



July 25, 2018

Federal Energy Regulatory Commission  
Secretary of the Commission  
888 First Street, N.E.  
Washington, DC 20426

**RE: PL18-1-000**

On April 19, 2018, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) seeking:

“information and stakeholder perspectives to help the Commission explore whether, and if so how, it should revise its approach under its currently effective policy statement on the certification of new natural gas transportation facilities to determine whether a proposed natural gas project is or will be required by the present or future public convenience and necessity, as that standard is established in section 7 of the Natural Gas Act.”<sup>1</sup>

Specifically, FERC identified four general areas of examination in this inquiry:

“(1) The reliance on precedent agreements to demonstrate need for a proposed project; (2) the potential exercise of eminent domain and landowner interests; (3) the Commission's evaluation of alternatives and environmental effects under NEPA and the NGA; and (4) the efficiency and effectiveness of the Commission's certificate processes.”

For 10 years, working on nearly two dozen FERC jurisdictional pipeline projects -- including monitoring, compiling, and analyzing the environmental and community impacts of shale gas pipelines, as well as our extensive experience working closely with impacted communities, landowners, economists, regulating agencies, industry experts and engineers -- the Delaware Riverkeeper Network has identified significant and fundamental failures in FERC’s review and approval of pipelines in these four areas and others, as implemented under the current 1999 Policy Statement. Reform is essential, but not to streamline the process and make it easier for industry - reform is needed to make the process more robust, impartial, fair, equitable and accessible to the public.

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<sup>1</sup> Notice of Inquiry, FERC Docket No. PL18-1, April 25, 2018. Retrieved from:  
<https://www.federalregister.gov/documents/2018/04/25/2018-08658/certification-of-new-interstate-natural-gas-facilities#footnote-19-p18022>

## **Delaware Riverkeeper Network urges FERC to add hearings to its PL18-1 comment process.**

To ensure that FERC identifies a full spectrum of truly meaningful fixes to its pipeline review and approval process, FERC's Commissioners need to hear directly from the communities impacted by the FERC infrastructure review and approval process. The Delaware Riverkeeper Network urges you to schedule a minimum of 6 hearings in affected communities across the nation. Testimony should be open to all who are interested and impacted including community members, impacted landowners, environmental advocates, and their representative organizations.

Public hearings would be in keeping with FERC's past practice on just this matter. In preparation of FERC's 1999 policy statement, which is a cornerstone of the PL18-1-000 docket, "the Commission held a public conference" on the issues and implications of anticipated natural gas demand in the northeastern United States over the then-upcoming two decades. FERC's call for testimony and comment in 1999, under Docket No. PL99-2, was primarily targeted towards the industry. As a result, while this hearing, held in Washington, DC, was technically open to the public, the representatives present were those of natural gas companies and industry organizations<sup>2</sup> which stood to profit from the expansion of the natural gas infrastructure system. FERC recognized this lopsided participation in its description of the process: "All segments of the industry presented their views at the conference and subsequently filed comments on those issues."<sup>3</sup>

As one would expect, the PL99-2 process resulted in a pipeline review and approval policy that was informed and designed in large part *by and for* the natural gas industry, and not for the protection of the public good.

In the years since FERC's "public" process that led to its 1999 Statement, the Commission has seen a vast increase in public participation in its pipeline review process, and a significant change in the demographics of stakeholders--largely because of the serious and increasing impacts pipeline projects have on the environment and the public under the current industry-oriented policy. In order to correct the inherent bias behind the 1999 Pipeline Certificate Policy, and to give all stakeholders the same level of access currently granted to industry, the Delaware Riverkeeper Network urges FERC to hold a minimum of six hearings in affected communities across the nation that are open and accessible to not only the stakeholders who currently benefit from FERC's pipeline certificate review policy, but also those who are harmed. Such hearings must be open for all who are interested to testify--including community members, impacted landowners, environmental advocates, and their representative organizations.

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<sup>2</sup> Two of the total 28 participants in the public conference were environmental organizations, none were representing community interests. *See* Speaker List, Anticipated Demand for Natural Gas in the Northeastern United States Conference, FERC Docket No. PL99-2, June 3, 1999, Accession Number 19990604-3064.

<sup>3</sup> Statement of Policy, FERC Docket No. PL99-3, September 15, 1999, Issuance 19990916-3113. *See also*: Order Clarifying Statement of Policy, FERC Docket No. PL99-3, February 9, 2000, and Order Further Clarifying Statement of Policy, FERC Docket No. PL99-3-002, July 28, 2000.

## **There is a clear need for FERC Reform.**

With the Department of Energy Organization Act of 1977 (S.826) Congress created the Department of Energy and FERC, as an independent executive agency. During Senate hearings on the bill, a rightfully skeptical Senator William V. Roth of Delaware had this to say about the critical role that an equitable energy policy plays in our society:

If there is a single area where it is necessary for the American people to believe implicitly in the fairness and honesty of Government, where there can be no doubts whatsoever, it is in the field of energy...A sweetheart relationship between those who regulate and those who are regulated will strain the credibility of the most trusting citizens.

Unfortunately, FERC's approach to the public process and decisionmaking when it comes to pipeline infrastructure has demonstrated an actual bias, or at least created the appearance of bias, so strong and inequitable that the public has little, if any trust, in FERC when it comes to pipeline, compressor, storage and LNG infrastructure. As it currently stands, the language of the Natural Gas Act, and its implementation allowed by the 1999 policy, is being misused by FERC to take from people their private property rights and take from communities the public open spaces they have worked hard to protect and preserve, to undermine the legal rights of people and the states, to undermine the authority of other state and federal agencies, to prevent fair public participation in the pipeline review process, to ignore the mandates of the Clean Water Act and the National Environmental Policy Act, to take jobs and destroy small businesses, and to inflict on our communities health, safety and environmental harms, all for the benefit of a single industry seeking to advance its own corporate profits and growth over its competitors.

### **FERC's Pipeline Review Process needs to be reformed to ensure**

- Protection of people, communities and the environment are clearly identified as priority goals in the decision making process that are earnestly pursued,
- Accurate facts, data, and science are identified goals for all decision making materials relied upon by FERC in its decision making process,
- Requirements of the law and the Constitution are respected,
- Full and fair implementation of the National Environmental Policy Act,
- Evaluation of alternatives account for alternatives outside the natural gas industry such as renewables, conservation, and efficiency,
- Use of independent and unaffiliated consultants to conduct project reviews and make recommendations,
- The public and lawmakers are informed of all benefits and harms of a project, not just those advantageous to the industry applicants, for example economic harms must be assessed, not just industry claimed benefits,
- Robust protection of environmental justice communities,
- More evidence than precedent agreements is required in order to establish need for a project,
- A more rigorous evaluation of safety implications and higher safety standards in order to minimize the potential impact radius and minimize the potential for accidents, incidents, and explosions,.

- A prohibition on the use of Tolling Orders to postpone review of pipeline projects while eminent domain and construction are allowed to begin,
- An end to the use of conditional permits so as to ensure a project will receive all required permits and approvals before a company is allowed to exercise eminent domain or begin any aspect of construction, including tree felling,
- Meaningful consideration of the climate changing impacts of proposed projects, including upstream impacts of securing natural gas and downstream uses of that gas,
- The rights of states are fully respected and honored and not undermined by premature certificate approval of projects (i.e. issuance of certificates, approval of eminent domain, approval of any aspect of construction including tree felling, prior to issuance of state water quality certification decisions),

This reform is necessary not only to address the current structure, that allows for private corporate needs to trump public but also to address changed conditions in the natural gas and energy markets. As the NOI accurately states, the circumstances surrounding shale gas infrastructure projects have drastically changed since the 1999 Policy Statement was written. While the NOI highlights the increase in shale gas production, increase in new and expanded shale gas infrastructure, increasing LNG exports, and ultimately “the Commission receiving and approving an increased number of pipeline and LNG export terminal applications,” there are many additional changes in the past two decades that should factor into the consideration in the revision of the Policy Statement. Notably, but not exclusively:

- The increased scale of social, environmental, and economic harms inflicted by shale gas extraction and its related pipelines, compressors, export facilities, storage facilities and end uses;
- The scientific recognition and demonstration that methane is a major climate changing emission that must be addressed if we are to avoid the increasing harms of climate change, and that shale gas along with its delivery, use and infrastructure are primary sources of methane, as well as other damaging air pollution;
- Climate change has been recognized as a man made catastrophe and that industries which utilize fossil fuels are among those most responsible for its creation and ongoing advancement;
- The increased availability and affordability of alternative, sustainable, and clean energy sources that can fulfill all of the energy needs of our communities, nation and world;
- The recognition of the health and safety harms that result from shale gas extraction, transport, and use;
- The effect of the shale gas industry and its infrastructure on environmental justice and rustbelt communities, where environmental, economic, health, safety and job costs outweigh claims of benefit.
- Information coming out of the industry itself expressing concern about overbuilding of pipelines.
- Wall street itself has begun to divest from fossil fuels, seeing no lucrative future in them.<sup>4</sup> Recognizing that it “no longer makes economic sense” to invest in fossil fuels especially with the rise of “cheaper, cleaner, better technologies.”<sup>5</sup>

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<sup>4</sup> The Institute for Energy Economics and Financial Analysis has found: "In the past several years, oil industry financial statements have revealed significant signs of strain: Profits have dropped, cash flow is down, balance sheets are deteriorating and capital spending is falling. The Stock Market has recognized the sector's overall weakness, punishing oil and gas shares over the past five years even as the market as a whole has soared." Labeling the industry, “weaker than it has been in decades.” <https://grist.org/article/despise-trump-wall-street-is-breaking-up-with-fossil-fuels/>

<sup>5</sup> Bill McKibben, *Despite Trump, Wall Street is Breaking Up with Fossil Fuels*, Grist, June 19, 2018, retrieved from:

For these reasons, and others discussed in this comment, reform of the pipeline review process to make it fair, equitable, impartial and genuinely responsive to facts, science, the law, the public and the protection of present and future generations is warranted.

**FERC must end the practice of determining major policy decisions in the context of single project dockets; rescind recent decisions made in this inappropriate manner; and reconsider under PL18-1.**

The Commission must end the practice of determining major policy decisions in the context of single project dockets. In the months since Chairman McIntyre announced the Commission's decision to initiate a process to review its pipeline review Policy Statement, FERC has made at least two major, far reaching determinations with implications for all pipeline infrastructure reviews within the context of a single pipeline docket.

On March 15, 2018, in the context of granting a certificate to construct the DTE Midstream Appalachia Pipeline, Docket No. CP17-409, FERC similarly announced a process decision with sweeping impacts across projects. In the DTE Midstream case, FERC announced it would be clamping down on out of time intervenors – irritated by community groups who did not become aware of projects within the mere few weeks the agency offers for intervention. The order states, “all other participants are on notice” of this new policy going forward.<sup>6</sup> FERC provided no rational justification for obstructing parties from becoming intervenors where there is no demonstrable detrimental impact to FERC's review process.

As Commissioners Glick and LaFleur expressed in their dissent from the Birdsboro DTE decision re the out of time intervenors policy decision:

“In addition, we have serious concerns with the Commission's “new policy” approach towards motions to intervene out of time. In a recent order, Tennessee Gas Pipeline Co., L.L.C., the Commission indicated a renewed adherence to our regulations regarding late intervention, but the Commission's statement that we will be “less lenient in the grant of late interventions” left room for intervenors to show good cause. However, today's order suggests that good cause for late intervention does not exist where an entity seeking to participate as a party in the proceeding submits a motion on the same day it learned that the application had been submitted. Further, the order declares, “all other participants are on notice” of this new policy going forward. While we agree that late interventions should be limited to parties that demonstrate good cause, we are concerned by the potential consequences of the Commission's pronouncement, particularly as it would apply to landowners and community organizations that lack sufficient resources to keep up with every docket. As we highlighted in our separate statements on Sable

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<https://grist.org/article/despite-trump-wall-street-is-breaking-up-with-fossil-fuels/>

<sup>6</sup> *Order Issuing Certificate, DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238 at P 11. FERC Docket No. CP-17-409, March 15, 2018.

Trail, we are concerned about public confidence in the Commission's pipeline siting process and increased efforts to limit interventions can only accelerate this trend."<sup>7</sup> (citations omitted)

On its May 18, 2018 in an Order Denying Rehearing of a certificate of public convenience and necessity issued to Dominion Transmission, Inc, FERC "announced a sudden and unprompted departure from FERC's practice of evaluating the environmental impact of downstream greenhouse gas emissions from natural gas infrastructure projects, and announced a new policy of not evaluating upstream or downstream greenhouse gas emissions in the vast majority of cases. The Rehearing Denial is procedurally and substantively wrong, and FERC should not adhere to it in the future."<sup>8</sup>

As the New York Attorney General's Office put it in their July 10, 2018 letter regarding the decision made on the Dominion docket, the decision "announced a major policy change on an issue of nationwide concern in a context that makes it virtually impossible to review."<sup>9</sup>

By interjecting and resolving an issue that no one raised, the Rehearing Denial appears designed to avoid judicial review of the FERC majority's decision. Only one party sought rehearing of the FERC certificate of public convenience and necessity at issue. 163 FERC ¶ 61,128, ¶1. Accordingly, only that party – Otsego 2000, Inc. – can seek judicial review of the Rehearing Denial under Natural Gas Act § 19(b). See 15 U.S.C. §717r(b). Otsego 2000, Inc. represents just one set of interests. The State of New York and others that will be affected by the policy change have therefore had their rights to seek review of this broad policy change curtailed.

These docket-based decisions undermine the legal rights of pipeline impacted communities across the nation. In both of these cases, FERC did not limit its sweeping policy decisions to the projects at hand, but declared their decisions applicable to every FERC-regulated pipeline infrastructure project the Commission is or will be reviewing. By rendering these far reaching determinations in the context of a single project docket, FERC has stripped from impacted communities across the nation the ability to challenge them, and therefore have taken from them their rights to fair and timely due process. Individuals and organizations can only legally challenge FERC determinations regarding infrastructure projects if they have intervened in the docket. Communities across the nation that will be impacted, and harmed, by these decisions had no reason to know or anticipate that they needed to intervene in Docket No. CP14-497-001 or Docket No. CP17-409 so they could protect themselves from these blanket decisions by FERC.

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<sup>7</sup> Statement of Commissioner Cheryl A. LaFleur and Commissioner Richard Glick on DTE Midstream Appalachia, LLC, FERC Docket No. CP17-409, March 15, 2018.

<sup>8</sup> Comment of NY State Attorney General on Order Denying Rehearing, Dominion Transmission, Inc., FERC Docket No. CP14-497, July 10, 2018.

<sup>9</sup> Comment of NY State Attorney General on Order Denying Rehearing, Dominion Transmission, Inc., FERC Docket No. CP14-497, July 10, 2018.

The Delaware Riverkeeper Network urges FERC to rescind the DTE Midstream certificate and the Dominion Rehearing Order, and to remove the policy determinations of nationwide significance, and instead to consider those items within the context of PL18-1.

**Any reforms made to the 1999 Policy Statement must focus on community and environmental protection and participation, and place the public on an even playing field with the industry.**

**NEPA: FERC must commit to a full and fair implementation of the National Environmental Policy Act (NEPA).**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC routinely evades and avoids full and fair implementation of the National Environmental Policy Act and its interpretation by the courts in a myriad of ways, including, but not limited to:**

1. ***Ignoring the Full Range of Harms and Costs of Pipeline and Compressor Infrastructure Projects and the Alternatives Analyzed; Instead Focusing on the Claimed, and Often Unsupported, Benefits Advanced by the Industry*** -- FERC fails to conduct a complete and independent analysis of the harms, costs and benefits of projects including, but not limited to, social justice and environmental justice impacts; climate change impacts of pipeline construction and operation; community, environment, and climate change impacts of increased natural gas exploration, fracking, and methane emissions that will be the foreseeable direct and indirect result of the project; economic costs, not just asserted benefits, of the project including (but not limited to) harms to business, adverse impacts to property values, increased community costs related to needed emergency services and preparedness; adverse impacts to jobs, businesses and local economies that result from construction and operation; robust health-and-safety impact analyses; costs associated with environmental harms including increased erosion, stormwater, and pollution. FERC instead accepts the one sided and biased claims of economic benefits put forth by the pipeline companies, without meaningful consideration of costs, as the basis of its determination of economic impact on the public good.
2. ***Failing to Consider the Full Range of Alternatives Available for Fulfilling Claimed Energy Needs*** -- FERC fails to require genuine consideration of alternative means for fulfilling the claimed energy needs asserted by the project applicant (such as increased efficiency, solar, wind, geothermal etc), or the no-build option, allowing applicants to instead focus primarily on alternate routes.
3. ***Approving Pipeline Projects Based on Applications and NEPA Reviews that are Demonstrably Deficient, False and Misleading***--FERC enters into the process of determining whether or not a Certificate is appropriate without ensuring it has complete and accurate information upon which to render a decision; and fails to require the applicant to fully investigate and address data inaccuracies, misleading information, and/or false information that are clearly demonstrated on the docket by expert reports, photographic evidence, eyewitness accounts, and other significant data and information sources.
4. ***Engaging in Segmentation in Order to Prevent Full Consideration of Environmental and Community Impacts***--FERC routinely engages in, and supports efforts by pipeline companies to engage in, illegal segmentation of projects for purposes of FERC review and certification in an effort to minimize the adverse impacts that might impact the ultimate decisionmaking outcome

by FERC and other agencies that rely on FERC NEPA documentation for considering project impacts.

5. ***Failing to Give Due Consideration to the Climate Change and Drilling Impacts of Pipeline Projects***--FERC fails to consider project impacts on climate change, including those resulting from the production, processing, distribution, consumption and use of natural gas associated with proposed infrastructure projects, and continues to reject the importance and value of using the Social Cost of Carbon for supporting this evaluation.
6. ***Orchestrating it's Public Process in a Manner that Frustrates Public Input and Participation***--FERC's public meetings are designed to discourage participation and opposition through unnecessary isolation of commenters, time restrictions, inconvenient timing and location of public meetings. Additionally, FERC routinely denies the public access to vital information; allowing for significant project alterations after public comment periods have ended; creates unnecessary technological barriers to participation; creates barriers to participation through lack of notice for and poor timing of public comment periods and public hearings; and misleads and discourages landowners from participating in the public process.
7. ***Predermining the level of it's NEPA reviews***--i.e. not undertaking an Environmental Assessment in order to determine whether or not a FONSI or EIS is the appropriate next step – but rather eyeballing the right path and determining whether an EA or EIS will be required before the review is even begun.

### **FERC Must Ensure they Follow the Intent and Purpose of NEPA**

The intent and purpose of NEPA is to ensure agencies are considering the community and environmental repercussions of their decisions and actions. In order to stick to the mandates of NEPA, agency focus should not be on shrinking the evaluation or streamlining the process but ensuring the process is thorough and true to the the mandates of the act. If, by contrast, agencies were to limit or in any way disregard the mandates put forth by congress in NEPA, it will serve to counteract the purpose and intent of the act and undermine agency mandates as established by congress. While there is a push by the current presidential administration to reform agency environmental review, including reviewing the process by which agencies implement NEPA,<sup>10</sup> this effort cannot be carried forth in a way that undermines the mandates of the law and should not be carried forth in a way that undermines good government decisionmaking. Truncating environmental reviews, displacing the use of solid science and facts, and undermining quality public engagement would undermine the mandates and spirit of NEPA raising both legal and political challenges.

Additionally, in light of the sweeping directives set out in EO 13807, we can not view the efforts to streamline pipeline review that are indicated in the NOI in a bubble. NEPA has served as an important and reliable protection for communities and the environment in the FERC pipeline review process throughout the decades. On June 20, 2018, CEQ issued Advance Notice of Proposed Rulemaking for the NEPA regulations.<sup>11</sup> So, while it is essential that FERC reform its policy so that it is no longer in

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<sup>10</sup> Executive Order 13807, August 24, 2017, retrieved from: <https://www.federalregister.gov/documents/2017/08/24/2017-18134/establishing-discipline-and-accountability-in-the-environmental-review-and-permitting-process-for>

<sup>11</sup> Council on Environmental Quality, Proposed Rule, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, June 20, 2018, retrieved from: <https://www.federalregister.gov/documents/2018/06/20/2018-13246/update-to-the-regulations-for-implementing-the-procedural-provisions-of-the-national-environmental>

violation of NEPA regulations and it ensures a full, robust and unbiased review of project proposals (including a full, fair and accessible public comment process that can help to illuminate FERC's review), at a minimum, it is also critical that FERC does not weaken or remove any of the vital community and environmental protections codified within the Policy Statement.

The FERC NOI appears to suggest that aspects of its NEPA and Pipeline Review process are redundant and/or duplicative. For example, the NOI asserts:

“under the Policy Statement, the Commission looks at adverse impacts on landowners and communities affected by a proposed project. The Policy Statement noted that “[t]raditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project,” but explains that “[l]andowner property rights issues are different in character from other environmental issues considered under [NEPA].” Since issuance of the Policy Statement, the Commission's environmental analyses have come to adopt a more expansive consideration of property rights issues, so issues that previously might not have been routinely reviewed in the environmental document—e.g., a project's potential impact on property values, community development, employment, tax revenue, and disadvantaged populations—now are. Thus, these issues are, in effect, considered twice, once in the context of the Policy Statement assessment focusing on economic impacts, and again in the NEPA review focusing on environmental impacts. Economic impacts on landowners and surrounding communities can be, and often are, mitigated, for example, through alternative routing of the proposed rights-of-way, co-location with existing utility corridors, and negotiating the purchase of rights-of-way.”

While FERC suggests that its and NEPA's process are duplicative, this is simply not the case -- or at least it should not be the case if FERC were properly fulfilling its legal obligations pursuant to NEPA and the Natural Gas Act (NGA). The requirements and standards for the different reviews under these two laws are different. NEPA reviews are intended to be more far ranging, more inclusive of concerns, considerations, science and facts so as to support more informed decisions whereas review under the NGA and the policy statement supporting its implementation are focused on fulfilling more specific statutory guidelines and criteria. For example, pursuant to NEPA, the adverse impacts to landowners and communities should take a broad look at the wealth of impacts -- environmental, economic, health, safety, aesthetic and quality of life and are to be used by agencies to help guide better decisions rather than dictating outcomes. In addition, the NEPA documentation is relied upon by multiple agencies to fulfill varying statutory obligations, such as the Clean Water Act, Clean Air Act and Endangered Species Act. By comparison, Under the NGA and Policy Statement, these adverse impacts are directed towards consideration of the “economic test” that is supposed to be the basis of FERC's determination of whether a project's public benefits outweigh its adverse effects.

**1. COSTS & BENEFITS: FERC Must Commit to Including a Complete Analysis of the Costs and Benefits of Every Aspect of a Project, Including a Full and Fair Evaluation of Climate Change Impacts; Induced Fracking/Drilling Operations; Costs of Construction, Operation and Maintenance (not Just Benefits); Health and Safety Impacts; the Full Array of Community, Business and Environmental Impacts that Will Result; Consideration of Economic and Job Costs, Not Just Industry-Asserted-Benefits.**

**Under its implementation of the 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Routinely Ignores the Full Range of Costs, Including Economic Costs, Associated with Pipeline and Compressor Infrastructure Projects**

FERC's section 7 duty to consider the public interest is broader than promoting a plentiful supply of cheap gas. (*See Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 649 (D.C. Cir. 2010)). Rather, FERC must ensure "the [public] benefits of the proposal outweigh the adverse effects on other economic interests." *AES Ocean Express, LLC*, 103 F.E.R.C. ¶ 61,030 at ¶ 19.

This requirement is also reflected in FERC's 1999 Policy Statement, which states that the Commission will evaluate projects 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 then proceed to complete the environmental analysis where other interests are considered"<sup>12</sup>

Despite the clear mandate of section 7 and this stated intention of FERC's existing policy that the agency consider costs, Dr. Spencer Phillips, Ph.D. of Key-Log Economics has found through independent analysis of five recent FERC pipeline projects, that the Commission's current pipeline certification policy--as stated and as implemented--does not result in "economically sound outcomes in which the public benefits delivered by new interstate natural gas transmission pipelines are likely to exceed the costs imposed on the public."<sup>13</sup>

FERC routinely ignores documented economic harms anticipated from proposed pipelines, while accepting at face value company claims of benefit. As Dr. Spencer Phillips, Ph.D. articulates, FERC's policy that guides its review of pipeline economics "is completely inadequate for evaluating the costs and benefits of proposed pipelines."<sup>14</sup>

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<sup>12</sup> Statement of Policy, FERC Docket No. PL99-3, September 15, 1999, retrieved from: <https://www.ferc.gov/legal/maj-ord-reg/PL99-3-000.pdf>.

<sup>13</sup> Key-Log Economics, LLC, *Economic Issues Related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines, and FERC Docket No. PL18-1-000*, prepared for the Delaware Riverkeeper Network, July 23, 2018.

<sup>14</sup> Testimony of Dr. Spencer Phillips, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016.

FERC's current policy allows for the applicant to provide information that supports FERC's approval. By asking only for information supporting a foregone conclusion, FERC fails to subject pipeline applications to a full, rigorous, or economically adequate examination of the proposals. FERC compounds this problem by failing to include in its decisionmaking, information and evidence brought forth during the NEPA process of economic harm -- once FERC turns on the blinders on with regards to harmful impacts, it keeps them on throughout the process.

Additionally, FERC relies almost exclusively on cost and benefit information supplied by applicants; their consultants; and other industry stakeholders, such as the Interstate Natural Gas Association of America (INGAA) who have -- and act upon -- their self-interest by presenting inflated estimates of benefits and greatly discounted estimates of costs, with many costs ignored entirely. Not surprisingly, these vested interests conclude that proposed projects would result in no damage to natural resources that cannot be mitigation for, no associated economic costs, and no adverse economic effects on the "surrounding communities" that are among the stated interests of FERC's policy. These claims rely on outdated methods that are proven to be useless, at best, for making such projections. As most recently demonstrated by the Atlantic Coast Pipeline<sup>15</sup> (*FERC Docket No. CP15- 554*), Mountain Valley Pipeline<sup>16</sup> (*FERC Docket No. CP16-13*), PennEast Pipeline<sup>17</sup> (*FERC Docket No. CP15-558*), Millennium Eastern System Upgrade Project<sup>18</sup> (*FERC Docket No. CP16-486*), and Atlantic Sunrise pipeline<sup>19</sup> (*FERC Docket No. CP15-138*), FERC's NEPA review relies almost entirely on the information provided by the applicant and as a result, provides no serious consideration of the costs of pipeline construction, operation and maintenance. Importantly, these estimates exclude external costs--that is, "costs borne by third parties like nearby landowners, businesses impacted by pipeline construction and operation, and the general public--of proposed interstate natural gas pipelines."<sup>20</sup>

Notably, FERC ignores rigorous, independent, third party economic analysis, or other documented and demonstrated harms, put forth on project dockets.<sup>21</sup>

Ultimately, the implementation of FERC's economic test results in the Commission's routine approval of pipeline projects that, when the true extent of economic impacts are considered, in fact fail the Commission's stated economic test.

### **Property Value Costs and Lost Tax Revenues Are Significant and Ignored**

Some of the important costs that pipeline applicants and FERC fail to consider include:

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<sup>15</sup> Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, FERC Docket No. CP15-138, February 2016.

<sup>16</sup> Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, FERC Docket No. CP16-10, May 2016.

<sup>17</sup> Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, FERC Docket No. CP15-558, January 2017.

<sup>18</sup> Key-Log Economics, LLC, *Economic Costs of the Eastern System Upgrade*, FERC Docket No. CP16-486, April 2017.

<sup>19</sup> Key-Log Economics, LLC, *FERC's Approval Based on Incomplete Picture of Economic Impacts*, March 2017.

<sup>20</sup> Key-Log Economics, LLC, *Economic Issues Related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines, and FERC Docket No. PL18-1-000*, prepared for the Delaware Riverkeeper Network, July 23, 2018.

<sup>21</sup> See Atlantic Coast Pipeline (*FERC Docket No. CP15- 554*), Mountain Valley Pipeline (*FERC Docket No. CP16-13*), PennEast Pipeline (*FERC Docket No. CP15-558*), Millennium Eastern System Upgrade Project (*FERC Docket No. CP16-486*), and Atlantic Sunrise pipeline (*FERC Docket No. CP15-138*).

- Reductions in private property values along the length of pipelines and extending outward through the right-of-way, the “high consequence area,” and the evacuation zone. These reductions in property value also translate into a reduction in the property taxes collected by local governments. These property value reductions can be significant:
  - construction and operation of the PennEast Pipeline, for example, would result in an estimated loss of property value of \$159.7 to \$177.3 million resulting in a \$2.7 to \$3.0 million loss in property tax revenue annually;<sup>22</sup>
  - construction and operation of the Mountain Valley Pipeline would result in estimated losses of \$42.2 to \$53.3 million in property value (resulting in losses ranging from \$243,500 to \$308,400 tax revenue annually).<sup>23</sup>
- Property value reductions associated with pipeline compressor stations have also been documented -- for example proximity to a pipeline compressor was responsible for a 25-50% reduction of property assessments for homes in Hancock, NY.<sup>24</sup>

Credible, independent research shows that pipelines do in fact have significant negative effects on property values. See “Claims That Pipelines Do Not Harm Property Value Are Invalid” beginning on page 20 of Key-Log Economics’ report on the Millennium Eastern System Upgrade project.<sup>25</sup> And yet, FERC routinely cites fundamentally flawed, industry-sponsored studies that claim there is no such property value effect, ignoring the independent data and real world experiences to the contrary. Never has FERC provided a detailed, thoughtful or credible response of any kind to the property value concerns raised by experts and impacted landowners.

