

170 FERC ¶ 61,198
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

PennEast Pipeline Company, LLC

Docket No. CP19-78-000

ORDER AMENDING CERTIFICATE

(Issued March 19, 2020)

1. On February 1, 2019, PennEast Pipeline Company, LLC (PennEast) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations² requesting authorization to amend its certificate granted in Docket No. CP15-558-000,³ which authorized the construction and operation of the PennEast Pipeline Project (PennEast Project). PennEast proposes several route realignments and workspace modifications to address landowner requests and constructability concerns. As discussed below, we grant the requested authorization, subject to certain conditions.

I. Background and Proposal

2. PennEast⁴ is a Delaware limited liability company, managed by UGI Energy Services, LLC, pursuant to a Project Management Agreement. Upon commencement of

¹ 15 U.S.C. § 717f(c) (2018).

² 18 C.F.R. pt 157 (2019).

³ *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (2018) (Certificate Order); *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Rehearing Order).

⁴ PennEast is a joint venture owned by Red Oak Enterprise Holdings, Inc., a subsidiary of AGL Resources Inc. (20 percent interest); NJR Pipeline Company, a subsidiary of New Jersey Resources (20 percent interest); SJI Midstream, LLC, a subsidiary of South Jersey Industries (20 percent interest); UGI PennEast, LLC, a subsidiary of UGI Energy Services, LLC (20 percent interest); and Spectra Energy Partners, LP, a subsidiary of Enbridge Inc. (20 percent interest).

operations authorized in the Certificate Order, PennEast will become a natural gas company within the meaning of section 2(6) of the NGA,⁵ subject to the Commission's jurisdiction.

3. The Certificate Order authorized PennEast to construct and operate the PennEast Project, which comprises a 116-mile-long, 36-inch-diameter mainline pipeline; three lateral pipelines (the Hellertown, Gilbert, and Lambertville laterals); one compressor station; and various associated facilities. The PennEast Project is designed to provide up to 1,107,000 dekatherms per day of firm natural gas transportation service from receipt points in the eastern Marcellus Shale region to delivery points in New Jersey and Pennsylvania, terminating at a delivery point with Transcontinental Gas Pipe Line Company, LLC's interstate pipeline system in Mercer County, New Jersey.⁶

4. In its amendment application, PennEast proposes certain pipeline realignments and workspace changes on certain sections of PennEast's mainline in Luzerne, Carbon, Monroe, and Northampton Counties, Pennsylvania (Amendment Project). PennEast states that the modifications respond to landowner concerns or requests, or address constructability concerns.

A. Saylor Avenue Realignment

5. The Saylor Avenue Realignment, located in Plains Township, Luzerne County, Pennsylvania, would adjust the proposed centerline and workspace between milepost (MP) 8.5R3 and MP 8.9R3 in order to address construction feasibility, and would include approximately 4.7 acres of new workspace. PennEast states that the previous workspace was located in an area with old coal slag and within a depression that would make pipeline construction difficult. The change also addresses mineral loss impacts, avoids monitoring wells, addresses issues with quarry asphalt operations, and minimizes impacts to a housing development. Compared to the certificated route, the Saylor Avenue Realignment would result in an approximately 1.1 acre decrease in workspace.

⁵ 15 U.S.C. § 717a(6) (2018).

⁶ On January 30, 2020, PennEast filed an application to amend its certificate to construct the PennEast Project in two phases; Phase one would include project facilities from the pipeline's origin in Luzerne County, Pennsylvania, through milepost (MP) 68 in Northampton County, Pennsylvania; Phase two would include project facilities from MP 68 to the project's terminus in Mercer County, New Jersey. *See* PennEast's January 30, 2020 Amendment Application in Docket No. CP20-47-000. PennEast's phasing amendment is pending before the Commission.

B. Interstate 81 Workspace Adjustment

6. The Interstate 81 Workspace Adjustment, located in Plains Township, Luzerne County, Pennsylvania, would relocate approximately 2.8 acres of workspace between MP 10.0R2 and MP 10.4R2 to accommodate a shortened horizontal directional drill (HDD). PennEast states that an additional geotechnical investigation indicated historical mines exist in the area and determined that using a shallower HDD design would reduce the risk of encountering mining voids. PennEast proposes to relocate the HDD drill pad to account for the shortened HDD drill. In addition, PennEast proposes to add temporary workspace for staging and pipe pullback near State Route 315/Interstate 81 and a temporary access road following an existing transmission line right-of-way (ROW), for a total increase of approximately 1.7 acres of workspace compared to the certificated route.

C. Appalachian Trail Crossing Realignment

7. In response to requests from the Bethlehem Water Authority, the National Park Service (Park Service), and the Pennsylvania Game Commission (Game Commission), PennEast proposes an approximately 5.5-mile realignment of the project's mainline from MP 48.6R2 to MP 53.6R3, in order to cross the Appalachian Trail at a different location, and to make corresponding changes to related aboveground facilities as a result of the realignment (the Appalachian Trail Crossing Realignment). The Appalachian Trail Crossing Realignment, located in Carbon, Monroe, and Northampton Counties, Pennsylvania, would be co-located with a utility ROW for a high voltage power line, thus reducing the visual impacts to the Appalachian Trail, reducing the overall project length, and decreasing, by 17.8 acres, the amount of workspace required compared to the certificated route. The Game Commission, Park Service, and Appalachian Trail Conservancy (Conservancy) have approved this proposed crossing location. The Appalachian Trail Crossing Realignment would also relocate the Blue Mountain Interconnect from MP 50.9R2 to MP 49.7R3 and add approximately 0.5 miles of 4-inch-diameter pipeline (the Blue Mountain Lateral) to connect the Blue Mountain Interconnect to the realigned mainline.

D. Freemansburg Avenue Realignment

8. The Freemansburg Avenue Realignment would include a 0.59-mile pipeline realignment and workspace decrease between MP 69.7R3 and MP 70.8R3 in Northampton County, Pennsylvania, deemed preferable due to the results of a geotechnical investigation and observation of karst features. PennEast states that karst features can result in an increased risk of loss of HDD drilling fluids, inadvertent returns, misalignment of the drill path, and potential stuck tooling and/or pipeline during pullback. PennEast further states that the Freemansburg Avenue Realignment is also in response to a landowner request, which would require new work space, adjustments to the Lehigh River HDD crossing, and changes to proposed access roads. The Freemansburg Avenue Realignment would require approximately 17.8 acres of new

workspace but result in a decrease of approximately 50 acres of workspace compared to the certificated route.

II. Notice, Interventions, Protests, and Comments

9. Notice of PennEast's application was published in the *Federal Register* on February 25, 2019,⁷ with interventions, protests, and comments due March 8, 2019. Timely, unopposed motions to intervene are granted by Rule 214 of the Commission's Rules of Practice and Procedure.⁸ Numerous individuals and entities filed comments concerning environmental issues. These comments are addressed in the Environmental Assessment and below.

III. Discussion

A. Certificate Policy Statement

10. The Commission's Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.⁹ The Certificate Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explained that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

11. Under this policy, the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new facilities. If residual adverse effects on these interest groups are identified after efforts

⁷ 84 Fed. Reg. 6000.

⁸ 18 C.F.R. § 385.214(c) (2019).

⁹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

12. In the Certificate Order, the Commission applied the Certificate Policy Statement and ultimately found that the PennEast Project was required by the public convenience and necessity.¹⁰ Because PennEast had no existing customers, there was no potential for subsidization by, or adverse effects on existing customers as a result of the project.¹¹ The Commission further found that the PennEast took “appropriate steps to minimize impacts on landowners and the surrounding communities.”¹² The route realignments and workspace modifications proposed here would further reduce impacts to landowners and surrounding communities.

13. Accordingly, we find that the proposed Amendment Project does not alter the Commission’s previous finding that the Penn East Project’s benefits will outweigh any adverse economic effects on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities. Therefore, we conclude that the proposal is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the proposal below.¹³

B. Environmental Analysis

14. On March 15, 2019, the Commission issued a Notice of Intent to Prepare an Environmental Assessment for the Proposed PennEast Pipeline Project Amendment and Request for Comments on Environmental Issues (NOI). The NOI was published in the

¹⁰ In comments on the EA, Ms. Tara Zrinski contends that the PennEast Project is not in the public convenience and necessity because the natural gas that will be transported by the project will be exported. As discussed in the Certificate Order, there is no evidence that the project’s capacity will be used for export, and, in the event some of the gas was to be used for export, the Commission does not have jurisdiction over the export of natural gas. *See* Certificate Order, 162 FERC ¶ 61,053 at P 35.

¹¹ *Id.* P 18.

¹² *Id.* PP 38-39.

¹³ *See* Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

Federal Register on March 22, 2019¹⁴ and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners. We received comments in response to the NOI from federal and state agencies, the public, and other interested parties, including: the Park Service, the Pennsylvania Department of Conservation and Natural Resources, the Delaware Nation Historic Preservation Department, Delaware Riverkeeper Network (Riverkeeper), Frenchtown Environmental Commission, Northampton County Farmland Preservation, Williams Township Board of Supervisors, and Appalachian Mountain Club.

15. Issues raised during the scoping process included the same wide range of concerns that were raised during scoping for the PennEast Project in Docket No. CP15-558-000, and subsequently evaluated in the Environmental Impact Statement (EIS) and orders for that project.¹⁵ Major concerns related to the Amendment Project included impacts on water quality, surface water, and wetlands; evaluation of alternatives; and safety concerns associated with the proposed Freemansburg Avenue Realignment.

16. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), Commission staff prepared an Environmental Assessment (EA) for PennEast's proposal. The EA was prepared with the cooperation of the U.S. Army Corps of Engineers (Corps), U.S. Environmental Protection Agency (EPA), and U.S. Department of Agriculture – Natural Resources Conservation Service. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, cumulative impacts, and alternatives. All substantive comments received in response to the NOI were addressed in the EA.

17. The EA was issued for a 30-day comment period and placed into the public record on September 20, 2019. In response to the EA, we received numerous comments primarily addressing issues related to our prior approval of the PennEast Project, which are outside the scope of this proceeding.¹⁶ We also received comments on the EA from

¹⁴ 84 Fed. Reg. 10,811.

¹⁵ Certificate Order, 162 FERC ¶ 61,053; Rehearing Order, 164 FERC ¶ 61,098.

¹⁶ We also received comments related to PennEast's request for an extension of time to complete construction and place the facilities into service. Comments related to that request will be addressed in the proceeding on that matter.

two individuals (Sondra Wolferman and Tara Zrinski¹⁷), the EPA, and Riverkeeper, raising environmental and procedural concerns associated with the Amendment Project. In addition, PennEast filed responses to the comments on the EA.

1. Procedural Comments

a. Segmentation

18. Commenters contend that the EA segments the impacts of the Amendment Project from the larger PennEast Project and assert that the environmental impacts of the Amendment Project, when combined with the overall PennEast Project, mandate that Commission staff prepare an EIS to review the impacts of the Amendment Project.¹⁸

19. Assertions that we segmented our environmental review by looking solely at the Amendment Project, which is the subject of this proceeding, and not reexamining the impacts of the PennEast Project are misplaced. An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.¹⁹ The EIS for the PennEast Project fully analyzed the environmental impacts of the PennEast pipeline as originally proposed. The Amendment Project is a proposed modification of PennEast’s certificated route in order to reduce environmental impacts. Therefore, the concerns central to a segmented NEPA review, namely the dividing of one project into several in order to reduce a project’s stated environmental impacts, are not present in this proceeding. It was appropriate for Commission staff to limit its analysis here to only those aspects that were changed by the Amendment Project.

20. Regarding Riverkeeper’s assertion that Commission staff should have prepared an EIS as opposed to an EA, NEPA dictates that agencies must prepare an EIS for major federal actions that may significantly impact the environment.²⁰ However, if an agency determines that a federal action is not likely to have significant adverse effects, it may

¹⁷ Ms. Zrinski filed two separate comments on October 20, 2019. Hereinafter, Ms. Zrinski’s first-filed comment (accession no. 20191021-5001) is referred to as Tara Zrinski EA Comment 1, and Ms. Zrinski’s second-filed comment (accession no. 20191021-5002) is referred to as Tara Zrinski EA Comment 2.

¹⁸ Tara Zrinski EA Comment 1, at 1; Riverkeeper’s October 21, 2019 EA Comments at 3-5 (Riverkeeper EA Comments).

¹⁹ *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

²⁰ *See* 42 U.S.C. § 4332(2)(c) (2018); 40 C.F.R. § 1502.4 (2019).

rely on an EA for compliance with NEPA. Here, Commission staff prepared an EA to determine whether the Amendment Project would have a significant impact on the human environment, which would then require the preparation of an EIS. The EA assesses effects the Amendment Project could have on a variety of resources and determines that its construction would not constitute a major federal action significantly affecting the quality of the human environment.²¹ Accordingly, an EIS is not required.

b. Insufficient Comment Period and Request for Public Comment Sessions

21. Riverkeeper states that the 30-day comment period for the EA is insufficient to allow parties to “meaningfully review and comment” on the proposal, particularly in light of the concurrent comment period for PennEast’s Petition for Declaratory Order in Docket No. RP20-41-000. Riverkeeper therefore requests that the comment period for the EA be extended to 90 days.²² Riverkeeper also asserts that the Commission should have held public comment sessions to further enable impacted communities and landowners to comment on the Amendment Project.²³

22. The 30-day comment period established for this EA is the standard period of time provided to comment on EAs for natural gas projects and provides a reasonable amount of time for the public to review and comment on a project of this scope. Further, we are here addressing all comments received on the EA during the 30-day comment period, as well as any additional comments within the scope of this proceeding filed since the end of the comment period. Moreover, no commenter alleges they were denied an opportunity to comment on the EA. Therefore, extending the comment period for the EA and holding public comment sessions are not warranted.

c. Response to Public Comments

23. Riverkeeper comments that the EA fails to respond to the majority of public comments filed in Docket No. CP19-78-000.²⁴ Riverkeeper states that the EA should include a response to comments section and asserts that Table A.5-1, “Issues Identified During the Scoping Period” provides an insufficient response to comments. Riverkeeper

²¹ See EA at 145.

²² Riverkeeper EA Comments at 5-7.

²³ *Id.* at 5.

²⁴ *Id.* at 6-7.

further contends that Commission staff only considered comments from Pennsylvania landowners, ignoring “over 2/3 of the comments on the record.”²⁵

24. As an initial matter, NEPA does not require that an EA include a response to comments section.²⁶ Commission staff provided Table A.5-1 as a means of identifying the substantive issues raised in response to PennEast’s proposed Amendment Project; Table A.5-1 is not meant to be an exhaustive accounting of Commission staff’s response to comments. The EA appropriately limits the scope of its analysis to the four pipeline modifications, all of which are located in Pennsylvania, and does not address comments seeking to rehash issues previously addressed in the PennEast Project proceeding in Docket No. CP15-558-000.²⁷ Thus, all comments regarding PennEast’s proposed Amendment Project are considered in the EA and that consideration was not limited to comments filed by individuals located in certain states.

d. Conditional Certificates

25. Ms. Zrinski takes issue with the Commission’s practice of issuing conditional certificates, and asserts that the Commission should not be able to approve “any portion [of the PennEast Project] in Pennsylvania... conditionally or otherwise” because of the New Jersey Department of Environmental Protection’s (New Jersey DEP) denial of PennEast’s application for a water quality certification pursuant to section 401 of the Clean Water Act (CWA),²⁸ as well as the Court of Appeals for the Third Circuit’s (Third Circuit) holding²⁹ that PennEast may not sue the State of New Jersey in federal court to obtain land via eminent domain.³⁰

²⁵ *Id.* at 7.

²⁶ 40 C.F.R. § 1503.4(a)(5) (2019).

²⁷ *Id.* (stating that an agency may respond to comments by explaining “why the comments do not warrant further agency response, citing the... reasons which support the agency’s position... .”)

²⁸ 13 U.S.C. § 1341(a)(1) (2018).

²⁹ *In re: PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019).

³⁰ Tara Zrinski EA Comment 1 at 1.

26. The Commission's practice of issuing conditioned certificates has consistently been affirmed by courts as lawful.³¹ The conditioned certificate prevents a pipeline company from commencing construction "unless and until there is a favorable outcome on all outstanding requests for necessary federal and state approvals."³² Thus, PennEast will need to satisfy the conditions of the Certificate Order, as well as this order, prior to any construction authorization. In addition, neither the New Jersey DEP's denial of PennEast's application for water quality certification for the portion of the PennEast Project in New Jersey, nor the Third Circuit's holding in *In re: PennEast* dealt with the validity of the Certificate Order. Thus, Ms. Zrinski's assertion that it is inappropriate for the Commission to consider PennEast's amendment application in this proceeding is without merit.

e. **EA Formatting**

27. The EPA comments that the EA should provide access (via a link or specific page numbers) to any "referenced documents" including "agency procedures, project plans, or EA study appendices."³³ The "referenced documents" are all contained in either PennEast's application for the Amendment Project or PennEast's responses to Commission staff's data requests, and are readily accessible and publicly available in the Commission's public record for this proceeding via eLibrary, under Docket Number

³¹ See *Appalachian Voices v. Fed. Energy Regulatory Comm'n*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished opinion) (citing 15 U.S.C. § 717f(e), court rejected petitioners argument that FERC violated the Natural Gas Act by issuing the certificate subject to conditions precedent); *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017) (upholding the Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the CWA); see also *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1320-1321 (D.C. Cir. 2015) (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state); *Del. Dep't. of Nat. Res. & Env'tl. Control v. FERC*, 558 F.3d 575, 578-579 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from the Commission's conditional approval of a liquefied natural gas terminal construction despite statutes requiring states' prior approval because the Commission conditioned its approval of construction on the states' prior approval); *Pub. Utils. Comm'n. of State of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding the Commission had not violated NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

³² Rehearing Order, 164 FERC ¶ 61,098 at P 31.

³³ EPA's October 21, 2019 EA Comments at 2 (EPA EA Comments).

CP19-78-000. As these documents are available to the public, EPA's requested modifications to the EA are unnecessary.

28. The EPA also notes that pages 128 through 131 of the EA, which may include section B.10.3.7, are missing from the version available for public review.³⁴ These page numbers were not included in the EA due to a numbering error. No information is missing from the EA available for public review and there is no section B.10.3.7.

