrounding the New PennEast Project, and the cumulative impacts they will have with the new and expanded New PennEast Project, are also completely different than those reviewed in FERC’s 2017 FEIS. PennEast must not be allowed to rush an entirely new and different project through FERC’s approval process by characterizing it as a phased approach to constructing the PennEast Project.

DRN has commented extensively on the harmful impacts of the PennEast Project and Adelphia Pipeline Project. To assist FERC in its analysis of the environmental impacts of the Phase 1 Project and to the degree there is overlap or redundancy with the New Penneast Project, DRN hereby expressly incorporates by reference: all comments submitted on FERC Docket Numbers CP15-558-000 and CP19-78-000 as they pertain to the portion of the PennEast Project affecting Pennsylvania; all comments submitted to the Pennsylvania Department of Environmental Protection (“PADEP”) regarding the PennEast Project; all comments submitted to the New Jersey Department of Environmental Protection (“NJDEP”) all comments submitted to the Army Corps of Engineers (“Corps”) regarding the PennEast Project; all comments submitted to the DRBC regarding the PennEast Project;

⁴ INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, UNITED STATES GOVERNMENT, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (August 2016).

⁵ Alex L. Marten, Elizabeth A. Kopits, Charles W. Griffiths, Stephen C. Newbold & Ann Wolverton (2015) *Incremental CH₄ and N₂O mitigation benefits consistent with the US Government’s SC-CO₂ estimates*, CLIMATE POLICY, 15:2, 272-298, DOI: 10.1080/14693062.2014.912981; Alex L. Marten, Elizabeth A. Kopits, Charles W. Griffiths, Stephen C. Newbold & Ann Wolverton (2015) *Corrigendum to: Incremental CH₄ and N₂O mitigation benefits consistent with the U.S. Government’s SC-CO₂ estimates*, CLIMATE POLICY, 15:5, 678-679, DOI: 10.1080/14693062.2015.1070550.

⁶ 42 U.S.C. § 4321, *et seq.*

⁷ *See id.* § 4332(2)(C).

⁸ *See* OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION, FERC\EIS:0271F, PENNEAST PIPELINE PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT (April 2017).

and all comments submitted to FERC, PADEP, and DRBC regarding the Adelpia Pipeline Project. Copies of the aforementioned comments are attached hereto for FERC's convenience.

I. The Phase 1 Project Scheme by PennEast

PennEast claims the Phase 1 Project is a stand-alone project involving the construction of “the facilities proposed to be located in Pennsylvania through approximate milepost (“MP”) 68, including two (2) of the compressor units at the Kidder Compressor Station, as well as new interconnection facilities . . . in Pennsylvania[.]”⁹ PennEast’s goal is to put the Phase 1 Project into service by November 1, 2021.¹⁰ The Phase 1 Project has a total capacity of 650,000 dekatherms per day (“Dth/d”).¹¹ As of the date of PennEast’s application, it has “executed precedent agreements with four shippers for approximately 340,000 [Dth/d] of capacity for long-term firm transportation service” from the Phase 1 Project receipt points to the new delivery points at the Church Road Interconnects[.]” namely, the Columbia Gas Transmission, LLC (“Columbia Gas”) Pipeline and the recently-certificated Adelpia Gateway, LLC (“Adelpia”) Pipeline.¹² PennEast claims that the “Phase 1 facilities would provide new incremental capacity to meet market demand[.]”¹³

II. FERC Must Prepare an Environmental Impact Statement that Does Not Impermissibly Segment PennEast’s Projects.

NEPA is our “basic national charter for protection of the environment.”¹⁴ As such, it makes environmental protection a part of the mandate of every federal agency.¹⁵ NEPA requires that federal agencies take environmental considerations into account in their decision-making “to the fullest extent possible.”¹⁶ Federal agencies must consider environmental harms and the means of preventing them in a “detailed statement” before approving any “major federal action significantly affecting the quality of the human environment.”¹⁷ When preparing an Environmental Impact Statement (EIS), an agency must take a detailed, “hard look” at the environmental impact of and alternatives to the proposed action.¹⁸ This required analysis serves to ensure that “the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”¹⁹

NEPA also “guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience,” including the public, “that may also play a role in the decision-making process and the implementation of the decision.”²⁰ As NEPA’s implementing regulations explicitly provide, “public scrutiny [is] essential to implementing NEPA.”²¹ The opportunity for public participation guaranteed by NEPA

⁹ Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity of PennEast Pipeline Company, LLC at 1, FERC Docket No. CP20-47-000 (Jan. 30, 2020) (hereinafter, “Phase 1 Application”).

¹⁰ *Id.* at 8.

¹¹ *Id.* at 1.

¹² *Id.* at 9-10.

¹³ *Id.* at 13.

¹⁴ 40 C.F.R. § 1500.1(a) (2019).

¹⁵ See 42 U.S.C. § 4332(1).

¹⁶ *Id.* at § 4332.

¹⁷ *Id.* at § 4332(2)(C).

¹⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

¹⁹ *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1979).

²⁰ *Robertson*, 490 U.S. at 349.

²¹ 40 C.F.R. § 1500.1(b) (2019).

ensures that agencies will not take final action until after their analysis of the environmental impacts of their proposed actions has been subject to public scrutiny.²²

An EIS must fully assess and disclose the complete range of environmental consequences of the proposed action, including “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, [and] cultural” impacts, “whether direct, indirect, or cumulative.”²³ Direct effects are “caused by the action and occur at the same time and place.”²⁴ Indirect effects are those impacts that are caused by the action, but occur “later in time or farther removed in distance, but are still reasonably foreseeable,” and may include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”²⁵ Cumulative impacts are “impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”²⁶ As the regulations make clear, “[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”²⁷ In addition, NEPA requires FERC to take a hard look at the ways to avoid or mitigate the Projects’ impacts.

NEPA is an “environmental full disclosure law.”²⁸ It requires that an agency obtain and consider detailed information concerning environmental impacts, and it “ensures that an agency will not act on incomplete information, at least in part, by ensuring that the public will be able to analyze and comment on an action’s environmental implications.”²⁹ The information provided to the public “must be of high quality” because “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”³⁰ The potential adverse effects of the PennEast’s proposed actions cannot be adequately analyzed without complete data on all affected resources.

