NO. 19-1039

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX
Volume I of II

JEREMY M. FEIGENBAUM
Counsel of Record
OFFICE OF THE NEW JERSEY ATTORNEY GENERAL
25 Market Street
Trenton, NJ 08611
(609) 376-2690
jeremy.feigenbaum@njoag.gov

Counsel for Respondents State of New Jersey, et al.

PAUL D. CLEMENT
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

(*Additional Counsel Listed on Inside Cover*)

March 1, 2021

Petition for Writ of Certiorari Filed Feb. 18, 2020
Petition for Writ of Certiorari Granted Feb. 3, 2021

MATTHEW LITTLETON
Counsel of Record
DONAHUE, GOLDBERG,
WEAVER & LITTLETON
1008 Pennsylvania Avenue, SE
Washington, DC 20003
(202) 683-6895
matt@donahuegoldberg.com

JENNIFER L. DANIS
EDWARD LLOYD
MORNINGSIDE HEIGHTS
LEGAL SERVICES
435 W. 116th Street
New York, NY 10027
(201) 306-3382
jld2228@columbia.edu
elloyd@law.columbia.edu

Counsel for Respondent New Jersey Conservation Foundation

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Volume I

Volume II

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1191

IN RE: PENNEAST PIPELINE COMPANY, LLC

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,

Appellants.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
01/25/2019	CIVIL CASE DOCKETED. Notice filed by Appellants Delaware & Raritan Canal Commission, New Jersey Department of Environmental Protection, New Jersey Department of Transportation, New Jersey Department of the Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture Development Committee, New Jersey Water Supply Authority

Date Filed	Docket Text
	and State of New Jersey in District Court No. 3-18-cv-01597. (KR) [Entered: 01/25/2019 03:42 PM]
01/30/2019	CLERK ORDER consolidating the Appeals at Nos. 19-1191 through 19-1232 for all purposes. The parties are advised that all case opening forms, motions and briefs must be electronically filed in all cases on the Court's electronic case filing (ECF) system. All required case opening forms should be filed within 14 days of the date of this Order. For ease of docketing, the State Defendants have been added to the case by department as listed on the notice of appeal rather than by how the State Defendants were listed on each individual docket, filed. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-

Date Filed	Docket Text
	1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (LML) [Entered: 01/30/2019 11:39 AM]
	* * *
03/05/2019	ECF FILER: Motion filed by Appellants Delaware & Raritan Canal Commission, New Jersey Department of Environmental Protection, New Jersey Department of Transportation, New Jersey Department of Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture Development Committee, New Jersey Water Supply Authority and State of New Jersey to stay District Court Order Pending Resolution of the Appeal, to Expedite the motion and the appeals with proposed briefing schedule. Certificate of Service dated 03/05/2019. Service made by ECF. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-

Date Filed	Docket Text
	1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 03/05/2019 by KR] (MAC) [Entered: 03/05/2019 03:18 PM]
	* * *
03/08/2019	ECF FILER: Response filed by Appellee County of Mercer to motion for stay, motion to Expedite the appeals. Certificate of Service dated 03/08/2019. [19-1191, 19-1192, 19-1227]--[Edited 03/08/2019 by KR] (PRA) [Entered: 03/08/2019 10:35 AM]
	* * *
03/15/2019	ECF FILER: Reply by Appellants Delaware & Raritan Canal Commission, New Jersey Department of Environmental Protection, New Jersey Department of Transportation, New Jersey Department of Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture

Date Filed	Docket Text
	Development Committee, New Jersey Water Supply Authority and State of New Jersey to Response to motion for stay, motion to Expedite, filed. Certificate of Service dated 03/15/2019. Service made by ECF, US mail [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 03/15/2019 by KR] (MAC) [Entered: 03/15/2019 03:26 PM]
03/19/2019	ORDER (CHAGARES and JORDAN, Circuit Judges) granting in part motion for stay filed by Appellants New Jersey Department of Environmental Protection, New Jersey Department of Transportation, State of New Jersey, New

Date Filed	Docket Text
	Jersey Department of Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture Development Committee, New Jersey Water Supply Authority and Delaware & Raritan Canal Commission. In the event Appellee transitions from the surveying and testing phase to the construction phase of the pipeline project, physical construction of the pipeline shall be stayed pending this appeal. Additionally, the just compensation portion of the litigation is stayed pending this appeal. Appellants' Motion to Expedite is granted. Appellants' Opening Brief of no more than 14,000 words must be filed and served within thirty (30) days from the date of this order. Appellee's Brief must be filed and served within twenty (20) days of service of Appellants' Brief. A reply brief, if any, must be filed and served within ten (10) days of service of the Appellee's Brief. The matter will be assigned to the first merits panel available at the conclusion of briefing, filed.