2. Geology

29. Riverkeeper asserts that because geotechnical surveys of potential karst areas are incomplete, it is inappropriate for the Commission to make determinations regarding the safety of PennEast's proposed use of HDD in potential karst areas.³⁵ Riverkeeper also states that it is unacceptable for the Commission to permit construction of the Amendment Project across areas classified as high susceptibility to landslides. In addition, Ms. Zrinski expresses concern regarding the construction of the Freemansburg Avenue Realignment in an area of confirmed karst geology, which is also in the vicinity of a school, shopping center, and other buildings, and states that this may pose construction challenges as well as the pipeline's integrity being at risk from future sinkholes.³⁶

30. It is standard practice for an EA to be completed prior to finalization of all construction and mitigation plans. As stated in the EA, PennEast continues to update its Karst Mitigation Plan as additional surveying is completed and karst areas are identified and mapped, and will make modifications to its construction plan and Karst Mitigation Plan as necessary.³⁷ For example, as geophysical surveys revealed the presence of karst features along the Freemansburg Avenue Realignment, PennEast made the decision to switch from HDD to open-trench cutting, as these karst features "elevate the risk of an inadvertent return and HDD failure."³⁸ In addition, Environmental Condition 16 of the Certificate Order requires PennEast to file, for written approval, its final Karst Mitigation

³⁴ *Id.*

³⁵ Riverkeeper EA Comments at 19-22.

³⁶ Tara Zrinski EA Comment 2 at 2.

³⁷ EA at 19.

³⁸ *Id.*

Plan before PennEast may commence construction.³⁹ Last, Environmental Condition 2 of this order allows the Director of the Office of Energy Projects (OEP) to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including the imposition of any additional measures necessary to avoid or mitigate adverse environmental impact resulting from project construction and operation. Therefore, we are satisfied that the EA appropriately addresses potential geotechnical hazards associated with the Amendment Project.

3. Water Quality

31. Riverkeeper states that the EA fails to account for numerous impacts on water quality, including (1) impacts from sediment pollution on streams and from potential inadvertent returns from HDD; (2) construction impacts on trout and trout streams; (3) construction impacts on special protection streams; (4) groundwater impacts, including impacts on groundwater seeps; (5) impacts on aquatic communities as a result of surface water crossings by the pipeline; and (6) impacts from open cut stream crossings.⁴⁰

32. The EA fully acknowledges and evaluates the Amendment Project's potential water quality impacts and discusses the Commission's required and PennEast's proposed measures to avoid or reduce these impacts. The EA states that HDD or bore crossing technology is not expected to increase sedimentation in streams, but recognizes that "breakthrough of HDD drilling muds" into streams could temporarily increase total suspended solids.⁴¹ These impacts would be adequately minimized through the application of PennEast's Erosion & Sedimentation Control Plan; Spill Prevention, Containment, and Countermeasures Plan; HDD Inadvertent Returns and Contingency Plan; and best management practices for HDD construction.⁴² Further, as noted in the EA, PennEast's HDD Inadvertent Returns and Contingency Plan was developed to minimize the potential for inadvertent returns by applying measures such as timely

³⁹ Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 16. We note that although the Amendment Project modifies the route for the PennEast Project, all Environmental Conditions in the Certificate Order apply to the Amendment Project.

⁴⁰ Riverkeeper EA Comments at 10-17.

⁴¹ EA at 39.

⁴² *Id.*

detection of inadvertent returns, ensuring an organized, minimally impactful response to inadvertent returns, and prompt notification to project personnel of inadvertent returns.⁴³

33. The EA also states that as trenching for the Amendment Project would only be approximately 7-10 feet deep, construction of the Amendment Project would not impact deeper bedrock aquifers or impact recharge patterns for bedrock aquifers.⁴⁴ Regarding impacts to aquatic communities, while construction of the Amendment Project could result in several impacts, including but not limited to increased sedimentation and restricted fish passage, such impacts would be temporary, and limited to the period of construction of the Amendment Project.⁴⁵ In addition, the EA notes that PennEast would be required to comply with all state and federal waterbody crossing windows to minimize impacts on fisheries resources, and restore streambeds and riparian vegetation.⁴⁶

34. The EA fully considers impacts to trout, trout waters, and other high quality streams, including Pennsylvania Code defined “high equality/exceptional value” waters (cold water fisheries supporting or maintaining naturally reproducing trout populations, or providing suitable trout habitat), as well as Pennsylvania Fish and Boat Commission “approved trout waters” (waters stocked with trout), “wild trout waters” (including both wild, Class A wild, and wilderness trout streams), and warm water/cold water fisheries.⁴⁷ While Commission staff found that the Commission’s *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures) would adequately protect such waters, the EA notes that PennEast proposed additional, “special construction procedures” to further minimize impacts, including dry-crossing and trenchless crossing of streams, and efforts to minimize impacts resulting from alternative temporary work space.⁴⁸ Open trench stream crossings would be used when encountering minor (less than 10 feet wide) “waterbodies with no discernible flow at the time of construction” as well as intermediate (between 10 and 100 feet wide) waterbodies.⁴⁹ To further limit impacts from open trench stream crossings, PennEast would complete minor conventional waterbody crossings within 24 hours, and intermediate conventional

⁴³ *Id.*

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 57.

⁴⁶ *Id.* at 58-59.

⁴⁷ *Id.* at 33.

⁴⁸ *Id.*

⁴⁹ *Id.* at 11.

crossings within 48 hours, and would comply with all applicable mitigation measures contained in the Commission's *Erosion Control, Revegetation & Maintenance Plan* (Plan) and Procedures.⁵⁰

35. Based on the foregoing, we find the EA adequately considered the potential impact of the Amendment Project on sediment pollution in streams, trout and trout waters, high quality streams, ground water, aquatic communities, and open cut stream crossings. The EA concludes that following construction of the Amendment Project and the restoration of waterbodies and the adjacent construction workspace, in accordance with the construction, restoration, and mitigation measures described in the EA, minimal long-term effects on surface water and water quality are anticipated.⁵¹ We agree with this conclusion.

4. Stream Crossings

36. The EPA comments that the EA's discussion of stream crossings is unclear as to whether there would be both pre- and post-construction surveys to ensure that impacts on aquatic resources would be short-term, as stated in the EA.⁵² EPA references the cumulative impacts analysis, which primarily discusses the potential impacts on resources associated with the Amendment Project when combined with past, present, and reasonably foreseeable future projects in the vicinity of the Amendment Project.⁵³ Commission staff provides a more detailed discussion of aquatic resource impacts associated with the Amendment Project in sections B.3.2 (Water Resources) and B.4.2.3 (Aquatic Resources) of the EA. As stated in EA, "because the pipeline would be buried beneath the bed of the waterbodies, erosion controls would be implemented during construction, and streambanks and streambed contours would be restored as close as possible to preconstruction conditions," no long-term impacts to water uses are anticipated.⁵⁴ Based on Commission staff's analysis in the EA, and PennEast's compliance with the measures in the Commission's Procedures, we agree with Commission staff's conclusion that impacts to aquatic resources would be short-term, and find that no additional post-construction surveys are required for aquatic resources.

⁵⁰ *Id.*

⁵¹ *Id.* at 40.

⁵² EPA EA Comments at 2.

⁵³ EA at 115.

⁵⁴ *Id.* at 40.

5. Wetlands

37. Riverkeeper states that the EA fails to assess impacts on “exceptional value” wetlands, as defined by Pennsylvania Department of Environmental Protection (Pennsylvania DEP) regulations.⁵⁵ Specifically, Riverkeeper alleges that: (1) the EA fails to acknowledge that construction of the Amendment Project would likely violate Pennsylvania DEP’s regulations, as the project is not “water dependent”; (2) the EA wrongly did not identify bog turtle-occupied wetlands along the Appalachian Trail Crossing Realignment as exceptional value wetlands (as required by Pennsylvania DEP regulations); and (3) PennEast’s proposed wetland mitigation plan would not adequately restore wetland losses, in particular at forested, scrub-shrub, and exceptional value designated wetlands.⁵⁶

38. Regarding Riverkeeper’s assertion that construction of the Appalachian Trail Crossing Realignment would violate Pennsylvania DEP regulations, we note that Pennsylvania DEP has already issued PennEast a water quality certification for the project, and the EA states that a revised water quality certification would not be required for the Amendment Project.⁵⁷ In addition, as wetland mitigation design progresses, further coordination with the Corps, Pennsylvania DEP, and Pennsylvania DEP Mitigation Unit will be required to incorporate site-specific design features and/or modifications, as applicable.⁵⁸ In the event any exceptional value wetlands are identified by PennEast or the Pennsylvania DEP, PennEast would be required to comply with any mitigation measures Pennsylvania DEP deems necessary. Further, the Corps or Pennsylvania DEP may require field verifications of wetland delineations as part of their respective review of applicable wetland permitting,⁵⁹ and the Corps and Pennsylvania DEP would also likely evaluate proposed wetland mitigation as part of the separate Clean Water Act section 404 permitting processes.

39. Regarding Riverkeeper’s assertion that PennEast’s proposed mitigation measures would be inadequate, the EA states that after construction, PennEast would revegetate scrub-shrub and forested wetlands by planting and/or seeding with appropriate plants to regenerate the wetland to the type present prior to construction, and would monitor the progress of regeneration annually until regeneration is successful, per PennEast’s

⁵⁵ Riverkeeper EA Comments at 22-29.

⁵⁶ *Id.*

⁵⁷ EA at 41.