On February 28, 2020, FERC issued a Notice of Intent to Prepare an Environmental Assessment for the Proposed PennEast 2020 Amendment Project. In that Notice, FERC stated that it “will prepare an environmental assessment (EA) that will discuss the environmental impacts of the PennEast 2020 Amendment Project involving the construction and operation of facilities by [PennEast]. The EA will discuss facilities to be built in Northampton County, Pennsylvania.”³¹ FERC apparently fails to realize that the Phase 1 Project is not simply an addition or amendment to the PennEast Project certificated in January 2018, but is rather a proposal to construct one-half of an entirely new project. FERC’s NEPA regulations state that “an environmental impact statement [(EIS)] will normally be prepared first for . . . [m]ajor pipeline construction projects under section 7 of the Natural Gas Act

²² See *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (noting that where “data is not available during the EIS process and is not available to the public for comment,” the process “cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process”) (quoting *Robertson*, 490 U.S. at 349)).

²³ 40 C.F.R. §§ 1502.16(a), (b); § 1508.8 (2019).

²⁴ *Id.* § 1508.8(a).

²⁵ *Id.* § 1508.8.

²⁶ *Id.* § 1508.7 (emphasis added).

²⁷ *Id.*

²⁸ *Monroe Cnty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

²⁹ *Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 792 (S.D. W. Va. 2009) (internal quotation marks and citations omitted).

³⁰ 40 C.F.R. § 1500.1(b) (2019).

³¹ NOTICE OF INTENT TO PREPARE AN ENVIRONMENTAL ASSESSMENT FOR THE PROPOSED PENNEAST 2020 AMENDMENT PROJECT AND REQUEST FOR COMMENTS ON ENVIRONMENTAL ISSUES at 1, FERC Docket No. CP20-47-000 (Feb. 28, 2020).

using rights-of-way in which there is no existing natural gas pipeline[.]”³² The Phase 1 Project is such a major pipeline construction project. The presumption under the law is that the Phase 1 Project will be subject to an EIS, as is required by NEPA.

PennEast cannot be allowed to claim the Phase 1 Project is simply an amendment to the method of constructing the PennEast Project,³³ while simultaneously claiming that Phase 1 is a stand-alone project.³⁴ Tellingly, PennEast believes that it will be able to construct “Phase 2” without any further input from FERC.³⁵ PennEast is apparently trying to confuse FERC and the public, and avoid a legal challenge by alternately characterizing Phase 1 as a mere change in construction method (when seeking to minimize the fact that the Phase 1 Project has a different purpose than the PennEast Pipeline Project and an expanded impact and footprint), or as a stand-alone project (in an attempt to avoid the argument that it is proposing a segmented NEPA analysis).

A. The Purpose of the Phase 1 Project is Different Than the Purpose of the PennEast Pipeline Project, Thus, the Baseline for FERC’s NEPA Analysis Has Changed.

One of the most significant components of an EIS is the statement of purpose and need.³⁶ The purpose and need of a project “defines the goals of the project to allow for the review of an appropriate range of alternatives.”³⁷ The Phase 1 Project has an entirely different purpose and need than the PennEast Project, thus, the baseline of FERC’s entire NEPA analysis has changed. FERC “bears the responsibility for defining at the outset the objectives of an action.”³⁸ When doing so, FERC “should take into account the needs and goals of the parties involved in the application” and “should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives.”³⁹

Here, in the Natural Gas Act, Congress has authorized FERC to issue certificates of public convenience and necessity.⁴⁰ An appropriate statement of purpose and need in this context will include information such as “where the gas must come from, where it will go, [and] how much it will deliver[.]”⁴¹ PennEast’s Phase 1 Project will result in a different destination for, and quantity of, natural gas. Thus, a new statement of purpose and need as well as a new alternatives analysis is necessary.

Accordingly, even as a stand-alone project, the Phase 1 Project requires an EIS. However, through its January 30, 2020 application, PennEast is essentially proposing two new projects: (1) the Phase 1 Project; and (2) a new and expanded version of the PennEast project that includes the interconnection with the Adelphia

³² 18 C.F.R. § 380.6(a)(3) (2019).

³³ *Phase 1 Application* at 1 (PennEast “hereby filed this application requesting that the Commission issue an order amending PennEast’s certificate of public convenience and necessity . . . for the PennEast Pipeline Project . . . to authorize PennEast to construct, own and operate the Project in two (2) phases[.]”).

³⁴ *Id.* at 8 (“[T]he construction and operation of these Phase 1 facilities are in no way contingent on or otherwise impacted by the . . . ultimate construction of the Phase 2 facilities.”).

³⁵ *Id.* at 3 (“Subsequently, upon receipt of the New Jersey Authorizations, PennEast will construct and operate Phase 2.”)

³⁶ 40 C.F.R. § 1502.13 (2019).

³⁷ *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 971 (S.D. Ohio 2002) (citing *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991)).

³⁸ *Busey*, 938 F.2d at 195-96.

³⁹ *Id.* at 196.

⁴⁰ See 15 U.S.C. § 717f(c).

⁴¹ *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 599 (4th Cir. 2018).

and Columbia Gas pipelines (“New PennEast Project”) which is now an essential and integrated section of the pipeline project necessary to defend the claimed purpose and need. If FERC approves the Phase 1 Project, then the PennEast Project as originally certificated by FERC will never come into being. FERC must prepare an EIS that addresses both new projects—to do otherwise would amount to segmentation which is unlawful.

B. An EIS or EA Addressing Only the Phase 1 Project Will Impermissibly Segment FERC’s NEPA Analysis by Failing to Consider the New PennEast Project as a Whole, as Well as the Interconnected Adelpia Project.

The D.C. Circuit in *Delaware Riverkeeper v. FERC*, identified two tests for evaluating whether an agency has improperly segmented its review of a project.⁴² First, the Court stated that for the purpose of segmentation review, an agency’s consideration of the proper scope of its NEPA analysis should be guided by the “governing regulations,” which are 40 C.F.R. § 1508.25(a).⁴³ The same analysis is required in the instant matter. Second, the Court in *Delaware Riverkeeper* also stated that even if the segmentation analysis was guided instead by the test articulated in *Taxpayers Watchdog v. Stanley*,⁴⁴ FERC still unlawfully segmented its review of the projects.⁴⁵ In drafting its EIS for the Phase 1 Project and New PennEast Project, FERC must avoid these pitfalls and unlawful gross errors and practices which benefit the pipeline operators over the public interest.