### **Environmental, Business, Farming, and Other Economic Costs are Far Reaching, Staggering, and Ignored**

Additional costs resulting from pipeline construction, operation, and maintenance are routinely ignored by FERC:

- Loss of water purification, water storage, air quality benefits, flood protection, aesthetic quality and wildlife habitat, are among the costs that are ignored despite being well documented on dockets. These benefits are lost, minimized and/or significantly reduced when land uses/land covers like forests, wetlands, natural meadows, and natural open space that produce these benefits at a high rate are converted to pipeline associated industrial operations and/or shrub/scrub that produce far less, and frequently no, natural benefits.
- Economic harms such as reduced crop production for farmers, adverse impacts to businesses along or near the pipeline right of way, and adverse impacts to ecotourism and related businesses and jobs are also costs that are routinely ignored despite being well documented on dockets.
- Forgone economic development opportunity from recreationists, tourists, retirees, entrepreneurs, and workers who will choose safer, more environmentally healthy, and more aesthetically pleasing locations than the ones associated with construction and operation of the

<sup>22</sup> Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, FERC Docket No. CP15-558, January 2017.

<sup>23</sup> Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, FERC Docket No. CP16-10, May 2016.

<sup>24</sup> Catskill Citizens, Press Release, *Proximity of Compressor Station Devalues Homes by as Much as 50%*, July 7, 2015.

<sup>25</sup> Key-Log Economics, LLC, *Economic Costs of the Eastern System Upgrade*, FERC Docket No. CP16-486, April 2017.

proposed pipeline/compressor are similarly left unconsidered and unaddressed by FERC and yet they are among the costs documented on dockets.

These costs can be significant and staggering:

- For the PennEast Pipeline, a 115 mile pipeline with one compressor, estimated external costs ignored by FERC total approximately \$13.3 to \$56.6 billion.<sup>26</sup>
- In the case of the Mountain Valley Pipeline, an analysis of only half the proposed 300- mile length revealed uncounted external costs of between \$8 and \$8.9 billion.<sup>27</sup>
- For the Atlantic Coast Pipeline, where costs were estimated for just a fifth of the ACP's proposed 500+ mile length, unconsidered costs by FERC would total between \$6.9 and \$7.9 billion.<sup>28</sup>
- For the Millennium Eastern System Upgrade project, which includes new compression and a new 7.8 mile section of pipeline, external costs ignored by FERC total between \$4.7 and \$18.8 million.<sup>29</sup>

FERC and applicants routinely fail to seriously consider these external costs directly related to and resulting from proposed projects. Key-Log Economics has developed conservative estimates of various external costs of several recently proposed pipeline and pipeline expansion projects. Table 1, below, provides a summary of these estimates and see attached Key-Log report attached for detailed descriptions of the the methods, data, and assumptions specific to each case.

The Delaware Riverkeeper Network, Key-Log Economics, and other organizations have provided these expert analyses in comments on the respective dockets of each project in a timely manner. FERC has failed to provide any substantive response to the enumeration and valuation of most of the external costs of these projects and in the course of ignoring this vital information has issued certificate approvals for each of them. For example, in the Final Environmental Impact Statements (FEISs) for the Atlantic Coast and Mountain Valley Pipelines, FERC completely ignores the loss of ecosystem service value and the potential impact on recreation and tourism income and amenity-based development that was provided on the docket.

**Table 1: Summary of Cost Estimates for Several Proposed Interstate Natural Gas Transmission Projects.<sup>30</sup>**

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<sup>26</sup> Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, FERC Docket No. CP15-558, January 2017.

<sup>27</sup> Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, FERC Docket No. CP16-10, May 2016.

<sup>28</sup> Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, FERC Docket No. CP15-554, February 2016.

<sup>29</sup> Key-Log Economics, LLC, *Economic Costs of the Eastern System Upgrade*, FERC Docket No. CP16-486, April 2017.

<sup>30</sup> Key-Log Economics, LLC, *Economic Issues Related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines*, and FERC Docket No. PL18-1-000, prepared for the Delaware Riverkeeper Network, July 23, 2018.

<b>Estimated impacts (costs)</b>	<b>Atlantic Coast Pipeline<sup>a</sup></b>	<b>Mountain Valley Pipeline<sup>b</sup></b>	<b>PennEast Pipeline<sup>c</sup></b>	<b>Atlantic Sunrise Pipeline<sup>d</sup></b>	<b>Millennium Eastern System Upgrade<sup>e</sup></b>
Lost Property Value (one-time cost)	\$57.8 - 83.0 million	\$43.7 - 55.2 million	\$165.1 - 183.4 million	Not Estimated	\$2.1 million
Lost Property Tax Revenue (Annual loss for the life of the project)	\$0.29 - 0.42 million	\$0.25 - 0.32 million	\$2.8 - \$3.1 million	Not Estimated	\$0.0376 million
Lost Ecosystem Service Value during Construction (one-time)	\$17.5 - 63.2 million	\$23.6 - 85.0 million	\$6.5 - 22.8 million	\$6.3 - 23.1 million	Not Estimated
Lost Ecosystem Service Value during Operation (annual)	\$5.0 - 18.4 million	\$4.2 - 15.3 million	\$2.5 - 9.3 million	\$3.0 - 11.4 million	Not Estimated
Forgone Economic Development <sup>f</sup> (annual)	\$51.3 million 387 jobs	\$139.6 million 1,164 jobs	\$537.6 million 4,090 jobs	Not Estimated	\$85.3 million 745 jobs
Social Cost of Carbon <sup>g</sup> (annual)	Not Estimated	Not Estimated	\$301.8 - 2,339.0 million	\$466.5 - 3,615.1 million	\$51.8 - 434.5 million

Lifetime costs in Present Discounted Value	\$9.5 - 11.8 billion	\$23.7 to \$25.8 billion	\$14.5 - 60.3 billion <sup>h</sup>	\$22.2 - 95.1 billion <sup>h</sup>	\$4.9 - 19.5 billion
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### **FERC Fails to Evaluate the Distribution of Economic Impacts and Environmental Justice --**

The disproportionate impact of environmental degradation on minority, immigrant and low income communities is a serious issue that needs to be considered, addressed and avoided in all decisionmaking. And yet FERC gives this important issue no genuine concern or evaluation. Concerns about FERC cherry-picking information in order to overlook environmental justice issues and disproportionate impacts to communities of color are prevalent in a search of dockets.

It is critically important that environmental justice communities be given robust protection in the FERC pipeline review process.

While “...some Environmental Impact Statements (EISs) have mentioned environmental justice concerns raised by members of the public. The Commission, however, has not been proactive or systematic in evaluating the distribution of impacts, positive and negative, of proposed interstate natural gas transmission pipelines. Such an evaluation would take into account whether negative impacts disproportionately affect minority, low-income, or otherwise vulnerable populations. And if there are cases in which overall expected benefits outweigh overall expected costs (thus passing an efficiency test), the Commission’s process should include a thorough evaluation of who would reap the the benefits and who would bear the costs.”<sup>31</sup>

### **FERC Lacks the Economic Expertise to Remedy Its Economic Failings**

FERC’s reliance on pipeline applicants to provide information about the need for, as well as the benefits and costs of, their proposals is exacerbated by FERC’s lack of capacity to review and filter the economic information they receive, let alone to conduct analyses of its own. The Office of Energy Projects (OEP), whose “mission...is to foster economic and environmental benefits for the nation through the approval and oversight of hydroelectric and natural gas pipeline energy projects that are in the public interest”<sup>32</sup> has no economists among its staff.<sup>33</sup> The Office of Energy Policy and Innovation, which otherwise collaborates with other FERC offices to evaluate industry proposals, does not support OEP by providing any economic review and analysis of pipeline certification projects.<sup>34</sup>

It does not seem plausible that an agency responsible for evaluating the economic merits of energy

<sup>31</sup> Key-Log Economics, LLC, *Economic Issues Related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines, and FERC Docket No. PL18-1-000*, prepared for the Delaware Riverkeeper Network, July 23, 2018.

<sup>32</sup> FERC, Office of Energy Projects, Updated March 20, 2017, retrieved from: <https://www.ferc.gov/about/offices/oep.asp>.

<sup>33</sup> 2018 FERC Employee Phone Directory, retrieved from: <https://www.ferc.gov/contact-us/tel-num/phone.pdf>.

<sup>34</sup> Personal communication of Dr. Spencer Phillips (Key-Log Economics) with OEPI’s Administrative Officer, March 17, 2017.

project proposals could do so without benefit of qualified economic expertise. Indeed, as we have noted above and as is detailed in this comment and referenced attachments, FERC does not provide adequate review of the economic costs and benefits of pipelines. The predictable result will be too much pipeline capacity, too many environmental and other external costs, and a loss of economic vitality for American people and communities.

### ***FERC Must Consider the Social Cost of Carbon in Its Climate Change Analysis***

The social cost of carbon (SCC) is “a measure, in dollars, of the long-term damage done by a ton of carbon dioxide (CO<sub>2</sub>) emissions in a given year.”<sup>35</sup> The SCC is important for decisionmaking because it helps agencies more accurately weigh the costs and benefits of a new rule or regulation. Particularly, it is a tool that would allow FERC to measure economic impacts of climate change that would result from the proposed pipelines it reviews in order to more accurately fulfill its NEPA and NGA mandates, and to perform its “economic test” of balancing the adverse impacts of a project against its benefits in order to determine whether the project is in the public interest.

In April 2016, a federal court upheld the legitimacy of using the social cost of carbon as a viable statistic in climate change regulations.<sup>36</sup> In August 2016, the CEQ issued its final guidance for federal agencies to consider climate change when evaluating proposed Federal actions, stating:

“agencies should consider applying this guidance to projects in the EIS or EA preparation stage if this would inform the consideration of differences between alternatives or address comments raised through the public comment process with sufficient scientific basis that suggest the environmental analysis would be incomplete without application of the guidance, and the additional time and resources needed would be proportionate to the value of the information included”<sup>37</sup>

Commissioners Glick and LeFleur have gone on the record in multiple dockets discussing the applicability, value and legal importance of using the SCC tool for evaluating climate change impacts and informing FERC’s legal mandate to consider whether projects are genuinely in the public interest. FERC has received comments on multiple dockets from the public and their experts not just explaining the value of the social cost of carbon but providing SCC facts and figures on how FERC should conduct that analysis in specific pipeline contexts, (see e.g. Delaware Riverkeeper Network comments on dockets CP15-558 for the PennEast Pipeline and CP16-486 for the Millennium Eastern System Upgrade Project).

Despite all this, FERC has gone out of its way to avoid seriously addressing project impacts from climate change by disregarding their upstream and downstream GHG emissions and disregarding the SCC tool. FERC argues that the Social Cost of Carbon is not useful for NEPA purposes.<sup>38</sup> Not only is

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<sup>35</sup> EPA Fact Sheet, Social Cost of Carbon, December 2016, retrieved from: [https://www.epa.gov/sites/production/files/2016-12/documents/social\\_cost\\_of\\_carbon\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf)

<sup>36</sup> Susanne Brooks, Environmental Defense Fund, *In Win for Environment, Court Recognizes Social Cost of Carbon*, August 29, 2016.

<sup>37</sup> Final Guidance on Greenhouse Gases and Climate Change, Council on Environmental Quality, August 2016.

<sup>38</sup> EarthReports, 828 F.3d at 956, retrieved from: <https://www.leagle.com/decision/infco20160715229>

this assertion demonstrably false, but in addition FERC has made no effort to identify a suitable alternative method for measuring a project's climate change impacts.

In the *Sabal Trail* decision, the Court vacated and remanded the Commission's authorization of the SMP Project, and directed the Commission to "explain whether it still adheres to its prior position that the Social Cost of Carbon tool is not useful in performing its NEPA review."<sup>39</sup> In FERC's order to reinstate the certificate authorizations for the Southeast Market Pipelines Project (SMP Project)<sup>40</sup>, FERC responded by claiming that "the Social Cost of Carbon cannot meaningfully inform our decisions on proposed pipeline projects"<sup>41</sup> and that "the Social Cost Carbon is not an appropriate tool for evaluating the significance of downstream GHG emissions."<sup>42</sup> This assertion has been repeated by FERC over and over in the certificate orders issued since. Most recently, in FERC's certificate to Texas Eastern Transmission, LP to construct and operate the Texas Industrial Market Expansion Project and the Louisiana Market Expansion Project (Projects):

The Commission also contends, without further explanation, that it "has not identified a suitable method" for determining the impact from the Projects' contribution to climate change and, absent such a method, it simply "cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment and how that impact would contribute to climate change."<sup>43</sup>

And is again repeated in the NOI:

"As for the use of the Social Cost of Carbon tool, the Commission has found that although this tool is appropriate to use as part of cost-benefit analyses associated with certain rulemakings, it is not useful or appropriate to apply in its NEPA documents."<sup>44</sup>

However, as Commissioners Glick and LaFleur have pointed out in multiple recent certificate order decisions (often in their concurrences and/or dissents), FERC is incorrect in its claims that there is "no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions"<sup>45</sup> and that "it cannot 'determine how a project's contribution to GHG emissions would translate into physical effects on the environment.'"<sup>46</sup> As Commissioner Glick explains in his dissent of the Florida SouthEast Connection,<sup>47</sup>:

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<sup>39</sup> Paraphrase of DC Circuit Court decision from Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>40</sup> *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018).

<sup>41</sup> Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>42</sup> Decision summarized in Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>43</sup> Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

<sup>44</sup> *Fla. Se. Connection*, 162 FERC ¶ 61,233 at PP 37-38 (LaFleur and Glick, Comm'rs, dissenting).

<sup>45</sup> *Id.* P 27. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at 2, 5-8 (2018) (Glick, Comm'r, dissenting).

<sup>46</sup> Statement of Commissioner Cheryl A. LaFleur on Texas Eastern's Texas Industrial Market Expansion Project, FERC Docket No. CP18-10, July 19, 2018 referencing Texas Eastern Certificate Order at P 33.

<sup>47</sup> Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC **Docket Nos.** CP17-441-000, CP17-441-001, July 19, 2018. See also Texas Eastern Transmission, LP, July 19, 2018, Docket No.: CP18-10-000; partial dissent on on Page **17 of 94**

“That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency’s obligation to consider how its actions contribute to the harm caused by climate change.”<sup>48</sup>

Similarly, Commissioner LaFleur rejects this claim stating:

“That is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived tool to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm. I have drawn the simplistic analogy of human food consumption and diet. It would be convenient for a person to say “I guess it is fine to eat this donut, because there is simply no way to assess if it will make me fat.” But there is such a tool, in the form of calories, which have been scientifically derived to translate the consumption of a specific food item to impact on weight gain. Similarly, we are able to estimate what the long-term consequence of a ton of carbon dioxide emissions is likely to be, by use of the Social Cost of Carbon tool.”<sup>49</sup> (citations omitted)

As Commissioner Glick acknowledged again in his June 15, 2018 dissent of the Mountain Valley Pipeline project order denying rehearing of the the pipeline’s certificate:

“... the Commission concludes that it is not obligated to consider the harm caused by the Projects’ contributions to climate change and, in any case, that it lacks the tools needed to do so. In order to meet our obligations under both NEPA and the NGA, the Commission must adequately consider the environmental impact of greenhouse (GHG) emissions on climate change. As I have previously explained, and reiterate below, the Commission has the tools needed to evaluate the Projects’ impacts on climate change. It simply refuses to use them. [Consideration of the Projects] contribution to the harm caused by climate change—[is] critical to determining whether the Projects are in the public interest.”<sup>50</sup> (citations omitted)

The U.S. Environmental Protection Agency has also recommended the use of the Social Cost of Carbon in its comments on the Commission’s pending review of its Policy Statement, explaining that estimates of the Social Cost of Carbon “may be used for project analysis when [the Commission] determines that a monetary assessment of the impacts associated with the estimated net change in GHG emissions

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Columbia Gas Transmission, L.L.C., July 19, 2018, Docket No.: CP17-80-000; July 19, 2018, Docket No.: CP17-80-000; partial dissent of the Northwest Pipeline certificate order.

<sup>48</sup> *Id.* at 5 (Glick, Comm’r, dissenting) (citing cases that discuss the Social Cost of Carbon when evaluating whether an agency complied with its obligation under NEPA to evaluate the climate change impacts of its decisions).

<sup>49</sup> Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>50</sup> Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC , FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

provides useful information in its environmental review or public interest determination.”<sup>51</sup>

Commissioners Glick and LaFleur have noted that while the task of developing the policy needed to address FERC’s current violations of NEPA and the NGA in this context isn’t easy, it is FERC’s obligation. As Commissioner LaFleur states, “The fact that consideration of climate change is difficult does not alleviate our responsibilities under the Natural Gas Act (NGA) and NEPA to determine the significance of GHG emissions.”<sup>52</sup> In his Partial Dissent of Columbia Gas Transmission, L.L.C.’s Eastern Panhandle Expansion Project (Eastern Panhandle Project), Commissioner Richard Glick

“The Commission cannot point to the mere presence of uncertainty over upstream and downstream GHG emissions to excuse it from considering the harm from the Project’s contribution to climate change. In the case of new natural gas pipelines, it is reasonable to assume that building incremental transportation capacity will spur additional production and result in some level of combustion of natural gas, even if the exact details of the method or location are not definite. As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the “nature of the effect” (end-use emissions) is reasonably foreseeable, but “its extent is not” (specific consumption activity producing emissions), an agency may not simply ignore the effect. [...] It is entirely foreseeable that natural gas transported through the Project will be combusted, emitting GHGs that contribute to climate change. [...] Under these circumstances, the Commission must consider the impact from climate change resulting from this likely end use.”<sup>53</sup> (citations omitted)

FERC’s claim that it lacks the means to account, at least conservatively/partially, for climate change impacts is absurd. The Social Cost of Carbon does just that. In the EPA’s own definition, it explains that the Social Cost of Carbon:

is meant to be a comprehensive estimate of climate change damages and includes, among other things, changes in net agricultural productivity, human health, property damages from increased flood risk and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning. However, it does not currently include all important damages.

....

The models used to develop [SCC] estimates do not currently include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature because of a lack of precise information on the nature of damages and because the science incorporated into these models naturally lags behind the most recent

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<sup>51</sup> United States Environmental Protection Agency, Comments on FERC Docket No. PL18-1-000, Accession Number 20180621-5095 at 4–5, June 21, 2018.

<sup>52</sup> Statement of Commissioner Cheryl A. LaFleur on **Texas Eastern’s Texas Industrial Market Expansion Project**, FERC Docket No. CP18-10, July 19, 2018.

<sup>53</sup> Statement of Commissioner Richard Glick on Columbia Gas Transmission, L.L.C., FERC Docket Nos. CP17-441 and CP17-441-001No. CP17-80, July 19, 2018.

research. Nonetheless, current estimates of the [SCC] are a useful measure to assess the climate impacts of CO2 emission changes.<sup>54</sup>

As the U.S. Court of Appeals for the District of Columbia Circuit explained in *Sierra Club v. FERC* (Sabal Trail), “in the face of indefinite variables, ‘agencies may sometimes need to make educated assumptions about an uncertain future.’”<sup>55</sup> The tools exist, and conservative estimates based on best science and economics can be calculated. In fact, as previously noted, the Delaware Riverkeeper Network and other public stakeholders have regularly done this work for FERC. The magnitude of adverse impacts revealed in Key-Log Economics’ conservative estimates of the SCC of three recently approved pipeline projects is significant.<sup>56</sup>

- Millennium’s Eastern System Upgrade: **\$51.8 - 434.5 million**
- The PennEast Pipeline: **\$301.8 - 2,339.0 million**
- Atlantic Sunrise Pipeline: **\$466.5 - 3,615.1 million**

→ **Needed Pipeline Review Reform: FERC must reform of its 1999 pipeline review policy to require the calculation and consideration of the significant costs of GHG emissions and climate change pursuant to NEPA and it’s NGA “public interest” duty. This reform should mandate that FERC use the Social Cost of Carbon for evaluating those impacts. Additionally, FERC must require that applicants provide the Commission and the public with all the information needed to conduct this evaluation.**

FERC’s current review of economic impacts for projects does not provide a comprehensive and equitable analysis of natural gas infrastructure benefits and adverse impacts. As summarized by Dr. Spencer Phillips:

“Given the weaknesses of the policy, and as evidenced by the track record, FERC’s “economic test” does not provide a robust evaluation of the public merits of natural gas transmission projects. It is a “test” in which difficult questions (such as about external costs borne by all stakeholders) are not asked, and where those taking the test (the applicants) provide the answer key.”

“FERC should update/upgrade both its policy, its capacity, and its practice regarding the economic effects of new interstate natural gas pipelines. To ensure that future certification decisions result in efficient use of land and other natural resource, FERC must establish procedures, and install analytical capacity sufficient to provide independent, rigorous, and credible analysis of the benefit claims promoted by pipeline applicants. It must also conduct (or contract to have conducted) thorough analyses of the external economic costs likely to result from the construction, presence, and operation of

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<sup>54</sup> EPA Fact Sheet, Social Cost of Carbon, December 2016, retrieved from: [https://www.epa.gov/sites/production/files/2016-12/documents/social\\_cost\\_of\\_carbon\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf).

<sup>55</sup> Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018; See *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329).

<sup>56</sup> The range of estimates for the social cost of carbon reflect different assumptions about how heavily future costs are discounted as well as differences over time in the impact of each tonne of CO2 equivalent emitted. New Key-Log memo

each pipeline. For any pipelines approved on efficiency grounds (i.e. benefits exceed costs), FERC should further ensure that the successful certification application pays compensation to the parties harmed by those external costs. Finally, to prevent problems of overcapacity and the associated problems of accelerated climate change and a delayed transition to safer, cleaner, more renewable fuels, FERC should ensure that all new pipeline capacity applications are considered in the context of existing (and previously certified) capacity in the entire gas transmission system.”

→ **Needed Pipeline Review Reform: Needed Pipeline Review Reform: FERC must amend it’s Policy Statement regarding the balancing of a proposed project’s adverse impacts against favorable economic benefits to determine whether the proposed project is required by the public convenience and necessity so that:**

- FERC may no longer rely on cost and benefit information supplied by applicants; their consultants; and other industry stakeholders. Instead FERC must rely on qualified and independent economic expertise to evaluate the economic costs and benefits, including those claimed by different stakeholders, of a project;
- FERC may no longer ignore documented economic harms anticipated from proposed pipelines, but must give them equal weight to a project’s economic benefits, both of which must be reviewed independently;
- FERC must consider all externalities, including the costs to third parties like nearby landowners, businesses impacted by pipeline construction and operation, and the general public--of proposed interstate natural gas pipelines;
- FERC must include the Social Cost of Carbon in its evaluation of the impacts of proposed projects;
- When considering costs FERC must also consider the issue of need -- including existing, approved and proposed projects in its analysis -- in order to prevent over capacity which would undermine any economic valuation;

**2. DEFICIENT EIS: FERC must ensure that All Inaccurate, Missing, False or Misleading Data and/or Information Gaps Identified by FERC and/or Public Commenters Are Fully, Completely and Accurately Addressed before FERC issues certificate approval.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Consistently Approves Pipeline Projects Based on Applications and NEPA Reviews that are Demonstrably Deficient, False, and Misleading.**

The National Environmental Policy Act (NEPA)<sup>57</sup> requires an applicant to supply the information necessary to determine a project’s impact on the environment and natural resources. Complete and accurate information is essential for informed decision making, yet FERC consistently approves projects when it has been demonstrated by data, photos, expert reports, and documented evidence that the information in the project application materials and the resulting NEPA documents are filled with

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<sup>57</sup> 18 CFR § 380.3(b)(2)

data gaps, misrepresentations, and inaccurate, false, or even conflicting information. Additionally, FERC approves projects based on information that has been solidly debunked, contradicted, and undermined by expert, agency, and public comment.

The NEPA documents upon which FERC bases its pipeline approvals are of such poor quality that they cannot support legitimate or defensible conclusions. These same documents are relied upon by other state and federal agencies and thereby similarly undercut reasoned decisionmaking by other regulatory bodies with authority over a project.

FERC must proactively work to ensure that NEPA documentation it is providing to the public, other agencies, the states, and the FERC Commissioners are complete and accurate. When FERC receives documented and credible information demonstrating deficiencies or inaccuracies in its NEPA documents, FERC must be obliged to remedy those problems before finalizing its NEPA documentation and review and must affirmatively explain how it considered and addressed the demonstrated deficiency or false information.

### **Missing Information Is a Frequent Deficiency in FERC NEPA Documents**

Often, it is the *lack* of information in NEPA documents which is the most egregious. For example, FERC documentation for the PennEast Pipeline Project (*FERC Docket CP15-558*) lacks: detailed locational maps; accurate lists of wetland, waterbody, and/or aquifer crossings; restoration measures and/or impact mitigation; accurate fisheries classifications; accurate information on vegetative cover impacts; accurate and complete information on endangered or threatened species impacts; an accurate list of biological/ecological impacts; fails to consider socioeconomic conditions and the project's impacts thereon; lacks accurate information on geologic hazards; lacks accurate information on existing air quality; and more.<sup>58</sup> All of these problems were challenged and backed up with solid documentation by members of the public, including with expert documentation, and yet FERC ignored all of the evidence provided of the inaccurate, false and missing information in the final NEPA documentation. the final EIS in no way addressed the concerns nor the evidence of false information and claims provided to FERC by the public. The Delaware Riverkeeper Network has had this same experience with every FERC pipeline and compressor we have been involved with.

### **FERC NEPA Documents Routinely Rely Upon Inaccurate Information**

The incorrect information supplied by pipeline companies and adopted by FERC often disregards the most basic of environmental impacts and easily proven as false. For example:

- When field-truthing just *one half of a mile* of the proposed PennEast Pipeline route, the Delaware Riverkeeper Network found twelve vernal pool complexes and groundwater seeps, where the pipeline company claimed in its materials to FERC that there were only two in the same area.
- PennEast failed to delineate an intermittent stream in another section of the proposed route, despite the fact that the stream was delineated on government mapping.

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<sup>58</sup> Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, FERC Docket No. CP15-558, September 12, 2016.

→ PennEast completely left out from its assessment of project impacts any discussion of eight NJ state threatened, endangered, or special concern mussel species that potentially exist along the project route. In addition, the DEIS asserted "there are no private water supply wells or springs located within 150 feet of the pipeline construction workspace in Pennsylvania", which was proven false by ground-truthing efforts.<sup>59</sup>

Despite the evidence provided that these claims and dozens of others were false, the concerns of the public were ignored by FERC representatives.

### **FERC Routinely Finds No Significant Impact Even When It Has Identified Deficiencies**

Data gaps are often acknowledged by FERC itself, yet the agency approves applications despite this lack of information. For example, FERC identified over thirty data gaps in the PennEast pipeline application, the majority of which were substantial, such as the failure to identify working and abandoned mines near waterbody crossings and migratory bird conservation plans. Experts identified and notified FERC of dozens of additional data gaps. Despite these known gaps, FERC issued the DEIS, concluding that while the Project "would result in some adverse environmental impacts...impacts would be reduced to less-than-significant levels..." How can such a conclusion be drawn when there is so much missing and false information underlying it?

### **Induced Drilling Impacts a Frequent Deficiency in FERC NEPA Documents**

FERC's cumulative impact analyses for pipelines frequently mischaracterize the degree of harm that will result from the project by ignoring reasonably foreseeable future actions that are both direct and indirect outcomes of the project. Natural gas production and its subsequent impacts are among the cumulative effects that FERC must consider under NEPA when determining whether an action will have a significant impact. A pipeline's capacity will necessarily lead to additional consumption of natural gas, with consequences for its price, production, and use – these are direct, indirect and clearly foreseeable outcomes, yet FERC fails to consider them. For example, FERC ignored that the PennEast pipeline will likely induce the drilling of 3,000 new wells in Northeast Pennsylvania's Bradford, Susquehanna, Lycoming, and Tioga counties.<sup>60</sup> FERC fails to address these future actions even when the applicants themselves state that more wells will be drilled to feed the proposal pipeline project.<sup>61</sup>

### **Economic Harms & Benefits Routinely Misrepresented in FERC NEPA Documents**

FERC routinely fails to independently verify a pipeline company's assertions of economic benefits, and ignores expert evidence to the contrary. FERC fails to consider the economic harms proposed projects will inflict such as reduced crop production for farmers, adverse impacts to businesses along

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<sup>59</sup> Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, FERC Docket No. CP15-558, September 12, 2016 and Delaware Riverkeeper Network, Field-Truthing and Monitoring of the Proposed PennEast Pipeline, FERC Draft EIS, September 2016.

<sup>60</sup> Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, FERC Docket No. CP15-558, September 12, 2016

<sup>61</sup> Mountain Valley Pipeline DEIS at 3-1, FERC Docket No. CP 16-10, September 2016. ("According to Mountain Valley, the MVP would alleviate some of the constraints on...natural gas production").

or near the pipeline right of way, the implications for ecotourism and related businesses and jobs, etc.<sup>62</sup> Read more in the section of this comment focused on economic harms.

Relatedly, FERC uniformly accepts industry assertions that property values are not harmed by pipeline rights of way or by location within the blast radius or evacuation zone of a pipeline, despite significant evidence to the contrary.<sup>63</sup> As discussed previously in this comment, reduced property values also reduce the property taxes that can be collected by local governments.

Economic losses resulting from pipelines can be dramatic, and far outweigh the claimed public benefits of the pipeline companies; for example, expert review determined that the PennEast Pipeline could result in as much as \$56.6 billion in total economic harm. By comparison, the company claimed only \$2.3 billion in economic benefit over a 30 year period. Similar findings have been documented for the Mountain Valley Pipeline, the Atlantic Coast Pipeline and the Millennium Eastern System Upgrade Project. In every instance, FERC ignored detailed reports demonstrating economic harm while accepting industry assertions describing only benefits.

Included with this comment are five summaries of economic harm for pipeline projects including the PennEast Pipeline Project, the Mountain Valley Pipeline Project, the Millennium Eastern System Upgrade Project, the Atlantic Coast Pipeline Project, and the Atlantic Sunrise Project that were obviously ignored by FERC.<sup>64</sup>

### **Health Harms Routinely Ignored in FERC NEPA Documents**

FERC NEPA analyses consistently fail to fully assess health impacts of proposed pipelines. For example, those living near compressor stations and other natural gas facilities often suffer from asthma, nosebleeds, dizziness, weakness, and rashes. Some residents are forced to sell or abandon their homes because of these health impacts—however, FERC turns a blind eye to these well-documented issues when assessing a natural gas project.