⁵⁸ *Id.* at 46.

⁵⁹ *Id.*

applicable state and federal permits.⁶⁰ In addition, PennEast has committed to providing off-site compensatory mitigation at a value equivalent to the wetlands lost as a result of the construction and operation of the Amendment Project.⁶¹ Further, Environmental Condition 32 of the Certificate Order requires PennEast to file a final Wetland Restoration Plan developed in consultation with the Corps and Pennsylvania DEP.⁶² Therefore, we find Commission staff appropriately considered the Amendment Project's wetland impacts and mitigation measures, and agree with staff's conclusion that impacts to wetlands would be minor.

6. Groundwater

40. Ms. Zrinski contends that while the EA states that the Amendment Project would not significantly impact groundwater during construction, it does not address potential impacts on groundwater during operation.⁶³ The EA addresses both construction and operation impacts on groundwater, specifically concluding that “no long-term or significant impacts on groundwater are anticipated from construction *and operation* of the Amendment Project” as PennEast would “restore natural ground contours, and revegetate the right-of-way” and implement its Erosion & Sediment Control Plan.⁶⁴ Additionally, PennEast has prepared a draft Well Monitoring Plan to outline the specific monitoring and mitigation measures that would be implemented to protect any identified groundwater sources, and has stated that it will perform monitoring for well yield and water quality before and after construction.⁶⁵ Environmental Condition 23 of the Certificate Order requires PennEast to submit a final Well Monitoring Plan. Accordingly, we agree with the EA's conclusion that construction and operation of the Amendment Project will not result in significant impacts on groundwater.⁶⁶

⁶⁰ *Id.* at 45.

⁶¹ *Id.* at 45-46.

⁶² Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 32.

⁶³ Tara Zrinski EA Comment 2 at 1.

⁶⁴ *Id.* at 29 (emphasis added).

⁶⁵ *Id.* at 28.

⁶⁶ *Id.* at 29.

41. Ms. Zrinski also states that the EA is unclear as to how the Appalachian Trail Crossing Realignment would address concerns of the Bethlehem Water Authority and the Game Commission.⁶⁷ As described in the final EIS for the Certificate Order, the Bethlehem Water Authority expressed concern about the original certificated PennEast Project route twice crossing a Bethlehem Water Authority water tunnel.⁶⁸ In the Amendment Project EA, Commission staff explained that the proposed Amendment Project would increase separation from the existing Bethlehem Water Authority infrastructure and avoid two crossings of a Bethlehem Water Authority water tunnel.⁶⁹ Further, as discussed in Appendix B of the EA, the Appalachian Trail Crossing Realignment is in keeping with a land exchange between the Park Service and Game Commission, which seeks to “encourage responsible future energy corridor development” in the area by collocating pipelines in existing right-of-way.⁷⁰ The Appalachian Trail Crossing Realignment would further these objectives by collocating the proposed project within an existing 100-foot-wide power line right-of-way, reducing impacts to forests and visual resources.⁷¹ Thus, we find that the EA adequately addresses these concerns.

7. **National Pollutant Discharge Elimination System (NPDES) Permit Requirement**

42. Riverkeeper comments that PennEast should be required to obtain an NPDES permit for construction of the project.⁷² Whether PennEast must obtain an NPDES permit is a decision left to the EPA, or the applicable state resource agency tasked with administering an EPA-approved NPDES permit program.⁷³ While an NPDES permit is not among the federal or state permits identified by PennEast as being necessary for the Amendment Project, and was subsequently not included in table A.10-1 in the EA, the EA states that PennEast is responsible for obtaining all necessary permits, licenses, and

⁶⁷ Tara Zrinski EA Comment 2 at 1.

⁶⁸ See final EIS for the PennEast Project at 4-173 in Docket No. CP15-558-000.

⁶⁹ EA at 7, 140.

⁷⁰ *Id.* at Appendix B, p. 1.

⁷¹ *Id.*

⁷² Riverkeeper EA Comments at 53.

⁷³ 33 U.S.C. § 1342 (2018).

approvals required for the Amendment Project, regardless of whether they are listed in table A.10-1.⁷⁴

8. Wild and Scenic Rivers

43. Riverkeeper comments that while the project will not cross a portion of the Delaware River that is designated Wild and Scenic, PennEast must comply with the “guidance, goals and vision” of the management plan for the Wild and Scenic Lower Delaware River.⁷⁵ As noted in the EA, the Amendment Project does not cross any Wild and Scenic Rivers, or the Delaware River.⁷⁶ Therefore, compliance with the management plan is not required.

9. Vegetation, Wildlife, and Forests

44. Riverkeeper states that the EA fails to adequately assess the long-term land, vegetation, and habitat transformation impacts that would result from the construction of the Amendment Project.⁷⁷ The EA acknowledges and addresses the long-term changes in land use, vegetation, and wildlife habitat that may occur where the Amendment Project would cross forested areas.⁷⁸ As stated in the EA, impacts to forested areas could be long term; however, these impacts will be avoided or mitigated by routing the Amendment Project away from “large contiguous stands of forest” and, where this was not possible, locating the pipeline “as far from the forest’s interior portion as practicable to maximize preservation of interior forest habitat.”⁷⁹ The EA further states that, in non-forested areas, impacts on land use, vegetation, and wildlife habitat would be short-term, as it is expected that these areas would be successfully restored within 3 years following construction with the implementation of the Commission’s Plan and Procedures, and PennEast’s Erosion & Sediment Control Plan.⁸⁰ Based on the type and amount (less than 50 acres of forested land would be impacted during construction) of vegetation impacted,

⁷⁴ EA at 14.

⁷⁵ Riverkeeper EA Comments at 51.

⁷⁶ EA at 30, 66 (stating that the Delaware River is not crossed by the Amendment Project).

⁷⁷ Riverkeeper EA Comments at 19.

⁷⁸ EA at 49.

⁷⁹ *Id.*

⁸⁰ *Id.*

Commission staff concluded that impacts to vegetation would not be significant, and we agree with this conclusion.

45. Regarding impacts to wildlife, the EA states that while construction of the Amendment Project may result in temporary impacts to wildlife species in the area, these impacts would not be significant and would be further mitigated by PennEast's implementation of certain construction practices, including collocation within existing rights-of-way, rotation of vegetation clearing schedules to allow for the establishment of wildlife habitat, and use of seed mixes to facilitate the re-establishment of native species.⁸¹ As a result, we find that Commission staff's analysis of the Amendment Project's potential impacts on vegetation and wildlife to be sufficient, and agree with staff's conclusion that these impacts would be minor.

46. Riverkeeper claims that the EA fails to evaluate impacts from loss of riparian forest vegetation and does not adequately evaluate direct and indirect impacts from forest loss and soil compaction along the cleared right-of-way for the entire length of the PennEast Project, and states that the Amendment Project would increase forest impacts.⁸² The EA quantifies loss of forest vegetation and evaluates direct and indirect impacts from forest clearing on wildlife, including impacts up to approximately 300 feet on either side of the clearing as a result of habitat fragmentation.⁸³ In addition, the EA evaluates impacts on waterbodies from vegetation clearing and erosion potential within riparian areas, and notes that PennEast proposes to consult with the Corps and the Pennsylvania DEP to use riparian conservation seed mixes to revegetate riparian areas, and plant trees and shrubs in riparian forested areas.⁸⁴ Therefore, we find that these impacts have been addressed adequately.

10. Appalachian Trail Crossing

47. Riverkeeper states that the EA fails to adequately address impacts and regulatory requirements associated with the proposed crossing of the Appalachian Trail. Riverkeeper states that even if the proposed Appalachian Trail Crossing Realignment is located on Game Commission land and not Park Service land, PennEast is prevented from crossing the Appalachian Trail.⁸⁵ Citing *Cowpasture River Preservation*

⁸¹ *Id.* at 51-52.

⁸² Riverkeeper EA Comments at 29-33.

⁸³ EA at 46-49.

⁸⁴ *Id.* at 25.

⁸⁵ Riverkeeper EA Comments at 48-51.

Association v. Forest Service,⁸⁶ Riverkeeper states that because the Appalachian Trail is a designated National Scenic Trail, it is considered Park Service land, and, per the Fourth Circuit’s decision in *Cowpasture*, the Park Service does not have authority to grant a pipeline right-of-way across the Appalachian Trail.⁸⁷

48. The Fourth Circuit’s opinion in *Cowpasture* is inapplicable to this proceeding. In *Cowpasture*, the court found that the Mineral Leasing Act does not permit the Park Service or U.S. Forest Service to permit pipeline rights-of-way across the Appalachian Trail.⁸⁸ However, as discussed in the EA and acknowledged by Riverkeeper, in order to “encourage responsible future energy corridor development,” the Park Service and Game Commission participated in a land exchange, whereby the Park Service and Game Commission exchanged “equal value 2.25 acre” tracts of lands.⁸⁹ As a result of this land exchange, the portion of the Appalachian Trail that would be crossed are on lands owned by the Game Commission and, as a result, do not require a Park Service right-of-way permit. In any event, Environmental Condition 10 of the Certificate Order requires PennEast to document that it has received all applicable authorizations required under federal law prior to construction.⁹⁰

11. Threatened and Endangered Species

49. Riverkeeper states that because surveys and agency consultations are incomplete, the EA has not adequately addressed impact on federal- and state-listed threatened and endangered species.⁹¹ By letter dated July 29, 2019, the U.S. Fish and Wildlife Service issued an amended Biological Opinion, which includes PennEast’s proposed modifications to the project, determining that the Amendment Project would “not result

⁸⁶ 911 F.3d 150 (4th Cir. 2018) (*Cowpasture*).