An agency should prepare a single programmatic EIS for actions that are “connected,” “cumulative,” or “similar,” such that their environmental effects are best considered in a single impact statement.⁴⁶ “Actions are ‘connected’ or ‘closely related’ if they: ‘(i) Automatically trigger other actions which may require environmental impact statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; [or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.’”⁴⁷ Similar actions have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.⁴⁸ NEPA requires “agencies to consider the cumulative impacts of proposed actions.”⁴⁹ An agency must analyze the impact of a proposed project in light of that project’s interaction with the effects of “past, current, and reasonably foreseeable future actions.”⁵⁰

“Piecemealing” or “segmentation” is the unlawful practice whereby a project proponent avoids the NEPA requirement that an EIS be prepared for all major federal actions with significant environmental impacts by dividing an overall plan into component parts, each involving action with less significant environmental effects.⁵¹ Federal agencies may not evade their responsibilities under NEPA by “artificially dividing a major federal action into smaller components, each without a ‘significant’ impact.”⁵² The general rule is that segmentation should be “avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.”⁵³ Without this rule, developers and agencies could “unreasonably restrict the scope of environmental review.”⁵⁴

⁴² *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission*, 753 F.3d 1304, 1314-15 (D.C. Cir. 2014).

⁴³ *Id.*

⁴⁴ 819 F.2d 294 (D.C. Cir. 1987).

⁴⁵ *Delaware Riverkeeper Network*, 753 F.3d at 1314-15.

⁴⁶ *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008); 40 C.F.R. § 1508.25(a).

⁴⁷ *Hammond v. Norton*, 370 F. Supp. 2d 226, 247 (D.D.C. 2005) (quoting 40 C.F.R. § 1508.25(a)(1)).

⁴⁸ *Id.* at 246; 40 C.F.R. § 1508.25(a)(3) (2019).

⁴⁹ *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988) (“Hodel”). See also *TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006).

⁵⁰ 40 C.F.R. § 1508.7 (2019).

⁵¹ *Taxpayers*, 819 F.2d 294, 298 (D.C. Cir. 1987).

⁵² *Coal. on Sensible Transp. v. Dole*, 826 F. 2d 60, 68 (D.C. Cir. 1987). See also 40 C.F.R. § 1508.27(b)(7).

⁵³ *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988).

⁵⁴ *Fund for Animals v. Clark*, 27 F. Supp. 2d 9, 16 (D.D.C. 1998) (“Fund”).

In accordance with the three-factor test articulated in *Taxpayers*, to determine whether a project has been unlawfully segmented, “courts have considered such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives[.]”⁵⁵ In *Delaware Riverkeeper*, the court held that even if it were to expand its analysis from Section 1508.25(a) to the factors in articulated in *Taxpayers*, FERC’s defense of its action was still deficient.⁵⁶ Relevant to the Phase 1 Project, a project lacks “independent utility” if it could not function or would not have been constructed in the absence of another project.⁵⁷

Now is the time for FERC to analyze the Phase 1 Project as well as the entirely New PennEast Project. NEPA clearly requires FERC to consider these interconnected projects, which are obviously being contemplated and planned for in the same time frame by the same owner for delivery of the same gas. There exists a physical, functional, and temporal nexus that cannot be overlooked. The New PennEast Project has not been examined before, and will *never* be examined if FERC fails to complete a comprehensive EIS by allowing PennEast to segment the New PennEast Project.

In addition, the effects of Phase 1’s connection with the Adelpia Pipeline have not yet been explored by FERC. Phase 1 serves as the northern portion of the Adelpia Pipeline, and will result in the seamless delivery of natural gas from the Marcellus Shale to Marcus Hook. In FERC’s Environmental Assessment (“EA”) of the Adelpia Project, it stated that the PennEast Project was “entirely outside of the geographic scope of the [Adelpia Project] (including for air quality), with the exception of the Martins Creek Station, which is within the corresponding HUC-12 watersheds, but is already in operation and would be considered the environmental baseline. Due to a large number of public comments about this project, it’s included here for comparison purposes only.”⁵⁸

PennEast’s new Phase 1 Project changes that fact—the pipelines will be directly connected at the Church Road Facility. Accordingly, Phase 1 and the Adelpia Pipeline are “interdependent parts of a larger action and depend on the larger action for their justification.”⁵⁹ Given that Adelpia Pipeline is one of only two delivery points for the Phase 1 Project, it is clear that the Phase 1 Project “[c]annot or will not proceed unless other actions [Adelpia Pipeline] are taken previously or simultaneously.” If FERC fails to analyze these projects as one, it will be unlawfully segmenting a larger project that must be subject to NEPA review.

C. The EIS Must Also Address the Environmental Impacts of Existing and Proposed Pipelines in the Vicinity of the Proposed Projects.

FERC must also consider the environmental effects of pipeline projects within temporal and spatial proximity of the Phase 1 Project and the New PennEast Project. “[F]ederal law requires that an EIS must analyze

⁵⁵ *Taxpayers*, 819 F.2d at 298.

⁵⁶ *Delaware Riverkeeper*, 753 F.3d at 1314-16 (The court held that the projects did not have “(1) has logical termini; [or] (2). . . substantial independent utility.” The court’s examination did not reach the remaining factor.)

⁵⁷ *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000). *See also West North Carolina Alliance v. North Carolina Dept. of Transp.*, 312 F. Supp. 2d 765, 774-775 (E.D.N.C. 2003) (project widening highway section lacked independent utility because it would leave a “bottleneck” of narrow highway to north, such that traffic congestion between the termini of the project would be worsened until construction of later project widening bottleneck section).

⁵⁸ OFFICE OF ENERGY PRODUCTS, FEDERAL ENERGY REGULATORY COMMISSION, Docket Nos. CP18-46-000 & CP18-46-001, ADELPHIA GATEWAY PROJECT ENVIRONMENTAL ASSESSMENT 157 (Jan. 2019).

⁵⁹ 40 C.F.R. § 1508.25 (2019).

‘the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.’”⁶⁰ “A necessary component of NEPA’s ‘hard look’ is ‘a sufficiently detailed catalogue of past, present, and future projects, and [] adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.’”⁶¹

These projects include, but are certainly not limited to, the Adelpia Pipeline, Regional Energy Access Project (Phase I and II), UGI Bethlehem Liquefied Natural Gas Peak Delivery Facility, Birdsboro Pipeline Project, Transco Atlantic Sunrise Project, Millennium Eastern System Upgrade Project, Transco Orion Project, Transco Susquehanna West, Transco Triad Expansion, Tennessee Gas Pipeline Company Northeast Upgrade Project, Tennessee Gas Pipeline Company 300 Upgrade Project, Transco Leidy Southeast Expansion, Constitution Pipeline (to the degree that it may be revived by project owners and to the degree that construction has already taken place that has harmed communities and the environment), Sunoco Mariner East 2 and 2X Projects, Paulsboro Natural Gas Delaware River Pipeline Relocation Project, Sunoco Logistics Delaware River Pipeline Relocation Project, and the Gibbstown Liquefied Natural Gas Export Facility.