Proximity to compressor stations inflicts various harms; impacts can be severe, with at least one documented case of a family forced to abandon their \$250,000 home rather than continue to suffer the health, safety, and other harms they were experiencing.<sup>65</sup> People and experts have urged FERC to adequately consider health impacts during NEPA review, including the establishment of baseline air quality, and FERC routinely refuses.<sup>66</sup>

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<sup>62</sup> Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016 and Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

<sup>63</sup> Key-Log Economics, Memo on effects of pipelines on property values, March 11, 2015.

<sup>64</sup> Key-Log Economics, Four Summaries of Economic Harm (PennEast Pipeline Project, the Mountain Valley Pipeline Project, the Millennium Eastern System Upgrade Project and the Atlantic Coast Pipeline Project).

<sup>65</sup> Jessica Cohen, *House Abandoned Because of Minisink Compressor Station -- Family Walks Away from \$250,000*, The River Reporter November 24, 2015.

<sup>66</sup> Neighbors Oppose Wawayanda Gas Plant; Health Concerns Top the List, July 31, 2015; NH Pipeline Committee Letter to Secretary Bose, January 14, 2016; and Times Union, *Bethlehem Lawmakers Oppose Natural Gas Pipeline*, February 11, 2016.

### **Harms to Historic Resources are Routinely Ignored in FERC NEPA Documents**

Historic and cultural resources are also among the impacts routinely ignored by FERC. For example, the Atlantic Coast Pipeline was found to have no impact on cultural resources, despite the fact that its proposed route slices through the "Most Endangered Historic Place" in Virginia, as found by Preservation Virginia.<sup>67</sup>

### **The Policy Statement Must Ensure a Full Informed Review Based on Complete and Accurate Data, Including in the Pre-Filing Process.**

Communities across the nation that have been subjected to the FERC process with regards to pipeline infrastructure review and approvals have, almost uniformly, the same experiences -- deficient EIS/EA documentation filled with false, misleading or missing information that has been proven by the public, their experts and even other agencies and yet no consideration or fix demanded by FERC before issuing their rubber stamp approval.<sup>68</sup> It is essential that the FERC pipeline review process demand better of the agency.

**→ Needed Pipeline Review Reform: FERC must amend its Policy Statement to mandate that all data deficiencies, gaps and false or misleading information identified with credible evidence by the public, experts or other agencies be addressed, remedied and subject to adequate time for public review and comment prior to FERC finalizing NEPA documents that are used by FERC for certification decisionmaking and by other agencies to support their final decisions.**

FERC's practice of initiating "its study of environmental impacts at the applicant's request during pre-filing and before an application is filed", "[b]ecause the NEPA review typically takes longer than the review of the non-environmental aspects of a proposed project"<sup>69</sup>, as stated in the PL18-1 NOI, circumvents the intent of NEPA and prevents impacted stakeholders from meaningfully commenting on the environmental impacts of a project. The level of project information and environmental review that is provided by many pipeline companies at this early stage of the process is routinely demonstrably deficient and inadequate for supporting environmental review.<sup>70</sup> The information available to the public during pre-filing, when FERC encourages companies to initiate their NEPA review process, engage stakeholders, and open scoping, is so incomplete and inaccurate that review, scoping, and comment at this stage is almost entirely meaningless.<sup>71</sup>

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<sup>67</sup> Union Hill/Woods Corner Rural Historic District Comments on FERC Docket No. CP15-554, June 2, 2016.

<sup>68</sup> See, for example, Letter from Pipeline Awareness Southern Oregon to Maya van Rossum, the Delaware Riverkeeper, February 4, 2016; and consider the testimony available at [www.PeoplesHearing.org](http://www.PeoplesHearing.org).

<sup>69</sup> Notice of Inquiry, FERC Docket No. PL18-1, April 25, 2018. Retrieved from: <https://www.federalregister.gov/documents/2018/04/25/2018-08658/certification-of-new-interstate-natural-gas-facilities#footnote-19-p18022>

<sup>70</sup> Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, FERC Docket No. CP15-558, September 12, 2016.

<sup>71</sup> Comments of Delaware Riverkeeper Network on Adelpia Pipeline Project, FERC Docket No. CP18-46, June 1, 2018.

→ Needed Pipeline Review Reform: FERC must mandate that full, complete and accurate information regarding the proposed pipeline route, need, and readily accessible information on impacts be available to the public for at least a full 60 days prior to initiation of any public sessions, including scoping, by the pipeline company.

**3. SEGMENTATION: FERC Must End the Practice of Using Segmentation, Allowing Pipeline Companies to Break Up Projects into Smaller Segments in Order to Undermine a Full and Accurate Review of Community and Environmental Impacts.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Engages in Segmentation in Order to Prevent Full Consideration of Environmental and Community Impacts**

FERC routinely and illegally narrows its environmental review of pipeline projects by allowing companies and FERC staff to engage in the practice of segmentation.

On January 22, 2013, Delaware Riverkeeper Network, *et. al.* filed a legal action challenging FERC's May 2012 approval of the Tennessee Gas Pipeline Company's Northeast Upgrade Project (NEUP). Delaware Riverkeeper Network *et al.* successfully argued that FERC's approval was illegal because it had segmented its environmental review when it ignored three other connected and interdependent pipeline projects that were simultaneously before FERC. Evidence clearly demonstrated that the 300 Line Project, the Northeast Supply Diversification Project, the MPP Project and the NEUP were merely separate parts of the same pipeline and, therefore, FERC was legally obligated to consider all of these projects together when reviewing the NEUP for environmental impacts.<sup>72</sup> On June 6, 2014, in *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission*, the United States Court of Appeals for the District of Columbia issued an opinion and order finding that FERC's segmentation violated NEPA and that FERC had failed to consider the cumulative impacts of these projects.<sup>73</sup>

Despite this ruling, FERC continues to rely upon segmentation as a matter of common practice in its pipeline reviews.

For example, on February 2, 2017 FERC approved the Tennessee Gas Company's proposed Orion Pipeline project -- another segmented project designed to further upgrade the 300 Line project -- that was the subject of the *Delaware Riverkeeper Network, et. al.* case. Just as before, Tennessee has improperly segmented its 300-3 pipeline into pieces for review: the Orion Project, the Triad Expansion project, and the Susquehanna West project.

- Application for the proposed Susquehanna West project was submitted on April 2, 2015 (*FERC Docket No. CP15-148*). Anticipated in-service date of November 1, 2017.

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<sup>72</sup> Maps of NEUP, 300LU, NSD, and MPP, January 24, 2013.

<sup>73</sup> *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission*, 753 F.3d 1304, at 1314-1315 (D.C. Cir. 2014) & Delaware Riverkeeper Network Press Release, *Federal Court Rules FERC Violated Federal Law When Issued Approvals for NEUP Pipeline Project*, June 6, 2014.

- Application for the Triad Expansion project was submitted on June 19, 2015 (*FERC Docket No. CP15-520*). Anticipated in-service date of November 1, 2017.
- Application for the Orion project was submitted October 9, 2015 (*FERC Docket No. CP16-4*). Anticipated in-service date of June 1, 2018.

The three 300-3 line Tennessee projects were all proposed within roughly six months of each other. Tennessee Gas's Orion, Triad, and Susquehanna West Map<sup>74</sup> demonstrates the interconnected nature of the three projects -- they are all clearly part of the same pipeline system-- each upgrading a different section of the pre-existing 300 pipeline. Yet when FERC reviewed the projects, they refused to assess them all together as one. Segmenting projects that are interconnected, have similar time frames and/or occur in the same area is a violation of the mandates put in place in the NEPA regulations. Additionally, it is a violation of the requirement to consider cumulative impacts of projects, as well as the standards established by the court in *Taxpayers Watchdog*.<sup>75</sup>

This case is now in court -- and if the Delaware Riverkeeper Network is victorious it will have been yet another waste of public and government resources for an issue FERC clearly could have addressed up front.

→ **Needed Pipeline Review Reform: FERC's pipeline review process must clearly prohibit the use of segmentation, not only is it illegal under NEPA, but it hides the true impacts of and/or needs for proposed projects. Good decisions will be supported by full review of the entire extent of a proposed project including current and anticipated construction and expansions.**

**4. CLIMATE CHANGE: FERC Must Fully Consider the Climate Change Impacts of Pipeline Infrastructure Projects, Including Resulting from the production, processing, distribution, consumption and other end uses of natural gas associated with proposed pipeline infrastructure projects. This Review Must Include the Social Cost of Carbon.**

**Under its 1999 policy on Certification of New Interstate Natural Gas Pipeline Facilities, FERC Fails to Give Due Consideration to the Climate Change and Drilling Impacts of Pipeline Projects as required by NEPA and the NGA.**

The real and existential threat of climate change is abundantly clear, and generally acknowledged by the Commission. FERC has a clear legal obligation to consider GHG emissions and climate change impacts resulting from its actions and decisions. As Commissioners Glick has noted in several recent statements:

“Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the

<sup>74</sup> Tennessee Gas's Orion, Triad, and Susquehanna West Map.

<sup>75</sup> *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987)

Commission first determining the activity is in the public interest.<sup>76</sup> This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the existential threat of climate change.”<sup>76</sup>

On August 1, 2016, The Council on Environmental Quality (CEQ) issued final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews. This Guidance offered guidance on how FERC and other agencies could consider the climate change impacts of its decisions. While this guidance has been rolled back by the Trump administration,<sup>77</sup> the obligation to review the climate changing impacts of agency decisionmaking still exists as a mandate under the NEPA.<sup>78</sup> The rollback of the guidance does not change the NEPA obligation to consider the climate changing impacts of pipeline infrastructure approvals.

In the August 22, 2017 decision rendered by the Court of Appeals for the DC Circuit in *Sierra Club v. FERC*, regarding the Sabal Trail Pipeline, the court determined that an analysis of the downstream impacts of GHG is reasonably foreseeable and required pursuant to NEPA.<sup>79</sup> It held that:

“... greenhouse-gas emissions are an indirect effect of authorizing this [pipeline] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. *See* 15 U.S.C. § 717f(e). The EIS accordingly needed to include a discussion of the “significance” of this indirect effect, *see* 40 C.F.R. § 1502.16(b), as well as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” *see WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7).”<sup>80</sup>

In addition to the requirements of NEPA, the NGA requires FERC to consider the climate changing ramifications of its pipeline decisions. Given that:

- FERC is required by law to consider “all factors bearing on the public interest,”

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<sup>76</sup> Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

<sup>77</sup> Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, Federal Register, April 5, 2017, retrieved from:

<https://www.federalregister.gov/documents/2017/04/05/2017-06770/withdrawal-of-final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas>

<sup>78</sup> Cite to Sabal Trail Decision

<sup>79</sup> *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017)(“... greenhouse-gas emissions are an indirect effect of authorizing this [pipeline] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. *See* 15 U.S.C. § 717f(e). The EIS accordingly needed to include a discussion of the “significance” of this indirect effect, *see* 40 C.F.R. § 1502.16(b), as well as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” *see WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7). “)

<sup>80</sup> decision rendered by the Court of Appeals for the DC Circuit on August 22, 2017 in *Sierra Club v. FERC*, 867, F.3d 1357, 1373 (D.C. Cir. 2017)

- prior to issuing a certificate for new pipeline or compressor station construction the Commission must find the project's benefits outweigh its harms,
- science conclusively demonstrates that human release of greenhouse gas emissions including methane are a direct cause of climate change,
- that natural gas pipelines and compressors are directly and indirectly a source of climate changing emissions,
- that climate change has serious and significant environmental, economic and safety impacts, and
- that as a result of its harmful impacts on our communities and environment, climate change poses one of the most extreme existential threats facing humanity,

FERC's consideration of the impacts resulting from the GHG of shale gas pipelines and compressors are clearly required as a result of the NGA.

As Commissioner Glick states in his dissent of the Dominion Order:<sup>81</sup>

"...anthropogenic climate change is among the most serious threats we face as a nation. For that reason, the Commission cannot determine whether a natural gas pipeline is in the "public interest" without considering the effect that granting a certificate will have on climate change. I certainly cannot support issuing a certificate where the Commission has not made its best effort to collect information regarding those emissions. Accordingly, I believe that the NGA's public interest standard requires the Commission to consider greenhouse gas emissions associated with the incremental production and consumption of natural gas caused by a new pipeline."<sup>82</sup>

And as Commissioner LaFleur summarizes in her partial dissent of May 18, 2018 Order Denying Rehearing for Dominion Transmission, Inc.:

"As I have said repeatedly, deciding whether a project is in the public interest requires a careful balancing of the economic need for the project and all of its environmental impacts. Climate change impacts of GHG emissions are environmental effects of a project and are part of my public interest determination."<sup>83</sup> (citations omitted)

As Commissioner Glick confirms:

"The fact that individual states and other federal agencies may consider, and even regulate, some of the environmental impacts from the pipeline, does not limit the Commission's responsibility to consider these impacts when evaluating the public interest."<sup>84</sup> Indeed, the certificate process is

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<sup>81</sup> Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>82</sup> The Court has explained that the NGA's purposes are multi-faceted. *See NAACP v. FPC*, 425 U.S. 662, 670 & n.6 (1976) (noting that, in addition to "encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices," the Commission has the authority to consider "conservation, environmental, and antitrust" concerns as relevant to the Commission's statutory authority). Congress' instruction that the Commission consider "the public convenience and necessity" is plenty broad enough to permit the Commission to balance these different purposes when exercising its statutory authority under the NGA. *Cf. Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959) (holding that NGA section 7 requires the Commission to consider "all factors bearing on the public interest").

<sup>83</sup> Statement of Commissioner Cheryl A. LaFleur on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>84</sup> See Footnote number 24 in Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018: "The order appears to suggest that the allocation of jurisdiction in NGA section 1(b) implies a limit on the Commission's authority, or even its ability, to consider environmental effects under the NGA. That provision

replete with overlapping jurisdiction: numerous federal and state agencies consider a pipeline's impact on natural resources under parallel and complementary statutes, including potential effects on endangered species, air quality, water bodies, and wetlands. Rather than indicating a problem with or a limit on the Commission's authority, these overlapping interests merely reflect the broad scope of the Commission's authority to evaluate the public interest and the sweeping impacts that a pipeline can have on the environment, communities, and individuals.”<sup>85</sup>

The GHG and climate change review must include the GHG emissions resulting from the pipeline construction, operation and maintenance itself, as well as the upstream drilling and fracking for gas that is being supported, advanced and induced by the pipeline as well as the downstream end uses of that gas. These are foreseeable direct and indirect impacts that NEPA requires be considered.

Despite these clear mandates from NEPA, the Natural Gas Act, and the Courts, FERC has selectively narrowed its consideration of climate change in recent years, most recently through its policy laid out in the May 18, 2018 Order Denying Rehearing for Dominion Transmission, Inc. Docket No. CP14-497-001 FERC:

“It is the Commission's policy to analyze upstream and downstream environmental effects when those effects are indirect or cumulative impacts as contemplated by CEQs regulations. When those effects are not indirect or cumulative effects, and thus are not environmental effects of the proposed action, the Commission is not required to consider them under NEPA.”

...

“Accordingly, to avoid confusion as to the scope of our obligations under NEPA and the factors that we find should be considered under NGA section 7(c), we will no longer prepare upper-bound estimates described supra at P 42, where, as here, the upstream production and downstream use of natural gas are not cumulative or indirect impacts of the proposed pipeline project, and consequently are outside the scope of our NEPA analysis.”

**Climate change is an existential threat, indisputably directly and indirectly connected to shale gas infrastructure projects, and must be considered in FERC's pipeline review process.**

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does no such thing. In considering the reasonably foreseeable consequences of its certification decisions, the Commission is not regulating, much less directly regulating, areas reserved for exclusive state jurisdiction. Although the Commission's evaluation of the public interest could, theoretically, affect matters subject to state jurisdiction, as long as the Commission is acting pursuant to its statutory authority and not directly regulating matters subject to state jurisdiction, the Commission will “not run afoul of [the NGA's jurisdiction limitations] just because it affects—even substantially—the” matters left for the states to decide. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016), as revised (Jan. 28, 2016); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016); see also *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 30–31 (1961) (recognizing the Commission's authority to consider the impact of air pollution from industrial boilers under NGA section 7).”

<sup>85</sup> Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

Construction and operation of FERC approved fracked gas pipelines, compressors and infrastructure are a direct, indirect and foreseeable cause of drilling and fracking for gas from shale (including all of the associated environmental impacts including GHG emissions) and the end use ramifications of that gas. Therefore, even by FERC's own recognition of its NEPA obligations, FERC must consider the climate change and other environmental impacts of the construction and operation of its approved pipeline infrastructure including upstream and downstream effects of shale gas extraction and end uses.

As Commissioner LaFleur concedes in her partial dissent of the Dominion order:

“pipelines are driving the throughput of natural gas, connecting increased upstream resources to downstream consumption. With respect to downstream impacts, I believe it is reasonably foreseeable, in the vast majority of cases, that the gas being transported by pipelines we authorize will be burned for electric generation or residential, commercial, or industrial end uses. In those circumstances, there is a reasonably close causal relationship between the Commission's action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the transported gas. We simply cannot ignore the environmental impacts associated with those downstream emissions.”<sup>86</sup>

In addition, as the Delaware Riverkeeper Network demonstrated in its PennEast Pipeline comment submitted to the FERC docket, and recreated elsewhere in this comment, there is a clear causal connection between pipeline construction/operation and induced/supported drilling and fracking for gas, including the clear ability to determine the level of gas extraction that will be directly caused by the pipeline. Therefore, there is no excuse pursuant to NEPA or the NGA not to consider the GHG and climate changing impacts of this associated and determinable gas extraction.

“Natural gas systems are the single largest source of anthropogenic methane emissions in the United States” contributing approximately 40% of the anthropogenic emissions of methane.<sup>87</sup> Emission of methane to the atmosphere during the production and distribution of shale gas contributes to this fossil fuel's climate changing impacts. Methane is released to the atmosphere on multiple occasions during the shale gas extraction process. It has been estimated that “during the life cycle of an average shale-gas well, 3.6 to 7.9% of the total production of the well is emitted to the atmosphere as methane.”<sup>88</sup> Among the most recent scientific findings is that as much as 9% of the methane produced while drilling for gas is lost to the atmosphere.<sup>89</sup> While a previous estimation that 4% was lost from the well fields had

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<sup>86</sup> Statement of Commissioner Cheryl A. LaFleur on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>87</sup> R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012.

<sup>88</sup> R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012, p. 55

<sup>89</sup> *Methane Leaks Erode Green Credentials of Natural Gas*, Nature International Weekly Journal of Science, Jan. 2, 2013; R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012, p. 56

already raised alarm bells for many<sup>90</sup>; the new figure of 9% is increasing evidence of the massive methane contribution shale gas development provides to the atmosphere.

Additionally, large amounts of methane leak into the atmosphere during the “transport, storage and distribution” phases of the natural gas delivery process including during transmission through interstate pipelines.<sup>91</sup> Even conservative estimates of leakage during gas transmission, storage and distribution have given a range of up to 3.6%.<sup>92</sup> Emissions from the transmission of natural gas occur along the length of pipeline project.

Researchers “have found that methane leaks would need to be held to 2% or less in order for natural gas to have less of a climate changing impact than coal due to the life cycle of methane.”<sup>93</sup> At leakage above 3.2% natural gas ceases to have any climate advantage over other fossil fuels. As discussed above, science is finding that the existing leakage rate during the production and/or transmission of shale produced gas is significantly higher than either of these numbers.

When upstream and downstream emissions are considered along with the increase in shale gas wells over the next 2 decades, the methane emissions from the natural gas industry will increase, by as much as 40 to 60%.<sup>94</sup> Upstream emissions occur during well completion and production at a well site while midstream emissions occur during gas processing. Downstream emissions are those that happen in the storage systems as well as the transmission and distribution pipelines.<sup>95</sup>

Scientists believe that if the earth warms to 1.8°C above what it was between 1890 and 1910 that it will put in play a set of chain reactions that will result in increasing releases of methane to the atmosphere – largely released from the arctic as a result of melting permafrost – which will in turn cause increased warming and its associated impacts.<sup>96</sup> It is posited by scientists that without immediate

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<sup>90</sup> *Methane Leaks Erode Green Credentials of Natural Gas*, Nature International Weekly Journal of Science, Jan. 2, 2013; R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012, p. 56

<sup>91</sup> R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012; See also U.S. EPA 1997. *Methane Emissions from the Natural Gas Industry*. USEPA National Risk Management Research Laboratory, June 1997, EPA-600-SR-96-080.

<sup>92</sup> Howarth, R. W. (2014). A bridge to nowhere: methane emissions and the greenhouse gas footprint of natural gas. *Energy Science & Engineering*.; See also Howarth, R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012, p. 55

<sup>93</sup> *Switching from Coal to Natural Gas Would Do Little for Global Climate, Study Indicates*, UCAR/NCAR Atmos News, Sept 8, 2011

<sup>94</sup> Howarth, R. W. (2014). A bridge to nowhere: methane emissions and the greenhouse gas footprint of natural gas. *Energy Science & Engineering*.; See also Howarth, R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012, p. 56

<sup>95</sup> Howarth, R. W. (2014). A bridge to nowhere: methane emissions and the greenhouse gas footprint of natural gas. *Energy Science & Engineering*.; See also Howarth, R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012, p. 56

<sup>96</sup> Howarth, R. W. (2014). A bridge to nowhere: methane emissions and the greenhouse gas footprint of natural gas. *Energy*

reductions in methane emissions and black carbon the earth will warm to 1.5°C by 2030 and 2.0°C by 2045/2050 and that this will be the case regardless whether carbon dioxide emissions are reduced or not.

Another cascading and irreversible impact of climate change involves irreversible changes in ocean currents. The Atlantic serves as the engine for the planet's conveyor belt of ocean currents - Atlantic Meridional Overturning Circulation (AMOC). The massive amount of cooler water that sinks in the North Atlantic stirs up that entire ocean and drives global circulation. When the Atlantic turns sluggish or stops, it has worldwide impacts and likely irreversible effects: The entire Northern Hemisphere cools, Indian and Asian monsoon areas dry up, North Atlantic storms get amplified, and less ocean mixing results in less plankton and other life in the sea.<sup>97</sup> Paleo climatologists have spotted times in the deep past when the current slowed quickly and dramatically, cooling Europe by 5 to 10 degrees C (10 to 20 degrees F) and causing far-reaching impacts on climate.

The Union of Concerned scientists has also recognized the combined effect of warming temperatures, changing precipitation, altered streams flows, higher water temperatures and diminished shading along stream banks for fish species, identifying two but recognizing others may be implicated as well: "As global warming drives up air temperatures and changes precipitation patterns, altered seasonal stream flows, higher water temperatures, and diminished shade along stream banks may follow. The native brook trout and smallmouth bass are particularly sensitive to such changes."<sup>98</sup>

According to the Union of Concerned Scientists:

"On a higher-emissions pathway, a short seasonal drought can be expected every year in most of New England by the end of this century, while the frequency of longer droughts could triple to once every 6 to 10 years in parts of New York, Pennsylvania, and Maine—the region's key agricultural states."<sup>99</sup>

FERC arbitrarily limits its review by failing to require the current, available, reasonable and attainable analyses, projections and methodologies that will in fact inform the agency of the scope and extent of the foreseeable induced natural gas production and, from there, allow assessment of the anticipated resulting greenhouse gas emissions. FERC's self-inflicted ignorance on the subject does not alleviate the agency of its obligation to undertake an assessment of greenhouse gas emissions from induced shale gas production associated with this project and its climate changing implications. Once

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Science & Engineering.; See also Howarth, R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012

<sup>97</sup> Hansen, J., M. Sato, P. Hearty, R. Ruedy, M. Kelley, V. Masson-Delmotte, G. Russell, G. Tselioudis, J. Cao, E. Rignot, I. Velicogna, E. Kandiano, K. von Schuckmann, P. Kharecha, A.N. LeGrande, M. Bauer, and K.-W. Lo, 2016: Ice melt, sea level rise and superstorms: Evidence for paleoclimate data, climate modeling, and modern observations that 2°C global warming could be dangerous. *Atmos. Chem. Phys.*, retrieved from: <http://csas.ei.columbia.edu/2016/03/22/ice-melt-sea-level-rise-and-superstorms-the-threat-of-irreparable-harm/>

<sup>98</sup> Union of Concerned Scientists, *Climate Change in Pennsylvania – Impacts and Solutions for the Keystone State*, October 2008.

<sup>99</sup> Union of Concerned Scientists, *Climate Change in Pennsylvania – Impacts and Solutions for the Keystone State*, October 2008.

the scope and extent of induced drilling is determined, FERC has demonstrated it has a competence in determining resulting levels of greenhouse gas emissions. This analysis should be undertaken and subjected to the NEPA review and comment process.

The Union of Concerned scientists has also recognized the combined effect of warming temperatures, changing precipitation, altered streams flows, higher water temperatures and diminished shading along stream banks for fish species, identifying two but recognizing others may be implicated as well: “As global warming drives up air temperatures and changes precipitation patterns, altered seasonal stream flows, higher water temperatures, and diminished shade along stream banks may follow. The native brook trout and smallmouth bass are particularly sensitive to such changes.”<sup>100</sup>

In addition, the USGCRP Climate Change Impacts in the United States Report states: “To date, all weed/crop competition studies where the photosynthetic pathway is the same for both species favor weed growth over crop growth as carbon dioxide is increased.”<sup>101</sup> This means that while crops impacted by a pipeline and climate change are already struggling to produce, they are also going to be more susceptible to being outcompeted by weeds, which will have further ramifications for crop production and for the increased use of herbicides on agricultural lands with both economic and health implications.

→ **Needed Pipeline Review Reform: FERC guidance should clearly mandate that all proposed actions include a detailed analysis of the climate changing impacts of a proposed project and available project alternatives.** It is important to consider the impacts of a proposed action using projected GHG emissions and when applicable, the potential changes in carbon sequestration and storage, as the proxy for assessing a proposed action’s potential climate change impacts.

→ **Needed Pipeline Review Reform: Addressing direct, indirect and cumulative effects is mandatory when agencies are analyzing any proposed federal actions and projecting their environmental consequences; the same must be true for consideration of GHG emissions and climate change impacts from FERC pipeline projects.** FERC must ensure that a valid climate change analysis include consideration of the cumulative impacts of each phase of the proposal as well as the impacts of all reasonably foreseeable direct and indirect actions that will result from the project, including induced and supported natural gas drilling and fracking, compressor stations, future pipeline expansions, and end uses of the transported gas. Each of these actions are foreseeable and legally connected and will contribute additional GHG emissions which need to be considered as part of any valid cumulative impacts analysis.

→ **Needed Pipeline Review Reform: Furthermore, land use impacts can be significant contributors to the climate changing impacts of a project – for example deforestation resulting from a pipeline or compressor station proposal can have meaningful climate changing impacts**

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<sup>100</sup> Union of Concerned Scientists, *Climate Change in Pennsylvania – Impacts and Solutions for the Keystone State*, October 2008.

<sup>101</sup> Horton, R., G. Yohe, W. Easterling, R. Kates, M. Ruth, E. Sussman, A. Whelchel, D. Wolfe, and F. Lipschultz, 2014: Ch. 16: Northeast. *Climate Change Impacts in the United States: The Third National Climate Assessment*, J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, Eds., U.S. Global Change Research Program, 16-1-nn.

**that must be considered in a valid NEPA analysis of climate impacts – FERC’s guidance must clearly mandate inclusion of these impacts.**

→ **Needed Pipeline Review Reform: NEPA requires a full and fair analysis of alternatives as part of NEPA review; FERC’s guidance must be clear that in the case of energy projects this means full and fair consideration of clean energy options for fulfilling the energy goals being asserted.**

→ **Needed Pipeline Review Reform: Because pipelines, associated compressors, and LNG facilities are individually, cumulatively, and in conjunction with the gas drilling and end use projects they specifically and directly induce, need and support, FERC guidance needs to make clear that these kinds of proposals will always require preparation of an EIS, and that an EA will not be sufficient to fulfill the mandates of NEPA.**

### ***FERC Must Consider the Social Cost of Carbon in Its Climate Change Analysis***

The social cost of carbon (SCC) is “a measure, in dollars, of the long-term damage done by a ton of carbon dioxide (CO<sub>2</sub>) emissions in a given year.”<sup>102</sup> The SCC is important for decisionmaking because it helps agencies more accurately weigh the costs and benefits of a new rule or regulation. Particularly, it is a tool that would allow FERC to measure economic impacts of climate change that would result from the proposed pipelines it reviews in order to more accurately fulfill its NEPA and NGA mandates, and to perform its “economic test” of balancing the adverse impacts of a project against its benefits in order to determine whether the project is in the public interest.

In April 2016, a federal court upheld the legitimacy of using the social cost of carbon as a viable statistic in climate change regulations.<sup>103</sup> In August 2016, the CEQ issued its final guidance for federal agencies to consider climate change when evaluating proposed Federal actions, stating:

“agencies should consider applying this guidance to projects in the EIS or EA preparation stage if this would inform the consideration of differences between alternatives or address comments raised through the public comment process with sufficient scientific basis that suggest the environmental analysis would be incomplete without application of the guidance, and the additional time and resources needed would be proportionate to the value of the information included”<sup>104</sup>

Commissioners Glick and LeFleur have gone on the record in multiple dockets discussing the applicability, value and legal importance of using the SCC tool for evaluating climate change impacts and informing FERC’s legal mandate to consider whether projects are genuinely in the public interest. FERC has received comments on multiple dockets from the public and their experts not just explaining the value of the social cost of carbon but providing SCC facts and figures on how FERC should conduct

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<sup>102</sup> EPA Fact Sheet, Social Cost of Carbon, December 2016, retrieved from: [https://www.epa.gov/sites/production/files/2016-12/documents/social\\_cost\\_of\\_carbon\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf)

<sup>103</sup> Susanne Brooks, Environmental Defense Fund, *In Win for Environment, Court Recognizes Social Cost of Carbon*, August 29, 2016.