Date Filed	Docket Text
	Panel No.: ECO-026E. Chagares, Authoring Judge. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (KR) [Entered: 03/19/201911:38 AM]
	* * *
04/18/2019	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants Delaware & Raritan Canal Commission, New Jersey Department of Environmental Protection, New Jersey Department of Transportation, New Jersey Department of Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture Development Committee, New Jersey Water Supply Authority and State of New Jersey in 19-

Date Filed	Docket Text
	1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232, filed. Certificate of Service dated 04/18/2019 by ECF, US mail. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231,19-1232] - [Appendix has been removed from this entry by the Clerk as it was filed separately]--[Edited

Date Filed	Docket Text
	04/24/2019 by MS] (MAC) [Entered: 04/18/2019 08:56 PM]
	* * *
04/24/2019	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellants Delaware & Raritan Canal Commission, New Jersey Department of Environmental Protection, New Jersey Department of Transportation, New Jersey Department of Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture Development Committee, New Jersey Water Supply Authority and State of New Jersey in 19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232, filed. Certificate of service dated

Date Filed	Docket Text
	04/24/2019 by ECF. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (MAC) [Entered: 04/24/2019 11:20 AM]
	* * *
04/25/2019	ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of Niskanen Center in support of Appellant/Petitioner, filed. Certificate of Service dated 04/25/2019 by ECF. F.R.A.P. 29(a) Permission: YES.[19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-

Date Filed	Docket Text
	1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (JS) [Entered: 04/25/2019 10:14 PM]
	* * *
05/08/2019	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee PennEast Pipeline Co LLC in 19-1191, 19-1192,19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232, filed. Certificate of Service dated 05/08/2019 by 3rd party, ECF. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-

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	* * *
05/15/2019	Amended Oral Argument Notification for Monday, 06/10/2019. Courtroom & Time: Maris Courtroom/2:00p.m.. Location: Philadelphia, PA. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (TLG) [Entered: 05/15/2019 03:06 PM]

Date Filed	Docket Text
05/15/2019	ECF FILER: ELECTRONIC AMICUS BRIEF with Supplemental Appendix attached on behalf of Interstate Natural Gas Association of America, American Gas Association, American Petroleum Institute, Chamber of Commerce of the United States of America, and National Association of Manufacturers in support of Appellee/Respondent, filed. Certificate of Service dated 05/15/2019 by ECF. F.R.A.P. 29(a) Permission: YES. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] - [Entry edited by the Clerk to reflect that Supp. Appendix is attached]--[Edited 05/16/2019

Date Filed	Docket Text
	by MS] (AMM) [Entered: 05/15/2019 05:33 PM]
	* * *
05/16/2019	ECF FILER: Motion filed by Amicus Appellees American Gas Association, American Petroleum Institute, Chamber of Commerce of the United States of America, Interstate Natural Gas Association of America and National Association of Manufacturers in 19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232 to Extend the Record and File Supplemental Appendix With Amicus Brief. Certificate of Service dated 05/16/2019. Service made by ECF. [19-1191, 19-1192, 19-1193, 19-1194, 19-

Date Filed	Docket Text
	1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (AMM) [Entered: 05/16/2019 06:36 PM]
05/20/2019	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellants Delaware & Raritan Canal Commission, New Jersey Department of Environmental Protection, New Jersey Department of Transportation, New Jersey Department of Treasury, New Jersey Motor Vehicle Commission, New Jersey State Agriculture Development Committee, New Jersey Water Supply Authority and State of New Jersey in 19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-

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05/21/2019	ORDER (JORDAN, BIBAS and NYGAARD, Circuit Judges) granting Motion by Amicus Appellees Natural Gas Association of America, et al. for

Date Filed	Docket Text
	Leave to Extend the Record and File Supplemental Appendix with Amicus Brief, filed. Kent A. Jordan, Authoring Judge. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (MS) [Entered: 05/21/2019 04:41 PM]
	* * *
06/10/2019	ARGUED on Monday, June 10, 2019. Panel: JORDAN, BIBAS and *NYGAARD, Circuit Judges. Jeremy Feigenbaum arguing for Appellant New Jersey Department of Environmental Protection; James M. Graziano arguing for Appellee PennEast Pipeline Co LLC. *(Participated in Video Conference). [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-

Date Filed	Docket Text
	1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (PM) [Entered: 06/10/2019 03:32 PM]
	* * *
09/10/2019	PRECEDENTIAL OPINION Coram: JORDAN, BIBAS and NYGAARD, Circuit Judges. Total Pages: 35.Judge: JORDAN Authoring. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-

Date Filed	Docket Text
	1228, 19-1229, 19-1230, 19-1231,19-1232] (KR) [Entered: 09/10/2019 08:33 AM]
09/10/2019	JUDGMENT, Vacated and Remanded. Parties to bear their own costs. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232] (KR) [Entered: 09/10/2019 08:36 AM]
09/11/2019	ORDER AMENDING OPINION (Clerk) It has come to the attention of the Clerk that Lela Hollabaugh counsel for amicus appellees Interstate Natural Gas Association of America, et al, was not listed as counsel on the opinion of this Court in addition American Gas Association was not listed as an amicus appellee. Accordingly, it

Date Filed	Docket Text
	is hereby ORDERED that the listing of counsel on the opinion is amended as follows, filed. (See Order for Corrections) Nda regenerated to show American Gas Association was also added to the order with counsel. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 09/11/2019 by PDB] (PDB) [Entered: 09/11/2019 11:40 AM]
* * *	
09/19/2019	ORDER AMENDING OPINION (Clerk) It has come to the attention of the Clerk that Mark A. Collier and Jeremy Feigenbaum are employed by the Office of the Attorney General of New Jersey, Division