⁸⁷ Riverkeeper EA Comments at 50.

⁸⁸ *Cowpasture*, 911 F.3d 150, 179-182.

⁸⁹ EA at 81; *see also* June 16, 2017 Game Commission Press Release *Acreage Added to Game Lands*, accessible at: <https://www.media.pa.gov/Pages/Game-Commission-Details.aspx?newsid=136>.

⁹⁰ Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 10.

⁹¹ Riverkeeper EA Comments at 7-10.

in [e]ffects above what was analyzed in the November 28, 2017 [Biological] Opinion.”⁹² This completes our consultation requirements for federally-listed species under the Endangered Species Act.⁹³ The EA further discusses PennEast’s proposed measures to avoid or minimize impacts on state-listed species, and Environmental Condition 39 of the Certificate Order requires PennEast to file a list of measures developed in consultation with state wildlife agencies to avoid or mitigate impacts to state-listed species and state species of concern.⁹⁴ Therefore, we conclude that the EA adequately addresses impacts on federal- and state-listed threatened and endangered species.

12. Cultural Resources

50. Riverkeeper alleges that the EA fails to adequately address impacts on archaeological sites because the EA states that two archaeological sites eligible for inclusion in the National Register of Historic Places are located within the Amendment Project work space.⁹⁵ Section 106 of the National Historic Preservation Act⁹⁶ requires the Commission to consider the effect of projects on properties listed or eligible for listing on the National Register of Historic Places, and provide the Advisory Council on Historic Preservation an opportunity to comment. As explained in the EA, on August 15, 2019, Commission staff notified the Advisory Council on Historic Preservation of the potential for adverse effects on the two sites identified and invited comment. To date, no comments have been received. However, PennEast continues to consult with Pennsylvania, and Commission staff will prepare an agreement addressing adverse effects on historic properties.⁹⁷ Further, Environmental Condition 51 of the Certificate Order states that PennEast may not commence construction until PennEast files documentation of the completion of all cultural resource surveys, including the comments on the cultural resource reports and plans from the New Jersey and Pennsylvania State History Preservation Offices, and has provided the Advisory Council on Historic

⁹² See Attachment to PennEast’s August 22, 2019 Supplement Information Filing, in Docket Nos. CP15-558-000 and CP19-78-000.

⁹³ 19 U.S.C. § 1536(c) (2018).

⁹⁴ Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 39.

⁹⁵ Riverkeeper EA Comments at 33.

⁹⁶ 54 U.S.C. § 306108 (2018).

⁹⁷ EA at 69.

Preservation an opportunity to comment.⁹⁸ Therefore, we find that the EA appropriately considered the Amendment Project's effects on cultural resources.

13. Socioeconomics

51. Riverkeeper states that the EA overestimates the economic benefits of the Amendment Project, underestimates the economic harm which may result, and ignores the economic impacts on property owners and the surrounding community.⁹⁹ Section B.7 of the EA provides an overview of the socioeconomic evaluation for the PennEast Project and updates this evaluation to include the Amendment Project, including potential impacts on local communities and property values.¹⁰⁰ Specifically, the EA states that Commission staff's previous analysis of the PennEast Project's impacts to property values, which concluded that there are no measurable, long-term impacts on property values due to the presence of natural gas transportation infrastructure, applies to the Amendment Project.¹⁰¹ As such, we find that the EA appropriately evaluates the socioeconomic impacts of the Amendment Project.

52. Ms. Zrinski comments that the EA fails to adequately address how construction of the proposed Freemansburg Avenue Realignment underneath the parking lot of the Southmont Shopping Center from November 15 through January 1 (the height of the holiday shopping season) would have significant, negative impacts on seasonal employment and shopping revenue, and disturb traffic.¹⁰² The EA discusses PennEast's proposed mitigation measures to limit impacts on the Southmont Shopping Center, which include limiting construction hours to 10:00 PM – 6:00 AM and *avoiding* all construction between November 15 to January 1.¹⁰³ During construction, PennEast states that it would provide traffic control and re-route project-related traffic (primarily delivery vehicles) to minimize traffic impacts.¹⁰⁴ The EA concludes that with the implementation of these measures, only minor impacts on transportation and traffic would be expected to occur

⁹⁸ Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 51.

⁹⁹ Riverkeeper EA Comments at 41-42.

¹⁰⁰ EA at 85-92.

¹⁰¹ See final EIS for the PennEast Project at 4-194, in Docket No. CP15-558-000.

¹⁰² Tara Zrinski EA Comment Letter 2 at 1-2.

¹⁰³ EA at 91.

¹⁰⁴ *Id.*

during construction of the Freemansburg Avenue Realignment and we agree with this conclusion.

14. Environmental Justice

53. Riverkeeper states that the EA fails to adequately identify, and subsequently protect, Environmental Justice communities, in an effort to downplay poverty within the one additional census block affected by the Amendment Project that was not previously addressed in the final EIS for the PennEast Project.¹⁰⁵ Riverkeeper also questions whether the Pennsylvania Environmental Justice tool was used in the analysis in addition to the EPA Environmental Justice Mapping and Screening Tool.

54. The Environmental Justice analysis was completed in accordance with Executive Order 12898.¹⁰⁶ Commission staff examined the additional census block the Amendment Project would cross and found that the census block does not meet the definition of minority population, nor does it meet the U.S. Census Bureau's definition of poverty area.¹⁰⁷ These conclusions were confirmed by the EPA's Environmental Justice Mapping and Screening Tool, which similarly found that the census block did not meet the definition of a minority or low-income community.¹⁰⁸ We find this analysis to be sufficient and agree with Commission staff's conclusion that construction and operation of the Amendment Project would not have adverse and disproportionate human health or environmental effects on minority or low-income communities.

15. Construction Emissions

55. Ms. Zrinski comments that the EA fails to adequately assess emissions, including dust and particulate matter, that may occur during construction of the Freemansburg Avenue Realignment.¹⁰⁹ PennEast has prepared a Fugitive Dust Control Plan in order to mitigate fugitive dust, which accounts for the majority of construction-related particulate matter emissions.¹¹⁰ PennEast's implementation of the Fugitive Dust Control Plan would

¹⁰⁵ Riverkeeper EA Comments at 41.

¹⁰⁶ *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994).

¹⁰⁷ EA at 92.

¹⁰⁸ *Id.*

¹⁰⁹ Tara Zrinski EA Comment 2 at 1-2.

¹¹⁰ EA at 99.

incorporate several measures to mitigate fugitive dust emissions, including (but not limited to) using water or dust suppression chemicals to limit dust emissions, reducing vehicle speeds, and covering trucks while transporting construction or other materials.¹¹¹ Considering PennEast's proposed mitigation measures and the temporary nature of construction emissions, the EA found that construction emissions would not be significant, and we agree.

16. Pipeline Scour

56. Riverkeeper asserts that the EA fails to consider threats to public safety that may occur due to scour¹¹² and resulting pipe degradation, which it asserts may result in the pipe rupturing and impacting water quality.¹¹³ Riverkeeper states that because open trench pipeline installation may unnaturally alter both stream bank and streambed stability, there is an increased likelihood of scouring within backfilled pipeline trenches. The geology section in the EA addresses pipe degradation and scouring, and identifies mitigation measures, including our Procedures and PennEast's Erosion & Sedimentation Control Plan, that would effectively minimize the potential for pipeline scour.¹¹⁴ Further, as discussed in the final EIS for the Certificate Order, pipeline on the PennEast Project (including the Amendment Project) would be installed below scour depth.¹¹⁵ In addition, public safety is discussed in detail in section B.9.0 of the EA, which concludes that with the implementation of standing safety design criteria, the Amendment Project would be constructed and operated safely.¹¹⁶

17. Cumulative Impacts

57. Commenters assert that the EA fails to account for the cumulative impacts of the Amendment Project.¹¹⁷ Riverkeeper alleges that the cumulative impacts analysis fails to evaluate greenhouse gas (GHG) emissions and climate change, as well as impacts from

¹¹¹ *Id.*

¹¹² Pipeline scour occurs when riverbed erosion causes a buried pipeline to be exposed.

¹¹³ Riverkeeper EA Comments at 39-40.

¹¹⁴ EA at 34-38, 57-58.

¹¹⁵ See final EIS for the PennEast Project at 4-9, in Docket No. CP15-558-000.

¹¹⁶ EA at 109-115.