<sup>104</sup> Final Guidance on Greenhouse Gases and Climate Change, Council on Environmental Quality, August 2016.

that analysis in specific pipeline contexts, (see e.g. Delaware Riverkeeper Network comments on dockets CP15-558 for the PennEast Pipeline and CP16-486 for the Millennium Eastern System Upgrade Project).

Despite all this, FERC has gone out of its way to avoid seriously addressing project impacts from climate change by disregarding their upstream and downstream GHG emissions and disregarding the SCC tool. FERC argues that the Social Cost of Carbon is not useful for NEPA purposes.<sup>105</sup> Not only is this assertion demonstrably false, but in addition FERC has made no effort to identify a suitable alternative method for measuring a project's climate change impacts.

In the Sabal Trail decision, the Court vacated and remanded the Commission's authorization of the SMP Project, and directed the Commission to "explain whether it still adheres to its prior position that the Social Cost of Carbon tool is not useful in performing its NEPA review."<sup>106</sup> In FERC's order to reinstate the certificate authorizations for the Southeast Market Pipelines Project (SMP Project)<sup>107</sup>, FERC responded by claiming that "the Social Cost of Carbon cannot meaningfully inform our decisions on proposed pipeline projects"<sup>108</sup> and that "the Social Cost Carbon is not an appropriate tool for evaluating the significance of downstream GHG emissions."<sup>109</sup> This assertion has been repeated by FERC over and over in the certificate orders issued since. Most recently, in FERC's certificate to Texas Eastern Transmission, LP to construct and operate the Texas Industrial Market Expansion Project and the Louisiana Market Expansion Project (Projects):

The Commission also contends, without further explanation, that it "has not identified a suitable method" for determining the impact from the Projects' contribution to climate change and, absent such a method, it simply "cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment and how that impact would contribute to climate change."<sup>110</sup>

And is again repeated in the NOI:

"As for the use of the Social Cost of Carbon tool, the Commission has found that although this tool is appropriate to use as part of cost-benefit analyses associated with certain rulemakings, it is not useful or appropriate to apply in its NEPA documents."

However, as Commissioners Glick and LaFleur have pointed out in multiple recent certificate order decisions (often in their concurrences and/or dissents), FERC is incorrect in its claims that there is "no

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<sup>105</sup> EarthReports, 828 F.3d at 956, retrieved from: <https://www.leagle.com/decision/infco20160715229>

<sup>106</sup> Paraphrase of DC Circuit Court decision from Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>107</sup> *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018).

<sup>108</sup> Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>109</sup> Decision summarized in Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>110</sup> Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

widely accepted standard to ascribe significance to a given rate or volume of GHG emissions”<sup>111</sup> and that “it cannot ‘determine how a project’s contribution to GHG emissions would translate into physical effects on the environment.’”<sup>112</sup> As Commissioner Glick explains in his dissent of the Florida SouthEast Connection,<sup>113</sup>:

“That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency’s obligation to consider how its actions contribute to the harm caused by climate change.”<sup>114</sup>

“That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency’s obligation to consider how its actions contribute to the harm caused by climate change.”<sup>115</sup>

Similarly, Commissioner LaFleur rejects this claim stating:

“That is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived tool to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm. I have drawn the simplistic analogy of human food consumption and diet. It would be convenient for a person to say “I guess it is fine to eat this donut, because there is simply no way to assess if it will make me fat.” But there is such a tool, in the form of calories, which have been scientifically derived to translate the consumption of a specific food item to impact on weight gain. Similarly, we are able to estimate what the long-term consequence of a ton of carbon dioxide emissions is likely to be, by use of the Social Cost of Carbon tool.”<sup>116</sup> (citations omitted)

As Commissioner Glick acknowledged again in his June 15, 2018 dissent of the Mountain Valley Pipeline project order denying rehearing of the the pipeline’s certificate:

“... the Commission concludes that it is not obligated to consider the harm caused by the Projects’ contributions to climate change and, in any case, that it lacks the tools needed to do so. In order to meet our obligations under both NEPA and the NGA, the Commission must

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<sup>111</sup> *Id.* P 27. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at 2, 5–8 (2018) (Glick, Comm’r, dissenting).

<sup>112</sup> Statement of Commissioner Cheryl A. LaFleur on Texas Eastern’s Texas Industrial Market Expansion Project, FERC Docket No. CP18-10, July 19, 2018 referencing Texas Eastern Certificate Order at P 33.

<sup>113</sup> Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC **Docket Nos.** CP17-441-000, CP17-441-001, July 19, 2018. See also Texas Eastern Transmission, LP, July 19, 2018, Docket No.: CP18-10-000; partial dissent on on Columbia Gas Transmission, L.L.C., July 19, 2018, Docket No.: CP17-80-000; July 19, 2018, Docket No.: CP17-80-000; partial dissent of the Northwest Pipeline certificate order.

<sup>114</sup> *Id.* at 5 (Glick, Comm’r, dissenting) (citing cases that discuss the Social Cost of Carbon when evaluating whether an agency complied with its obligation under NEPA to evaluate the climate change impacts of its decisions).

<sup>115</sup> *Id.* at 5 (Glick, Comm’r, dissenting) (citing cases that discuss the Social Cost of Carbon when evaluating whether an agency complied with its obligation under NEPA to evaluate the climate change impacts of its decisions).

<sup>116</sup> Statement of Commissioner Cheryl A. LaFleur on Southeast Market Pipelines Project, FERC Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

adequately consider the environmental impact of greenhouse (GHG) emissions on climate change. As I have previously explained, and reiterate below, the Commission has the tools needed to evaluate the Projects' impacts on climate change. It simply refuses to use them. [Consideration of the Projects] contribution to the harm caused by climate change—[is] critical to determining whether the Projects are in the public interest.”<sup>117</sup> (citations omitted)

The U.S. Environmental Protection Agency has also recommended the use of the Social Cost of Carbon in its comments on the Commission's pending review of its Policy Statement, explaining that estimates of the Social Cost of Carbon “may be used for project analysis when [the Commission] determines that a monetary assessment of the impacts associated with the estimated net change in GHG emissions provides useful information in its environmental review or public interest determination.”<sup>118</sup>

Commissioners Glick and LaFleur have noted that while the task of developing the policy needed to address FERC's current violations of NEPA and the NGA in this context isn't easy, it is FERC's obligation. As Commissioner LaFleur states, “The fact that consideration of climate change is difficult does not alleviate our responsibilities under the Natural Gas Act (NGA) and NEPA to determine the significance of GHG emissions.”<sup>119</sup> In his Partial Dissent of Columbia Gas Transmission, L.L.C.'s Eastern Panhandle Expansion Project (Eastern Panhandle Project), Commissioner Richard Glick

“The Commission cannot point to the mere presence of uncertainty over upstream and downstream GHG emissions to excuse it from considering the harm from the Project's contribution to climate change. In the case of new natural gas pipelines, it is reasonable to assume that building incremental transportation capacity will spur additional production and result in some level of combustion of natural gas, even if the exact details of the method or location are not definite. As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the “nature of the effect” (end-use emissions) is reasonably foreseeable, but “its extent is not” (specific consumption activity producing emissions), an agency may not simply ignore the effect. [...] It is entirely foreseeable that natural gas transported through the Project will be combusted, emitting GHGs that contribute to climate change. [...] Under these circumstances, the Commission must consider the impact from climate change resulting from this likely end use.”<sup>120</sup> (citations omitted)

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<sup>117</sup> Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC , FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

<sup>118</sup> United States Environmental Protection Agency, Comments on FERC Docket No. PL18-1-000, Accession Number 20180621-5095 at 4–5, June 21, 2018.

<sup>119</sup> Statement of Commissioner Cheryl A. LaFleur on **Texas Eastern's Texas Industrial Market Expansion Project**, FERC **Docket No.** CP18-10, July 19, 2018.

<sup>120</sup> Statement of Commissioner Richard Glick on Columbia Gas Transmission, L.L.C., FERC Docket Nos. CP17-441 and CP17-441-001No. CP17-80, July 19, 2018.

FERC's claim that it lacks the means to account, at least conservatively/partially, for climate change impacts is absurd. The Social Cost of Carbon does just that. In the EPA's own definition, it explains that the Social Cost of Carbon:

is meant to be a comprehensive estimate of climate change damages and includes, among other things, changes in net agricultural productivity, human health, property damages from increased flood risk and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning. However, it does not currently include all important damages.

....

The models used to develop [SCC] estimates do not currently include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature because of a lack of precise information on the nature of damages and because the science incorporated into these models naturally lags behind the most recent research.

Nonetheless, current estimates of the [SCC] are a useful measure to assess the climate impacts of CO2 emission changes.<sup>121</sup>

As the U.S. Court of Appeals for the District of Columbia Circuit explained in *Sierra Club v. FERC* (Sabal Trail), "in the face of indefinite variables, 'agencies may sometimes need to make educated assumptions about an uncertain future.'"<sup>122</sup> The tools exist, and conservative estimates based on best science and economics can be calculated. In fact, as previously noted, the Delaware Riverkeeper Network and other public stakeholders have regularly done this work for FERC. The magnitude of adverse impacts revealed in Key-Log Economics' conservative estimates of the SCC of three recently approved pipeline projects is significant.<sup>123</sup>

- Millennium's Eastern System Upgrade: **\$51.8 - 434.5 million**
- The PennEast Pipeline: **\$301.8 - 2,339.0 million**
- Atlantic Sunrise Pipeline: **\$466.5 - 3,615.1 million**

→ **Needed Pipeline Review Reform: FERC must reform of its 1999 pipeline review policy to require the calculation and consideration of the significant costs of GHG emissions and climate change pursuant to NEPA and it's NGA "public interest" duty.** This reform should mandate that FERC use the Social Cost of Carbon for evaluating those impacts. And FERC must require that applicants provide the Commission and the public with all the information needed to conduct this evaluation.

→ **Needed Pipeline Review Reform: The GHG and Climate Change Evaluation Should Consider both Domestic and International Cost and Ramifications -- Recognizing that Climate Change Has No Boundaries and So If There is an International Affect There is Necessarily a Domestic Impact.**

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<sup>121</sup> EPA Fact Sheet, Social Cost of Carbon, December 2016, retrieved from: [https://www.epa.gov/sites/production/files/2016-12/documents/social\\_cost\\_of\\_carbon\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf).

<sup>122</sup> Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018. See *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329).

<sup>123</sup> The range of estimates for the social cost of carbon reflect different assumptions about how heavily future costs are discounted as well as differences over time in the impact of each tonne of CO2 equivalent emitted. New Key-Log memo

On March 28, 2017, President Trump signed Executive Order (EO) 13783, “Promoting Energy Independence and Economic Growth”, directing agencies to ensure that estimates of the social cost of greenhouse gases used in regulatory analyses are consistent with the guidance contained in OMB Circular A-4, “including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates”<sup>124</sup> The E.O. 13783 also formally withdrew the technical support documents describing the global social cost of greenhouse gas estimates developed under the Obama Administration as “no longer representative of government policy.”

As a result, In October 2017, the EPA released a proposed “Regulatory Impact Analysis for the Review of the Clean Power Plan”, detailing the costs and benefits of repealing the Clean Power Plan. The proposal revealed that the administration's new SCC estimates “focus on the direct impacts of climate change that are anticipated to occur within U.S. borders” and shifts “the focus to the domestic (rather than global) social cost of carbon.”<sup>125</sup> As a result, the government’s estimates of the cost of climate change are “87 percent to 97 percent” lower than previous administration estimates.<sup>126</sup>

Neither the global climate system nor the global economy adhere to state borders. The impacts of GHG generated in the US can be felt across the world, and vice versa. And moreover, climate change costs suffered abroad will also be felt in the US through the globally connected economy. This Trump administration policy is short-sighted, with the obvious intent of manipulating cost-benefit analyses in the favor of the fossil fuel industry and at the expense of the greater good. The global social cost of carbon that Trump has attempted to remove from the calculation is a real externality in the global economy that the US will be forced to face eventually. Choosing to ignore it, despite the scientific and economic evidence clearly demonstrating otherwise, will only magnify the devastating social and economic impacts felt by the United States and world in the coming years.

→ **Needed Pipeline Review Reform: The Social Cost of Carbon Analysis instituted as part of the FERC pipeline review process must include both domestic and international costs and impacts.**

→ **Needed Pipeline Review Reform: FERC Must Give Due Consideration to the Climate Change and Environmental Impacts Resulting from the production, processing, distribution, and consumption of natural gas associated with proposed pipeline infrastructure projects.**

FERC must explicitly mandate that all pipeline reviews assess the environmental and climate changing impacts of all gas development associated with the proposed project. FERC is very capable of determining the level of development and the number of wells that will be developed and can access all of the readily available information on emissions, land use impacts, water volume and quality impacts etc.

Despite the mandate of the National Environmental Policy Act (NEPA) that federal agencies take

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<sup>124</sup> Federal Register, Promoting Energy Independence and Economic Growth, March 31, 2017, retrieved from: <https://www.federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth>

<sup>125</sup> Regulatory Impact Analysis for the Clean Power Plan: Proposal, US Environmental Protection Agency, October 2017.

<sup>126</sup> Richard G. Newell, Unpacking the Administration’s Revised Social Cost of Carbon, Resources for the Future, October 10, 2017.

environmental considerations into account in their decision-making “to the fullest extent possible” (42 U.S.C. § 4332; 40 C.F.R. § 1500.2; *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658,684 (D.C. Cir.)) FERC routinely fails to meet its obligation to consider foreseeable drilling and fracking impacts directly resulting from its pipeline approvals, including water impacts, air impacts, community impacts and effects on climate change.

The U.S. Environmental Protection Agency has explicitly commented that FERC should consider impacts from the development and production of natural gas being transported through a proposed pipeline, as well as considering impacts associated with the end use of the gas, particularly with regards to greenhouse gas emissions and climate change effects.<sup>127</sup> And yet FERC continues to ignore both the input of EPA and the mandates of NEPA.

In the May 18, 2018 Order Denying Rehearing for Dominion Transmission, Inc. Docket No. CP14-497-001 FERC asserts:

“....in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.<sup>140</sup> A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas)”

FERC both overly narrows and outright misrepresents both its legal review obligations and the reasonably foreseeable consequences of shale gas extraction associated with the pipeline infrastructure projects (new and expansion projects) it reviews and approves. It is not just demonstrated new drilling and extraction activities that must be considered, it is all related extraction and drilling activities, even when from a pre-existing drilling/extraction location. New drilling and gas extraction is a foreseeable and direct consequence of FERC approved pipelines the ramifications of which must be considered by FERC. Pipelines also support ongoing drilling and gas extraction at existing wells, that activity is also a direct and foreseeable consequence of FERC approved pipelines the ramifications of which must be considered by FERC.

FERC’s assertion that there is no demonstrable or reasonably foreseeable connection between continuing and expanding shale gas extraction and the projects it reviews and approves is disingenuous at best. FERC attempts to assert:

“Nothing in the record supports the dissent’s assertion that approval of transportation projects spurs the production of natural gas. The fact that natural gas production and transportation are both components of the general supply chain required to bring natural gas to market is not in dispute. However, this does not mean that the Commission’s action of

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<sup>127</sup> E.g. U.S. EPA Detailed Comments on the DEIS for the Leach Xpress Pipeline and Rayne Xpress Expansion Project, June 13, 2016.

approving a particular pipeline project will cause or induce the effect of additional shale gas production. Rather, a number of factors, such as domestic natural gas prices and production costs, drive new drilling.”<sup>128</sup>

FERC further attempts to evade its legal review obligations of the environmental and climate changing impacts of the projects its reviews by falsely asserting:

“Even if a causal relationship between the proposed action here and upstream production was presumed, the scope of the impacts from any such production is too speculative and thus not reasonably foreseeable.”<sup>129</sup>

As the Delaware Riverkeeper Network has demonstrated on the PennEast pipeline docket, and demonstrated below, the relationship between FERC approved pipeline projects and upstream production is foreseeable, direct and demonstrable. In addition, the capability for determining the scope of induced and supported production and its impacts is also readily available and demonstrable.

The direct and indirect connection between FERC’s approval of shale gas infrastructure and climate change impacts resulting from upstream production and downstream consumption of shale gas is clear and undeniable and has been recognized by at least two FERC commissioners.

As Commissioner Glick stated on the FERC Dominion order:

“It is particularly important for the Commission to use its “best efforts” to identify and quantify the full scope of the environmental impacts of its pipeline certification decisions given that these pipelines are expanding the nation’s capacity to carry natural gas from the wellhead to end-use consumers. **Adding capacity has the potential to “spur demand” and, for that reason, an agency conducting a NEPA review must, at the very least, examine the effects that an expansion of pipeline capacity might have on production and consumption.**<sup>130</sup> Indeed, if a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be “needed” in the first place.” (emphasis added)

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<sup>128</sup> Order Denying Rehearing for Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>129</sup> Order Denying Rehearing for Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>130</sup> See Footnote number 20 in Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018: “*See Barnes*, 655 F.3d at 1138; *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*) (“[T]he proposition that the demand . . . will be unaffected by an increase in availability and a decrease in price . . . is illogical at best.”). The Commission attempts to distinguish these cases chiefly by contending that “a number of factors, such as domestic natural gas prices and production costs, drive new drilling.” *New Market*, 163 FERC ¶ 61,128 at P 60. Although sales price and production costs are, undoubtedly, factors that influence natural gas production, that is no answer to the argument that the Commission must at least consider the demand-inducing effects of new capacity. After all, surely the sales prices and production costs associated with air travel and coal mining affected demand in *Barnes* and *Mid States*, respectively.”

“The fact that the pipeline’s exact effect on the demand for natural gas may be unknown is no reason not to consider the type of effect it is likely to have.”<sup>131</sup> As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure to transport fossil fuels—“if the *nature* of the effect” (i.e., increased emissions) is clear, the fact that “the *extent* of the effect is speculative” does not excuse an agency from considering that effect in its NEPA analysis.<sup>132</sup> And while natural gas pipelines can benefit the nation—including by, in some cases, providing natural gas supplies that can displace older, more greenhouse gas-intensive methods of electricity generation—any “hard look” at incremental pipeline capacity should also consider the environmental consequences associated with that additional capacity.”<sup>133</sup> (citations omitted)

Commissioner LaFleur also remarked in her partial dissent of the Millennium ESU:

“it is reasonably foreseeable in the vast majority of cases that the gas being transported by a pipeline we authorize will be burned for electric generation or residential, commercial, or industrial end uses. In those circumstances, there is a reasonably close causal relationship between the Commission’s action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the transported gas. *See Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8<sup>th</sup> Cir. 2003) (*Mid States*). In *Mid States*, the Court concluded that the Surface Transportation Board erred by failing to consider the downstream impacts of the burning of transported coal. Even though the record lacked specificity regarding the extent to which the transported coal would be burned, the Court concluded the nature of the impact was clear.”<sup>134</sup>

The failure to consider impacts of the induced drilling operations and end uses of the gas FERC approved pipelines deliver is significant, particularly considering the scope of the induced activities. For example, in the case of the PennEast Pipeline (*FERC Docket CP15-558*) FERC failed to consider the emissions and other harms that will result from the shale gas production necessary to fulfill the claimed “need” for the project and to carry the volumes of gas proposed. As documented by the Delaware Riverkeeper Network on the record, the PennEast pipeline will induce the drilling of an

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<sup>131</sup> See Footnote number 21 in Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018: “In the Commission’s 1999 Policy Statement it provided the following illustrative list of the “public benefits”: “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748 (1999). All of those examples, with the exception of the last two, are benefits that could “spur demand” for natural gas. *Cf. Mid States*, 345 F.3d at 549.”

<sup>132</sup> See Footnote number 22 in Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018: “*Id.* The Commission attempts to distinguish *Mid States* on the basis that the agency in that case conceded that the harm in question was reasonably foreseeable. *New Market*, 163 FERC ¶ 61,128 at P 65. I agree that where an agency finds that a harm is reasonably foreseeable, but nevertheless fails to consider that harm, it invites *vacatur*. But while that concession may be sufficient, it is not necessary. As noted above, whether a particular harm is reasonably foreseeable should be a record-by-record determination and, accordingly, there may be instances in which an agency contends that a harm is not reasonably foreseeable, but the record indicates otherwise. *See Sabal Trail*, 867 F.3d at 1371–72.

<sup>133</sup> Statement of Commissioner Richard Glick on Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

<sup>134</sup> See Footnote Number 6 in Statement of Commissioner Cheryl LaFleur on Millennium Pipeline, FERC Docket No. CP16-486, July 24, 2018.

estimated 3,000 wells in Northeast Pennsylvania, in Bradford, Susquehanna, Lycoming, and Tioga counties.<sup>135</sup> Given recent estimates that “during the life cycle of an average shale-gas well, 3.6 to 7.9% of the total production of the well is emitted to the atmosphere as methane”<sup>136</sup> combined with the water, land, and community harms resulting from drilling operations, the environmental and community impacts ignored by FERC in its analysis of PennEast are massive.

FERC excludes consideration of induced drilling and end-use impacts from its NEPA review, despite having recognized that increased gas production will result from pipeline construction. For instance, FERC has recognized that a new pipeline would “alleviate some of the constraints on...natural gas production”.<sup>137</sup> Despite this acknowledgement, FERC fails to consider the direct production impacts resulting from pipeline development.

This failure to consider the impacts of induced shale gas production and its end uses is particularly troubling given that FERC explicitly recognized in its initial review of the PennEast Pipeline that “upstream development and production of natural gas might be a ‘reasonably foreseeable’ effect of a proposed action.” FERC’s Draft EIS went further to state that “Construction of the PennEast Pipeline Project would potentially increase demand for natural gas, which could increase Marcellus Shale natural gas extraction and therefore increase the negative environmental impacts associated with such development.” Despite this recognition, FERC removed these admissions from its final EIS for the project, while adding an explicit estimate of induced upstream natural gas production from the project:

“PennEast has estimated that it could transport the production from approximately 89 new wells, based on the U.S. EIA’s November 2016 estimate of Marcellus Region “new-well gas production per rig” of 12,130 thousand cubic feet/day. If it is assumed that the average production per well is half the new well rate, then the proposed Project could transport the production from approximately 178 wells at a production rate per well of 6,065 thousand cubic feet/day.”

FERC concluded that “the scope and effects of the potential GHG emissions from natural gas production attributable to this Project [PennEast] are not reasonably foreseeable,” and therefore no consideration pursuant to NEPA is necessary.<sup>138</sup> Through this circular logic of recognizing induced drilling but then discounting it because FERC has failed to assess the extent of the GHG emissions that will occur, FERC seeks to avoid its NEPA obligation to consider the impacts.

The only reason why FERC now deems such impacts unforeseeable is because the agency itself chooses to remain purposefully blind. This kind of doublespeak – that shale gas production is reasonably foreseeable but at the same time it is not reasonably foreseeable – is used by FERC to arbitrarily limit its review of impacts. It seems clear and obvious that FERC removed the admission

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<sup>135</sup> Delaware Riverkeeper Network Comment Regarding the PennEast Pipeline DEIS, FERC Docket No. CP15-558, September 12, 2016, at p.35.

<sup>136</sup> R. Howarth, D Shindell, R. Santoro, A. Ingraffea, N. Phillips, A Townsend-Small, *Methane Emissions from Natural Gas Systems*, Background Paper Prepared for the National Climate Assessment, Reference number 2011-0003, Feb. 25, 2012.

<sup>137</sup> Mountain Valley Pipeline DEIS at 3-1, FERC Docket No. CP 16-10, September 2016.

<sup>138</sup> PennEast Pipeline DEIS at 4-285, FERC Docket No. CP15-558, July 2016.

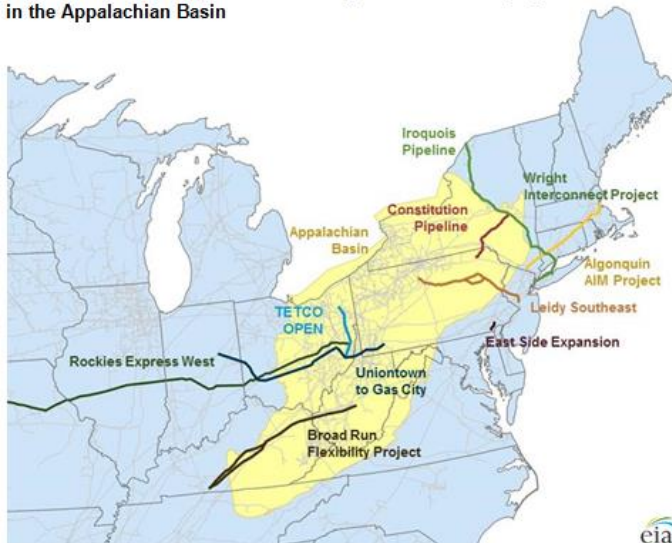
that upstream gas development was “a reasonably foreseeable effect” of PennEast from the final EIS in order to advance its newly manufactured position that it should not have to consider these effects -- not only is this indefensible, but it does nothing to alleviate FERC of the obligation to consider the gas extraction activities (new, induced and ongoing) associated with the pipeline infrastructure it approves.

While FERC continues to try and ignore the connection between new natural gas infrastructure and increased production in terms of both new wells and the ability of existing wells to continue and even increase their production, others in the industry, including gas producers, industry experts, and other government agencies, clearly recognize the effect and are actually counting on it. With limitations on the ability to deliver gas to high-value markets, the economics do not favor increased and ongoing drilling. In recent years, due to low gas prices and constrained delivery systems, many drillers cut back on drilling; total production in the Marcellus actually declined in some recent years for the first time since shale gas extraction began its mass proliferation in 2008.<sup>139</sup>

In 2016 there were at least 12 projects proposed or under construction that would either expand existing pipeline capacity or add new pipelines for the purpose of delivering shale gas from the Marcellus region into markets in the Northeast, South, and beyond.<sup>140</sup>

*Reproduced from EIA, January 2016. Available at:  
<http://www.eia.gov/todayinenergy/detail.cfm?id=24732>*

**Selected existing and planned natural gas infrastructure projects in the Appalachian Basin**



<sup>139</sup> Christine Buurma, Bloomberg News, “America’s Biggest Shale Gas Field Is Choking on Its Own Supply.” October 14, 2015; US Energy Information Administration, Drilling Productivity Report, July 2018, retrieved from: <https://www.eia.gov/petroleum/drilling/pdf/dpr-full.pdf>

<sup>140</sup> Northeast Gas Association, Planned Enhancements, Northeast Natural Gas Pipeline Systems, August 2016, retrieved from: [http://www.northeastgas.org/pdf/system\\_enhance0816.pdf](http://www.northeastgas.org/pdf/system_enhance0816.pdf)

These pipelines were proposed/pursued in order to allow for additional production potential in the Marcellus region, both directly by providing additional takeaway capacity from the region and indirectly by resulting in higher regional prices. Natural gas prices in the Marcellus region have, in recent years, traded at a significant discount to national benchmark prices, as discussed elsewhere in this comment. Growth in gas production slowed in Pennsylvania in 2015, and local prices dropped significantly.

As a result of the slowdown in production, there were/are numerous well sites that were/are permitted but had/have not been drilled. For this reason there was a specific effort by industry to pursue new pipelines in order to encourage, support and/or induce drilling and gas extraction activities. For example, a subsidiary of the Natural Fuel Gas Company, Seneca Resources, stated in a presentation to its investors in 2016 that it had “[l]imited development drilling [in its Eastern Development Area in northeastern Pennsylvania] until firm transportation on [the proposed] Atlantic Sunrise (190 MDth/d) is available in late 2017” and that it had “50-60 remaining Marcellus [drilling] locations” and “100-120 [Geneseo shale] locations” that could not be developed until that pipeline project was underway.<sup>141</sup>

Other producers in the region have similarly stated that they require additional pipeline capacity to develop new production capacity. Argus Media, a leading provider of data on prices and fundamentals for the natural gas industry, reported that “Antero Resources is waiting on the 3.25 Bcf/d Energy Transfer Rover pipeline to come online in the second half of 2017 before it increases drilling activity,” while “Northern Fuel Gas [in July 2016] said it was waiting on its own 475mn cf/d Northern Access to come online in the second half of 2017 before it raises its production levels.”<sup>142</sup> Argus also reported that “Range Resources plans to drill a seven-well pad in the Appalachian shale region this year, and could quickly drill up to 42 more laterals. The producer is expecting the 628mn cf/d (18mn m<sup>3</sup>/d) Spectra Gulf Markets project to facilitate some of its increased output when it begins flowing in the fourth quarter [of 2016].”<sup>143</sup> In their 2015 Annual Report, Cabot Oil & Gas noted that drilling activity in the Marcellus region had been reduced to a single rig, in response to “the market environment.” Cabot further noted that the company plans to “exit 2016 with between 45 and 50 drilled uncompleted wells, which will allow for operational flexibility into 2017.”<sup>144</sup>

A report<sup>145</sup> issued by the Greater Philadelphia Energy Action Team advocates for more pipelines for the specific purpose of inducing and supporting more and new shale gas production:

“In creating an Energy Hub, the goal, first and foremost, is to expand the market for the Marcellus/Utica natural gas and NGLs to increase the economic benefits that will come to the Commonwealth and the Greater Philadelphia region from more vigorous production...

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<sup>141</sup> National Fuel Investor Presentation: Q2 Fiscal 2016 Update, April 2016. Slide 10, retrieved from: [http://s2.q4cdn.com/766046337/files/doc\\_presentations/2016/April/20160428\\_NFG-IR-Presentation.pdf](http://s2.q4cdn.com/766046337/files/doc_presentations/2016/April/20160428_NFG-IR-Presentation.pdf)

<sup>142</sup> Argus Media, “US gas producers boost output ahead of expansions”, August 29, 2016, retrieved from: <https://www.argusmedia.com/pages/NewsBody.aspx?id=1302610>

<sup>143</sup> Ibid.