Date Filed	Docket Text
	of Law, not the Division of Criminal Justice, filed. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230,19-1231, 19-1232] (KR) [Entered: 09/19/2019 02:42 PM]
	* * *
10/22/2019	ECF FILER: Petition filed by Appellee PennEast Pipeline Co LLC for Rehearing before original panel and the court en banc. Certificate of Service dated 10/22/2019. Service made by ECF, US mail. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-

Date Filed	Docket Text
	1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 10/23/2019 by KR] (JCM) [Entered: 10/22/2019 01:33 PM]
	* * *
10/29/2019	ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of Amicus Appellees American Gas Association, American Petroleum Institute, Interstate Natural Gas Association of America and National Association of Manufacturers in support of Appellee's Petition for Rehearing. Certificate of Service dated 10/29/2019 by ECF. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-

Date Filed	Docket Text
	1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 10/30/2019 by KR] (AMM) [Entered: 10/29/2019 04:12 PM]
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10/29/2019	ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of TC Energy Corporation in support of Appellee's petition for rehearing. Certificate of Service dated 10/29/2019 by ECF. F.R.A.P. 29(a) Permission: NO. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 10/30/2019 by KR] (CES) [Entered: 10/29/2019 04:38 PM]
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Date Filed	Docket Text
11/05/2019	ORDER (SMITH, Chief Judge, CHAGARES, JORDAN, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and NYGAARD*, Circuit Judges) denying Petition En Banc and Panel Rehearing filed by Appellee PennEast Pipeline Co LLC. Jordan, Authoring Judge. *Judge Nygaard's vote is limited to panel rehearing only. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 11/05/2019 by LML to attach corrected order] (LMR) [Entered: 11/05/2019 08:04 AM]
11/13/2019	MANDATE ISSUED, filed. [19-1191, 19-1192, 19-1193, 19-1194, 19-1195, 19-1196, 19-1197, 19-1198, 19-1199, 19-

Date Filed	Docket Text
	1200, 19-1201, 19-1202, 19-1203, 19-1204, 19-1205, 19-1206, 19-1207, 19-1208, 19-1209, 19-1210, 19-1211, 19-1212, 19-1213, 19-1214, 19-1215, 19-1216, 19-1217, 19-1218, 19-1219, 19-1220, 19-1221, 19-1222, 19-1223, 19-1224, 19-1225, 19-1226, 19-1227, 19-1228, 19-1229, 19-1230, 19-1231, 19-1232]--[Edited 11/13/2019 by TMK] (TMM) [Entered: 11/13/2019 09:30 AM]
* * *	

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 3:18-cv-01597

IN RE: PENNEAST PIPELINE COMPANY, LLC,

Plaintiff,

V.

A PERMANENT EASEMENT FOR 1.92 ACRES AND TEMPORARY EASEMENT FOR 2.05 ACRES IN HOPEWELL TOWNSHIP, MERCER COUNTY, NEW JERSEY, TAX PARCEL NO. 1106-59-13.01, et al.,

Defendants.

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/06/2018	1	COMPLAINT against A PERMANENT EASEMENT FOR 1.92 ACRES AND TEMPORARY EASEMENT FOR 2.05 ACRES IN HOPEWELL TOWNSHIP, MERCER COUNTY, NEW JERSEY, TAX PARCEL NO. 1106-59-13.01, COUNTY OF MERCER, JERSEY CENTRAL POWER AND LIGHT COMPANY, STATE OF NEW JERSEY, BY THE

Date Filed	#	Docket Text
		SECRETARY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, TOWNSHIP OF HOPEWELL, VERIZON NEW JERSEY, INC. (Filing and Admin fee $ 400 receipt number 0312-8457293), filed by PENNEAST PIPELINE COMPANY, LLC. (Attachments: # 1 Civil Cover Sheet, # 2 NOTICE OF CONDEMNATION, # 3 PROPOSED ORDER TO SHOW CAUSE, # 4 Brief, # 5 DECLARATION OF DANIEL MURPHY, # 6 DECLARATION OF JEFFREY ENGLAND AND EXHIBITS, # 7 Text of Proposed Order)(GRAZIANO, JAMES) (Entered: 02/06/2018)
	* * *	
03/22/2018	21	ANSWER to Complaint with JURY DEMAND by TOWNSHIP OF HOPEWELL. (DUGGAN, TIMOTHY) (Entered: 03/22/2018)
	* * *	
04/02/2018	36	ANSWER to Complaint with JURY DEMAND *(with Cert of Service)* by VERIZON NEW JERSEY, INC..(DALCORTIVO,

Date Filed	#	Docket Text
		KATHLEEN) (Entered: 04/02/2018)
		* * *
04/03/2018	38	ANSWER to Complaint with JURY DEMAND by COUNTY OF MERCER. (Attachments: # 1 Supplement Cover Letter) (ADEZIO, PAUL) (Entered: 04/03/2018)
		* * *
05/17/2018	44	BRIEF *Final Summation* (Attachments: # 1 Brief, # 2 Certification Appleget, # 3 Certification DeChristie, # 4 Certification Gates, # 5 Certification Payne, # 6 Certification Yeany, # 7 Certificate of Service) (COLLIER, MARK) (Entered: 05/17/2018)
		* * *
05/18/2018	46	BRIEF *Plaintiff PennEast Pipeline Company, LLC Final Written Summation* (Attachments: # 1 Certificate of Service)(GRAZIANO, JAMES) (Entered: 05/18/2018)
05/21/2018	47	BRIEF (DUGGAN, TIMOTHY) (Entered: 05/21/2018)
06/04/2018	48	BRIEF Plaintiff PennEast Pipeline Company, LLC