¹¹⁷ See, e.g., Riverkeeper EA Comments at 33-40.

construction of the Amendment Project when combined with current, future, or pending pipeline projects.¹¹⁸ Ms. Wolferman comments that the cumulative impact analysis is incomplete because the EA does not consider the combined impacts on Blue Mountain resources from the proposed Appalachian Trail Crossing Realignment and the existing and “reasonably foreseeable” expansion of two Transcontinental Gas Pipe Line Company, LLC (Transco) pipelines, the Franklin Loop Leidy Southeast Expansion and Atlantic Sunrise Pipeline, which currently cross Blue Mountain.¹¹⁹ Ms. Wolferman contends that the Appalachian Trail Crossing Realignment and the likely future expansion of these pipelines would impact “the same resources in the same hydrologic unit” including wetlands, geology, vegetation, wildlife, protected species, aesthetics, and historic, recreational, and socioeconomic values. In addition, Riverkeeper asserts that the EA fails to evaluate the cumulative impacts of air emissions and water degradation.¹²⁰

58. The EA considers the cumulative impacts of the Amendment Project with other projects in the same geographic and temporal scope of the project.¹²¹ Commission staff notes in the EA that due to the Amendment Project’s small scale, its environmental impacts will be highly localized, resulting in a correspondingly more narrow area of potential effects.¹²² The types of other projects evaluated in the EA that were found to potentially contribute to cumulative impacts were other FERC-jurisdictional and non-jurisdictional natural gas projects; electric generation and transmission projects; transportation projects; and commercial and large-scale residential developments.¹²³ As Ms. Wolferman acknowledges, table B.10.2-1 of the EA identifies the Atlantic Sunrise and Franklin Loop Leidy Southeast Expansion projects as potentially contributing to cumulative impacts and analyzes these potential impacts in section B.10.3.¹²⁴ However, neither the Franklin Loop Leidy Southeast Expansion nor Atlantic Sunrise projects include facilities crossing Blue Mountain, nor is there any indication that Transco is contemplating expanding these facilities such that they would cross Blue Mountain. Further, although Transco’s existing pipeline system does cross Blue Mountain, it has

¹¹⁸ Riverkeeper EA Comments at 34-37.

¹¹⁹ Sondra Wolferman’s October 4, 2019 EA Comments at 1 (Sondra Wolferman EA Comments).

¹²⁰ Riverkeeper’s EA Comments at 40.

¹²¹ EA at 115.

¹²² *Id.*

¹²³ *Id.* at 115-116.

¹²⁴ *Id.* at 118, 125-126.

been in operation for several years, and was therefore considered as part of the baseline environmental condition in our cumulative impacts analysis. In the EA, Commission staff analyzed the cumulative impacts of these projects on air quality, groundwater, surface water, and wetlands,¹²⁵ and in all instances found that cumulative impacts from these projects would be minor. Therefore, we find that staff's analysis of cumulative impacts was sufficient.

59. The EA estimates the maximum potential greenhouse gas (GHG) emissions from construction of the Amendment Project to be 4,190 metric tons of carbon dioxide equivalent (CO₂e).¹²⁶ As stated in the EA, no operational emissions from operation of the Amendment Project are anticipated, nor would operation of the Amendment Project result in changes to operating emissions for the PennEast Project as a whole.¹²⁷ To provide context to the EA's GHG estimate, 5.743 billion metric tons of CO₂e were emitted at a national level in 2017 (inclusive of CO₂e sources and sinks).¹²⁸ The construction-related emissions of the project could potentially increase CO₂e emissions based on the 2017 levels by 0.00007 percent at the national level. Currently, there are no national targets to use as a benchmark for comparison.¹²⁹

¹²⁵ *Id.* at Table B.10.2-1, P 119.

¹²⁶ *Id.* at 100. The EA also estimates that the maximum potential greenhouse gas (GHG) emissions from construction of the Pennsylvania portion of the Penn East Project, as amended, to be 53,117 metric tons of CO₂e. *Id.*

¹²⁷ *Id.* at 101-102. We further note that because the Amendment Project will not increase the capacity of the PennEast Project or provide for new or expanded receipts or deliveries of natural gas, there will be no other increases in operational GHG emissions..

¹²⁸ U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017* at ES6-8 (Table ES-2) (2019), available at <https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf> (accessed November 2019).

¹²⁹ The national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed, Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,522-32 (July 8, 2019), and the targets in the Paris Climate Accord are pending withdrawal.

60. The EA also acknowledges that GHG emissions, such as those emitted from the construction of the project, will contribute incrementally to climate change,¹³⁰ and we have previously disclosed various effects of climate change on the Northeastern region of the United States.¹³¹ However, as the Commission has previously concluded, it cannot determine a project's incremental physical impacts on the environment caused by GHG emissions.¹³² We have also previously concluded the Commission cannot determine whether an individual project's contribution to climate change would be significant.¹³³ That situation has not changed.

18. Alternatives

61. Riverkeeper states that the EA improperly evaluated alternatives based on PennEast's stated purpose for the Amendment Project, rather than the purpose of the entire PennEast Project.¹³⁴ As a result, Riverkeeper alleges that the EA fails to properly consider the no-action alternative and system alternatives to the PennEast Project. Riverkeeper further states that the EA must consider alternative construction practices to reduce project impacts, including an analysis of alternatives that would: (1) avoid crossing exceptional value wetlands in Pennsylvania as required by state regulations; (2) require the use of HDD as the default method for crossing streams, wetlands, and forests; and (3) avoid crossing of the Appalachian National Scenic Trail (Appalachian Trail).¹³⁵

62. We find that the EA properly considered alternatives to the Amendment Project. The applicant's statement of purpose and need informs the choice of alternatives. The choice of alternatives, and the depth of discussion of those alternatives, must be

¹³⁰ EA at 95.

¹³¹ *PennEast Pipeline Company, LLC*, PennEast Pipeline Project Final Environmental Impact Statement at 4-334 to 4-335, Docket Nos. CP15-558-000 (April 2017) (detailing the environmental impacts attributed to climate change in the Northeastern United States from U.S. Global Change Research Program's 2014 Climate Change Impacts in the United States: The Third National Climate Assessment).

¹³² *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 67-70 (2018) (LaFleur, Comm'r, *dissenting in part*; Glick, Comm'r, *dissenting in part*).

¹³³ *Id.*

¹³⁴ Riverkeeper EA Comments at 43-44.

¹³⁵ *Id.* at 44-46.

reasonable.¹³⁶ The Council on Environmental Quality (CEQ) advises that “a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.”¹³⁷ An agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is “shaped by the application at issue and by the function that the agency plays in the decisional process.”¹³⁸ Courts have upheld agencies’ use of applicants’ project purpose and need as the basis for evaluating alternatives.¹³⁹

63. As stated in the EA, the purpose of the Amendment Project is to “improve construction feasibility, address agency concerns, and minimize the potential for environmental impacts from those previously approved in the certificated project.”¹⁴⁰ In evaluating the no-action alternative, Commission staff concluded that by not constructing the Amendment Project, the PennEast Project would still likely be constructed without the benefits of the Amendment Project, and therefore the no-action alternative was rejected.¹⁴¹ We agree with this conclusion.

64. Furthermore, Commission EAs and EISs typically do not evaluate alternative construction practices (except for specific sites or locations where warranted or identified during scoping), and CEQ regulations do not require the consideration of alternative construction practices.¹⁴² However, for the Amendment Project, each of the four proposed realignments include some type of modified construction practice, including modifications of HDD plans, modifications of construction work space, and modifications of a crossing method for the Appalachian Trail. Analysis of environmental

¹³⁶ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

¹³⁷ CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

¹³⁸ *Citizens Against Burlington, Inc.*, 938 F.2d at 195, 199.

¹³⁹ *See, e.g., City of Grapevine, Tex. v. Dept. of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

¹⁴⁰ EA at 1.

¹⁴¹ *Id.* at 133.

¹⁴² 40 C.F.R. § 1502.14 (2019) (stating that the alternatives analysis is in to the proposal, not the specific construction procedures to be used in furtherance of the proposal).

impacts that would result from these modifications is included in the alternatives analysis in section C.1.3.¹⁴³

65. The EA also evaluated alternative routes for each of the four proposed modifications and found that none of the alternatives would provide significant environmental advantages compared to the proposed realignments.¹⁴⁴ As noted above, only one segment of the Amendment Project (the Appalachian Trail Crossing Realignment) would impact wetlands and the EA found that no exceptional value wetlands would be crossed by the Amendment Project.¹⁴⁵ With respect to the route alternative evaluated in the EA, Route Alternative 3 to the Appalachian Trail Crossing Realignment would impact more acres of wetlands during construction (3 acres compared to 1.4 acres) and operation (2.1 acres compared to 0.6 acres).¹⁴⁶

66. With regards to evaluation of alternative crossings of the Appalachian Trail, as stated above, the EA's alternatives analysis is limited to PennEast's stated purpose of the Amendment Project, addressing agency concerns and minimizing the environmental impacts of the PennEast Project's original, certificated route.¹⁴⁷ The Appalachian Trail Crossing Realignment was developed in response to requests from agencies, including the Park Service, to reduce impacts to the Appalachian Trail caused by the PennEast Project. Accordingly, staff's evaluation of alternatives to the Appalachian Trail Crossing Realignment was limited to crossings of the trail that would potentially have fewer impacts than PennEast's proposed crossing. Route Alternative 3, which staff evaluated as a potential alternative to the proposed Appalachian Trail Crossing Realignment, was found to avoid more known bog turtle sites (one as compared to two) and would cross fewer waterbodies (three as compared to eight), but would have greater impacts to the trail on every other resource considered, including total length, acres disturbed during construction and operation, acres of rare species habitat disturbed, and impacted forest

¹⁴³ EA at 133-142.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 41.

¹⁴⁶ *Id.* at 138.

¹⁴⁷ *Id.* at 1.

land.¹⁴⁸ As such, Commission staff concluded that Route Alternative 3 did not offer a significant environmental advantage as compared to PennEast's proposed Appalachian Trail Crossing Realignment,¹⁴⁹ and we agree with this finding.