<sup>144</sup> Cabot Oil & Gas 2015 Annual Report, Page 3., retrieved from: <http://www.cabotog.com/wp-content/uploads/2016/04/COG-2015-AR.pdf>

<sup>145</sup> Greater Philadelphia Energy Action Team, *A Pipeline for Growth*, March 30, 2016.

To achieve this goal, however, we need to expand the existing interstate and intrastate natural gas pipeline infrastructure.”

“Encouraging the industry to invest in new pipelines and in new distribution system infrastructure ... provides additional capacity for increased volumes of gas.”

Clearly, new pipeline capacity enables, supports and inspires operators to complete, advance and accelerate gas production – the industry is aware of this fact, the public is aware of this fact, and FERC is surely also aware of this fact. As a result of the foreseeable and direct effect that new and expanded pipelines result in new, expanded and ongoing gas drilling and extraction activities, the known and demonstrable community and environmental impacts of supported, induced and/or associated drilling/extraction activities must be considered in every pipeline infrastructure project, whether it is a new proposal or an expansion of an existing pipeline system.

***Table 1: Pipeline Capacity Exiting Northeast Pennsylvania<sup>146</sup>***

	<b>Capacity (Bcf/day)</b>
<b>Existing</b>	
Transco	3.4
Tennessee	1.8
Millennium	0.8
Existing Capacity	6.0
<b>In Development</b>	
TGP Susquehanna	
West	0.15
TGP Orion Expansion	0.14
Constitution Pipeline	0.65
Transco Atlantic	
Sunrise	1.70
PennEast Pipeline	1.11
Millennium Upgrade	0.20
In Development	3.95
<b>Total</b>	<b>10.0</b>

→ **Needed Pipeline Review Reform: FERC must explicitly mandate that all pipeline reviews assess the fully array of environmental and climate changing impacts of all gas development associated with proposed pipeline infrastructure projects.**

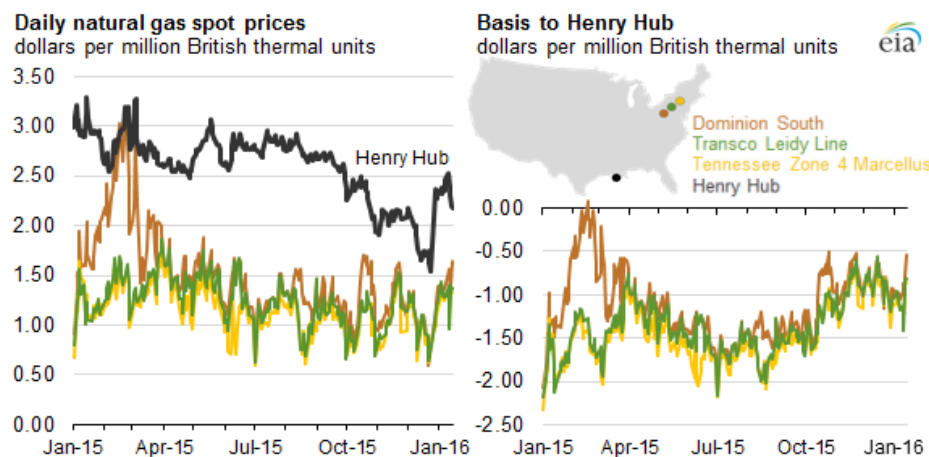
<sup>146</sup> Pipeline capacities are taken from the relevant FERC dockets: TGP Susquehanna (CP15-148), TGP Orion (CP16-4), Constitution (CP13-449), Transco Atlantic Sunrise (CP155-138), PennEast (CP15-558), and Millennium (PF16-3).

**By way of further evidence that new and expanding pipeline capacity is a foreseeable, direct and demonstrable cause of new, expanding, and ongoing gas extraction activities, economics dictates that natural gas production will increase as additional pipeline capacity is added to a region.**

Natural gas prices are lowest in the regions in which gas is produced. For many years, the lowest natural gas prices in the East were found at Henry Hub, located near the Gulf of Mexico where much of the natural gas in the United States was produced. With the increase in shale gas production, however, the lowest natural gas prices in the country are now found at trading points in and around the Marcellus and Utica shale plays in Pennsylvania, West Virginia, and Ohio. Availability of pipeline infrastructure to send natural gas to other regions has a direct impact on the price of natural gas in those regions—greater gas take-away capacity allows more natural gas to be produced. The improved access to higher priced markets via additional pipeline infrastructure will raise the price of natural gas in the producing region, which also will increase production.

Information on natural gas spot prices published in January 2016 by the EIA shows these market forces in action. While trading points in and around the Marcellus and Utica shale regions have been below the Henry Hub price in recent years, the EIA points out that, as of January 2016, the difference between these price points narrowed due to then-recent pipeline projects that came online. That narrowing is shown in Figure 3.

**Figure 3. Spread in Natural Gas Prices at Henry Hub and Marcellus Trading Points**



*Source: US Energy Information Administration, based on Natural Gas Intelligence. Available online at: <http://www.eia.gov/todayinenergy/detail.cfm?id=24712>*

Despite the eroding of the Marcellus basis differential in late 2015, towards close to \$1 per million BTU, that differential persisted throughout 2016 and further increased. On August 29, 2016, natural gas in Northeast Pennsylvania was trading at \$1.30 per million BTU, while Henry Hub gas was at \$2.87—a \$1.57 differential.<sup>147</sup>

The narrowing of prices between the Henry Hub and Marcellus/Utica trading points in late 2015

<sup>147</sup> Natural Gas Intelligence, Shale Daily, August 29<sup>th</sup>, 2016.

may be due in part to the fact that producers in the Marcellus curtailed production of natural gas by approximately 1.2 Bcf/d as of November 2015 in response to weak prices resulting from the rapid growth of production in the face of pipeline constraints. Of the gas production that was curtailed, about 750 MMcf/d was in Bradford and Susquehanna counties in Pennsylvania.<sup>148</sup>

Economics dictates that natural gas production is likely to increase as additional pipeline capacity is added to the region. Producers in the Marcellus such as Seneca Resources and Cabot Oil & Gas have indicated that additional pipeline infrastructure is a cornerstone of plans to increase production in Northeast Pennsylvania.<sup>149</sup> In January 2016, Bentek Energy and the EIA noted a large backlog of natural gas wells that have been drilled but will not begin production until infrastructure (in the form of pipelines) becomes available to transport additional supply or until the price of natural gas increases. Bentek and EIA suggested that this backlog will allow production of natural gas in the Marcellus to increase quickly when new infrastructure projects are completed.<sup>150</sup> And so, in addition to advancing new drilling, additional pipeline infrastructure will advance gas production in wells that may have been drilled but from which the industry did not yet extract gas due to a lack of available pipeline infrastructure.

**→ Needed Pipeline Review Reform: A FERC mandate that all pipeline reviews assess the fully array of environmental and climate changing impacts of all gas development associated with proposed pipeline infrastructure projects must include not just newly approved and/or drilled gas wells but must include the advancement of gas production in all wells associated with the project whether newly drilled or pre-existing.**

**There are known methods FERC can use to assess associated drilling, fracking and well development in order to support assessment of the environmental and community impacts.**

There are known methods FERC can use to assess associated drilling, fracking and well development in order to support this needed aspect of the NEPA analysis. The below analysis is one provided by the Delaware Riverkeeper Network in association with the PennEast pipeline and demonstrates one means of determining the level of induced, supported and/or associated natural gas development that is step one in assessing the extent of environmental impact associated with a pipeline infrastructure project under consideration by FERC. The below assessment was provided in September, 2016, Docket CP15-558.

*---comment excerpt begins---*

The state of Pennsylvania currently has 9,480 “active” unconventional

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<sup>148</sup> NGI’s Shale Daily, Information on the Marcellus Shale, retrieved from: <http://www.naturalgasintel.com/marcellusinfo> on August 28, 2016.

<sup>149</sup> Comments of Allegheny Defense Project before the Federal Energy Regulatory Commission on the Draft Environmental Impact Statement for Transcontinental Pipe Line Company proposed Atlantic Sunrise Project, FERC Docket No. CP14-138, Page 22, June 2016.

<sup>150</sup> US Energy Information Administration, *Spread between Henry Hub, Marcellus natural gas prices narrows as pipeline capacity grows*, January 27, 2016, retrieved from: <https://www.eia.gov/todayinenergy/detail.php?id=24712>

natural gas wells.<sup>151</sup> Active gas wells have been issued a permit, but may or may not have been drilled or be currently producing natural gas. Those wells are found largely in the counties located in the Northeast and Southwest regions of the state, which contain 83 percent of active wells. Table 2 shows the breakdown of these active natural gas wells by region.

**Table 2. Active natural gas wells in Pennsylvania**

Region	Active Wells
Northwest	856
Southwest	3,537
Capital	0
Central	673
Northeast	4,414
Southeast	0
<b>Total</b>	<b>9,480</b>

*Source: Pennsylvania Department of Environmental Protection. PA Oil and Gas Mapping. Accessed August 26, 2016. Available online at: <http://www.depgis.state.pa.us/PaOilAndGasMapping/OilGasWellsStrayGasMap.html>*

In the Northeast, near the start of the PennEast pipeline, four counties contain large volumes of active gas wells: Bradford County (12 percent of active wells in the state), Lycoming County (9 percent), Susquehanna County (14 percent), and Tioga County (8 percent). Figure 1 shows the distribution of active wells across the state.

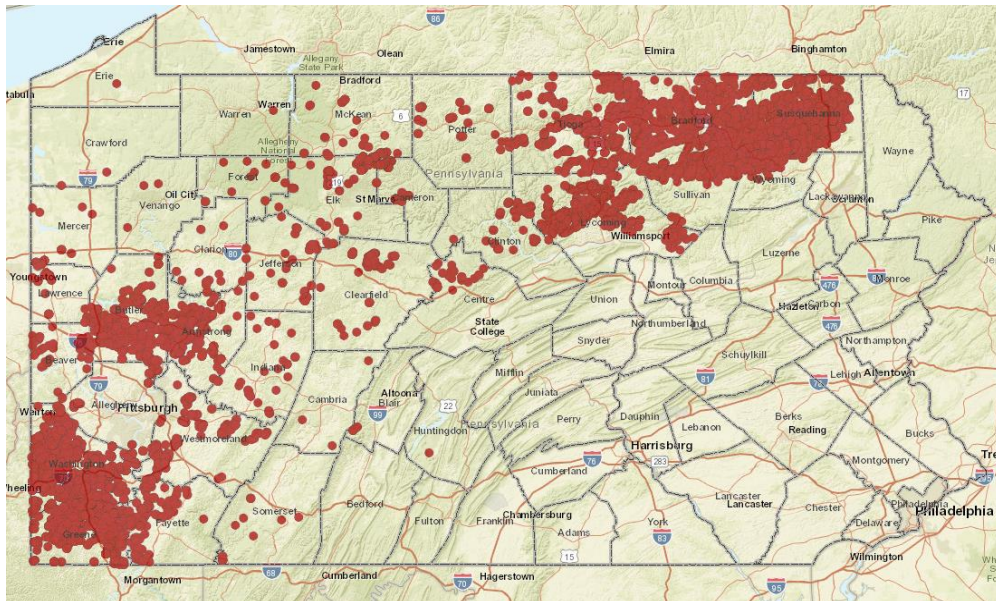
**Figure 1. Map of Active Natural Gas Wells in Pennsylvania**

*Source: Pennsylvania Department of Environmental Protection. PA Oil and Gas Mapping. Accessed August 26, 2016. Available online at: <http://www.depgis.state.pa.us/PaOilAndGasMapping/OilGasWellsStrayGasMap.html>*

For a full listing of the number of active wells in Pennsylvania by county, see

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<sup>151</sup> Pennsylvania Department of Environmental Protection, PA Oil and Gas Mapping, retrieved on August 26, 2016 from: <http://www.depgis.state.pa.us/PaOilAndGasMapping/OilGasWellsStrayGasMap.html>



Appendix 1.

The state of Pennsylvania tracks natural gas wells that are Proposed but Never Materialized (PBNM), in which a permit was issued but expired prior to the commencement of drilling, as well as Operator Reported Not Drilled (ORND), in which a permit was issued but the operator reported that the well was never drilled. These sites are logical and likely candidates for new drilling in Pennsylvania. A total of 2,733 wells fall into the PBNM category, and 4,258 wells are classified as ORND. The breakdown by region is shown in Table 2. Well more than half of these sites are located in Northeastern Pennsylvania.

**Table 3. Number of Wells in Pennsylvania That Have Been Permitted but Not Drilled**

Region	Proposed but Never Materialized	Operator Reported Not Drilled
Northwest	200	275
Southwest	789	746
Capital	0	0
Central	295	517
Northeast	1,449	2,720
Southeast	0	0
<b>Total</b>	<b>2,733</b>	<b>4,258</b>

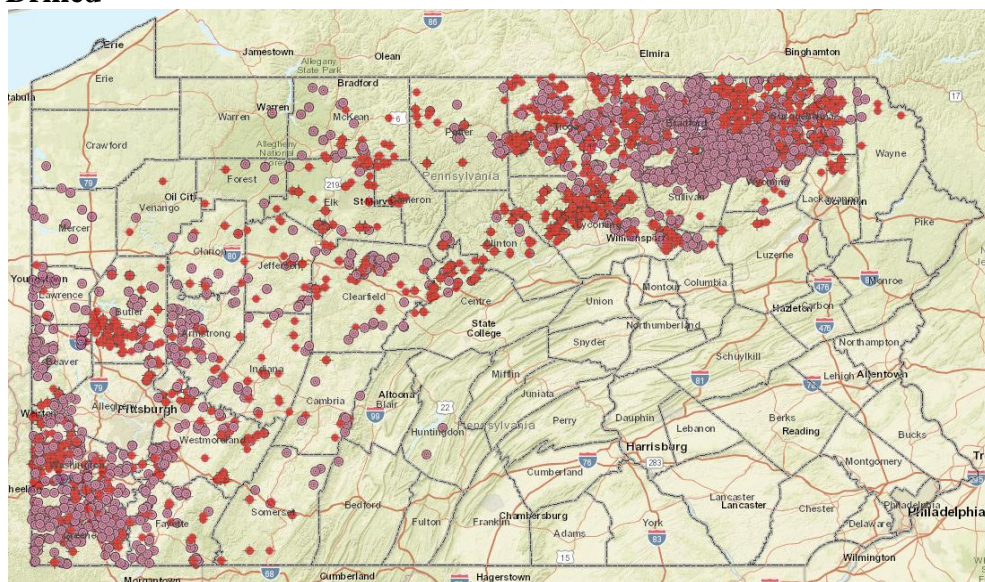
As shown in Table 4, of the counties in Northeast Pennsylvania,

Bradford County and Susquehanna County have the highest number of wells that are PBNM and ORND. In general, the counties with the highest number of active wells also have the highest number of PBNM and ORND wells. Figure 2 shows the distribution across the state of Pennsylvania of natural gas wells that were permitted but never drilled, with the purple circles representing PBNM wells, and the red circles representing ORND wells. Appendix 1 contains a full listing by county of PBNM and ORND wells.

**Table 4. Active, PBNM, and ORND wells in Northeast Pennsylvania**

County	Active	Proposed but Never Materialized	Operator Reported Not Drilled
<b>Northeast Pennsylvania</b>	<b>4,414</b>	<b>1,449</b>	<b>2,720</b>
Bradford	1,133	650	1,114
Carbon	0	0	0
Lackawanna	0	0	27
Luzerne	0	1	12
Lycoming	894	104	404
Monroe	0	0	0
Pike	0	0	0
Sullivan	119	131	82
Susquehanna	1,306	262	494
Tioga	743	199	449
Wayne	0	5	4
Wyoming	219	97	134

**Figure 2. Map of Gas Wells in Pennsylvania that were Permitted but Not Drilled**



Distribution across the state of Pennsylvania of natural gas wells that were permitted but never drilled, with the purple circles representing PBNM wells, and the red circles representing ORND wells. *Source: Pennsylvania Department of Environmental Protection. PA Oil and Gas Mapping. Accessed August 26, 2016. Available online at: <http://www.depgis.state.pa.us/PaOilAndGasMapping/OilGasWellsStrayGasMap.html>*

Given the large number of wells that have been permitted but not drilled, one can reasonably expect that new natural gas wells drilled as a result of the construction of the PennEast pipeline would most likely be among the sites identified in Figure 2. Those counties with the highest number of wells that received permits but were never drilled are Bradford, Susquehanna, Greene, Washington, Tioga, Sullivan, Wyoming, Lycoming, and Clearfield.

***The PennEast Project would induce significant and predictable new drilling activity***

The PennEast pipeline represents a significant fraction of the total new pipeline capacity coming to Northeast Pennsylvania—over 25 percent according to Table 1. A significant amount of existing production that has been curtailed will now come online for asserted customers as a result of the new pipeline. Permitted wells that were not previously completed would start producing gas for transport to New Jersey and Pennsylvania markets through the PennEast pipeline.

The total number of wells induced by any given pipeline depends on the lifetime production, or estimated ultimate recovery (EUR), from a given well. Wells in Northeast Pennsylvania provide up to 20 BcF of total lifetime production, according to a recent Range Resources presentation.<sup>152</sup> There is significant variability across wells, and well decline rates—the decline in daily production over time after a well starts producing gas—have proven to be much more significant than initially estimated. As a result of this uncertainty, we use a lower average well EUR based on EIA data. We weight this county-specific EIA data based on the number of wells in each county in Northeast Pennsylvania (as provided in Table 4). This results in an average EUR for the region near the start of the PennEast pipeline of between 3.84 Bcf and 5.5 Bcf.

The PennEast pipeline, with 1.1 Bcf per day of gas transmission capacity, could result in the transfer of up to 16,000 Bcf over its expected economic lifetime. Based on an average well EUR of 5 Bcf, the PennEast could effectively support the drilling of **3,000 new wells in Pennsylvania**. This would likely come from a combination of wells that have been drilled but are not yet producing due to market conditions and wells not yet drilled. These wells are most likely to be located in Northeast Pennsylvania, in Bradford, Susquehanna, Lycoming, and Tioga counties.

*---comment excerpt ends---*

**→Needed Pipeline Review Reform: FERC Must Fully Consider the Climate Change Impacts of Pipeline Infrastructure Projects, Including Resulting from the production, processing, distribution, consumption and other end uses of natural gas associated with proposed pipeline infrastructure projects. This Review Must Include the Social Cost of Carbon.**

**5. PUBLIC PARTICIPATION: FERC Must Reform its Public Participation Process in the Review of Proposed Pipeline Projects to be Genuinely Accessible, Inclusive, to a Diversity of Voices, and Facilitate Public Engagement, Discussion, and Learning**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC's Public Process Is Carefully Crafted to Frustrate Public Input and Deny Full and Fair Opportunity to Participate**

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<sup>152</sup> Range Resources. EnerCom Oil & Gas Conference 21, August 15, 2016, retrieved from: <http://ir.rangeresources.com/phoenix.zhtml?c=101196&p=irol-presentations>

The National Environmental Policy Act (NEPA) requires that federal agencies take environmental considerations into account in their decision-making “to the fullest extent possible.” 42 U.S.C. § 4332. In addition, NEPA “guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience,” including the public, “that may also play a role in the decision-making process and the implementation of the decision.” *Robertson*, 490 U.S. at 349. As NEPA’s implementing regulations explicitly provide, “public scrutiny [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). The opportunity for public participation guaranteed by NEPA ensures that agencies will not take final action until after their analysis of the environmental impacts of their proposed actions has been subject to public scrutiny. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011)

And yet, FERC’s public meeting process is notorious for the many ways it disenfranchises the public and creates barriers to public participation. FERC ...

- frequently holds hearings at locations far from the impacted communities,
- fails to respond in a timely manner to requests for confidential information needed to inform public comment,
- ends public hearings prematurely, before all in attendance have been given the opportunity to speak
- fails to provide adequate notice of hearing venues and/or changes, and
- targets comment periods for major holidays, e.g. comment period over thanksgiving, new year’s or that end on labor day.

***FERC routinely denies the public access to vital information regarding pipeline projects prior to comment deadlines***

Recently, FERC refused to provide Critical Energy Infrastructure Information (“CEII”) to an environmental organization until after the scoping period for the proposed Project had closed, despite the organization’s timely filing of the request for information and its repeated efforts to secure the documents requested.

- April 29, 2016, FERC posted Confidential CEII material relating to the Millennium Eastern System Upgrade to the FERC pre-filing docket (*FERC Docket No. PF16-3*). Delaware Riverkeeper Network (DRN) submitted its request for the information on the same day.
- May 11, 2016, FERC released a request for comments with a deadline of June 10, 2016.
- DRN submitted no less than five requests for a comment period extension, to allow time to receive, analyze and comment upon the CEII data before the deadline.
- The June 10th comment deadline passed without the Delaware Riverkeeper Network having received the CEII materials.
- On July 15, 2016, DRN received a letter from FERC acknowledging, that despite Millennium’s objections, the organization had demonstrated a legitimate need for the information—“to assess the need and true nature of the project being proposed.”
- DRN finally received responsive information from FERC on July 29th, nearly two months after the comment deadline and three months after the information was requested. The responsive materials did not include the Flow Diagrams that were needed to assess the true size and scope of the project. That same day, Millennium submitted an Abbreviated Application to FERC

(*FERC Docket No. CP16-486*), which included more complete CEII information, including the Flow Diagrams.

- The following business day, August 1, DRN submitted a new CEII request for the latest CEII filing.
- On December 6, over four months later, FERC sought to deny release of the CEII Flow Diagrams and Flow Diagram Data required to assess the project. FERC's rejection of the request was in contrast with the agency's previous practice of providing such information no explanation was provided for the change. Delaware Riverkeeper Network filed a challenge to the denial.
- In January 2017, Millennium finally agreed to release the information to DRN.
- The information was received in January 2017, a full 8 months after the close of the scoping period.

***FERC undermines the entire purpose of public participation and fair notice by allowing for significant project alterations after public comment periods have ended***

It is not uncommon for FERC to allow a proposed pipeline route to change or to offer new viable alternatives after the filing of a formal FERC application, and after relevant comment periods have ended, but without giving the public a full and fair opportunity to comment.

New Hampshire residents struggled to understand the impacts of the Northeast Energy Direct Project (*FERC Docket No. PF14-22*) as the pipeline route was repeatedly changed during the project's scoping period. Members of the community attempted to identify and alert new landowners on ever-changing maps when Kinder Morgan and FERC failed to do so.<sup>153</sup> As a result, the public was unable to meaningfully comment on a pipeline's route, and impacted landowners were left unaware that a pipeline was slated to cross their property until the application process was well under way and public comment opportunities had passed.<sup>154</sup>

***FERC creates unnecessary technological barriers to participation***

When residents participate in FERC's "public process" via written comment or intervention, they are often stymied by FERC's website which is, at best, convoluted, and often, non functioning at critical times.<sup>155</sup> FERC could remedy this barrier by participating in The eRulemaking Program

and utilizing the far more accessible commenting and notification platform available through Regulations.gov, which was created to "increase public access to federal regulatory materials," "increase public participation and their understanding of the federal rulemaking process," and "improve federal agencies' efficiency and effectiveness in rulemaking development." FERC is a Non-Participating Agency in the program, despite regular complaints regarding their e-Filing

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<sup>153</sup> Testimony of Stephanie Scherr, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>154</sup> Email from Susan Meacham regarding PennEast route changes, June 3, 2016.

<sup>155</sup> Letter from Kingwood Township to FERC, September 11, 2016; "Draft for Maya" describing the difficulty in navigating the FERC website and Jim Levulis, *Rosenberg: Gas Pipeline at Odds with State's Energy Goals*, WAMC Northeast Public Radio, January 5, 2016.

system.<sup>156</sup>

***FERC's lack of notice for and poor timing of public comment periods and public hearings creates barriers to participation***

It is common practice for FERC to provide short notice of upcoming hearings and to offer limited windows within which to comment on significant project proposals.

- FERC provided a mere 3 weeks public notice for scoping hearings regarding the Atlantic Coast Pipeline -- FERC announced on February 27 that it would hold a scoping meeting on March 18 to receive public testimony. Given the high interest and significant volume of information that needed to be compiled, reviewed, and addressed, 3 weeks was highly deficient.
- FERC provided only 24 days before holding public hearings on a 1,174 page EIS document for the PennEast Pipeline project. In total only 45 days was given for those who wanted to submit written comment. Neither the 24 days for verbal comment nor the 45 days for written comment was enough for such a long and detailed proposal.

FERC is known to give even less notice when there is a change in the location of a public meeting.

- Notice of a change of hearing venue for the PennEast pipeline project's August 16<sup>th</sup> and 17<sup>th</sup> Draft EIS hearings were postmarked August 11 and in fact did not arrive in mailboxes until on or about August 16, 2016, the same day as the hearing.<sup>157</sup> The delayed notification of the change denied many concerned members of the public the opportunity and ability to attend the hearings at the new locations. *(Note, the notice itself was dated August 5, but the postmark was August 11, indicating the agency waited a full 6 days before actually getting the notice into the postal system for delivery).*

***FERC's public meetings are designed to discourage participation and opposition through unnecessary time restrictions and inconvenient timing and locations***

FERC public meetings are often held at a limited set of locations along a proposed pipeline route, making it difficult for many impacted community members to travel the long distances necessary to participate, particularly those that have some sort of physical limitation or significant family obligations.

- Residents in Buckingham County, VA were not given the benefit of a public meeting or subsequent "listening session" in their community to discuss the Atlantic Coast Pipeline (*FERC Docket No. CP15-554*) despite the fact that the county would be the site of a large compressor station, the only one in the state, and the proposed pipeline would cut through the entire length of the 584-square mile county.<sup>158</sup>

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<sup>156</sup> Regulations.gov Overview, Retrieved from: <https://www.regulations.gov/aboutProgram>

<sup>157</sup> FERC Notice of Public Comment Meeting Location Change, PennEast Pipeline, LLC., FERC Docket No. CP15-558, August 5, 2016.

<sup>158</sup> Email from Lakshmi Fjord to Maya K. van Rossum regarding Atlantic Coast Pipeline, January 28, 2017.

- Residents had been told that there would be a FERC hearing in their county on the pipeline, as well as additional hearings specific to the compressor station. Instead, the public meeting was held in another county, 45 minutes to an hour's drive away. This drastically limited Buckingham residents, many of whom are elderly and do not normally drive on a winter's evening, from attending and expressing their concerns over the project.
  - Local public officials requested that FERC hold a meeting in the county, as did Senators Kaine and Warner on their behalf. Senator Kaine summarized in his letter to FERC, "the opportunity [to comment] was not sufficiently given."<sup>159</sup> FERC did not respond to any of the requests.
  - Residents who were able attend the meeting later found that their comments were not transcribed accurately and were so riddled with mistakes that their testimonies seemed nonsensical on the record.<sup>160</sup>
- Millennium held "open house" forums on the Eastern System Upgrade project (*FERC Docket No. PF16-3*) at inconvenient times and locations that were inaccessible for impacted community members, among other problems. The public meeting that was intended to focus on the proposed Highland compressor station was held 30 miles north of the proposed site, at a time that many indicated was inconvenient for the daily realities of those affected.<sup>161</sup>

FERC public meetings include strict time limits for testimony and turn testifiers away once arbitrary time limits are met:

- FERC public hearings traditionally allow only 2 to 3 minutes of time per person for testimony. This time limit is enforced even when the number present is so few that there is clearly the ability to provide more time without reaching the scheduled end time for the hearing.

For example, at PennEast project hearings, a three minute time limit was imposed for the stated purpose of ensuring that everyone had the opportunity to testify, despite the fact that the number of individuals signed up to testify did not warrant the time constraint. FERC's unnecessary time restriction was evident when all individuals had provided testimony by 8:30 pm and the scheduled close of the public hearing was 10 pm.

- For meetings where there is significant turnout, when the scheduled end time of the meeting is reached, people are turned away without ever getting a chance to testify -- regardless of how long or far they travelled, or how long they waited to speak. Providing an opportunity for written comment does not serve the same function as an opportunity to verbally testify for the benefit of FERC and two to three minutes is simply not enough.

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<sup>159</sup> Letter from Senator Kaine to FERC Asking to Revise Policies, April 7, 2015.

<sup>160</sup> Testimony of Chad Oba, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016 and Testimony of Irene Leech, People's Hearing on FERC's Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>161</sup> Delaware Riverkeeper Network letter to FERC concerning Millennium, May 15, 2016.

### ***FERC separates and intimidates commenters at public hearings***

FERC recently began implementing a new hearing format designed to take the “public” out of the concept of public hearings and deny the ability of attendees to hear the testimony offered by others in attendance; commenters are escorted individually to rooms to state their testimony, in private, to a FERC-hired stenographer out of earshot of others in attendance. The press is prohibited from hearing comments given (even if testifiers request that press be allowed to hear their testimony) and are also prohibited from taking photos and/or video for their news reporting. The public is also told that they are prohibited from taking photos of the public meeting.