III. FERC Must Analyze the Cumulative Climate Impacts of PennEast’s Projects, Including Upstream Production and Downstream Consumption.

In determining the climate impacts of PennEast’s projects, both upstream production and downstream consumption are within the required scope of FERC’s NEPA analysis. The scope of an EIS includes the impacts of an action, which may be direct, indirect or cumulative.⁶² Effects subject to a NEPA analysis include ecological, economic, and social impacts.⁶³

In FERC’s FEIS for the PennEast Project, it erroneously concluded that “upstream production is not causally connected to the Project, and as such [FERC does] not evaluate the impacts of such activity.”⁶⁴ With regard to downstream uses of gas transmitted by the PennEast project, FERC determined that “the scope and effects of the potential GHG emissions from natural gas production attributable to this Project are not reasonably foreseeable, as there is not enough information available to permit a meaningful analysis.”⁶⁵ Ultimately, FERC concluded that “[b]ecause we cannot determine the projects’ incremental physical impacts on the environment caused by climate change, we cannot determine whether the projects’ contribution to cumulative impacts on climate change would be significant.”⁶⁶

Contrary to FERC’s belief, “[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves.”⁶⁷ In this respect, the construction of a pipeline is similar to the construction of a logging road in *Thomas v. Peterson*,⁶⁸ a case that discussed the appropriate scope of a NEPA analysis. In that case, the Ninth Circuit reasoned:

⁶⁰ *Oregon Nat. Res. Coun. Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (quoting 40 C.F.R. § 1508.7).

⁶¹ *Id.* (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1027-28 (9th Cir. 2005)).

⁶² 40 C.F.R. § 1508.25 (2019).

⁶³ *Id.* § 1508.8(b).

⁶⁴ OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION, PENNEAST PIPELINE PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT at 4-258, FERC\EIS: 0271F (Apr. 2017).

⁶⁵ *Id.* at 4-334.

⁶⁶ *Id.* at 4-335.

⁶⁷ *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

⁶⁸ 753 F.2d 754 (9th Cir. 1985).

The location, the timing, or other aspects of the timber sales, or even the decision whether to sell any timber at all affects the location, routing, construction techniques, and other aspects of the road, or even the need for construction.

....

The Forest Service argues that the sales are too uncertain and too far in the future for their impacts to be analyzed along with that of the road. This comes close to saying that building the road now is itself irrational. We decline to accept that conclusion. Rather, we believe that if the sales are sufficiently certain to justify construction of the road, then they are sufficiently certain for their environmental impacts to be analyzed along with those of the road.⁶⁹

In sum, if the production and consumption of natural gas is sufficiently certain to justify construction of Phase 1 and the New PennEast Project, then they are sufficiently certain for their environmental impacts to be analyzed along with the construction of the pipeline. PennEast's new application for Phase 1 gives FERC the obligation to assess the climate impacts of the Phase 1 Project and the New PennEast Project, as required by NEPA.

Cumulative impacts caused by "reasonably foreseeable" future actions are recognizable under NEPA and must be considered throughout the NEPA process. Additionally, FERC must consider the cumulative effects of actions similar to the proposed action, whether existing or reasonably foreseeable. Cumulative impacts include "impact[s] on the environment which result from the incremental impact of the action *when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*"⁷⁰ "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."⁷¹ Cumulative impacts include "coincident effects (adverse or beneficial) on specific resources, ecosystems, and human communities of all related activities, not just the proposed project or alternatives that initiate the assessment process."⁷² A cumulative effects analysis focuses on resource sustainability, and has expanded geographic and time boundaries.

Upstream natural gas production, and its subsequent impacts, are among the effects that NEPA requires FERC to consider, in determining whether its action will have a significant impact. NEPA's implementing regulations define, as "[i]ndirect effects," those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."⁷³ That the Phase 1 Project's and the New PennEast Project's takeaway capacity will necessarily lead to additional demand for natural gas, with consequences for its price, production, and use, is eminently foreseeable. The D.C. Circuit has recently held that such "generally applicable economic principles," as the relationship between the price of a good and its production and consumption, are "sufficiently 'self-evident'" to "require 'no evidence outside the administrative record.'"⁷⁴ The

⁶⁹ *Id.* at 760.

⁷⁰ 40 C.F.R. § 1508.7 (2019) (emphasis added).

⁷¹ 40 C.F.R. § 1508.7 (2019).

⁷² COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT at v (Jan. 1997).

⁷³ 40 C.F.R. § 1508.8(b) (2019).

⁷⁴ *Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 410-11 (D.C. Cir. 2015) (finding standing based on "basic proposition that 'increasing the price of an activity . . . will decrease the quantity of that activity demanded in the market'" (alteration in original) (quoting *Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993))).

results of generally applicable economics are all the more foreseeable here because the administrative record does contain evidence specifically foreseeing them.

The Council on Environmental Quality's ("CEQ's") regulations implementing NEPA provide illustrative examples of indirect effects that are closely analogous to those at issue here: "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate[.]"⁷⁵ Like impacts on gas production and use, growth-inducing effects and induced changes in the pattern of land use reflect responses—generally market-based—to changes in the supply of, and demand for, various resources. Further reflecting the need to consider such impacts, the regulations include economic as well as environmental impacts among those that an agency must consider.⁷⁶

For that reason, courts have consistently required that agencies extend the ambit of their analysis to include effects akin to upstream production and downstream consumption. The Eighth Circuit has addressed circumstances that closely parallel those here, holding that when an agency approves a rail-line extension that would result in "an increase in availability and a decrease in price" of coal, NEPA demands that the agency examine the environmental "effects that may occur as a result of the reasonably foreseeable increase in coal consumption."⁷⁷ In *Mid-States*, the agency's decision enabled an increase in the supply of coal to the domestic market; here, as described below, FERC has enabled an increase in demand for natural gas. In *Mid-States*, that decision had foreseeable effects on the price of coal, its production, and its use.