19. Environmental Analysis Conclusion

67. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with PennEast's Amendment Project application and supplements, and in compliance with the environmental conditions in the appendix to this order and the Certificate Order in Docket No. CP15-558-000, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

C. Conclusion

68. Based on our Certificate Policy Statement determination and our environmental analysis, we find under section 7 of the NGA that the public convenience and necessity requires approval of PennEast's project, subject to the conditions in this order.

69. Compliance with the environmental conditions included in our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

70. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state

¹⁴⁸ *Id.* at 138-140.

¹⁴⁹ *Id.* at 140.

or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁵⁰

71. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

(A) The Certificate Order in Docket No. CP15-558-000 is amended, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein. In all other respects, the Certificate Order is unchanged.

(B) PennEast shall continue to comply with environmental conditions set forth in Appendix A to the Certificate Order.

(C) PennEast shall comply with all applicable Commission regulations under the NGA, particularly the general terms and conditions set forth in paragraphs (a), (b), (c), (e), and (f) of section 157.20 of the regulations.

(D) PennEast shall complete construction of the proposed facilities and make them available for service within the timeframe conditioned in the Certificate Order, in accordance with section 157.20(b) of the Commission's regulations.

(E) PennEast shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies PennEast. PennEast shall file written

¹⁵⁰ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

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confirmation of such notification with the Secretary of the Commission (Secretary) within 24 hours.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached
Commissioner McNamee is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

As recommended in the EA, this authorization includes the following conditions:

1. PennEast Pipeline Company, LLC (PennEast) shall follow the construction procedures and mitigation measures described in its application and as identified in the EA, unless modified by the Order. PennEast must:
 1. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 2. justify each modification relative to site-specific conditions;
 3. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 4. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:
 1. the modification of conditions of the Order;
 2. stop-work authority; and
 3. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
3. PennEast shall continue to comply with environmental conditions set forth in the appendix to the January 19, 2018 Order in Docket No. CP15-558-000.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC

Docket No. CP19-78-000

(Issued March 19, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissented from the Commission's order granting PennEast Pipeline Company, LLC (PennEast) a certificate of public convenience and necessity. As I explained, the record did not show a need for the pipeline and the Commission erred by finding that the pipeline was required by the public convenience and necessity when many permits and details about the proposed route remained unanswered.¹ Those issues, as well as a host of others, are now being litigated in the federal courts. The only issue before us today is a requested amendment to PennEast's certificated route. While I believe the amendments to the route—proposed in response to landowner and constructability concerns²—are supported by the record, I dissent in part from today's order because it violates both the Natural Gas Act³ (NGA) and the National Environmental Policy Act⁴ (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order amending PennEast's certificate to allow four discrete adjustments to the pipeline route (Project),⁵ the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other

¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (Glick, Comm'r, dissenting at 1) (Certificate Order); see *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 (2018) (Glick, Comm'r, dissenting at 1) (order on rehearing).

² *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,198, at P 4 (2020) (Amendment Certificate Order).

³ 15 U.S.C. § 717f (2018).

⁴ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

⁵ Amendment Certificate Order, 170 FERC ¶ 61,198 at PP 5-8.

environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions resulting from the Project's construction of the amended route.⁶ The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment"⁷ and, as a result, conclude that the Project is in the public interest and required by the public convenience and necessity.⁸ Claiming that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

I. The Commission's Public Interest Determination Is Not the Product of Reasoned Decisionmaking

3. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and the consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding that "GHGs. . .are naturally occurring pollutants in the atmosphere and products of human activities, including burning fossil fuels,"⁹ and that "GHG emissions, such as those emitted from the construction of the project, will contribute incrementally to climate change."¹⁰ In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change,

⁶ PennEast Pipeline Project Amendment Environmental Assessment at Tables B.8.2-6 – B.8.2-8 (EA). Today's order does not change the authorized transportation capacity of the PennEast Pipeline, therefore does not increase or change the operational or downstream GHG emissions. *See* Amendment Certificate Order, 170 FERC ¶ 61,198 at P 59 n.127; EA at 100.

⁷ Amendment Certificate Order, 170 FERC ¶ 61,198 at P 67; EA at 145.

⁸ Amendment Certificate Order, 170 FERC ¶ 61,198 at P 68.

⁹ EA at 95. It is worth noting that the Commission used to acknowledge the combustion of fossil fuels as the primary cause behind the accumulation of GHGs in the atmosphere, see, for example, Environmental Assessment, Docket No. CP18-332-000, at 11 (Nov. 14, 2018) (South Mainline Expansion Project), but, for reasons that are not explained, appear to no longer make the same conclusion in the EA.

¹⁰ Amendment Certificate Order 170 FERC ¶ 61,198 at P 60.

both in order to fulfill NEPA's requirements and to determine whether the Project is in the public interest and required by the public convenience and necessity.¹¹

4. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the facility's impact on climate change.¹² That is now clearly established D.C. Circuit precedent.¹³ The Commission, however, insists that it cannot consider whether the Project's contribution to climate change is significant because it is "not aware of a widely accepted standard – which was established by international or federal policy, or by a recognized scientific body – to ascribe significance to a given rate or volume of greenhouse gas emissions."¹⁴ However, the most troubling

¹¹ Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f. Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This means that the Commission must consider and discuss the significance of the harm from a pipeline's contribution to climate change by actually evaluating the magnitude of the pipeline's environmental impact. Doing so enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (a)–(b) (An agency's environmental review must "include the environmental impacts of the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)).

¹² *See Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); *see also Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

¹³ *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72.

¹⁴ *See* Amendment Certificate Order, 170 FERC ¶ 61,198 at P 60 (citing *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 68 (2018)); *see also Dominion*

part of the Commission’s rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project will not significantly affect the quality of the human environment.¹⁵ Think about that. The Commission is saying out of one side of its mouth that it need not assess the significance of the Project’s impact on climate change while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant. That is ludicrous, unreasoned, and an abdication of our responsibility to give climate change the “hard look” that the law demands.¹⁶

5. It also means that the volume of emissions caused by the Project does not play a meaningful role in the Commission’s public interest determination, no matter how many times the Commission assures us otherwise. Using the approach in today’s order, the Commission will always be able to conclude that a project will not have any significant environmental impact irrespective of the project’s actual GHG emissions or those emissions’ impact on climate change. So long as that is the case, a project’s impact on climate change cannot, as a logical matter, play a meaningful role in the Commission’s public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

Transmission, Inc., 163 FERC ¶ 61,128 at P 67 (“Without an accepted methodology, the Commission cannot make a finding whether a particular quantity of greenhouse gas emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that impact would contribute to climate change”).

¹⁵ See Amendment Certificate Order, 170 FERC ¶ 61,198 at P 67 (stating that “approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment”); EA at 145.

¹⁶*E.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (“[A]gencies cannot overlook a single environmental consequence if it is even “arguably significant.”); see *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (“Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.” (internal quotation marks omitted)); see also *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is “arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency”).

6. Commissioner McNamee argues that the D.C. Circuit cases cited above¹⁷ were wrongly decided.¹⁸ Although that is his prerogative, it is irrelevant to the task before us. As he has explained, we are called on to apply the law and the facts, not our personal policy preferences. But surely, implicit in that statement, is a recognition that we must apply the law as it is, not as we wish it were. The D.C. Circuit has unambiguously interpreted the “public convenience and necessity” standard in section 7 of the NGA to encompass the authority to consider and, if appropriate, act upon “the direct and indirect environmental effects” of a proposed pipeline.¹⁹ As Commissioners, our job is to apply that law, not to attack binding judicial precedent in favor of an interpretation that was, in fact, expressly rejected by the court.²⁰

II. The Commission’s NEPA Analysis of the Project’s Contribution to Climate Change Is Deficient

7. The Commission’s NEPA analysis is similarly flawed. In order to evaluate the environmental consequences of the Project under NEPA, the Commission must consider the harm caused by the Project’s GHG emissions and “evaluate the ‘incremental impact’ that these emissions will have on climate change or the environment more generally.”²¹ Today’s order does quantify and disclose the GHG emissions caused by the Project’s construction.²² Although quantifying the Project’s GHG emissions is a

¹⁷ *Supra* notes 12-13.

¹⁸ Certificate Order, 170 FERC ¶ 61,198 (McNamee, Comm’r, concurring at P 3).

¹⁹ *E.g.*, *Sabal Trail*, 867 F.3d at 1373.

²⁰ *Id.*; *see Birckhead*, 925 F.3d at 519 (explaining that in “the pipeline certification context the Commission does have statutory authority to act” on the reasonably foreseeable GHG emissions caused by the pipeline (citing *Sabal Trail*, 867 F.3d at 1373)).

²¹ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 2019) (explaining that the agency was required to “provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute” to the “impacts of climate change in the state, the region, and across the country”).

²² EA at Tables B.8.2-6 – B.8.2 -8.

necessary step toward meeting the Commission's NEPA obligations, simply reporting the volume of emissions is insufficient.²³

8. In *Sabal Trail*, the court explained that the Commission was required “to include a discussion of the ‘significance’ of” the direct and indirect effects of the Project, including its GHG emissions.²⁴ That makes sense. Identifying and evaluating the consequences that the Project's GHG emissions may have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed.²⁵ But neither today's order nor the accompanying EA provide even attempt to assess the significance of the Project's GHG emissions or how they contribute to climate change. It is hard to see how hiding the ball by refusing to assess the significance of the Project's climate impacts is consistent with either of those purposes.

9. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.²⁶ An environmental review document must “contain a detailed discussion of possible mitigation measures” to address adverse environmental impacts.²⁷ “Without such a discussion, neither the agency

²³ See *Ctr. for Biological Diversity*, 538 F.3d at 1216 (“While the [environmental document] quantifies the expected amount of CO2 emitted . . . , it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment more generally”); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) (“A calculation of the total number of acres to be harvested in the watershed is a necessary component . . . , but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.”).

²⁴ *Sabal Trail*, 867 F.3d at 1374.

²⁵ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA's purposes is to ensure that “relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (“The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.”).

²⁶ 40 C.F.R. § 1502.16 (2018) (NEPA requires an implementing agency to form a “scientific and analytic basis for the comparisons” of the environmental consequences of its action in its environmental review, which “shall include discussions of . . . [d]irect effects and their significance.”).

²⁷ *Robertson*, 490 U.S. at 351

nor other interested groups and individuals can properly evaluate the severity of the adverse effects” of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a “hard look” at the environmental consequences of the action at issue.²⁸

10. Instead, the Commission insists that it need not assess the significance of the Project’s GHG emissions because it lacks an “accepted methodology” to determine “whether a particular quantity of greenhouse gas emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that impact would contribute to climate change.”²⁹ But that does not excuse the Commission’s failure to evaluate these emissions. As an initial matter, the lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project’s contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary “hard look” at the Project’s environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a single project’s climate change impacts into concrete and comprehensible terms plays a useful role in the NEPA process by putting the harms from climate change in terms that are readily accessible for both agency decisionmakers and the public at large. The Commission, however,

²⁸ *Id.* at 352. The discussion of mitigation is especially critical under today’s circumstances where the Commission prepared an EA instead of an Environmental Impact Statement to satisfy its NEPA obligations. The EA relies on the fact that certain environmental impacts will be mitigated in order to ultimately find that the Project “would not . . . significantly affect[] the quality of the human environment.” EA at 145. Absent these mitigation requirements, the Project’s environmental impacts would require the Commission to develop an Environmental Impact Statement—a much more extensive undertaking. *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (“If *any* ‘significant’ environmental impacts might result from the proposed agency action then an [Environmental Impact Statement] must be prepared *before* the action is taken.”).

²⁹ *See* Amendment Certificate Order, 170 FERC ¶ 61,198 at P 60 (citing *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 67).

continues to ignore the tools at its disposal, relying on deeply flawed reasoning that I have previously critiqued at length.³⁰

11. Regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Project will not have a significant effect on issues of "vegetation"³¹ or "aquatic resources."³² Notwithstanding the lack of any "accepted methodology" to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review, and assess the significance of the Project's effect on those considerations. The Commission's refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.³³

12. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."³⁴ NEPA "merely prohibits uninformed—rather than unwise—

³⁰ See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 167 FERC ¶ 61,110 (2019) (Glick, Comm'r, dissenting in part at P 6 & n.11) (noting that the Social Cost of Carbon "gives both the Commission and the public a means to translate a discrete project's climate impacts into concrete and comprehensible terms"); *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 (2018) (Glick, Comm'r, dissenting).

³¹ EA at 49 ("Based on the amounts and types of vegetation impacted along the pipeline, and the measures that would be implemented to minimize adverse effects, we have determined that construction and operation of the Amendment Project would not significantly affect vegetation.").

³² *Id.* at 58 ("With these measures, the intake and discharge of water for hydrostatic testing would not significantly impact aquatic resources.").

³³ After all, the standard the Commission typically uses for evaluating significance is whether the adverse impact would result in a substantial adverse change in the physical environment. See e.g. *Adelphia Gateway Project Environmental Assessment*, Docket No. CP18-46-000 at 33 (Jan 1, 2019). Surely that standard is open to some subjective interpretation by each Commissioner. What today's order does not explain is why it is appropriate to exercise subjective interpretation and judgment when it comes to impacts such as vegetation and aquatic resources, but not climate change.

³⁴ *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

agency action.”³⁵ In other words, taking the matter seriously—and rigorously examining a project’s impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

13. Even if the Commission were to determine that a project’s GHG emissions are significant, that would not be the end of the inquiry nor would it mean that the project is not in the public interest or required by the public convenience and necessity. Instead, the Commission could require mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that, when a project may cause potentially significant environmental impacts, the relevant environmental impact statement must “contain a detailed discussion of possible mitigation measures” to address adverse environmental impacts.³⁶ The Court explained that, “[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects” of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a “hard look” at the environmental consequences of the action at issue.³⁷ The Commission not only has the obligation to discuss mitigation of adverse environmental impacts under NEPA, but also the authority to condition certificates under section 7 of the NGA,³⁸ which could encompass measures to mitigate a project’s GHG emissions.

14. Furthermore, a rigorous examination and determination of significance regarding climate change impacts would bolster any finding of public interest by providing the Commission a more complete set of information necessary to weigh benefits against adverse effects. By refusing to assess significance, however, the Commission short circuits any discussion of mitigation measures for the Project’s GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Project is consistent with the public interest.

* * *

³⁵ *Id.* (quoting *Robertson*, 490 U.S. at 351).

³⁶ *Robertson*, 490 U.S. at 351.

³⁷ *Id.* at 352; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures).

³⁸ 15 U.S.C. § 717f(e); Amendment Certificate Order, 170 FERC ¶ 61,198 at P 69 (“[T]he Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources . . . , including authority to impose any additional measures deemed necessary . . .”).

15. Today's order is not the product of reasoned decisionmaking. Its analysis of the Project's contribution to climate change is shoddy and its conclusion that the Project will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that the Project will contribute to climate change, but refuses to consider whether that contribution might be significant before proclaiming that the Project will have no significant environmental impacts. So long as that is the case, the record simply cannot support the Commission's conclusion that there will be no significant environmental impacts. Simply put, the Commission's analysis of the Project's consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC

Docket No. CP19-78-000

(Issued March 19, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order grants PennEast Pipeline Company, LLC's (PennEast) request to amend its certificate of public convenience and necessity granted in Docket No. CP15-558-000 to construct and operate its PennEast Pipeline Project.¹ PennEast's amendment request proposes several route realignments and workspace modifications to address landowner requests and constructability concerns.

2. I fully support the order as it complies with the Commission's statutory responsibilities under the Natural Gas Act and the National Environmental Policy Act. The order determines that PennEast's proposal does not alter the Commission's conclusion that the construction and operation of the PennEast Pipeline Project is in the public convenience and necessity given that the facilities will not adversely affect competitor pipelines and their captive customers, and that PennEast has taken appropriate steps to minimize adverse impacts on landowners.² In fact, the order finds that PennEast's amendment proposal will further reduce impacts to landowners and surrounding communities.³ The order also finds that PennEast's proposal will not significantly affect the quality of the human environment.⁴ Further, the Commission has quantified and considered the additional greenhouse gases (GHG) related to route realignments and workspace modifications,⁵ consistent with the holding in *Sierra Club v. FERC (Sabal Trail)*.⁶

¹ 170 FERC ¶ 61,198 (2020).

² *Id.* P 13.

³ *Id.* P 12.

⁴ *Id.* P 67.

⁵ *Id.* PP 59-60; Environmental Assessment at 95, 100-102.

⁶ 867 F.3d 1357 (D.C. Cir. 2017). Despite my colleague's arguments to the contrary, I state in my concurrence in *Adelphia Gateway, LLC* in which I incorporate

3. I write separately to respond to my colleague's argument that the Commission should have determined whether the incremental GHG emissions related to the route realignment and workspace modifications are "significant" using the Social Cost of Carbon or by establishing its own framework. In my concurrence in *Adelphia*, I explain why the Social Cost of Carbon is not a useful tool to determine whether the GHG emissions are "significant" and the Commission has no authority or reasoned basis to make a determination of significance using its own expertise.⁷ Further, it is not appropriate for the Commission to establish out of whole cloth a GHG emission mitigation program, particularly when Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions over the last 15 years.⁸ As I explain in *Adelphia*, Congress delegated the Administrator of the U.S. Environmental Protection Agency the exclusive authority to establish standards of performance for air pollutants, including GHGs.⁹ For logistical reasons and administrative efficiency, I hereby incorporate my analysis in *Adelphia* by reference and am not reprinting the full text of my analysis here.¹⁰

For the reasons discussed above and incorporated by reference herein, I respectfully concur.

Bernard L. McNamee
Commissioner

herein that "[t]hrough the D.C. Circuit's holding in *Sabal Trail* is binding on the Commission, it is not appropriate to expand that holding through the dicta in *Birckhead* so as to establish new authorities under the NGA and NEPA. The Commission is still bound by the NGA and NEPA as enacted by Congress, and interpreted by the U.S. Supreme Court and the D.C. Circuit. Our obligation is to read the statutes and case law in harmony." *Adelphia*, 169 FERC ¶ 61,220 at P 12 n.29 (2019) (McNamee, Comm'r, concurring).

⁷ *Id.* PP 62-73.

⁸ *Id.* PP 52-61.

⁹ *Id.* PP 53-57.

¹⁰ *Id.* PP 52-73.

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