- At a summer 2017 public hearing for the PennEast Pipeline, individuals who took photos were quickly admonished by FERC representatives, told that photos were prohibited and suggested they would have to leave the event if they persisted.
  - During this same faux hearing, FERC sought to use state police to intimidate a community member from sharing information and free T-shirts regarding the pipeline in the hearing “waiting room”, where testifiers were awaiting their chance to speak to the FERC-hired stenographer.
  - At this same meeting FERC employees stated that they had neither made, nor were making, any special accommodations for members of the public with sight impairment.
  - At this series of faux hearings a parent had to argue with a FERC employee for the right to sit with her minor child during delivery of the child’s testimony to the stenographer. When challenged by the FERC employee as to the need to be present the mother stated her concerns, and had to forcibly assert her right as a parent to be present.
- At a November 3, 2016 FERC public meeting in Roanoke, Virginia for the Mountain Valley Pipeline (MVP) (*FERC Docket No. CP16-10*), FERC again replaced the public meeting with one-on-one three minute individual testimonies to a FERC stenographer. The FERC Project Manager Paul Friedman took it a step further by “badgering, speaking over people and refutation of citizens’ concerns” as they attempted to give their testimony. According to residents, “Friedman, who was present for many of these recording sessions, interrupted individuals, disrupting their carefully prepared statements, disputing their concerns, and thereby (once again) whitewashed the public record.”<sup>162</sup>
- At a FERC public hearing on the NEXUS Pipeline (*FERC Docket No. CP16-22*), Ohio residents attempting to voice their concerns, and to share with and gain insights from their neighbors, were instead taken into separate rooms to give their statements to FERC contractors. As a result, many people left that meeting without commenting because “they

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<sup>162</sup> Testimony of Russell Chisholm, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016 and also supported by Testimony of Richard Shingles, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

felt uneasy talking one-on-one and they wanted to hear what everyone else had to say.”<sup>163</sup>

### **FERC does not fulfill its NEPA obligation to consider and address relevant issues raised in public comments**

When members of the public, and even elected representatives, participate in the public process, either in-person or in writing, their concerns and valid legal arguments fall on FERC’s deaf ears.

- For example, 22,093 people and 37 elected state officials informed FERC of their opposition to the Marc-1 Pipeline in Northeast Pennsylvania; the EPA even questioned the need for yet another pipeline in the area, yet FERC rubber stamped the project and hastily granted eminent domain authority to the pipeline company.
- Residents impacted by the Spectra AIM pipeline (*FERC Docket No. CP14-96*) watched helplessly as the pipeline company and FERC ignored the questions and objections of community members and elected officials at every level of government in the four impacted States (NY, CT, RI, and MA), including Senators and members of Congress, the New York Governor and four New York state agencies, during the scoping period and through the Draft and Final Environmental Impact Statements.<sup>164</sup>

This behavior is not regionally-limited. FERC has acted similarly when approving two fiercely contested pipelines in Texas; Trans-Pecos and Comanche Trail, and in countless other situations across the nation.

Key-Log Economics has undergone a thorough analysis of all comments submitted to the FERC docket during key comment periods for the Atlantic Coast Pipeline, the PennEast Pipeline, and for Millennium’s Eastern System Upgrade (ESU) project. Across the board, these analyses have found that the vast majority of comments submitted to FERC express negative opinions and serious concerns about the proposed pipelines. More so, these concerns are greatest among people who would be directly affected by the proposed pipelines. Under NEPA, FERC must consider and address relevant concerns raised in public comments. These comments are important to the process as they “provide direct and clear information about the issues of concern to the people living in communities through which the pipeline would pass as well as to people who, as visitors, downstream water users, business owners, and others, use and enjoy the affected landscape. The comment letters help FERC understand the nature and extent of the effects of the proposed pipeline.”<sup>165</sup> However, FERC regularly fails to meet its legal obligation to consider the full range of environmental effects raised on the record in their final EIS or EA.<sup>166</sup>

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<sup>163</sup> Testimony of Renee Walker, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>164</sup> Testimony of Nancy Vann and testimony of Chris D. Gauthier, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>165</sup> Testimony of Cara Bottorff, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>166</sup> Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, February 2016, Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016 and Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

### **FERC misleads and discourages landowners from participating in the public process**

FERC has gone so far as to actively mislead and discourage landowners who stand to lose their property to eminent domain from participating in the public process.

- William F. Limpert, who, along with his wife, stood/stands to have his retirement property cut in half by the Atlantic Coast Pipeline (ACP) (*FERC Docket no. CP15-554*), was discouraged from participating as an intervenor by FERC staff when he inquired about the process. He was told, falsely, that “being an intervenor is very difficult because [he] would have to send letters to hundreds of other intervenors.” The FERC employee made the process sound so daunting and time consuming that the Limperts decided not to intervene at the time. The ACP would cut a 3,000 foot by 125 foot path cut through the virgin forest on their property within several hundred feet of their home, taking down hundreds of old growth trees.<sup>167</sup>

### **FERC’s disregard for public concern is reckless, illegal, and appears intentional**

Members of the public have reported overhearing FERC employees disparage the public process and, when they thought they were not being overheard, laughing at the notion that the public believed that their input could have any impact on the pre-determined outcome of approval of a pipeline by FERC.

The public is denied any opportunity to testify before the FERC Commissioners directly before they render the final decision on a pipeline infrastructure project – and if they attempt to speak at a FERC Commissioners meeting they are forcibly removed or arrested.<sup>168</sup> And so people who are losing their lives, livelihoods, properties, protected lands and healthy environments are never even given the opportunity to be heard by the very decisionmakers who are making the decision to inflict the harm.

The steps taken by FERC to deny people their right to be heard and to participate in the public review process are particularly egregious in light of the fact that these proposed projects take their private property rights, irreparably damage natural resources and lands communities have worked hard to preserve and restore, take jobs and harm small businesses, impede farmers from being able to most successfully grow their crops, and put communities in a literal blast zone that could take their lives. This clearly frustrates provisions of the National Environmental Policy Act, the Clean Water Act, and the Natural Gas Act.

→ **Needed Pipeline Review Reform: FERC’s public participation process needs a complete overhaul -- in order to identify needed fixes and reforms FERC should hold a comment period focused on such reform.**

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<sup>167</sup> Testimony of William Limpert, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

<sup>168</sup> Testimony of Nancy Vann and testimony of Ted Glick, People’s Hearing on FERC’s Abuses of Power and Law, National Press Club, December 2, 2016.

**6. PREDETERMINATION: FERC must follow the appropriate NEPA environmental review process, undertaking an Environmental Assessment in order to determine whether or not a FONSI or EIS is the appropriate next step.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Illegally Predetermines the Level of Its NEPA Reviews.**

The National Environmental Policy Act (NEPA) (18 CFR § 380.3(b)(2)) mandates that FERC evaluate the environmental impact of a proposed action by first preparing an Environmental Assessment (EA). If significant impacts are found during the preparation of the EA, FERC must then prepare a more comprehensive Environmental Impact Statement (EIS). If, as a result of the EA, it is determined that there will be no significant impact, then FERC issues a Finding of No Significant Impact and the Agency is deemed to have fulfilled its NEPA environmental review obligations.

Rather than enter into the EA process in good faith and with an open mind as to the outcome, an outcome that is informed by the information and data received from the public, agencies, and experts during the EA review process, FERC instead “eyeballs” a project applicant’s initial request and predetermines whether it will only undertake an EA and forego the more comprehensive EIS. Contrary to the mandates of NEPA, the EA is **not** used by FERC as the vehicle for determining the appropriate level of review. Instead, FERC routinely pre-determines the environmental review process it will use based on its own judgment.

For example, in response to concerns raised by Senator Elizabeth Warren regarding the Atlantic Bridge Project (*FERC Docket CP 16-9*), FERC issued a response stating that “The Commission staff will issue an environmental assessment (EA) to meet our responsibilities under the National Environmental Policy Act.”<sup>169</sup> In other words, FERC clearly stated, prior to its review, that the issuance of an EA would fully meet NEPA requirements.

This kind of advance determination is routine. Notably, and by way of further evidence of this assertion, FERC has **never** issued an Environmental Assessment that found possible significant impacts, or even unknown impacts, which would then require a full Environmental Impact Statement.

This process of preliminarily choosing either an EIS **or** an EA as its ultimate environmental review document is embedded in FERC’s process, as demonstrated by the guidance documents available on FERC’s website for Processes for Natural Gas Certificates.<sup>170</sup> This fundamental misunderstanding of the mandates of NEPA is also cemented in FERC’s 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*:

“If the proposed project will not have any adverse effect on the existing customers of the expanding pipeline, existing pipelines in the market and their captive customers, or the economic interests of landowners and communities affected by the route of the new

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<sup>169</sup> Letter from FERC Chairman Norman Bay to Senator Elizabeth Warren, February 12, 2016.

<sup>170</sup> Processes for Natural Gas Certificates, retrieved from: <https://ferc.gov/resources/processes/flow/gas-2.asp>  
<https://ferc.gov/resources/processes/flow/process-ea.asp>.

pipeline...**The Commission would proceed... to a preliminary determination or a final order depending on the time required to complete an environmental assessment (EA) or environmental impact statement (EIS)(whichever is required in the case)."**

"Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered. It is possible at this stage for the Commission to identify conditions that it could impose on the certificate that would further minimize or eliminate adverse impacts and take those into account in balancing the benefits against the adverse effects. If the result of the balancing is a conclusion that the public benefits outweigh the adverse effects then the next steps would be the same as for a project that had no adverse effects. That is, **if the EA or EIS would take more than approximately 180 days then a preliminary determination could be issued, followed by the EA or EIS and the final order. If the EA would take less time, then it would be combined with the final order.**"<sup>171</sup>

This misunderstanding is also repeated in FERC's recent PL18-1 NOI:

"Regulations issued by the CEQ to implement NEPA <sup>[24]</sup> require agencies, including the Commission, to consider the environmental impacts of a proposed action, generally by preparing either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS).<sup>[25]</sup>"

Such truncated environmental review procedures save the industry both time and money, and denies the public an unbiased review of project impacts as required by NEPA.

→**Needed Pipeline Review Reform: In order to comply with the mandates of NEPA, FERC must amend its Policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, requiring that it evaluate the environmental impact of each pipeline infrastructure project by first preparing an Environmental Assessment (EA).** If significant impacts are found during the preparation of the EA, FERC must then prepare a more comprehensive Environmental Impact Statement (EIS). If, as a result of the EA, it is determined that there will be no significant impact, then FERC issues a Finding of No Significant Impact and the Agency is deemed to have fulfilled its NEPA environmental review obligations.

### **Consultant Conflicts of Interest.**

### **FERC Must End Its Practice of Using Conflicted Consultants to Conduct Project Reviews and Make Recommendations**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Routinely Uses Conflicted Consultants to Conduct Project Reviews and Make Recommendations.**

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<sup>171</sup> Statement of Policy, FERC Docket No. PL99-3, September 15, 1999, retrieved from: <https://www.ferc.gov/legal/maj-ord-reg/PL99-3-000.pdf>.

FERC routinely hires third party consultants to lead its project reviews knowing full well that these same consultants are simultaneously working as consultants for the pipeline companies seeking FERC approval for projects. Sometimes the projects consultants are working on for FERC and for pipeline companies have a direct and demonstrated relationship. The use of these conflicted consultants, that are operating on both sides of the FERC approval process at the same moment in time, sometimes even on directly related projects, injects an obvious source of bias and concern. The practice must end.

For example:

The FERC Environmental Assessment (EA) for Spectra Energy's Atlantic Bridge project was prepared with the help of NRG, a third party contractor hired by FERC. At the same time, Spectra had also retained NRG as a "public outreach and relations" consultant on the PennEast pipeline project, of which Spectra owns 10% interest. This means that NRG was hired by FERC to conduct an objective, unbiased review of Spectra's Atlantic Bridge project, while at the same time receiving money from Spectra Energy to conduct the preliminary review for another of the company's proposed pipelines (i.e. PennEast pipeline). Additionally, the two projects (PennEast and Atlantic Bridge) are physically connected, further entrenching the conflict of interest. It is no stretch of the imagination that NRG would financially benefit from Spectra's Atlantic Bridge project if the project were approved, a project which NRG was partially tasked by FERC with "objectively" reviewing. In fact, while NRG was conducting its "review", Spectra hired NRG *for no less than five other projects*.<sup>172</sup>

FERC's own handbook defines such a situation as a conflict of interest, stating a conflict of interest exists when a contractor has an ongoing relationship with an applicant. The conflicts involving NRG, Spectra, the PennEast Pipeline (*FERC Docket No. CP15-558*), and the Atlantic Bridge Pipeline (*FERC Docket No. CP16-9*) were brought to FERC's attention by concerned community members and two U.S. Senators. Instead of conducting a new, unbiased review, FERC's then-Chairman Norman Bay simply responded by quoting sections of FERC's handbook on hiring third-party contractors. NRG's review still stands intact because despite clear evidence to the contrary, FERC took NRG's word that no conflicts existed.<sup>173</sup>

By way of further example:

Tetra Tech is a known consultant for FERC, most recently on the PennEast Pipeline project. Tetra Tech is also a member of the Marcellus Shale Coalition. Founded in 2008, the Marcellus Shale Coalition works to advance production and distribution of gas fracked from the Marcellus and Utica Shales. The support of the Marcellus Shale Coalition is not just well known, but is touted by the PennEast Pipeline company raising another significant conflict for FERC on the PennEast Pipeline project.<sup>174</sup>

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<sup>172</sup> DeSmog Blog, *Revealed: Contractors Hired by FERC to Review a New Spectra Energy Pipeline Work for Spectra on a Related Project*, May 26, 2016.

<sup>173</sup> DeSmog Blog, *Despite Senate Inquiry into Potential Conflicts of Interest, FERC Approves Spectra Energy's Atlantic Bridge Project*, January 26, 2017.

<sup>174</sup> Times of Trenton, *PennEast Natural Gas Pipeline Environmental Study Firm's Connection to Shale Coalition is*  
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→**Needed Pipeline Review Reform: FERC must reform the pipeline review process so as to specifically prohibit FERC use of third party consultants with actual or potential bias.**

→**Needed Pipeline Review Reform: FERC must reform the pipeline review process so that any potential conflicts with third party consultants are disclosed publicly.**

→**Needed Pipeline Review Reform: FERC Must Prohibit the Practice of Hiring Third-Party Consultants to Assist in the FERC Review Process who Have Any Business Contracts (Past, Present or Future) with a Pipeline Company Seeking FERC Approval.**

→**Needed Pipeline Review Reform: FERC Must Prohibit FERC Commissioners or FERC Staff from Working on or Deciding upon Any Pipeline or Infrastructure Project in which They or a Family Member Have a Direct or Indirect Financial or Employment Interest.**

### **FERC Transparency**

#### **FERC Must Institute a Policy of Full Disclosure with States, Regulatory Agencies, & the Public**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Intentionally Conceals Critical Information from States and the Public.**

FERC has intentionally, both individually and jointly with pipeline companies, withheld critical information and facts from state lawmakers and the public so as to inappropriately drive the outcome of pipeline infrastructure decisionmaking. In order to fulfill its obligations as an unbiased decisionmaker and to ensure the public, states and other agencies have the full body of information necessary to inform their judgements about a project, FERC must institute a policy of full disclosure regarding its impact and alternative reviews. To date that has not been the policy of FERC.

In their review of the Tennessee Gas Pipeline Company, LLC's ("Tennessee") Orion Project ("Orion") (*FERC Docket CP16-4*), FERC concealed information from the Pennsylvania Department of Environmental Protection ("PADEP") regarding a project Alternative that would have greatly reduced the project footprint and its impact on water resources, and therefore could have had a substantial influence on the State's Clean Water Act ("CWA") Section 401 Certification determination, as well as the public's understanding and opinion.

The Delaware Riverkeeper Network was involved in two legal challenges to the Orion project, allowing the organization to secure documents through litigation that were not otherwise available to the public or

the state through public information requests.<sup>175</sup> Were it not for this litigation, evidence of FERC concealing critical information would never have come to light. The fact that this information was only made available as the result of litigation and was not otherwise available through federal Freedom of Information Act requests demonstrates the critical need for a formal policy that mandates full disclosure.

***Facts demonstrating that FERC withheld analyses of viable, technically feasible, and environmentally preferable alternatives from the state and the public:***

- ⇒ On or about July 10, 2016, FERC generated a Draft Environmental Assessment (Draft EA) for Tennessee's Orion Project.
- ⇒ In the Draft EA, FERC identified and evaluated alternatives to the Orion Pipeline proposal.
- ⇒ As a result, the Draft EA included a detailed analysis regarding an Alternative which eliminated the need for the 12 miles of pipeline looping being proposed and which would eliminate all waterbody impacts.<sup>176</sup>
- ⇒ The Draft EA included a detailed description of the Alternative and concluded that this Alternative "meets the purpose and need" of the Orion Project, and "is technically feasible."
- ⇒ The Draft EA also concluded that the Alternative "would eliminate the need for 12.9 miles of new pipeline construction, which would eliminate 30 waterbody crossings, 13 road crossings, and impacts on wetlands and other land use impacts along the pipeline route."
- ⇒ The Draft EA included a table showing the different impacts resulting from the Alternative in comparison to the proposed looping pipeline project. The analysis showed that while the Alternative had its own set of impacts which required full and thoughtful consideration, the proposed looping project would harmfully impact 30 waterbodies, would have significant wetland impacts, as well as result in 222.6 more acres of total disturbed land, over 100 more acres of impact to agricultural lands, would traverse 2,100 feet of steep slopes, and would necessitate the long-term deforestation of between 9 and 19 more acres of upland forests.

Therefore, not only did the Draft EA conclude that the Alternative was technically feasible and would meet the purpose and need of the Orion Project, but it also concluded that the Alternative's environmental impacts would be significantly smaller, thereby making it the environmentally preferred option. However, without reason or explanation, FERC removed this analysis of the Alternative from the final Environmental Assessment that was eventually released to the public, and to the State of Pennsylvania.<sup>177</sup>

The public and state agencies were never made aware of the analysis scrubbed from the Draft EA. As such, both the public and state were never provided, by FERC, critical information regarding the scope and breadth of potential alternatives to the proposed Orion Pipeline Project, including the less environmentally harmful Alternative.

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<sup>175</sup> Delaware Riverkeeper Network Reply Brief in Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection et al., June 6, 2017.

<sup>176</sup> Draft Environmental Assessment for Tennessee's Orion Project, FERC Docket No. CP16-4, June 10, 2016.

<sup>177</sup> Environmental Assessment for Tennessee's Orion Project, FERC Docket No. CP16-4, August 2016.

Had PADEP been provided access to the draft Environmental Assessment and/or the analysis and conclusions regarding the Alternative, it may have chosen the Alternative as opposed to the pipeline looping Project. Had the public been aware of this information the direction of their comment and associated technical analyses would likely have been very different. And had FERC received comment that was more onpoint with the full breadth of information about this project and its alternatives, perhaps FERC would have made a different decision as well.

→ **Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Must Institute a Policy of Full Disclosure with States, Regulatory Agencies, & the Public.**

## **NEED.**

**FERC Must Mandate a Legitimate Demonstration of “Need” for a Proposed Pipeline Infrastructure Project that is Verified by Unbiased Experts, Showing There is a Market Demand and Need, and that this Need Cannot be Supplied by Renewable or Existing Energy Sources.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Fails to Require Genuine Demonstration of Need and Instead Takes at Face Value Precedent Agreements Provided by Companies Often from Their Own Counterparts, Resulting in Ill Informed Certifications and Pipeline Overbuild.**

FERC’s approval of a pipeline requires a demonstration of need.<sup>178</sup> FERC’s 1999 Policy relies on precedent agreements to demonstrate need, yet does nothing to ensure they are backed up by market projections.<sup>179</sup> Such a narrow view of whether a project is needed allows for companies to manufacture/represent need where in fact none exists, ignores the changing dynamics of the energy market, and fails to reflect the possibility that alternatives to providing natural gas exist. As a result of its current policy and practice, FERC routinely ignores evidence that there is no genuine public need for a proposed pipeline project. Further, instead of requiring a demonstration of genuine need, FERC allows pipeline companies to assert increased profits, competitive advantage, and self-manufactured claims of need to fulfill the public necessity mandate. Compounding on this harm is the fact that FERC allows for companies to create need through precedent agreements, questioning such contracts no further than what they are told. Further, FERCs policy on increasing competition in the marketplace incentivizes overbuilding in favor of increasing competition to reduce rates.

In the end, rather than engage in objective and independent review of the claims of need “FERC has increasingly relied on information supplied by pipeline operators in making decisions to grant approvals....”<sup>180</sup> and routinely ignores evidence that there is no genuine public need for a proposed pipeline project from outside parties and independent, reliable sources.

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<sup>178</sup> (*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further certified*, 92 FERC ¶ 61,094 (2000)).

<sup>179</sup> Statement of Policy, FERC Docket No. PL99-3 at pg. 14., September 15, 1999, retrieved from: <https://www.ferc.gov/legal/maj-ord-reg/PL99-3-000.pdf>.

<sup>180</sup> Tom Pawlicki, *FERC deference to pipeline operators seen contributing to overbuild*, *snl.com*, March 24, 2016.

**FERC's refusal to consider expert analysis that is contrary to claims of need by the pipeline companies has led to overbuild.** In many projects expert analyses directly contradicted the company's assertions of "need." And yet, in each instance, FERC insisted that need for the project existed and failed to give serious (if any) consideration to the contrary demonstration provided by the public and their experts:

- NorthEast Direct Pipeline (FERC Docket No. CP 16-21): A 2015 study conducted by Analysis Group at the request of the Massachusetts Attorney General found that new interstate natural gas pipeline capacity is not needed in New England through the year 2030.<sup>181</sup>
- Mountain Valley (FERC Docket No. CP16-13) and Atlantic Coast Pipelines (FERC Docket No. CP15-554): According to a 2016 study conducted by Synapse Energy "The region's anticipated natural gas supply on existing and upgraded infrastructure is sufficient to meet maximum natural gas demand from 2017 through 2030. Additional interstate natural gas pipelines, like the Atlantic Coast Pipeline and the Mountain Valley Pipeline, are not needed to keep the lights on, homes and businesses heated, and industrial facilities in production."<sup>182</sup> In a separate analysis, Synapse found that Dominion overestimated the Atlantic Coast Pipeline's economic benefits in reports to FERC and failed to account for any of the environmental and societal costs that the pipeline would impose on local communities.<sup>183</sup>
- Constitution Pipeline (FERC Docket No. CP13-499): In the case of the Constitution Pipeline, one report concluded that New York City's existing infrastructure is "large, dynamic, and more than adequate" to support the City's needs. The report also provided evidence that the Constitution Pipeline does not, in fact, seek to supply the City with natural gas, but instead seeks to export the natural gas.<sup>184</sup>
- PennEast Pipeline (FERC Docket No. CP15-558): The asserted public "need" advanced by the PennEast pipeline company for the PennEast Pipeline Project included assertions that the proposed pipeline is necessary to serve New Jersey and eastern Pennsylvania communities and some unstated number of "surrounding states." However, numerous expert reports on the PennEast docket demonstrate there is in fact no such "need" for the gas that PennEast would transport, and that if the pipeline were to be built there would be an increased gas surplus in both NJ and PA:
  - "The proposed PennEast Pipeline would deliver an additional 1 Bcf/d of natural gas to New Jersey potentially creating a 53% supply surplus above the current level of consumption." "...Pennsylvania has no unfulfilled demand..."<sup>185</sup>
  - "Local gas distribution companies in the Eastern Pennsylvania and New Jersey market have more than enough firm capacity to meet the needs of customers during peak winter periods. Our analysis shows there is currently 49.9% more capacity than needed to meet

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<sup>181</sup> Power System Reliability in New England, Analysis Group, Inc., November 2015 and Press Release, Mass Attorney General's office, AG Study: Increased Gas Capacity Not Needed to Meet State's Electric Reliability Needs, November 18, 2015.

<sup>182</sup> Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? Synapse Energy, September 12, 2016.

<sup>183</sup> Atlantic Coast Pipeline Benefits Review, Synapse Energy, June 12, 2015.

<sup>184</sup> Anne Marie Garti, Report on Need for the Constitution Pipeline, April 7, 2014.

<sup>185</sup> Arthur Berman, Labyrinth Consulting Services, Inc., Professional Opinion on the PennEast Pipeline, February 2015 and Arthur Berman, Labyrinth Consulting Services, Inc., PennEast Updated Opinion, September 11, 2016.

*even the harsh winter experienced in 2013.”*<sup>186</sup>

- Sabal Trail Pipeline (FERC Docket No. CP14-554): FERC refused to revisit the alleged “need” for the Sabal Trail pipeline through Alabama, Georgia, and Florida, despite admissions by Florida Power and Light (FPL) that the region’s needs had dramatically changed. In 2016, FPL’s Ten Year Plan stated firmly that “FPL does not project a significant long-term additional resource need until the years 2024 and 2025” and acknowledged that growing investments in efficiency and solar power will stave off and reduce Florida’s need for increased natural gas deliveries.”<sup>187</sup>

As reported by the Institute for Energy Economics and Financial Analysis, pipeline companies have an incentive to overbuild, and no reason to self-moderate or limit their construction.<sup>188</sup> The failure of FERC to provide any independent review or oversight over self-serving claims of “need” undermines the requirements of the law and the actual needs of the public..

- “...current low natural gas prices in the Marcellus and Utica region are driving a race among natural gas pipeline companies .... An individual pipeline company acquires a competitive advantage if it can build a well-connected pipeline network...; thus, pipeline companies competing to see who can build out the best networks the quickest. This is likely to result in more pipelines being proposed than are actually needed to meet demand in those higher-priced markets.”<sup>189</sup>
- “...[T]he regulatory environment created by FERC encourages pipeline overbuild. The high returns on equity that pipelines are authorized to earn by FERC and the fact that, in practice, pipelines tend to earn even higher returns, mean that the pipeline business is an attractive place to invest capital. And because ... there is no planning process for natural gas pipeline infrastructure, there is a high likelihood that more capital will be attracted into pipeline construction than is actually needed.”<sup>190</sup>
- “The pipeline capacity being proposed exceeds the amount of natural gas likely to be produced from the Marcellus and Utica formations over the lifetime of the pipelines. An October 2014 analysis by Moody’s Investors Service stated that pipelines in various stages of development will transport an additional 27 billion cubic feet per day from the Marcellus and Utica region. This number dwarfs current production from the Marcellus and Utica (approximately 18 billion cubic feet per day).”<sup>191</sup>

Industry experts themselves have recognized that there is no need for additional pipeline capacity. Rusty Braziel speaking to attendees at the 21<sup>st</sup> Annual LDC Gas Forums Northeast Conference regarding capacity in the Northeast, said:

- “an evaluation of price and production scenarios through 2021 suggests the industry is planning too many pipelines to relieve the region’s current capacity constraints...What we’re

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<sup>186</sup> Analysis of Public Benefit Regarding PennEast, Skipping Stone, March 9, 2016.

<sup>187</sup> Florida Power and Light, Ten Year Power Plant Site Plan, 2016-2025, April 2016, p.56-62.

<sup>188</sup> Institute for Energy Economics and Financial Analysis, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, April 2016.

<sup>189</sup> Institute for Energy Economics and Financial Analysis, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, April 2016.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

really seeing is the tail end of a bubble, and what's actually happened is that bubble attracted billions of dollars' worth of infrastructure investment that now has to be worked off.”<sup>192</sup>

Elle G. Atme, Vice President, Marketing and Midstream Operations for independent producer Ranger Resources has said:

- “We believe that the Appalachian Basin’s takeaway capacity will be largely overbuilt by the 2016-2017 time frame.”<sup>193</sup>

### **FERC fails to consider the effects of emerging technologies in the renewable energy sector.**

Currently, FERC sees natural gas as the main driver of energy in the US market, yet there is an emerging renewable market that has the potential to overtake the natural gas sector and needs to be part of FERC’s consideration of need or we risk building a natural gas infrastructure that becomes obsolete within years of construction. Energy market estimates project that within the next 10-20 years it will be less expensive to build new clean energy portfolios than it will be to run existing gas plants.

With new energy market changes, not only is the natural gas infrastructure overbuild contributing to a waste of economic resources, but it also is attempting to increase capacity in an industry that is becoming obsolete.

- “across a wide range of case studies, regionally specific clean energy portfolios already outcompete proposed gas-fired generators, and/or threaten to erode their revenue within the next 10 years. Thus, the \$112 billion of gas-fired power plants currently proposed or under construction, along with \$32 billion of proposed gas pipelines to serve these power plants, are already at risk of becoming stranded assets. This has significant implications for investors in gas projects (both utilities and independent power producers) as well as regulators responsible for approving investment in vertically integrated territories.”<sup>194</sup>
- Due to the ‘expected cost declines in renewable energy and battery storage technology...the costs of optimized clean energy portfolios [could] fall by [about] 40% within the next 20 years. Depending on the price of natural gas, the calling costs of clean energy portfolios will begin to outcompete just the operating costs of a highly efficient gas plant by 2026,’<sup>195</sup>
- “The loss borne by the public, businesses, and critical irreparable natural resources when a natural gas pipeline is approved by FERC requires that the Agency sufficiently consider whether an infrastructure project is actually necessary and for the public good. Instead, FERC uses an inappropriate and counterintuitive definition of “need” which is contrary to the historic underpinnings and intent of the Natural Gas Act, and results in the overbuild of unnecessary pipelines to pad companies’ quarterly balance sheets.”<sup>196</sup>

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<sup>192</sup> Jeremiah Shelor, *Marcellus/Utica on Pace for Pipeline Overbuild, Says Brazier*, Natural Gas Intelligence, June 8, 2016.

<sup>193</sup> Kallanish Energy, *Marcellus-Utica could soon be overpiped*, February 2, 2016.

<sup>194</sup> Rocky Mountain Institute, *The Economics of Clean Energy Portfolios*, May 2018.

<sup>195</sup> Rocky Mountain Institute, *The Economics of Clean Energy Portfolios*, May 2018.

<sup>196</sup> Institute for Energy Economics and Financial Analysis, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia*, April 2016.

**Precedent agreements can no longer be the sole way to show need, especially those among affiliates themselves, and cannot be the only factor that the commission uses.** Self-Dealing creates artificial need for a project. FERC routinely, and inappropriately, allows companies to put forth themselves as the customers in “need” of a proposed pipeline project and do so using unverifiable data and information.