FERC's decision has foreseeable impacts on natural gas's price, production, and use. In *Mid-States*, the Eighth Circuit held that the agency could not responsibly or lawfully ignore those effects under NEPA.⁷⁸ Likewise, neither could FERC do so here. Other Circuits have reached similar results. When authorizing a runway that would expand capacity and "spur demand," the Ninth Circuit has held that the Department of Transportation must examine the increased usage that will result from that demand.⁷⁹ The First Circuit has refused to let an agency construct a causeway and port, without examining the "industrial development" that would be enabled by that construction.⁸⁰ Those cases establish that when an Agency approves infrastructure that will increase demand for a resource, it cannot ignore the effects of that increased demand.

NEPA does not require agencies to consider only those effects whose specifics are known and certain. As the Eighth Circuit held, "when the *nature* of the effect is reasonably foreseeable but its *extent* is not ... [an] agency may not simply ignore the effect."⁸¹ Indeed, where an action's effects are not precisely known, the

⁷⁵ 40 C.F.R. § 1508.8(b) (2019).

⁷⁶ *Id.*

⁷⁷ *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (requiring that agency address air pollution resulting from increased coal use).

⁷⁸ *Id.*

⁷⁹ *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138-9 (9th Cir. 2011).

⁸⁰ *Sierra Club v. Marsh*, 769 F.2d 868, 877-79 (1st Cir. 1985). *See also Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 39-40 (D.D.C. 2000) (invalidating agency decision approving casino, without considering economic development that would result).

⁸¹ *Mid-States Coal. for Progress*, 345 F.3d at 549-50 (when agency permits rail extension that will increase "availability of coal," it may not ignore "the construction of additional [coal-fired] power plants" that may result merely because agency does not "know where those plants will be built, and how much coal these new unnamed power plants would use").

Council on Environmental Quality's regulations suggest that the action is more - not less - likely to warrant an environmental impact statement.⁸²

NEPA's implementing regulations provide detailed instructions as to how such uncertainty is to be addressed in an environmental impact statement.⁸³ That the precise location of natural gas production is unknown, therefore, does not render such production unforeseeable, or allow FERC to dismiss its effects as insignificant. "It is well recognized that a lack of certainty concerning prospective environmental impacts cannot relieve an agency of responsibility for considering reasonably foreseeable contingencies."⁸⁴ Rather, "[a]t the threshold stage of the NEPA inquiry ... an agency must determine, to the extent feasible, whether the sum of all reasonably foreseeable effects, discounted by the probability of their occurrence, represent a 'significant' effect on the environment."⁸⁵ If so, the "agency must issue an [environmental impact statement] analyzing the probabilistic facets of the prospective environmental impact."⁸⁶ Here, record evidence shows that not only will additional unconventional shale gas drilling be necessary to support the Project over the lifespan of its contracts, but furthermore, it is shown where the new wells are likely to be located, and how many wells will be needed to support the Project.

A. FERC's Cumulative Impacts Assessment Must Consider Reasonably Foreseeable Shale Gas Production.

FERC's NEPA analysis must include existing and reasonably foreseeable shale development/production that will be advanced, induced and supported if the Phase 1 Project and New PennEast Project were to be approved by FERC and built. Among the reasonably foreseeable actions—the environmental and community impacts of which must be considered—include the construction, operation and maintenance of the shale gas wells that will be the source of the gas carried by the Phase 1 Project and new PennEast Project with interconnects, which will be carrying that gas in interstate commerce – both the new wells that will be constructed and the production that will be induced at pre-existing wells by the proposed projects. The analysis of impact for these gas wells, which will be producing gas for the purposes of delivering it through the pipelines in interstate commerce, must include the associated gathering pipelines, access roads, gathering lines, compressor stations, water pipelines, water consumption and water disposal, truck traffic, and other supporting infrastructure which is necessary for the construction and development of these wells.

Given that shale gas production activities for delivery of gas into interstate commerce through the PennEast Pipeline are "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision,"⁸⁷ and given that FERC's approval of this project is a legally relevant cause resulting in the induced new, expanded, extended, and ongoing production of shale gas through construction of new gas

⁸² See 40 C.F.R. § 1508.27(b)(5) (intensity depends upon "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks"); see also *Found. on Econ. Trends*, 756 F.2d at 154-55 (It is not "sufficient for the agency merely to state that the environmental effects are currently unknown," because uncertainty is "one of the specific criteria for deciding whether an [environmental impact statement] is necessary").

⁸³ 40 C.F.R. § 1502.22(b) (specifying how agency should proceed when "the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known").

⁸⁴ *Potomac Alliance v. U.S. Nuclear Reg. Comm'n*, 682 F.2d 1030, 1036-37 (D.C. Cir. 1982).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992))

wells and well pads and inducing new production at pre-existing wells, FERC is obligated to consider their impacts in its NEPA analysis of the project.

Analysts, experts, and modelers use the location of interstate transmission gas lines as a predictor of where gas production will take place. The reality of the industry is that gas is produced for transmission through interstate commerce, and that there is a direct relationship between the siting and construction of well pads and the location of existing or proposed interstate pipelines.

B. FERC's Cumulative Impacts Assessment Must Consider the Reasonably Foreseeable Consumption of Natural Gas, and Use the Social Cost of Carbon and Social Cost of Methane to Measure the Impact of Emissions.

FERC must establish the amount of carbon and methane emissions that will result from the Phase 1 Project and the New PennEast Project. Using these amounts, FERC must then incorporate the impact of these greenhouse gases (GHGs) into its NEPA analysis.

The social cost of carbon (SC-CO₂) is a comprehensive estimate of the economic cost of harm associated with the emission of carbon. Particularly relevant to natural gas infrastructure is the social cost of methane (SC-CH₄), a tool that allows agencies to similarly weigh the economic cost of harm associated with methane emissions. These estimates are important for regulation because they help agencies more accurately weigh the costs and benefits of a proposed action.

Although agencies are not *required* to perform cost-benefit analyses in an EIS,⁸⁸ failure to do so when the economic benefits of an agency action are quantified may be arbitrary and capricious.⁸⁹ Here, there is sufficient information in the record about the claimed economic benefits of the Phase 1 Project and New PennEast Project to allow FERC to quantify them and perform a cost-benefit analysis using the SC-CO₂ and the SC-CH₄. Furthermore, FERC is already required by the Natural Gas Act to balance the benefits of PennEast's proposed projects with the harms they will cause. Thus, it would be arbitrary and capricious for FERC to ignore the SC-CO₂ and the SC-CH₄ in the EIS.