Date Filed	#	Docket Text
		Response to Closing Argument of the State of New Jersey (Attachments: # 1 Certificate of Service) (GRAZIANO, JAMES) (Entered: 06/04/2018)
		* * *
12/10/2018	59	BRIEF (DUGGAN, TIMOTHY) (Entered: 12/10/2018)
12/10/2018	60	BRIEF (DUGGAN, TIMOTHY) (Entered: 12/10/2018)
12/14/2018	61	OPINION filed. Signed by Judge Brian R. Martinotti on 12/14/2018. (Attachments: # 1 Exhibit A) (mps) (Entered: 12/14/2018)
12/14/2018	62	VACATED - ORDER Denying the State Defendants' request for dismissal; PennEast's application for orders of condemnation and for preliminary injunctive relief allowing immediate possession of the respective Rights of Way in advance of any award of just compensation is Granted; PennEast shall post security in the form of a surety bond into the Courts Registry pursuant to Local Civil Rule 67.1(a); upon PennEast's post of appropriate security, PennEast is

Date Filed	#	Docket Text
		authorized to immediately enter and take possession of the Rights of Way for all purposes allowed under the FERC Order; The Court appoints the individuals listed herein as Special Masters/Condemnation Commissioners to adjudicate and determine compensation; CASE MANAGEMENT CONFERENCE set for 2/14/2019, at 10:00AM in courtroom 1; PennEast shall submit a revised, case-specific forms of orders by 1/4/2019.. Signed by Judge Brian R. Martinotti on 12/14/2018. (Attachments: # 1 Exhibit A)(mps) (Entered: 12/14/2018)
		* * *
12/28/2018	64	MOTION for Reconsideration by STATE OF NEW JERSEY, BY THE SECRETARY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. (Attachments: # 1 Brief, # 2 Certificate of Service, # 3 Text of Proposed Order) (COLLIER, MARK) (Entered: 12/28/2018)
12/28/2018	65	MOTION to Stay by STATE OF NEW JERSEY, BY THE

Date Filed	#	Docket Text
		SECRETARY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. (Attachments: # 1 Brief, # 2 Certificate of Service, # 3 Text of Proposed Order) (COLLIER, MARK) (Entered: 12/28/2018)
		* * *
01/08/2019	70	BRIEF in Opposition filed by PENNEAST PIPELINE COMPANY, LLC re 64 MOTION for Reconsideration (Attachments: # 1 Certificate of Service)(GRAZIANO, JAMES) (Entered: 01/08/2019)
01/08/2019	71	BRIEF in Opposition filed by PENNEAST PIPELINE COMPANY, LLC re 65 MOTION to Stay (Attachments: # 1 Certificate of Service)(GRAZIANO, JAMES) (Entered: 01/08/2019)
		* * *
01/11/2019	73	NOTICE OF APPEAL as to 62 Order,,, 61 Opinion by STATE OF NEW JERSEY, BY THE SECRETARY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. Filing fee $ 505, receipt number 0312-9301226.

Date Filed	#	Docket Text
		The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Attachments: # 1 Certificate of Service)(MILES, KRISTINA) (Entered: 01/11/2019)
		* * *
01/15/2019	75	REPLY BRIEF to Opposition to Motion filed by STATE OF NEW JERSEY, BY THE SECRETARY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION re 65 MOTION to Stay (Attachments: # 1 Certificate of Service) (COLLIER, MARK) (Entered: 01/15/2019)
		* * *
01/23/2019	82	ORDER that the State Defendants' Motion for Reconsideration is denied. The State Defendants' Motion to Stay is denied as moot. Signed by Judge Brian R. Martinotti on 1/23/2019. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (mps) (Entered: 01/23/2019)

Date Filed	#	Docket Text
01/25/2019	83	VACATED - ORDER that PennEast has substantive right to condemn a permanent Right of Way and temporary easement to be taken on the subject property within this Order. PennEast shall post security in the form of a surety bond into the Court's Registry in the amount of $112,200.00. The Court, along with the Special Master/Condemnation Commissioners, shall hold a case management conference on 2/14/2019, at 10:00 AM in Courtroom 1, regarding the protocol for determining just compensation, Signed by Judge Brian R. Martinotti on 1/25/2019. (mmh) (Entered: 01/25/2019)
01/25/2019	84	USCA Case Number 19-1191 for 73 Notice of Appeal (USCA) filed by STATE OF NEW JERSEY, BY THE SECRETARY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. USCA Case Manager Kirsi (Document Restricted - Court Only) (ca3kr) (Entered: 01/25/2019)

Date Filed	#	Docket Text
		* * *

Order Issuing Certificates, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018)

1. On September 24, 2015, PennEast Pipeline Company, LLC (PennEast) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)[1] and Parts 157 and 284 of the Commission's regulations,[2] requesting authorization to construct and operate a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities (PennEast Project). The project is designed to provide up to 1,107,000 dekatherms per day (Dth/d) of firm transportation service. PennEast also requests a blanket certificate under Part 284, Subpart G of the Commission's regulations to provide open-access transportation services, and a blanket certificate under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and operations.