- The New Jersey Division of Rate Counsel’s comments on the PennEast Docket has criticized this process claiming these contracts do not in fact demonstrate need:
  - “PennEast bases its claim of need on “precedent agreements with seven foundation shippers and twelve total shippers, which together combine for a commitment of firm capacity of 990,000 dekatherms per day (‘Dth/d’),” approximately 90% of the Project’s total capacity...In this case, approximately 610,000 Dth/d of the 990,000 Dth/d of capacity has been contracted by affiliates of the Project owners... Of the twelve shippers that have subscribed to Project capacity, five of them are affiliates of companies that collectively own PennEast... **Thus, two-thirds of the demand for the pipeline exists because the Project’s stakeholders have said it is needed. This self-dealing undermines the assertion of need that the DEIS relies upon.**”<sup>197</sup>(emphasis added)
- In *Empire Pipeline*, then-Commissioner Norman Bay acknowledged that the Agency’s reliance on precedent agreements to establish need is misplaced. Former Commissioner Bay stated that FERC should consider “whether precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize” among other considerations.<sup>198</sup>

Despite these facts, FERC makes no investigation into the legitimacy of the claims resulting from self-dealing.

As so clearly articulated by Commissioner Glick (1/19/18) responding to the Certificate issued for the PennEast Pipeline (Docket No.: CP15-558):

“In today’s order, the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed.<sup>199</sup> Pursuant to these agreements, PennEast’s affiliates hold more than 75 percent of the pipeline’s subscribed capacity. While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline,<sup>200</sup> contracts among

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<sup>197</sup> Comments of the New Jersey Division of Rate Counsel on PennEast Pipeline, FERC Docket No. CP15-558, Sept. 12, 2016. (emphasis added; *citations omitted*).

<sup>198</sup> Commissioner Bay Separate Statement, p.3, FERC Docket No. CP15-115, February 3, 2017.

<sup>199</sup> See footnote number 2 in Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018: “*PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at P 27 (2018) (explaining that “it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers”); *id.* P 29 (“Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service, the Commission places substantial reliance on those agreement to find that the project is needed.”).”

<sup>200</sup> See footnote number 4 in Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018: “*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,747 (1999) (Certificate Policy Statement) (“[T]he Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”).”

affiliates may be less probative of that need because they are not necessarily the result of an arms-length negotiation. By itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer's burden to show that the pipeline is needed.”<sup>201</sup> (citations omitted)

Commissioner Glick reiterates this concern in his June 15, 2018 dissent<sup>202</sup> of the Mountain Valley Pipeline project order denying rehearing of the the pipeline's certificate, stating that the order “fails to comply with our obligations under section 7 of the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA)” (citations omitted):

Two issues are particularly egregious.<sup>203</sup> First, the Commission concludes that precedent agreements among affiliates of the same corporation are sufficient to demonstrate that the Projects are needed. I disagree. The mere existence of affiliate precedent agreements—which, by their very nature, are not necessarily the product of arms-length negotiations—is insufficient to demonstrate that the Projects are needed. Second, the Commission concludes that it is not obligated to consider the harm caused by the Projects' contributions to climate change and, in any case, that it lacks the tools needed to do so. In order to meet our obligations under both NEPA and the NGA, the Commission must adequately consider the environmental impact of greenhouse (GHG) emissions on climate change. As I have previously explained, and reiterate below, the Commission has the tools needed to evaluate the Projects' impacts on climate change. It simply refuses to use them. Both of these considerations—the need for the Projects and their contribution to the harm caused by climate change—are critical to determining whether the Projects are in the public interest. Therefore, the Commission's failure to adequately address them is a sufficient basis for vacating this certificate. For these reasons, I dissent from today's order.” (citations omitted)

Additionally, the energy market is in flux. As the overall demand for energy is decreasing and alternatives to natural gas and other fossil fuel sources become more cost efficient and effective natural gas is phasing out. This means that the Commission needs to take a flexible look at the market for natural gas. Being aware that advances in technology can change the demand and adjust their consideration of projects on that need.

**→ Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC must mandate a legitimate demonstration of an**

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<sup>201</sup> Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018.

<sup>202</sup> Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC , FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

<sup>203</sup> See footnote number 3 in Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC , FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018: “In addition, I agree with the concerns expressed by my colleague, Commissioner LaFleur, that the Commission should consider conducting regional reviews for the development of natural gas infrastructure and take steps to ensure that the natural gas certification process is transparent, so that all interested parties know how to fully participate in the process. I look forward to exploring these issues as part of the Commission's Notice of Inquiry on the natural gas certification process. *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).”

end use “need” for a proposed pipeline/infrastructure project considering market demands, alternative energy sources, and current infrastructure in the region.

→ **Needed Pipeline Review Reform: FERC should prohibit claims of need only supported by the use of precedent agreements especially where agreements are claiming need for the pipeline company itself, or any of its subsidiaries or business counterparts or affiliates.**

→ **Needed Pipeline Review Reform: FERC should mandate that assertions of need must be objectively verified by experts who are not tainted by an industry conflict of interest and FERC must be required to investigate and evaluate challenges of “need” claims provided by public commenters.**

→ **Needed Pipeline Review Reform: The Commission should consider project needs on a regional basis. A claim of “need” for a project should not be deemed justified if the geographic region to be served already has gas service from other pipelines that would merely be replaced/displaced by gas delivery from the proposed project. Such illegitimate “need” demonstrations must be prohibited, and cannot be used to fulfill the “public use” requirements needed to support project approval and eminent domain authority.**

→ **Needed Pipeline Review Reform: All applications for pipeline/infrastructure projects must be required to include a demonstration that the energy goals to be achieved cannot be fulfilled by renewable energy options, or by existing or proposed energy sources and infrastructure (e.g. the gas is already being supplied by a pre-existing pipeline supply network).**

→ **Needed Pipeline Review Reform: The Commission should not be allowed to certify a project if the asserted goal is simply to increase competition or profits.** To determine whether there is a public need for a proposed project the Commission should consider the current energy market, current and projected usage, alternative energy sources, long term expectation of availability and costs projection for natural gas and its infrastructure. (i.e. steel prices)<sup>204</sup>

→ **Needed Pipeline Review Reform: FERC needs to consider how the project will affect captive consumers and the cost recovery of existing pipeline, particularly the amount of unsubscribed capacity that would be created and who would bear that risk, because approving the project.**

→ **Needed Pipeline Review Reform: The commission should allow for state utility regulators to review precedent agreements.** The state’s often set and regulate industry within their boards and are more likely familiar with the needs of the state energy grid and able to better scrutinize documents that aim to show need exists. The Commission needs to consider the term, capacity, and corporations in the precedent agreements as well as the potential for captive consumers and where they would be.

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<sup>204</sup> Eberat, Dan, *President Trump’s Tariffs Threaten To Blunt America’s Booming Energy Sector*, Forbes, April 19, 2018. <https://www.forbes.com/sites/daneberhart/2018/04/19/president-trumps-tariff-threaten-to-blunt-americas-booming-energy-sector/#7900093957ff>

## **LACK OF PUBLIC ASSISTANCE.**

### **FERC Should Give Equal or Greater Assistance to the Public, Including Creating a Office of Public Participation.**

#### **Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Minimizes Assistance to the Public While Providing Robust Access and Assistance to the Pipeline Industry.**

While not legally required to do so, it is notable that FERC has never made any effort to fund a Congressionally authorized Office of Public Participation to help the public navigate the difficult, complex, and highly technical pipeline review and approval process that so dramatically impacts and harms their lives, communities, and the environment. In contrast to this refusal by the agency to assist the Public, FERC regularly holds educational seminars and events with industry allowing for easy access to FERC commissioners and staff.

Congress established an Office of Public Participation (“Office”) at FERC as part of the 1978 Public Utility Regulatory Policies Act. (16 U.S.C. § 825q–1). In creating this Office, Congress recognized that effectively participating in FERC proceedings is especially challenging for individuals, homeowners associations, non-profit organizations, local government bodies, and consumer protection organizations because the highly technical nature of FERC dockets requires significant specialization and costly resources often unavailable to non-industry related parties. Among the Office’s responsibilities would be to help “coordinate assistance to the public” on Commission dockets, and the Office may “provide compensation for reasonable attorney’s fees, expert witness fees, and other costs of intervening” for the public. (16 U.S.C. § 825q–1(b) (1-2)). FERC has never created this Office.

The pipeline industry enjoys vast advantages and virtually open access in navigating FERC’s review and approval process in comparison to the public—not only are they able to communicate regularly with FERC staff regarding their projects from as early as the pre-filing stages, they enjoy the benefits of the employee revolving door and regular trainings offered by FERC for their benefit. FERC’s online calendar details various industry seminars, such as the one held March 7, 2017, described as a “three day interactive seminar [that] will include how to successfully navigate the FERC environmental review process and to prepare an Environmental Report, a brief introduction to pipeline construction for industry newcomers, a discussion of pre- construction preparation considerations, and a review of baseline mitigation measures for pipeline construction and restoration.”<sup>205</sup> In addition, the industry has far greater resources in order to engage with FERC and to use the process to their full power and advantage.

Not only does FERC fail to educate the general public regarding the pipeline permitting process, the Agency completely ignores the public’s requests for help. For example, citizens interested in participating in the Mountain Valley Pipeline process (*FERC Docket No. PF15-3*) repeatedly, and

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<sup>205</sup> *FERC Environmental Review and Compliance for Natural Gas Facilities Seminar*, from March 7, 2017 on FERC’s online calendar.

formally, sought help on issues ranging from the Agency's definition of "public interest" to how the Agency resolves conflicting expert reports. Despite multiple requests for assistance, none was given.<sup>206</sup>

Despite the clear need for the Office of Public Participation, FERC has **never** requested nor allocated any funds for this Office, even though fully funding the office would constitute less than 2 percent of FERC's budget. As such, this Office exists only in theory; individuals, families, communities, and organizations faced with the significant impacts of a pipeline project and faced with the high complexity and cost of properly reviewing and/or challenging a project when the need arises have never received the appropriate, needed or congressionally envisioned assistance from FERC.

FERC's failure to fund the Office of Public Participation reflects FERC's lack of institutional interest in cultivating a balanced, fair, and impartial review and approval process for natural gas pipeline projects.

→ ***Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC must request or allocate the necessarily funds and resources required and open the long overdue Office of Public Participation,***

## **SAFETY.**

**FERC Must Add Safety As A Consideration In Its Review Process And Account for the Potential Hazards Pipeline Construction and Operation Can Bring to an Area, Including a more rigorous evaluation of safety implications and higher safety standards in order to minimize the potential impact radius and minimize the potential for accidents, incidents and explosions.,**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Ignores Critical, Even Catastrophic, Safety Concerns.**

FERC routinely overlooks critical safety issues. For example, FERC has approved construction of the Algonquin Incremental Market (AIM) pipeline (*FERC Docket CP14-96*) adjacent to the Indian Point nuclear facility on the Hudson River, bringing the total number of neighboring pipelines to three. Nuclear safety experts have warned FERC that a rupture in the AIM pipeline at Indian Point could result in a radioactive release greater than that at Fukushima, rendering the region and likely New York City uninhabitable. FERC has approved the project despite its knowledge of the unique national security risk that the pipelines sited at the Indian Point nuclear facility pose to the 20 million people within the 50-mile impact radius of the plant.

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<sup>206</sup> Thomas Bourdain comment on FERC docket regarding the Mountain Valley Pipeline on FERC Docket No. PF15-3, September 28, 2015.

According to Richard Kuprewicz, pipeline safety expert, the mitigation measures proposed (such as burying the pipe two feet deeper and adding concrete slabs above the pipe) are unlikely to offer protection. In addition, a former chief consultant for the Indian Point power plant put the probability of a nuclear failure at Indian Point due to a pipeline incident in the range of 1 in 1,000 to 1 in 10,000 per year--a very dangerous level that not only shocks the public conscience, but is not in keeping with regulatory goals according to expert testimony.<sup>207</sup>

FERC also fails to adequately consider the safety record of pipeline companies in its reviews. For example, in considering the Pacific Connector Gas Pipeline (*FERC Docket CP13-492*) being proposed by the Williams Company, FERC did not give due consideration to the massive gas leak and explosion at its liquid natural gas facility in Washington state. Workers were injured and hundreds were forced to evacuate their homes when 599,340 gallons of liquid natural gas leaked or exploded.<sup>208</sup>

While FERC has no jurisdiction over pipeline safety, it is the only agency that stands between them and construction. FERC should not allow the claimed growing demand for natural gas to be an excuse to overlook any safety concerns. Recent explosions have highlighted that such expansion can come at costs of human life.

→ **Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Must Address and End Granting Certificates Without A Proper Assessment of the Dangers They Pose to the Surrounding Communities and a thorough critique of the Company's Safety Record**

## **TOLLING ORDERS.**

**FERC Must End Its Strategic Practice of Using Tolling Orders Rather than Affirmatively Grant or Deny Rehearing Requests. Tolling Orders Prevent Impacted Parties from Bringing a Legal Challenge To FERC Approval In A Timely Fashion, Before Eminent Domain Is Exercised and Construction Begins.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Denies the Public their Right to Due Process, Through Tolling Rehearing Requests and Thereby Placing the Public's Right to Stop the Project on Hold as Pipeline Companies Proceed with Eminent Domain and Construction.**

FERC routinely uses a legal loophole to deny the public the right to challenge approval of a pipeline project before it allows private companies to seize property rights via eminent domain and before

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<sup>207</sup> Testimony of Amy Rosmarin, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016, Declaration of Paul Blanch, *Town of Dedham v. FERC*, (D.C. Cir., Docket No. 16-1081), September 21, 2016, and Declaration of Richard Kuprewicz, *Town of Dedham v. FERC*, (D.C. Cir., Docket No. 16-1081) September 21, 2016.

<sup>208</sup> Letter from Stacey McLaughlin to FERC enclosing Tarika Powell, How Industry and Regulators Kept Public in the Dark after 2014 LNG Explosion in Washington, February 8, 2016.

pipeline construction begins. Through the use of tolling orders, FERC puts people in legal limbo and prevents them from challenging FERC pipeline approvals for an undetermined amount of time – often for well over a year – during which time FERC approves the exercise of eminent domain and construction by the pipeline company.

### **How FERC Forces Communities Into Legal Limbo:**

Under federal law, a private party is not allowed to legally challenge FERC approval of a pipeline project until they have first submitted a rehearing request to FERC, and FERC has affirmatively granted or denied that request. Rather than do one or the other, FERC's practice is to issue a "tolling order" in response to such requests, which temporarily grants the request but only "for further consideration". As a result, the public's ability to challenge the FERC decision is put into legal limbo until such time as FERC renders and issues its final decision regarding the rehearing request. It is common for FERC to place people in this legal limbo for up to a year or more, while allowing the pipeline company to advance its project, take property, and begin construction.

There does not appear to be a single instance when FERC has granted a rehearing request submitted by the public -- as such, the rehearing denial is a foregone conclusion and the use of tolling is simply a ploy to allow pipeline projects to advance unfettered by any legal challenge.

The harms inflicted by the delay in responding to the rehearing requests cannot be undone or fully remedied later – forests cut cannot be instantly regrown; property rights, once taken, are not returned.

**E.g. Transco Southeast Leidy:** While issuing a tolling order to leave communities in Pennsylvania in legal limbo for 15 months for the Transco Southeast Leidy pipeline project, FERC issued over 20 Notices to Proceed that allowed the project to advance through various stages of construction and operation.

Specifically:

- Transco filed an application with FERC on September 30, 2013 to construct and operate the Leidy Southeast Pipeline, and received its Certificate of Public Convenience and Necessity from FERC on December 18, 2014.
- The Delaware Riverkeeper Network submitted a rehearing request to FERC on January 16, 2015.
- Already, on January 30, 2015 – prior to the deadline for the submission of rehearing requests – FERC issued Transco its first Notice to Proceed with the project.

On February 4, 2015 Transco requested that FERC approve its request for a Notice to Proceed with additional construction activity. FERC again granted Transco's request on February 5, 2015.

- On February 18, 2015 FERC issued its "tolling order", granting DRN's rehearing request for the purposes of "further consideration", thereby putting the organization and its membership into a legal limbo that prevented them from taking any further legal action to challenge the pipeline's approval.
- On March 9, 2015, FERC again authorized Transco to begin tree felling and other construction activities, allowing the company to permanently destroy more than 140

forested acres adjacent to valuable streams and wetland resources. All of this occurred before the public had any chance for court review.

- In total, FERC issued twenty Notices to Proceed for the project, including allowing certain portions of the project to begin operation, before it finally denied the Delaware Riverkeeper Network's rehearing request on March 3, 2016 – 15 months later -- thereby freeing the organization to file its legal challenge to the project.

Delaware Riverkeeper Network filed a legal challenge to the project on March 9, 2016; however, much of the irreparable harm to the environment that the Delaware Riverkeeper Network and its members had sought to avoid had already occurred. By the time the Delaware Riverkeeper Network was allowed to proceed with its challenge, FERC had allowed the pipeline company to cut trees along 21 miles of right of way on 209 acres of land, and inflicted irreparable harm to at least 8 ½ acres of pristine forested wetlands.<sup>209</sup>

**E. g. Algonquin Pipeline Expansion - Algonquin Incremental Market (AIM):** In response to a rehearing request submitted by Stop the Algonquin Pipeline Expansion (SAPE) FERC issued a tolling order on May 1, 2015. As a result, SAPE was left without access to a legal remedy until FERC issued its Order Denying Rehearing on January 28, 2016. The Spectra AIM pipeline was largely constructed in the 11 months that SAPE was placed in legal limbo by FERC's tolling order.

While FERC was “considering” the rehearing request, it allowed the pipeline company to seize private property and destroy homes, roads, and parklands.<sup>210</sup>

**E.g. Tennessee Gas Pipeline Company's Northeast Upgrade Project (TGP NEUP):** In the case of *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), FERC's use of a tolling order prevented any sort of real remedy even where a court ruled that FERC had violated the National Environmental Policy Act in allowing the use of segmentation and failing to consider cumulative impacts in its review and approval of the project. Specifically:

- May 29, 2012 FERC issued a Certificate of Public Convenience and Necessity for the TGP NEUP. The NEUP would devastate 810 acres of land and convert 120.6 acres, including forest, into permanent pipeline right of way. The pipeline cut through PA's Delaware State Forest, NJ's Highpoint State Park, the Appalachian Trail, and crossed the Wild & Scenic Delaware River. Seven miles of prime farmland and dozens of creeks and wetlands all fell within the pipeline's footprint.
- June 28, 2012 the Delaware Riverkeeper Network filed its rehearing request.
- July 9, 2012 FERC issued its tolling order.
- January 11, 2013, after 7 months, FERC finally denied the rehearing request.
- Delaware Riverkeeper Network filed its legal challenge within 2 weeks.

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<sup>209</sup> Testimony of Maya van Rossum, the Delaware Riverkeeper on behalf of the Delaware Riverkeeper Network, People's Hearing Investigating FERC Abuses of Law & Power, December 2, 2016.

<sup>210</sup> Akiko Matsuda, *FERC Denies Rehearing Request on Algonquin Pipeline Expansion*, the Journal News, January 29, 2016.

The seven months of legal limbo meant that by the time the Delaware Riverkeeper Network secured the court ruling that FERC had in fact violated federal law in their review and approval of the project, the pipeline segment was fully constructed and in operation.

**E.g. Constitution Pipeline:** In the case of the Constitution Pipeline (FERC Docket CP13-499), FERC tolled the rehearing request for nearly a year. In this case the FERC Certification was issued on December 2, 2014. Concerned communities filed their Rehearing Request on January 2, 2015. FERC issued its tolling order on January 27, 2015, and from that point on communities were left without a legal remedy as the project proceeded. It wasn't until one year later, January 28, 2016, when FERC finally denied the rehearing request that concerned communities got the opportunity to challenge FERC's illegal approval of the Constitution Pipeline.

During the one year communities were in legal limbo, the project continued to advance towards construction. By December of 2014, the Constitution Pipeline Company had filed 125 Complaints in Condemnation in the Northern District of New York alone, seeking to take private property away from landowners in its path. By the end of 2015 homeowners who had refused access to their property had their property rights overridden through condemnation, the Constitution pipeline was granted easements by force, and the Constitution Pipeline Company secured access to the properties to finish surveying work and to tag trees for clearing. On January 29, 2016, FERC approved tree cutting on 25 miles of the Pennsylvania portion of the pipeline, despite lacking multiple state and federal approvals, including New York Clean Water Act Certification.<sup>211</sup> Ultimately New York would deny its Clean Water Act Certification. And so the construction and eminent domain proceedings allowed, ultimately have been for naught. Property owners are now forced to expend resources on legal actions in order to try to secure return of their property rights that were taken by the power of eminent domain.

**E.g. The Sabal Project** (FERC Docket CP15 - 17 - 001): In the case of Sierra Club v. FERC, 867, F.3d 1357, 1373 (D.C. Cir. 2017), FERC's use of a tolling order prevented any sort of timely remedy, even where the court ruled that FERC had violated the National Environmental Policy Act in its failure to analyze GHG emissions resulting from the Project. Specifically:

- On February 2, 2016, FERC granted a Certificate of Public Convenience and Necessity to construct and operate the Sabal Trail Project.
- On March 3, 2016, Sierra Club and other environmental petitioners filed a timely request for rehearing, rescission of the certificates, and stay. Sierra Club requested rehearing, arguing, among other things, that FERC failed to estimate the downstream GHG emissions from the gas that will be transported by the project and in failing to consider the effects that those emissions will have on climate change, as required by NEPA.<sup>212</sup>

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<sup>211</sup> Earthjustice Response to Supplemental Information, FERC Docket No. CP13-499, January 15, 2016; Catskill Mountainkeeper *et al.*, Press Release, February 18, 2016; and Stop the Pipeline Statement in Opposition to Request for Partial Notice to Proceed, FERC Docket No. 13-499, January 12, 2016. See also Petitioner Stop the Pipeline Brief in FERC Docket Nos. 16-345 and 16-361, (2nd Cir.) July 12, 2016.

<sup>212</sup> FERC Order on Rehearing, Docket Nos. CP14-554-001, CP15-16-001, CP15-17-001, September 7, 2016.

- On March 29, 2016, FERC issued its tolling order—and on March 30, FERC denied their request for stay.
- Although FERC was still considering Sierra Club’s rehearing request, it authorized the construction of the projects, in August and early September 2016.<sup>213</sup>
- On September 7, 2016, the Commission denied the rehearing request, finding that the FEIS sufficiently assessed GHG emissions.
- In September 2016, Sierra Club, among other parties, appealed the Commission's Decision to the U.S. Court of Appeals for the District of Columbia Circuit.
- In June and July 2017, while the court case was pending, Commission staff authorized the pipelines to commence service on completed facilities<sup>214</sup>
- On August 22, 2017, D.C. Circuit Court sided with the Sierra Club and other environmental groups, concluding that FERC had adequately analyzed the impacts of GHG emissions that may result from the pipeline. *See Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329).

**E.g. Atlantic Sunrise** (Docket No. CP15-138): FERC tolling rehearing requests in this case for 9 months, allowing eminent domain and other significant actions to take place during tolling.

**E.g. Orion Pipeline Project** (FERC Docket No. CP 16-4-000): Tennessee Gas Pipeline Company, L.L.C (TGP), a subsidiary of Kinder Morgan Inc, filed an application with the Federal Energy Regulatory Commission (FERC) for its proposed Orion Project on October 9, 2015. In February 2017, DRN submitted a rehearing request, on the grounds that FERC was required to consider the cumulative effects of Orion and two other Tennessee projects because they are connected and clearly part of the same expansion project. On February 27, 2018, one year after the request was submitted, FERC denied DRN’s Rehearing Request, maintaining that it was unnecessary to consider the impacts of all three pipelines, as the projects are independent of one another.

**E.g. New Market Project** (FERC Docket No. CP14-497): Most recently, FERC tolled the New Market project for 24 months:<sup>215</sup>

- On April 28, 2016, FERC issued Dominion Transmission, Inc. (Dominion) a certificate of public convenience and necessity for the New Market Project
- on May 31 2016 Otsego 2000, Inc. Filed a timely request for rehearing
- May 31 request for rehearing
- On May 18, 2018, FERC issued an order denying rehearing

**E.g. PennEast Pipeline (FERC Docket No. CP15-558)** FERC continues its use of tolling of tolling orders unabated. The PennEast Pipeline has been tolled since February 22, 2018 with no end in sight. On January 19, 2018, the Commission issued an order under section 7(c) of the Natural Gas Act

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<sup>213</sup> FERC Order on Remand Reinstating Certificate and Abandonment Authorization, Docket Nos. CP14-554-002, CP15-16-003, CP15-17-002, March 14, 2018.

<sup>214</sup> *Ibid.*

<sup>215</sup> FERC Order Denying Rehearing, Dominion Transmission, Inc., FERC Docket No. CP14-497-001, May 18, 2018.

authorizing PennEast Pipeline Company, LLC (PennEast).

- Numerous entities and individuals filed rehearing requests--including the Delaware Riverkeeper Network, filed on January 24
- On February 22, 2018, FERC issued a order tolling
- On March 16, 2018, the Delaware Riverkeeper sought rehearing of the Tolling Order
- On April 13, 2018, FERC issued a second order tolling the rehearing request for the February tolling order
- On May 8, 2018, Delaware Riverkeeper Network sought rehearing of the April Tolling Order.
- On May 30, FERC denied the Delaware Riverkeeper Networks request for rehearing of the April tolling order<sup>216</sup>

The tolling of this project is especially concerning, as Commissioner Glick points out in the statement below, given the unusual level of uncertainty and fundamental concerns regarding the project. Even amongst the Commissioners, with two of the five issuing concurrences to the certificate order that highlight serious concerns, and one dissenting.<sup>217</sup> Immediately following FERC's certificate approval, PennEast filed nearly 200 eminent domain cases in PA and NJ.

As Commissioner Glick stated in a concurring statement to the May 30, 2018 order denying the Delaware Riverkeeper Network rehearing of the April tolling order:

“...It is nonetheless critical that the Commission respond to rehearing requests as quickly as possible, especially where—as here—parties have raised serious questions regarding the Commission’s conclusion that a new natural gas pipeline facilities needed and in the public interest.

Until the Commission issues its ultimate order on rehearing, the NGA precludes parties from challenging the Commission’s decision in federal court. However, the pipeline developer has the right to pursue eminent domain<sup>3</sup> and, in many cases, to begin construction on the new pipeline facility while the Commission addresses the rehearing requests. As a result, landowners, communities, and the environment may suffer needless and avoidable harm while the parties await their opportunity to challenge the Commission’s certificate decision in court.

This proceeding, in particular, illustrates the need for prompt action on rehearing requests. As I explained in my dissent from the underlying order, I disagree with the Commission’s finding that the PennEast Project is needed and in the public interest. I believe that the Commission’s reliance on affiliate precedent agreements is, without more, insufficient to demonstrate that a new natural gas pipeline is needed. I also have serious concerns regarding the Commission’s practice of issuing conditional certificates—which, notwithstanding their name, vest the pipeline developer with full eminent domain authority—in cases where the record does not contain adequate evidence to conclude definitively that the pipeline is in the public interest.

In short, when the Commission issues a tolling order, it is critical that the Commission issue a subsequent order addressing the merits of the rehearing request as

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<sup>216</sup> FERC Order on Rehearing, FERC Docket Nos. CP15-558-002 and CP15-558-003, May 30, 2018.

<sup>217</sup> FERC Order Issuing Certificates, FERC Docket No. CP15-558, January 19, 2018.

expeditiously as reasonably possible in order to both protect the public from unnecessary harm and permit the parties to timely seek their day in court.<sup>218</sup>

### **Legal Limbo is a Strategy**

Delaware Riverkeeper Network is unaware of any non-industry aggrieved party who has actually been granted a request for rehearing in the history of FERC's existence. As a result, the denial of the rehearing request is a foregone conclusion. The only rationale for FERC to delay issuing its denial response is to allow the project to advance and be constructed to the benefit of the company. Another possible justification is to grant FERC more time to attempt to justify its decision after-the-fact thereby increasing its chances of defeating a later legal action by the public.

Simply by issuing more timely final orders on rehearing requests, as contemplated by the Natural Gas Act provisions on administrative remedies and judicial review, FERC would not only fulfill its due process obligations to rehearing requesters but also avoid time-consuming and unnecessary litigation that wastes both the agency's and the courts' resources. In many, if not most, instances it would provide an opportunity for affected parties to secure legal review of a project well before the project actually begins, negating the need for requests for injunction and fully honoring affected parties' rights to have their grievances heard and addressed by a court before it is harmed by a pipeline project approved by FERC.

→ **Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Must End Its Strategic Practice of Using Tolling Orders. FERC's new *Certification of New Interstate Natural Gas Pipeline Facilities* should:**

- Prohibit projects from advancing in any way, shape or form, including eminent domain and/or any aspect of construction (including tree felling), if there is an outstanding rehearing request/tolling order; and/or
- Mandate FERC affirmatively and substantively grant or deny rehearing requests within 30 days and prohibit projects from advancing in any way, shape or form during that period.

### **FEDERAL AUTHORITY.**

**FERC Must Stop Granting Conditional Certificates And Instead Ensure All State and Federal Permits Are Issued and Valid Before Granting Certification, Which Brings With It Eminent Domain Authority and The Ability To Seek FERC Construction Approval.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC undermines the regulatory authority of sister federal agencies by granting permission for pipeline construction activity prior to the issuance of all required federal permits.**

In its Certificates issued to natural gas infrastructure companies, FERC routinely includes the provision:

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<sup>218</sup> FERC Order on Rehearing, FERC Docket Nos. CP15-558-002 and CP15-558-003, May 30, 2018.

**Prior to receiving written authorization from the Director of OEP [Office of Energy Projects] to commence construction of any project facilities,** [pipeline company] shall file with the Secretary documentation that it has received all applicable authorizations required under federal law or evidence of waiver thereof.<sup>219</sup>

While this provision gives the impression that a project will not commence until such time as it has fully secured agency review and approvals, has complied with all applicable laws, and has received all necessary permits, that is not in fact the case. Projects are routinely allowed to commence eminent domain proceedings and undertake actions with significant environmental impacts, prior to receiving all necessary approvals.