C. FERC's Cumulative Impacts Assessment Must Consider the Reasonably Foreseeable Outcome of Natural Gas Exports.

The direct, cumulative, and foreseeable impacts resulting from the exportation of the transported gas must also be considered. Facts are clear—the Phase 1 Project and the New PennEast Project will be part of a pipeline system that could transport its shale gas to the recently-approved Cove Point LNG export facility, as well as the Marcus Hook Industrial Complex. The Adelpia Pipeline, if built/permitted, will connect with the Marcus Hook Industrial Complex, which Adelpia advertised in its open season materials as a “state-of-the-art terminalling and natural gas liquids storage facility.” Given that natural gas can sell at a significantly higher price overseas as compared to domestically, it is both reasonable and foreseeable that Phase1/Adelpia transported gas will be transported to Marcus Hook for export.

In addition, the New PennEast Project will have an interconnect with Transco's mainline in Mercer County, NJ, a pipeline that intersects with the Pleasant Valley interconnect in Fairfax County Virginia, which in

⁸⁸ 40 C.F.R. § 1502.23 (2019).

⁸⁹ See *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014).

turn could deliver gas to Dominion's Cove Point Pipeline. Given that natural gas can sell at a significantly higher price overseas as compared to domestically, it is both reasonable and foreseeable that PennEast transported gas will be transported to Cove Point for export. Furthermore, it is likely that natural gas that is displaced by the PennEast line will likely be exported as well.

IV. PennEast's Air Quality Analysis Fails to Consider Impacts From the Entire Project, Fails to Account for Acute Emissions Impacts, and Uses Outdated Assumptions in Calculating Emissions.

The New PennEast Project would result in significant emissions of several major categories of air pollutants, including NO_x, VOCs, carbon monoxide, air toxics, and greenhouse gases. These emissions would result from the construction and operation of the new pipeline, the new compressor station, and other above-ground facilities, including the Church Road Facility. These additional emissions would affect residents of areas already burdened by elevated levels of pollution. Focusing in on Northampton County alone, the county is in marginal nonattainment under the 8-hour ozone NAAQS.⁹⁰

But the first problem in PennEast's air quality analysis is that it omits the entirety of "Phase 1" of the project. PennEast writes in its Abbreviated Application that "PennEast is proposing only minor modifications to the Project consisting of the Church Road Facility; with the limited exception of these minor modifications, phasing the Project will not otherwise alter the facilities or locations of facilities authorized in the Certificate Order and as proposed to be modified in the 2019 Amendment Application, which itself separately discusses the environmental impacts related thereto." PennEast makes clear that it plans to serve as the northern stretch of the Adelpia Pipeline Project, which is contemporaneous. Yet it does not include any emissions from Adelpia in its analysis. It has been well-settled for decades that NEPA's ultimate goal is the protection of human health and welfare and the physical environment.⁹¹ FERC must therefore undertake a full and substantive analysis of the potential environmental and health effects of NO_x, VOCs, greenhouse gases and other pollutants—including fugitive emissions—that would be generated if PennEast were to go forward, including Adelpia's emissions.

It is not entirely clear from PennEast's application what equipment will be onsite at the Church Road Facility. There is some description in Section 1.2.2 of Exhibit F-1, and it refers to a site plan in Appendix A, but at least the public version of Appendix A contains no site plan. Therefore, the public is prevented from fully characterizing the emissions of the onsite equipment.

However, from the description, there will be at least: (1) a pig⁹² launcher/receiver; (2) gas meters; (3) flow control valves; (4) heaters; and (5) a gas control/remote terminal unit. The first four of these types of equipment all emit pollution. PennEast characterizes emissions from these sources on an annual/chronic but not an acute basis.⁹³ But chronic and acute risks can both be serious and deserve consideration. Of these types of equipment, the pigging operations and valve equipment carry both chronic and acute risks.

⁹⁰ See EPA, Nonattainment Areas for Criteria Pollutants (Green Book), available at <https://www.epa.gov/green-book> (last visited March 2, 2020).

⁹¹ See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771 (1983) ("All the parties agree that effects on human health are cognizable under NEPA . . ."), 773 ("NEPA states its goals in sweeping terms of human health and welfare . . . [T]hese goals are ends that Congress has chosen to pursue by means of protecting the physical environment.") (original emphasis omitted).

⁹² PennEast uses the term "Pipe Inspection Gauge" and capitalizes "PIG," but the term is actually just from the animal, and the device is not a gauge. See <https://en.wikipedia.org/wiki/Pigging>.

⁹³ See Phase 1 Application, Exhibit F-1 at Section 9.0; Appendix G.

Starting with the pigging operations, pigging refers to the use of cylindrical cleaning and inspection devices inside the pipeline. A pig launcher is where the pig is inserted into the pipe, and a pig receiver is where it is removed. In both instances, the inside of the pipe is opened up. During this process, the product inside the pipe is released. This can result in a large amount of emissions all at once. PennEast has not said how it plans to manage that process, but that can make a big difference to the neighbors at the site--and the Church Road Facility is located in a residential area. The federal Agency for Toxic Substances & Disease Registry has taken an interest in studying pigging facilities over concerns of their “potential immediate short-term exposures” to neighbors, just the types of impacts that PennEast ignores here.⁹⁴ In an instance in Western Pennsylvania, as reported in the *Pittsburgh Post-Gazette*, the difference between one method of pigging and another could have grave implications for neighbors:⁹⁵

The model indicated that if gas from the pig launcher had been vented directly from a high-pressure tank during stable nighttime weather conditions, residents could have been exposed to methane at concentrations that could cause “potential irreversible health effects” when they were downwind.

After the equipment was modified to route gas to a low-pressure pipeline in July 2015, the model found that no meteorological conditions would have put either house in that threat zone.

Sites with valves such as the Church Road Facility are sometimes subject to onsite venting and sometimes flaring. Just last week, for example, a Sunoco valve site in Pennsylvania was the site of both venting and flaring.⁹⁶ Depending on the nature of the venting or flaring, it could involve large quantities of product, such as with a blowdown,⁹⁷ or produce heavy and continuous smoke from a portable flare. Either way, it is harmful to neighbors, and should be examined as part of the impacts from the emissions at the site.

Moving on to the chronic air pollution risks, PennEast provided some discussion and documentation of these risks in the form of construction and operation emissions calculations. PennEast’s construction emissions calculations have errors that need fixing before the project can move ahead.