2. As explained herein, we find that the benefits that the PennEast Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Further, as set forth in the environmental discussion below, we agree with Commission staff's conclusion in the Environmental Impact Statement (EIS) that the project will result in some adverse environmental impacts, but that these impacts will be reduced to

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[1] 15 U.S.C. § 717f(c) (2012).

[2] 18 C.F.R. pt. 157 (2017).

acceptable levels with the implementation of the applicant's proposed mitigation and staff's recommendations, as modified herein, and adopted as conditions in the attached Appendix A of this order. Therefore, for the reasons stated below, we grant the requested authorizations, subject to the conditions discussed herein.

I. Background and Proposal

3. PennEast[3] is a Delaware limited liability company organized and existing under the laws of the State of Delaware, managed by UGI Energy Services, LLC, pursuant to a Project Management Agreement. Upon the commencement of operations proposed in its application, PennEast will become a natural gas company within the meaning of section 2(6) of the NGA,[4] and will be subject to the Commission's jurisdiction.

A. Facilities and Services

4. PennEast proposes to construct a new greenfield pipeline system to provide up to 1,107,000 Dth/d of firm natural gas transportation service to markets in New Jersey, New York, Pennsylvania, and surrounding states. The project extends from various receipt point interconnections with the interstate

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

[4] 15 U.S.C. § 717a(6) (2012).

natural gas pipeline system of Transcontinental Gas Pipe Line Company, LLC (Transco) and with gathering systems in the eastern Marcellus Shale region operated by UGI Energy Services, LLC, Williams Partners, L.P., and Energy Transfer Partners, L.P., to multiple delivery point interconnections in natural gas-consuming markets in New Jersey and Pennsylvania, terminating at a delivery point with Transco in Mercer County, New Jersey.[5] PennEast states that the project is designed to bring lower cost natural gas to markets in New Jersey, Pennsylvania, and New York and to provide shippers with additional supply flexibility, diversity, and reliability.[6]

5. PennEast proposes to construct the following facilities:

- approximately 116 miles of 36-inch-diameter mainline transmission pipeline originating in Luzerne County, Pennsylvania, and extending to Mercer County, New Jersey, traversing Luzerne, Carbon, Northampton, and Bucks Counties, Pennsylvania, and Hunterdon and Mercer Counties, New Jersey;
- three lateral pipelines extending off of the mainline consisting of:
  - the approximately 2.1-mile, 24-inch-diameter Hellertown Lateral in Northampton County, Pennsylvania to connect with Columbia Gas Transmission, LLC, and UGI Utilities, Inc.;

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[5] *See* PennEast's Application at 3.

[6] *Id.* at 4, 8-10.

  - the approximately 0.6-mile, 12-inch-diameter Gilbert Lateral in Hunterdon County, New Jersey to connect with NRG REMA, LLC, and Elizabethtown Gas at the Gilbert Electric Generating Station; and
  - the approximately 1.54-mile, 36-inch-diameter Lambertville Lateral in Hunterdon County, New Jersey to connect with Algonquin Gas Transmission, LLC, and Texas Eastern Transmission, LP;
- one new compressor station in Carbon County, Pennsylvania; and
- various associated aboveground facilities, including interconnects, launchers, receivers, and mainline block valves.

PennEast estimates that the proposed facilities will cost approximately $1.13 billion.

6. PennEast states that it conducted an open season for the project from August 11 to August 29, 2014. As a result of the open season, PennEast states that it has executed long-term precedent agreements with the following 12 shippers for 990,000 Dth/d of firm transportation service, or approximately 90 percent of the project's capacity:

Shipper (* indicates PennEast Affiliate)	**Contracted Volumes** (Dth/d)
New Jersey Natural Gas Company*	180,000
PSEG Power, LLC*	125,000
Texas Eastern Transmission, LP*	125,000
South Jersey Gas Company*	105,000

ConEd of New York	100,000
Elizabethtown Gas*	100,000
UGI Energy Services, Inc.*	100,000
Cabot Oil & Gas Corp.	50,000
Talen Energy Marketing, LLC	50,000
Enerplus Resources Corp.	30,000
Warren Resources, Inc.	15,000
NRG Rema LLC	10,000

PennEast proposes to provide service to the project shippers at negotiated rates.

7. PennEast also requests approval of its pro forma tariff. PennEast proposes to offer open-access transportation services under Rate Schedules FTS (Firm Transportation Service), ITS (Interruptible Transportation Service), and PALS (Parking and Lending Service).

B. Blanket Certificates

8. PennEast requests a blanket certificate of public convenience and necessity pursuant to Part 284, Subpart G of the Commission's regulations authorizing PennEast to provide transportation service to customers requesting and qualifying for transportation service under its proposed FERC Gas Tariff, with pre-granted abandonment authorization.[7]

9. PennEast requests a blanket certificate of public convenience and necessity pursuant to Part 157, Subpart F of the Commission's regulations

[7] 18 C.F.R. § 284.221 (2017).

authorizing certain future facility construction, operation, and abandonment.[8]

II. Procedural Issues

A. Notice, Interventions, Protests, and Comments

10. Notice of PennEast's application was published in the *Federal Register* on October 15, 2015.[9] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[10] Late interventions were granted by notice issued on March 23, 2017, and May 18, 2017.