For example, the Tennessee Gas Pipeline Northeast Upgrade Project (*FERC Docket No. CP11- 161*), which cut through significant areas of mature forest and forested wetlands on both public and private lands, was allowed to initiate tree felling prior to receiving Clean Water Act permits, including US Army Corps of Engineers Section 404 wetlands permits. The tree cutting significantly impacted water quality and was among the major causes of environmental harm and community impacts resulting from pipeline construction.

Another example: FERC issued a Certificate for Sabal Trail (*FERC Docket No. CP15-17*) in February 2016, before an Army Corps section 404 permit was issued. FERC began approving construction in summer 2016, including through private lands for which no court date had yet been set to settle eminent domain claims.<sup>220</sup>

FERC permission to proceed with tree felling enables pipeline companies to argue that they have already made major investments in the construction of a project and the agencies reviewing the approvals are now compelled to issue permits regardless of potential agency concerns. And so premature approval and initiation of construction, including tree felling, becomes an incentive for other agencies to truncate their reviews and expedite their approvals

**→ Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC should prohibit the practice of issuing Conditional Certificates and should Ensure All Federal Permits Are Issued and Valid Before Allowing A Project is Allowed to Begin**

FERC must prohibit the issuance of (a) Certificates of Public Convenience or Necessity, (b) Notices to Proceed with Any Aspect of Construction, Including Tree Felling, and/or (c) Approval for Exercise of Eminent Domain, Until Such Time as an Infrastructure Project Has Secured All Federal and/or Regional Permits (e.g. from River Basin Commissions), Dockets and/or Approvals. This Includes a Prohibition on Conditional FERC Certificates.

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<sup>219</sup> 139 FERC ¶ 61,161, Tennessee Gas Pipeline Company, L.L.C., FERC Docket No. CP11-161, Order Issuing Certificate and Approving Abandonment, May 29, 2012, Appendix B, Environmental Conditions, ¶ 8 (emphasis in original).

<sup>220</sup> FERC Order Issuing Certificates to Sabal Trail Transmission, LLC; FERC Docket No. CP15-17, Feb. 2 2016, pages 1-30 of 110.

Such a prohibition is essential for ensuring that projects are not allowed to proceed until all government agencies/entities have had the opportunity to fully and fairly evaluate a project and render their own independent determinations regarding necessary approvals, and to avoid the current situation where pipeline companies are allowed by FERC to proceed with eminent domain and/or construction only to find that later they have been denied some key permit and are not able to proceed to completion. This prohibition must include the issuances of conditional FERC Certificates or approvals of any kind, because conditional approvals by FERC have resulted in projects advancing prior to securing all necessary reviews, approvals, permits and/or dockets.

## **STATE RIGHTS.**

**FERC Must Ensure the rights of states are fully respected and honored and not undermined by premature certificate approval of projects (i.e. issuance of certificates, approval of eminent domain, approval of any aspect of construction including tree felling, prior to issuance of state water quality certification decisions),**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC FERC Improperly Strips States of Their Legal Authority in the Certification Process.**

The Clean Water Act (CWA) prohibits FERC from issuing a Certificate of Public Convenience and Necessity prior to receiving a Clean Water Act Section 401 Certification from states impacted by a proposed project.

- Section 401 of the CWA states: “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.” 33 U.S.C. § 1341(a)(1).
- Several courts, including the Supreme Court, have elaborated on the CWA’s authority, stating:
  - “without [Section 401] certification, FERC lacks authority to issue a license.”<sup>221</sup> and
  - Section 401 “requires States to provide a water quality certification *before* a federal license or permit can be issued....”<sup>222</sup>

In addition, this legal authority preserved by the terms of the Clean Water Act, is specifically referenced and preserved in the federal Natural Gas Act.

Despite this clear legal mandate, FERC, with court acquiescence, circumvents the requirement by issuing conditional Certificates -- including language that the FERC Certificate is conditional on a company securing state CWA 401 Certification. But FERC does not fully enforce the conditional mandate before allowing pipelines companies to exercise the power of eminent domain, to engage in preliminary construction activities such as tree felling/clearing, or to undertake full construction on some segments of the project prior to securing CWA 401 Certifications from all impacted states. In fact, FERC often wastes no time in authorizing the use of eminent domain and approving irreparable aspects

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<sup>221</sup> *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

<sup>222</sup> *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 707 (1994) (emphasis added).

of construction such as tree clearing, once the FERC Certificate has been issued, but prior to state CWA 401 Certification from all affected states,<sup>223</sup> sometimes issuing them just hours after receiving a request.<sup>224</sup>

As a result, FERC undermines the rights of states to prevent pipeline construction activities, which will result in violation of state water quality standards by rejecting a project outright or mandating modifications regarding the route, construction practices and/or mitigation obligations.

Furthermore, Conditional Certification allows projects whose harms are not accounted for to proceed on promises of compliance instead of facts. Currently, FERC claims to consider all of the information in the record to determine whether the proposed project is required by public convenience and necessity yet they grant certificates conditioned on the issuance of other permits, this means that the project is yet to actually provide proof that their claims to FERC will take place.

→ As Commissioner Glick addressed in his dissent in PennEast. The commission has taken to conditionally granting certifications, assuming the company will abide by state laws in construction. This means that when the commission balances benefits versus consequences, they do not actually know the full scope of the project. This means that there may be serious consequences that the commission is unaware of on certifying the project.<sup>225</sup>

***By way of explicit examples and the resulting harms:***

**Constitution Pipeline (FERC Docket CP13-499):**

On December 2, 2014, FERC granted a Certificate to the Constitution Pipeline despite the fact that New York State had not issued a CWA 401 Certification. Thereafter, FERC granted the company the power of eminent domain, a power that the company began to exercise that same month, with the filing of 125 complaints in condemnation against NY and PA landowners. FERC then expressly permitted the Constitution Pipeline to begin elements of construction. For example, on January 8, 2016, the Constitution pipeline submitted a request to proceed which was quickly granted by FERC.<sup>226</sup>

Amongst other actions, FERC authorized the Constitution Pipeline company to seize and cut eighty percent of the trees in a forest in New Milford Township, Pennsylvania. On March 1, 2016, the Constitution Pipeline company began to cut the forest that has belonged to the Holleran family since the 1950s -- they live on the property, enjoy its natural beauty, and operated a growing maple syrup business (North Harford Maple).

On April 22, 2016, New York denied CWA 401 Certification for the pipeline, and as a result, the project

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<sup>223</sup> FERC Partial Notice to Proceed with Construction Activities, FERC Docket No. CP14-17, January 9, 2015, and FERC Authorization to Commence Construction, Tree Clearing, and Use of Variances, FERC Docket No. CP11-161, December 14, 2012.

<sup>224</sup> Rover's Request to Fell Trees, FERC Docket Nos. CP15-93, CP15-94, and CP15-96, and FERC Partial Notice to Proceed with Tree Felling, February 13, 2017.

<sup>225</sup> Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018.

<sup>226</sup> FERC Partial Notice to Proceed with Tree Felling and Variance Requests, FERC Docket No. CP13-499, January 29, 2016.

is permanently stalled.<sup>227</sup> The courts have upheld New York's legal right to render this denial. If NY never grants the CWA 401 Certification, the project cannot be built and the devastation inflicted on the Hollerans and other Pennsylvania and New York environments, communities, and homeowners was for naught. Even if New York approval were to be granted at some future time, the Hollerans and other Pennsylvanians had to prematurely suffer the environmental, economic and personal loss inflicted.

Despite New York's denials of Constitution's January 14 and February 25, 2016 requests to clear cut and start earth moving activities, and despite Constitution's lack of a New York Water Quality Certification, the company started illegally clearing trees in New York.<sup>228</sup> Constitution went ahead with these activities in 2015 and 2016 in multiple towns and counties in New York, and when concerned citizens and the New York Attorney General's Office made FERC aware of these activities, FERC did nothing to stop Constitution's illegal acts, resulting in the permanent loss of vast amounts of trees, devastating impacts to water quality and a further undermining of state authority.<sup>229</sup>

#### **Other examples:**

- FERC issued a Certificate of Public Convenience and Necessity for Sabal Trail (*FERC Docket No. CP15-17*) in February 2016, before CWA 401 Certifications were issued by Alabama and Georgia, and before an Army Corps section 404 permit was issued. FERC began approving construction in summer 2016, including through private lands for which no court date had yet been set to settle eminent domain claims.<sup>230</sup>
- On March 11, 2016, FERC issued a Certificate to the Tennessee Gas Pipeline company for the Connecticut Expansion Project (*FERC Docket No. CP14-529*) before the state of Massachusetts issued or waived its CWA 401 Certification.<sup>231</sup>
- On December 18, 2014, FERC issued a Certificate to Transco Pipeline Company for its Leidy Southeast project (*FERC Docket No. 16-416*) before the state of Pennsylvania issued or waived CWA 401 Certification.<sup>232</sup>
- On February 3, 2017 FERC issued a Certificate to Transco Pipeline Co for its Atlantic Sunrise Pipeline (*FERC Docket No. CP15-138*). A Pennsylvania Electric Utility attempted to prevent FERC from allowing Transco to build on their right of way, but FERC ignored their warnings that construction of the pipeline would interfere with the electric company's right of way. Ultimately, FERC issued a Certificate despite the fact that it would negatively affect the

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<sup>227</sup> Letter from NYSDEC to Constitution Pipeline Company, Water Quality Certification/Notice of Denial, April 22, 2016.

<sup>228</sup> NY AG Notice of Complaint for Violations of Law and the Order Issuing Certificates of Public Convenience and Necessity, FERC Docket No. CP13-499, May 13, 2016.

<sup>229</sup> NY AG Notice of Complaint for Violations of Law and the Order Issuing Certificates of Public Convenience and Necessity, FERC Docket No. CP13-499, May 13, 2016 and Letter from Stop the Constitution Pipeline to NY Attorney General Eric Schneiderman, January 11, 2016.

<sup>230</sup> FERC Order Issuing Certificates to Sabal Trail Transmission, LLC, FERC Docket No. CP15-17, pages 1-30 of 110, Feb. 2 2016.

<sup>231</sup> Carolyn Elefant, Press Release, *Notice of Intent to Sue FERC for Violating the Clean Water Act Filed by the Sandisfield Taxpayers Opposing the Pipeline*, March 21, 2016, and Clarence Fanto, *Berkshire Eagle*, *Tennessee Gas Co. Wants Court's OK to Start Cutting Trees for Sandisfield Spur of Pipeline*, March 18, 2016.

<sup>232</sup> Merits Brief of Delaware Riverkeeper Network and the Delaware Riverkeeper (D.C. Cir. 2016).

electrical grid's reliability and resiliency ignoring the state utility's issues in order to allow construction to commence.<sup>233</sup>

→ **Needed Pipeline Review Reform: In its reform of its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC should prohibit the practice of issuing certificates (conditional or not) before state water quality certifications have been decided upon.**

→ **Needed Pipeline Review Reform: If FERC continues the practice of conditional certificates it must reserve the power of eminent domain and deny all construction requests (including tree felling or clearing) until such time as state decisionmaking has come to conclusion and any related legal challenges to that decision have been resolved.**

FERC's Policy Statement should Clarify the law to make clear that State Section 401 Clean Water Act approvals have primacy in the FERC review and approval process. Section 401 of the Clean Water Act specifically reads: "no [federal] license or permit shall be granted until the certification required by this section has been granted or waived." 33 U.S.C. § 1341(a)(1). Requiring Section 401 certification from the states prior to federal action ensures that states' rights are honored, that state standards are met, and that public and private resources are not unnecessarily lost. It also ensures that the federal government is held accountable to the same standards as private entities, an important point of equity. Despite this clear, black letter law and the important policy it represents, FERC routinely issues Certificates of Public Convenience and Necessity prior to state decisionmaking on 401 Certifications for FERC pipeline and infrastructure projects. The result is to undermine state authority, and in some instances, has resulted in the taking of property rights, damage of business, jobs and the environment for construction of a pipeline that a state ultimately rejects. 401 primacy prevents such irreversibly harmful outcome.

→ **Needed Pipeline Review Reform: To the extent allowed under the Natural Gas Act, FERC's Policy Statement should Prohibit preemption of state or local laws or authority.**

A fundamental underpinning of our nation is respect for the rights of states to govern within their boundaries and to ensure the protection of the health, safety and welfare of their people. States' rights are carefully honored throughout our nation's laws and history. Stripping states and municipalities of their legal authority, particularly given the tremendous health, safety and economic harms pipelines inflict on communities is not justified. In addition, there is no reason that natural gas pipeline projects should not be subject to the same laws that all other industries are subject to, and that other arms of the energy industry must comply with. To exempt interstate natural gas infrastructure from the state and local laws that apply to every other industry gives them an inappropriate competitive advantage. This respect for the rights of states to take leadership in the protection of their citizens is carefully recognized and provided for in the area of environmental protection, particularly the implementation of the Clean Water Act.

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<sup>233</sup> Motion to Intervene out-of-time of the PPL Electric Utilities Corporation re the Transcontinental Gas Pipeline Company, FERC Docket No. CP15-138, March 6, 2017.

## **Eminent Domain.**

### **FERC's Needs to Stop Condoning the Taking of Land Through Eminent Domain For Projects That Have Not Been Fully Justified Pursuant to the NGA or the Constitution.**

**Under its 1999 policy on *Certification of New Interstate Natural Gas Pipeline Facilities*, FERC Improperly Grants Certification To Projects Giving Private Companies the Right to Take Land By Eminent Domain Without Ensuring that Such a Taking is Constitutional.**

The Fifth amendment to the Constitution ensures that “private property [shall not] be taken for public use, without just compensation,”; yet FERC violates this constitutional right by allowing for the taking of private property without ensuring there is an actual public benefit, without fully evaluating the project, and doing so in a way that benefits private industry over public concerns. Allowing the taking of private land via eminent domain for projects that are demonstrably for private benefit and that do not show a clear public benefit is a violation of the constitution as it strips people of their property for purposes that are not a public use.

Pursuant to the Natural Gas Act section 717f(e), FERC is empowered to issue a Certificate of Public Convenience and Necessity (“Certificate”). This Certificate allows projects approved by FERC to commence construction and confers upon companies the right of eminent domain. Specifically, the Natural Gas Act States,

“When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of way to construct, operate, and maintain a pipeline or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipeline or pipe lines, it may acquire the same by the exercise of the right of eminent domain ....”<sup>234</sup>

Given that FERC approval in the form of a Certificate of Public Convenience and Necessity grants pipeline companies the power to condemn and take properties through eminent domain, the obligation to ensure the interests of the public are fully and fairly protected throughout the review process must be of paramount importance. And yet, in practice, the public’s rights are routinely overlooked. In addition, FERC routinely fails in its obligation to ensure that these projects are actually done for the benefit of the public, as is required by law.

FERC’s Current Test to Determine if A Project is Needed Does Not Follow Constitutional Requirements. FERC’s determination of whether or not to grant a Certificate of Public Convenience and Necessity balances the project’s benefits against its adverse effects using a sliding scale approach to determine whether to grant a certificate.<sup>235</sup> This is an incorrect application of the constitutional standard

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<sup>234</sup> NGA Section 717f(h)

<sup>235</sup> 99-3-000 pg. 27; “The strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures.”

and makes FERCs granting of eminent domain unconstitutional. In order to meet constitutional muster, FERC must show that the pipeline “unquestionably serves a public purpose.”<sup>236</sup> Moreover, FERC generalizes that the only concern for landowners is based on the potential for adverse environmental effects on their property associated with a permanent right-of-way.<sup>237</sup> This generalization minimizes the harm pipeline construction and infrastructure causes landowners and communities and allows corporations to inflict permanent damage to an individual's land if they “promise: to abide by state environmental laws.

FERC’s current process grants private property rights to pipeline companies, despite the fact that FERC and the companies regularly evade full consideration of the effects of the project through FERC’s granting of conditional certificates, before the full scope and impacts of a project are known.

FERC approves projects without ensuring the project actually has a market need and financial security. FERC’s 1999 Policy threshold requirement for whether it will grant a Certificate states: “Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace.” Yet FERC does little to ensure compliance with this obligation - their review of need, as previously discussed, is narrow and superficial. See Need Section above.

FERC has also started to grant eminent domain in order to allow survey access. This is a wholly inappropriate use of the authority. FERC Certification mandates a company demonstrate compliance with the requirements of the NGA. Granting certification and eminent domain authority so a company can get the property access needed to make that demonstration is an abuse of authority, a violation of the law, and clearly unconstitutional. Allowing companies to take private property rights in order to access data that is in fact required to grant those property rights the first place is an abuse of the power of eminent domain granted to FERC from Congress in the NGA.

FERC’s granting of eminent domain not only takes people’s land for private purposes, but also allows pipeline companies to abuse the power granted to them through certification to unreasonably bully and intimidate landowners. Constitution Pipeline used US Marshals and State police to access land and intimidate land owners.

Mountain Valley saw the Forest Service cut off all food and water supplies to the protest conducting sit in in Jefferson National Forest. Individuals who attempted to provide them with food and water and other supplies were met with an aggressive response.<sup>238</sup>

FERC excuses this practice through guaranteeing a payment to the landowner, but buying out landowners does not actually adequately compensate them for the adverse effects of a project on their land.<sup>239</sup> FERC cannot continue to claim to play such a small role in the determination of eminent domain. When the Commission issues a Certificate it is common industry practice for the pipeline

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<sup>236</sup> *Kelo v. City of New London*, 545 U.S. 469, 484 (2005)

<sup>237</sup> 99-3-000 pg. 24;...[Therefore] [t]raditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project; however, there interests can be distinct.”

<sup>238</sup> Kathryn Miles, Outside Online, *The Forest Service Is Arresting Protesters Along the AT*, April 25, 2018.

<sup>239</sup> Key-Log Economics, LLC, *Economic Issues Related to FERC Policy Regarding Certification of Interstate Natural Gas Pipelines*, and FERC Docket No. PL18-1-000, prepared for the Delaware Riverkeeper Network, July 23, 2018.

company to initiate eminent domain proceedings.<sup>240</sup> FERC must honor the rights of property owners to deny survey access, and not grant conditional certificates in order to allow a company to force its way onto private property.

*By way of explicit examples and the resulting harms:*

PennEast Pipeline (FERC Docket CP15-558)

PennEast, after receiving its Certificate of Public Convenience and Necessity, promptly took almost 200 landowners to court to exercise its right of eminent domain.<sup>241</sup> Yet it is still unknown whether the pipeline will actually get built, as it is yet to receive proper approvals from NJ or the DRBC. In addition to the eminent domain cases brought to land owners, PennEast has also included a request to stop all protests and forms of disobedience, even those that occur outside of the land at issue.<sup>242</sup> This is a gross overstep of the power of eminent domain and , anything, exemplifies the power and entitlement these companies feel over the public.

The commissioners expressed concern about the effects granting the right of eminent domain to PennEast would have, they have done nothing within their power to postpone the project until it has been fully evaluated.

Commissioner Richard Glick Statement, January 19, 2018, Docket No. CP15-558-000, The PennEast Project:

“I recognize that the courts have upheld the Commission’s authority to issue conditional certificates. Nevertheless, doing so comes with **significant consequences for landowners** whose properties lie in the path of the proposed pipeline. Although the certificate is conditional, **it gives the pipeline developer the authority to exercise eminent domain** and condemn land as needed to develop the pipeline. In my view, **Congress did not intend for the Commission to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest.** ...However, the question whether landowners should be required to provide pipeline developers with access to their property for the purpose of determining whether it is suitable for a proposed pipeline is one that is and should be left to the states to decide. The **Commission should not use the pipeline**

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<sup>240</sup> Filings for eminent domain were initiated immediately once PennEast and Mountain Valley were Certified.

<sup>241</sup> List of PennEast Eminent Domain Plaintiffs, FERC Docket No. CP15-558, retrieved from: [www.delawareriverkeeper.org/sites/default/files/Eminent%20Domain\\_NJ\\_as\\_of\\_2.16.18\\_plaintiffs.pdf](http://www.delawareriverkeeper.org/sites/default/files/Eminent%20Domain_NJ_as_of_2.16.18_plaintiffs.pdf) and [www.delawareriverkeeper.org/sites/default/files/Eminent%20Domain\\_PA\\_as\\_of\\_2.15.18.pdf](http://www.delawareriverkeeper.org/sites/default/files/Eminent%20Domain_PA_as_of_2.15.18.pdf).

<sup>242</sup> See PennEast Eminent Domain Briefs In the District of New Jersey, attached, which states:

“F. The Court’s Order Should Include a Provision for Enforcement of the Injunction.

PennEast requests that the Court’s injunction order contain a provision authorizing the United States Marshal Service to take appropriate steps to enforce the Court’s injunction in the event that the Landowners violate the order, including interference with PennEast’s possession of the Rights of Way by Landowners or by third parties who are authorized by Landowners to be on the Property. Individuals and groups have declared their opposition to the PennEast Project and made threats indicating that they may engage in demonstrations, attempt to block entry to the Right of Way or otherwise harass and intimidate PennEast’s employees and agents who are attempting to carry out the survey activities. See England Decl.¶¶ 34-40. This Court has the power to enter an order intended to coerce compliance with its terms. *Berne Corp. v. Government of the Virgin Islands*, 570 F.3d 130, 139 (3d Cir. 2009)”

**certification process as an end run around states and landowners that choose not to grant access to their property before a certificate is issued.”<sup>243</sup>**

Chatterjee statement regarding PennEast:

**I do have concerns about the order’s impact on landowners.** For this project, there are incomplete surveys due to lack of access to landowner property. I recognize that the rights of landowners are important, and do not take their concerns lightly. ... if [the pipeline] cannot acquire the easement by an agreement with the landowner. **It is important that the Commission have as much data as possible on which to base a determination that has such a momentous effect.**

Statements cannot replace action and do no undo the harms inflicted on landowners. If FERC Commissioners are truly worried about the issues of eminent domain, it must more actively ensure the public is protected than voice concerns while granting the right to condone the property to a private corporation.

Constitution Pipeline (FERC Docket CP13-499):

On December 2, 2014, FERC granted a Certificate to the Constitution Pipeline despite the fact that New York State had not issued a CWA 401 Certification. Thereafter, FERC granted the company the power of eminent domain, a power that the company began to exercise that same month, with the filing of 125 complaints in condemnation against NY and PA landowners. FERC then expressly permitted the Constitution Pipeline to begin elements of construction.<sup>244</sup>

Weeks after issuance of the FERC Certificate, Constitution filed eminent domain charges against landowners, and “once awarded possession, forged ahead on the Landowners’ property, surveying and staking the right of way and pursuing contempt charges against the Landowners for their alleged obstruction of tree-clearing activity,<sup>245</sup> ultimately securing state police and heavily armed U.S. Marshals outfitted with assault weapons and bulletproof vests.”<sup>246</sup>

On March 1, 2016, the Constitution Pipeline Company began to cut the forest that has belonged to the Holleran family since the 1950s -- they live on the property, enjoy its natural beauty, and operated a growing maple syrup business (North Harford Maple). In total Constitution chopped down over 500 ash and sugar maple trees.<sup>247</sup>

The Holleran family has had pipeline construction stalled on their property for two years, with no

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<sup>243</sup> Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018.

<sup>244</sup> FERC Partial Notice to Proceed with Tree Felling and Variance Requests, FERC Docket No. CP13-499, January 29, 2016.

<sup>245</sup> Stripping People’s Rights Attachment 11, Candy Woodall, *Constitution Pipeline delayed, but hundreds of trees already cut down*, Pennlive, March 10, 2016; and Stripping People’s Rights Attachment 12, Jon Hurdle, *Maple syrup trees cut to make way for Constitution Pipeline*, StateImpact, March 2, 2016 <https://stateimpact.npr.org/pennsylvania/2016/03/02/maple-syrup-trees-cut-to-make-way-for-the-constitution-pipeline/>

<sup>246</sup> Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458. See Attached.

<sup>247</sup> Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458. See Attached.

compensation for the taking of their maple trees nor for the inconvenience forced upon them of hosting a construction site on their land.<sup>248</sup> decided to fight back against this egregious taking that occurred, yet nothing can replace the trees cut and business loss because Constitution Pipeline exercised the power granted to them by FERC.<sup>249</sup>

#### Mountain Valley Pipeline (FERC Docket CP16-13)

Landowners in the Mountain Valley Pipeline (MVP) vehemently opposed the taking of their land through staging protests, and refusing to enter negotiations with the company.<sup>250</sup> Mountain Valley Pipeline received its FERC certification on October 13, 2017, Mountain Valley Pipeline. While MVP still has not obtained permits and authorizations from other state and federal agencies, it filed federal lawsuits against hundreds of landowners in Virginia.<sup>251</sup> FERC's ignorance of the public's outcries to stop eminent domain is destroying property and homes,

#### **→ Needed Pipeline Review Reforms: FERC's Needs to Stop Condoning the Taking of Land Through Eminent Domain by Issuing Certificates of Public Convenience and Necessity Without Ensuring the Project Actually Confers A Public Benefit.**

##### **→ Needed Pipeline Review Reforms: FERC Needs to Deny Certificates that Rely on Eminent Domain for over 20% of the project**

- In order to determine whether the project is likely to use eminent domain the Commission can look to indicators such as: whether landowners have not allowed for surveys to take place, landowners who have denied or resisted allowing the pipeline company access to property, and landowners who have stated opposition to the project entering their land. Because the company must conduct a survey and often interacts with most owners prior to or during the commission's review of the project, this information can be obtained and considered as part of this process
- Require that applications take additional measure to minimize the use of eminent domain including considering viable alternative routes that will reduce or eliminate the need for eminent domain, and ensure there is a compelling justification for any pipeline that utilizes eminent domain, such as an unreliable grid
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##### **→ Needed Pipeline Review Reform: FERC Needs to Change its Analysis of Public Benefits versus adverse effects**

- The risk of Eminent domain must be categorized as an adverse effect, it can no longer be considered mitigated by ensuring environmental protections. Additionally, FERC must account for the externalities created by pipeline construction and occupation on a homeowners land.

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<sup>248</sup> Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458. See Attached.

<sup>249</sup> Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation, *Constitution Pipeline v. A Permanent Easement for 1.84 Acres*, Civil Action no. 3:14-2458. See Attached.

<sup>250</sup> The Lily News, *This Virginia woman doesn't want a pipeline running through her land. To stop it, she went up into the trees*, April 25, 2018.

<sup>251</sup> Duncan Adams, *Mountain Valley sues landowners to gain pipeline easements and access through eminent domain*, Roanoke Times, October 27, 2017, retrieved from:

[https://www.roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-and-access/article\\_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html](https://www.roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-and-access/article_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html)

- Currently, the FERC assessment of whether or not a project is in the public interest focuses on the needs and benefits of the pipeline industry, not that of the public. Therefore, FERC's consideration of public benefit needs to include an accurate and unbiased look at a project's impact on pipeline competition, on the possibility of overbuilding, and whether a project subsidizes an existing shipper. As well as the impacts of an approval on private property values or marketability, the impacts on the use of private property or the adverse implications for open space preservation, the impacts on community quality of life, impacts on existing businesses along a proposed pipeline route, and more.

→ **Needed Pipeline Review Reform: FERC Needs to Stop Allowing Market principles to justify the taking private land.**

- FERC's establishment of whether a project is needed must encompass more than just precedent agreements. It should include an assessment of project natural gas need of the area, an analysis of
- Precedent agreements must be analyzed and scrutinized by an independent source, especially if done between affiliates and ensure that the data shows that the projects are needed and reliable.

→ **Needed Pipeline Review Reform: FERC Needs to Stop the practice of granting "conditioned certificates".**

- The Commission needs to reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way and insist that all information concerning a site is gathered prior to it granting the right to take the land to the natural gas company.

→ **Needed Pipeline Review Reform: FERC Needs to Stop The use of Tolling Orders.**

- Tolling orders are routinely used to place people in legal limbo, unable to challenge a FERC approval even when the agency has allowed the company to use the power of eminent domain to take property rights and is approving construction and operation of project sections. If tolling orders are not prohibited then other mechanisms for addressing the problem include:
  - **Prohibit projects from advancing** in any way, shape or form, including eminent domain and/or construction, if there is an outstanding rehearing request/tolling order;
  - **Mandate FERC response to rehearing requests within 30 days** and prohibit projects from advancing in any way, shape or form during that period.

**FERC's Purpose and Legal Mandates are to Regulate the Industry and Protect the People; It's Time to Give Proper Priority to People, Environment, Climate, and Future Generations.**

In 1977 Congress established FERC as an independent agency responsible for regulating the industry and protecting the people--not the other way around. The majority of the failings of the current Policy Statement that we have outlined in this comment--including property rights and eminent domain; states rights; individuals rights; and health and safety--are cross cutting issues that are of concern to Republicans and Democrats alike. These are not partisan issues, but rather issues of bias that are stacked against the public.

There can be no defense for destroying the lives and livelihoods of so many for purely private profit, for taking public lands preserved with public dollars to serve purely private industrial interests, for the unavoidable harms to the environment of pipeline construction and operation, and for approving the proliferation of pipelines to serve a dying energy source that will prevent us from achieving goals needed to protect us from the worsening ramifications of climate change.

the Delaware Riverkeeper Network has identified significant and fundamental failures in FERC's review and approval of pipelines, as implemented under the current 1999 Policy Statement over the past 10 years working on nearly two dozen FERC jurisdictional pipeline projects. This includes monitoring, compiling, and analyzing the environmental and community impacts of shale gas pipelines, as well as our extensive experience working closely with impacted communities, landowners, economists, regulating agencies, industry experts and engineers. We have concluded that reform is essential, but not to streamline the process and make it easier for industry - reform is needed to make the process more robust, impartial, fair, equitable and accessible.

Respectfully,



Maya K. van Rossum  
the Delaware Riverkeeper  
Delaware Riverkeeper Network  
925 Canal Street, Suite 3701, Bristol, PA 19007  
215-369-1188