PennEast writes that “The emission factors for off-road construction equipment and on-road vehicles were developed using the EPA MOVES2014 model for Northampton County and construction in 2019.” That is not entirely accurate. The construction emissions calculations are estimated using a mix of up-to-date and outdated guidance.⁹⁸ On the one hand, PennEast correctly uses the MOVES2014 model for some of its estimation. On the other hand, PennEast uses calculations based on superseded EPA documents EPA-420-R-10-018 and EPA420-P-04-005. The first was superseded in July 2018 by EPA-420-R-18-009. This calls into question

⁹⁴ See Laura Legere, “No venting at night? Agency finds tweaks to pipeline maintenance tools could reduce risks to residents,” *Pittsburgh Post-Gazette*, Sept. 19, 2017, available at <https://www.post-gazette.com/business/powersource/2017/09/19/Pig-launcher-health-study-DEP-Mount-Pleasant-Pennsylvania-Agency-for-Toxic-Substances-natural-gas-emissions/stories/201709150053>

⁹⁵ *Id.*

⁹⁶ See February 25, 2020 letter from Township of Middletown, Delaware County, Pennsylvania to its residents, available at https://middletowndelcopa.gov/vertical/sites/%7BE08CD8FE-6BF2-4104-AF8F-C16770381A63%7D/uploads/02.25.2020_Sunoco_Update_-_overnight_venting_of_12in_pipeline.pdf.

⁹⁷ Federal regulations require that “[e]ach blowdown discharge must be located so the gas can be blown to the atmosphere without hazard.” 49 C.F.R. § 192.179. It is unclear if PennEast has done any such analysis.

⁹⁸ See *Phase 1 Application*, Appendix G-1.

PennEast's SO₂ and CO₂ calculations.⁹⁹ The second was superseded in July 2010 by EPA-420-R-10-016. This calls into question PennEast's calculations of air toxics emissions.¹⁰⁰ Its air toxics calculations also fail to use the July 2018 EPA-420-R-18-011 for emissions factors, instead using emissions factors from EPA's AP-42 Sections 3.3 and 3.4, both dating to 1996.¹⁰¹ AP-42 is explicitly for *stationary* sources. MOVES is the model designed for *mobile* sources.

V. PennEast Has Failed to Establish Public Need for its Phase 1 Project and Thus FERC Must Deny PennEast's January 30, 2020 Request for Amendment

Prior to constructing any natural gas facility, a company such as PennEast must obtain a certificate of public convenience and necessity issued by FERC.¹⁰² According to FERC's own Certificate Policy Statement,¹⁰³ in deciding whether to issue such a certificate:

[T]he Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects discussed below.¹⁰⁴

Those adverse effects include those against "the interests of landowners and surrounding communities."¹⁰⁵ "Traditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project."¹⁰⁶ After completing a thorough EIS with public scrutiny and comment on the Phase 1 Project, FERC will have a comprehensive understanding of the environmental impacts of these projects. The cumulative adverse effects associated with the Phase 1 Project are enormous, as the pipeline will cut through sensitive water bodies causing short term and long term harm to water quality, habitat, steep slopes, and recreation areas, will induce additional fracking activity in the Marcellus Shale region, and result in the emission of GHGs such as carbon and methane. The science and expert reports put on record and referenced in this comment outline some of these irreversible harms.

In balancing these adverse effects against the so-called public benefits of Phase 1, FERC should conclude that the benefit of transmitting 340,000 Dth/d of natural gas to existing pipelines simply cannot outweigh the harm that will be caused by the Phase 1 Project. In its application, PennEast asserts that FERC should "evaluate the public benefits of the stand-alone Phase 1 facilities against any potential adverse consequences of PennEast's proposal to phase construction of the Project, including the construction of the Church Road Interconnects."¹⁰⁷ This calculation both assumes that the New PennEast Project will inevitably be built, and puts a thumb on the scale in favor of finding public need.

⁹⁹ See *Phase 1 Application*, Table G-1.2.

¹⁰⁰ See *Phase 1 Application*, Table G-1.3.

¹⁰¹ See *id.*

¹⁰² 15 U.S.C. § 717f(c).

¹⁰³ Federal Energy Regulatory Comm'n, Docket No. PL99-3-000, Statement of Policy, 88 FERC ¶ 61,227 (Sept. 15, 1999).

¹⁰⁴ *Id.* at 23.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 24.

¹⁰⁷ *Phase 1 Application* at 12.

In order to evaluate the Phase 1 Project accurately, FERC must consider the adverse effects of all construction and operational activity of the Phase 1 Project. This includes the siting of the sixty-eight mile pipeline itself, the induced fracking, the new Church Road Facility, and the GHG emissions during construction and operation. This massive conglomeration of adverse effect simply does not outweigh the benefit of “provid[ing] new incremental capacity to meet market demand, as reflected by PennEast’s agreements with the Phase 1 shippers.”¹⁰⁸

PennEast also cites consumer access to stable, low-cost supplies, the creation of pipeline diversity, an increase in reliability of the natural gas transmission grid by providing a pipeline alternative, and reduction of system constraints and an increase in operational flexibility. These “benefits” could be used to describe every proposed new pipeline, and are not sufficient to overcome the permanent environmental harms that will be caused by the Phase 1 Project. Notably, the only Market Data included in PennEast’s Phase 1 Project Application is PennEast’s precedent agreements with its Phase 1 shippers,¹⁰⁹ despite the fact that FERC’s Certificate Policy Statement says that “the evidence necessary to establish the need for the project will usually include a market study.”¹¹⁰ The need PennEast attempts to demonstrate with its shipper agreements is particularly weak because PennEast apparently has not found a single shipper to sign a precedent agreement for its Phase 1 Project besides the component companies of PennEast itself.¹¹¹

Accordingly, the Phase 1 Project fails to meet the standard for public need because the public benefits of the project do not outweigh its adverse effects. FERC should not issue a certificate of public convenience and necessity to PennEast for the Phase 1 Project.

VI. Both the Phase 1 Project and New PennEast Project are Subject to Delaware River Basin Commission Jurisdiction and Approval.