11. Numerous entities, landowners, individuals, and New Jersey State representatives filed protests and adverse comments raising the following issues: (1) the need for an evidentiary hearing; (2) the need for the project; and (3) whether the use of eminent domain is appropriate for this project. On November 13, 2015, PennEast filed a Motion for Leave to Answer and Answer to the protests, as well as to various comments filed on the project. Although the Commission's Rules of Practice and Procedure generally do not permit answers to protests,[11] we will accept PennEast's answer because it clarifies the concerns raised and provides information that has assisted in our decision making. These concerns are addressed below.

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[8] *Id.* § 157.204 (2017).

[9] 80 Fed. Reg. 62,068 (2015).

[10] 18 C.F.R. § 385.214 (2017).

[11] *Id.* § 385.214(c) (2017).

12. In addition, numerous comments were filed raising concerns over the environmental impacts of the project. These comments are addressed in the Final Environmental Impact Statement (EIS) and, as appropriate, below.

B. Request for Evidentiary Hearing

13. New Jersey Senator Shirley K. Turner, New Jersey Assemblyman Reed Gusciora, and New Jersey Assemblywoman Elizabeth Muoio requested an evidentiary hearing to determine the need for the project, and explore whether less disruptive, more cost-effective alternatives exist to meet demand. Similarly, the New Jersey Conservation Foundation (NJCF) and Stony Brook-Millstone Watershed Association (Stony Brook) assert that a hearing is necessary in order to develop a record to determine the public benefits of the project and whether the project is viable without subsidies.

14. An evidentiary, trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.[12] No party has raised a material issue of fact that the Commission cannot resolve on the basis of the written record. As demonstrated by the discussion below, the existing written record provides a sufficient basis to resolve the issues relevant to this proceeding. The Commission has satisfied the hearing requirement by giving all interested parties a full and complete opportunity to participate through

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[12] *See, e.g., Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Dominion Transmission, Inc.,* 141 FERC ¶ 61,183, at P 15 (2012).

evidentiary submission in written form.[13] Therefore, we will deny the request for a trial-type evidentiary hearing.

III. Discussion

15. As PennEast's proposed pipeline system would be used to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.[14]

A. Application of the Certificate Policy Statement

16. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[15] The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's

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[13] *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

[14] 15 U.S.C. §§ 717f(c), (e) (2012).

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

responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline facilities construction.

17. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the construction. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, we will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will we proceed to consider the environmental analysis where other interests are addressed.

1. Subsidization and Impact on Existing Customers

18. As discussed above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers. As PennEast is a new company, it has no existing customers. As such, there is no potential for

subsidization on PennEast's system or degradation of service to existing customers.

2. Need for the Project

19. Numerous parties and commenters challenge the need for the project.[16] They raise a variety of arguments including: (1) insufficient demand for natural gas in New Jersey and Pennsylvania; (2) the need for a regional analysis to determine if the project is needed; (3) the availability of alternatives, including renewable energy and capacity on existing and proposed interstate pipelines, to meet future demand; (4) the public benefits of the project, including cost savings, supply flexibility and reliability, and local employment impacts are unfounded or are overstated; (5) the use of precedent agreements with affiliated entities to demonstrate project need; and (6) that a portion of the gas transported on the project may be exported.

20. A number of commenters claim that the project is not needed because there is little or no forecasted load growth in New Jersey and Pennsylvania.[17] In

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[16] Many of the commenters conflate the balancing of economic benefits (market need) and effects under the Certificate Policy Statement with the distinct description of purpose and need in the final EIS. The purpose and need statement in the final EIS complied with Council on Environmental Quality (CEQ) regulations that provide that this statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed actions" for purposes of its environmental analysis. 40 C.F.R. § 1502.13 (2017).

[17] *See, e.g.*, October 29, 2015 Comments of NJCF at 9; February 11, 2016 Comments of Delaware Riverkeeper (citing attached affidavit of David Berman, Labyrinth Consulting Services);

addition, the New Jersey Division of Rate Counsel (NJRC) cites to filings made by local distribution companies (LDCs) before state regulatory agencies in Pennsylvania and New Jersey which show that the peak day requirements of the LDCs will be largely stable through 2020, and can be met through existing supply arrangements.[18]

21. Numerous commenters suggest that increased use of renewable resources to generate electricity and energy conservation could eliminate the need for the project. Several other commenters claim that there is no need to construct a new pipeline, as PennEast's shippers could source gas on existing pipelines or on other to be constructed, but already-authorized pipeline capacity.[19] NJRC states that the fact that utilization rates of several long-haul pipelines declined from 2007 to 2013 suggests that there is available firm capacity on these existing pipelines.[20]

October 27, 2015 Comments of the West Amwell Citizens Against the Pipeline.

[18] *See* September 12, 2016 Comments of NJCF (citing attached Affidavit of David E. Dismukes). On October 17, 2016, PennEast filed an answer to NJRC. On November 14, 2016, the New Jersey Division of Rate Council (NJRC) filed a Motion for Leave to Answer and Answer to PennEast. Although the Commission's Rules of Practice and Procedure generally do not permit answers to answers, we will accept NJRC's answers because it clarifies the concerns raised and provides information that has assisted in our decision making.