If FERC in error decides to issue a certificate of public convenience and necessity to PennEast for the Phase 1 Project and New PennEast Project, then it must not do so until PennEast receives the approval of the Delaware River Basin Commission (“DRBC”). In its Phase 1 Application, PennEast states that it “will source water for hydrostatic testing and dust suppression from approved sources (e.g. commercial and municipal suppliers), and no chemicals will be added to hydrostatic test waters. Hydrostatic test water will not be discharged or used for dust suppression; all used hydrostatic test water will be removed from the site and disposed of at approved water treatment facilities.”¹¹² On the same date that PennEast submitted its Phase 1 Application to FERC, it also wrote a letter to the DRBC withdrawing its Water Withdrawal and Discharge (“W&D”) Application due to the new “alternatives for water withdrawals and discharge.”¹¹³

FERC must not issue a certificate without DRBC’s approval of the entire New PennEast Project. As previously discussed, PennEast is attempting to unlawfully segment the New PennEast Project by seeking approval for the construction of the Phase 1 Project from FERC.¹¹⁴ By attempting to withdraw its W&D

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 22, Exhibit I.

¹¹⁰ Statement of Policy at 25.

¹¹¹ See Answer of PennEast Pipeline Company, LLC, FERC Docket No. CP20-47-000 (Feb. 26, 2020)

¹¹² *Phase 1 Application*, Exhibit F-I at 14.

¹¹³ Letter from Jeffrey D. England, Project Manager, PennEast Pipeline Company, LLC to Steven J. Tambini, Executive Director, Delaware River Basin Commission (Jan. 30, 2020).

¹¹⁴ See Section II, *supra*.

Application from DRBC, PennEast hopes to evade review of a major pipeline project that would ultimately cross dozens of streams and wetlands in Pennsylvania and New Jersey, and the Delaware River itself. Even if FERC allows PennEast to take its desired piecemeal approach, the Phase 1 Project in Pennsylvania alone is subject to DRBC jurisdiction as a “project having a substantial effect on the water resources of the basin.”¹¹⁵

Section 3.8 of the Delaware River Basin Compact provides:

No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. The commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan. The commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section.¹¹⁶

The DRBC Rules of Practice and Procedure (“RPP”) classifies projects for review under Section 3.8 of the Compact into two categories, those deemed not to have a substantial effect on the water resources of the Basin and therefore not required to be submitted for DRBC review, and those deemed to have substantial effects on water resources of the Basin and therefore required to be submitted for Commission review.¹¹⁷

With respect to natural gas pipeline projects, the RPP categorizes them as projects that *presumptively* do not have a substantial effect on the water resources of the Watershed and that therefore do not automatically require DRBC review. But then Section 2.3.5(A) says that:

Except as the Executive Director may specifically direct by notice to the project owner or sponsor, or as a state or federal agency may refer under paragraph C., ... a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the Basin and is not required to be submitted under Section 3.8 of the Compact:

....

12. Electric transmission or bulk power system lines and appurtenances; major trunk communication lines and appurtenances; **natural and manufactured gas transmission lines and appurtenances**; major water transmission lines and appurtenances; unless they would pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive

¹¹⁵ DELAWARE RIVER BASIN COMPACT, § 3.8 (1961)

¹¹⁶ *Id.*

¹¹⁷ See DELAWARE RIVER BASIN COMMISSION, RULES OF PRACTICE AND PROCEDURE, Article 3, § 2.3.5 (July 1, 2019).

Plan; **unless such lines would involve significant disturbance of ground cover affecting water resources[.]**¹¹⁸

A clear and straightforward reading of the DRBC Compact and Rules of Practice and Procedure clearly contain four exceptions to the exemption that, if the stated conditions are met, trigger DRBC review for natural gas transmission lines and appurtenances:

- 1) if the Executive Director of the Commission specifically directs;
- 2) if any state or federal agency refers a project under paragraph C.;
- 3) if the project in question crosses an existing or proposed reservoir or recreation area that has been incorporated into the Comprehensive Plan; or
- 4) if the project involves a significant disturbance of ground cover affecting water resources.

The New PennEast Project, including the Phase 1 Project in Pennsylvania standing alone, will involve significant disturbance of ground cover affecting water resources of the basin and clearly requires a docket from the DRBC before it can be allowed to proceed with any level of construction, including tree felling. The Phase 1 Project in Pennsylvania includes over sixty-eight (68) miles of pipeline right of way, the vast majority of which will be located within the Delaware River watershed basin. Dozens of waterways will be cut in Luzerne, Carbon, and Northampton Counties and these waterways will suffer temporary and permanent harm. There will be temporary and permanent impacts to wetlands, floodways, and upland habitats that will inflict direct, indirect, irreparable and enduring harm on the water resources of the basin. In addition, the project is still proposed to pass through Comprehensive Plan areas such as Beltzville State Park, Beltzville Reservoir, F.E. Walter Reservoir, Hickory Run State Park and Weiser State Forest which clearly triggers DRBC review.

Because of this significant disturbance of ground cover and the crossing of multiple reservoirs and recreation areas within DRBC's Comprehensive Plan, FERC cannot issue a certificate for the Phase 1 Project or New PennEast Project without the approval of DRBC.

VII. Conclusion

In processing PennEast's Phase 1 Application, FERC must recognize the wolf in sheep's clothing—PennEast is proposing an entirely different multi-phase pipeline project that will have a much greater environmental impact on the region than the previously-certificated PennEast Project. Analysis of the Church Road Facility alone, as FERC currently proposes, would be a glaringly obvious segmentation of a much larger project. In analyzing the entirety of PennEast's proposed project, FERC must focus on the climate impacts of its approval, including the induced fracking it would cause as well as the emissions of GHGs associated with consumption of natural gas, and the social costs associated with those emissions. In analyzing the air pollution emissions associated with the projects, FERC must not narrowly focus on the Church Road Facility but look at the project as a whole. FERC should also determine acute emissions impacts, and require that PennEast use the latest science to document the projects' air impacts.

¹¹⁸ *Id.* at § 2.3.5(A)(12).

FERC must also scrutinize PennEast's assertion of public benefit when analyzing whether the Phase 1 Project and New PennEast Project are deserving of a certificate of public convenience and necessity, ultimately concluding that the asserted public benefits are in fact hollow and that the environmental effects are staggering. Thus, PennEast has not shown that it deserves a certificate of public convenience and necessity and this scheme by PennEast should be rejected by FERC. Should FERC issue a certificate, however, that certificate cannot be issued prior to the approval of the DRBC, as the proposed projects will have a substantial effect on the water resources of the Delaware River basin.

Maya K. van Rossum

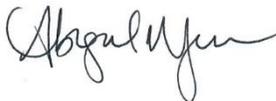


the Delaware Riverkeeper
Delaware Riverkeeper Network



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