[19] *See, e.g.,* October 29, 2015 Comments of NJCF at 10.

[20] September 12, 2016 Comments of NJCF at 6-8 (citing Denny Young, Black & Veatch, Has Emerging Natural Gas Shale Production Affected Financial Performances of Interstate pipelines? (2013).

22. Multiple commenters assert that PennEast's claims that the project will provide cost-savings for end users, and provide increased reliability and supply diversity are unfounded or overstated.[21] The NJCF filed a report prepared by Skipping Stone, LLC, (Skipping Stone Report) which challenges the findings in the Concentric study filed by PennEast[22] that the PennEast Project would lower costs to consumers.[23] Among other things, the Skipping Stone Report concludes that local gas distribution companies already have more than enough capacity to meet peak winter demand, suggesting that increased demand by providers of gas-fired electric generation could be more cost effectively met by dual fuel switching or by purchasing gas from LNG facilities, and that the PennEast Project could increase, rather than decrease costs to consumers. Commenters also claim that the employment and economic benefits of the project

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[21] *See, e.g.*, November 14 Answer of NJRC, October 27, 2015 Comments of the West Amwell Citizens Against the Pipeline.

[22] In Exhibit F-1, Resource Report 5, PennEast submitted a study by Concentric Energy Advisors, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Serving Eastern Pennsylvania and New Jersey*) (Concentric Study) that finds that the project would provide increased access to low-cost natural gas in New Jersey and Pennsylvania that could save consumers nearly $900 million. Resource Report 5 also includes a study by Econsult Solutions & Drexel University, *Economic Impact Report and Analysis: PennEast Pipeline Project Economic Impact Analysis* (2015) (Econsult Study) that estimates the total (direct, indirect, and induced) jobs that would be supported during construction and operation of the project.

[23] *See* Report of Skipping Stone, LLC, attached to NJCF's December 1, 2016 Comments (Skipping Stone Report).

contained in the Econsult study cited by PennEast have been overstated, possibly significantly so.[24]

23. Several commenters allege that because a large portion of the project's capacity has been subscribed by affiliates of the pipeline, additional evidence of need must be presented as precedent agreements with pipeline affiliates may not be the result of an "arms-length negotiation," or reflect the competitive market.[25] Commenters further claim that the project is being cross-subsidized by the captive customers of the affiliated shippers, and may not be financially viable without these subsidies.[26]

24. The NJCF and Stony Brook claim that the NGA requires the Commission to evaluate the need for new pipeline infrastructure on a regional basis.[27] They state that the public interest cannot be effectively safeguarded through the approval of individual pipelines without coordinated planning to ensure that pipeline proposal fits within long-term, regional plans. Therefore, they assert that the Commission should implement a planning process for natural gas infrastructure development that is similar to the planning process for electric transmission.

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[24] *See* November 7, 2015 Comments of NJCF (citing attached Report of the Goodman Group, ltd.), September 8, 2016 Comments of the NJCF; September 8, 2016 Comments of Jeffrey R. Shafer.

[25] *Id.* at 9-10.

[26] *See* October 20, 2016 Comments of the Eastern Environmental Law Center, citing attached Report of Dr. Steve Isser, "*Natural Gas Pipeline Certification and Ratemaking.*

[27] NJCF Comments at 24-27.

25. Finally, a few commenters contend that the PennEast Project is not being proposed to benefit United States markets but to support the growing LNG export market.[28]

PennEast's Answers

26. PennEast filed several answers disputing commenters' claims that the project was not needed. PennEast maintains that that substantial need for the project has been demonstrated by precedent agreements for long-term firm service for approximately 90 percent of the project's capacity.[29] PennEast filed a study that responds to NJRC's assessment of the need for the project that explains that shippers contract for pipeline capacity for a variety of reasons beyond simply the need to be able to meet peak demands, including costs savings, supply security, and price stability.[30] PennEast asserts that the various studies by market experts that it filed in the proceeding provide ample market data and analysis supporting the market need for the project.

Commission Determination

27. The Certificate Policy Statement established a policy under which the Commission will allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require

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[28] *See, e.g.*, October 27, 2015 Comments of West Amwell Citizens Against the Pipeline at 15-17; February 11, 2016 Comments of Delaware Riverkeeper (attaching opinion of Labyrinth Consulting Services, Inc.).

[29] *See* PennEast's October 17, and December 1, 2016 Answers.

[30] PennEast's October 17 Answer (attaching report of Concentric Energy Advisors, Inc).

that a percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[31] These factors might include, but are not 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.[32] The Commission stated that it will consider all such evidence submitted by the applicant regarding need. Nonetheless, the Certificate Policy Statement made clear that, although precedent agreements are no longer required to be submitted, they are still significant evidence of demand for the project.[33] As the court stated in *Minisink Residents for Environmental Preservation & Safety v. FERC*, and again in *Myersville Citizens for a Rural Community, Inc., v. FERC,* nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers.[34] Moreover, it is current

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[31] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747. Prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. *See* Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,743. PennEast, at 90 percent subscribed, would have satisfied this prior, more stringent, requirement.

[32] *Id.* at 61,747.

[33] *Id.* at 61,748.

[34] Minisink Residents for Envtl. Pres. & Safety v. FERC, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014); see also Myersville Citizens for a Rural Cmty., Inc., v. FERC, 183 F.3d 1301, 1311 (D.C. Cir. 2015).

Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.[35]

28. We find that PennEast has sufficiently demonstrated that there is market demand for the project. PennEast has entered into long-term, firm precedent agreements with 12 shippers for 990,000 Dth/d of firm transportation service, approximately 90 percent of the project's capacity.[36] Further, Ordering Paragraph (C) of this order requires that PennEast file a written statement affirming that it has executed contracts for service at the levels provided for in their precedent agreements prior to commencing construction. PennEast has entered into precedent agreements for long-term, firm service with 12 shippers. Those shippers will provide gas to a variety of end users, including local distribution customers, electric generators, producers, and marketers and those shippers have determined, based on their assessment of the long-term needs of their particular customers and markets, that there is a market for the natural gas to be transported and the PennEast Project is the preferred means for delivering or receiving that gas. Given the substantial financial commitment required under these contracts by project

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[35] *Id.* at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

[36] *Constitution Pipeline Company, LLC*, 154 FERC ¶ 61,046, at P 21 (2016) ("Although the Certificate Policy Statement broadened the types of evidence certificate applicants may present to show the public benefits of a project, it did not compel an additional showing … [and] [n]o market study or other additional evidence is necessary where … market need is demonstrated by contracts for 100 percent of the project's capacity.").

shippers, we find that these contracts are the best evidence that the service to be provided by the project is needed in the markets to be served. We also find that end users will generally benefit from the project because it would develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by providing additional transportation capacity connecting sources of natural gas to markets in Pennsylvania and New Jersey.

29. We are unpersuaded by the studies submitted by commenters in their attempt to show that there is insufficient demand for the project and by their assertions that the Commission is required to examine the need for pipeline infrastructure on a regional basis. Commission policy is to examine the merits of individual projects and assess whether each project meets the specific need demonstrated. While the Certificate Policy Statement permits the applicant to show need in a variety of ways, it does not suggest that the Commission should examine a group of projects together and pick which project(s) best serve an estimated future regional demand. In support of their arguments regarding demand, commenters cite general forecasts for load growth in Pennsylvania and New Jersey or certain LDC supply forecast projections through 2020 made to state commissions.[37] However, projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Given this uncertainty associated

[37] NJRC Comments at 5.

with long-term demand projections, including those presented in the studies noted by commenters above, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand. The Commission evaluates individual projects based on the evidence of need presented in each proceeding. Under section 7(c) of the NGA, the Commission shall issue a certificate for any proposal found to be required by the public convenience and necessity.[38] Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service, the Commission places substantial reliance on those agreements to find that the project is needed.

30. Commenters also overlook the fact that shippers on PennEast's system have noted several reasons other than load growth for entering into precedent agreements with PennEast to source gas from the Marcellus Shale region.[39] Project shippers state they believe that the project will provide a reliable, flexible, and diverse supply of natural gas that will lead to increased price stability, and the opportunity to expand natural gas service in the future.[40] Based on

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[38] 15 U.S.C. § 717(f) (2012).

[39] *See* Exhibit F-1 of PennEast's application, Resource Report 1 - General Project Description, section 1.1 - Purpose and Need.

[40] *See* Motion to Intervene and Comments in Support of New Jersey Natural Gas Co. (filed October 28, 2015); Pivotal Utility Holdings, Inc., d/b/a Elizabethtown Gas (filed October 28, 2015); Consolidated Edison Company of New York, Inc. (filed October 29, 2015); Texas Eastern Transmission, LP (filed October 29,

the record before us, we find no reason to second guess the business decisions of these shippers that they need the service to which they have subscribed.

31. With respect to the ability of alternatives to meet the project's need, our environmental review considered the potential for renewable energy and energy conservation, and the availability of capacity on existing or proposed natural gas systems, to serve as alternatives to the project and concluded that they do not presently serve as practical alternatives to the project.[41] Specifically, the final EIS stated that renewable energy and energy efficiency measures to reduce the dependence on natural gas is not a comparable replacement for the transportation of natural gas to be provided by the project.[42] Moreover, the final EIS found that there is not sufficient available capacity on existing pipeline systems to transport all of the volumes contemplated to be transported by the PennEast Project to the range of delivery points proposed by PennEast, and that expansion of existing pipeline systems was not a feasible alternative.[43] The EIS also found that the proposed Atlantic Sunrise Project could not serve as a practical system alternative because there is customer demand for both projects (noting that approximately 100 percent of capacity of the Atlantic Sunrise Project, and 90 percent of the capacity of the PennEast Project

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2015); PSEG Energy Resources & Trade LLC (filed October 29, 2015); and South Jersey Gas (filed October 29, 2015).

[41] Final EIS at 3-1 - 3-8.

[42] *Id.* at 3-3.

[43] *Id.* at ES-16; 3-4 - 3-7.

has been contracted for), as well as the fact that the Atlantic Sunrise Project would not provide for the same delivery points for customers that have been identified for the PennEast Project.[44]

32. We also find that NJRC's assertion that the PennEast Project is not needed based on the fact that pipeline utilization on long-haul pipelines from the Gulf Coast to markets in the Northeast has declined in recent years is unavailing. Pipeline utilization rates reflect actual gas flows over the facilities but do not indicate whether there is available firm capacity on the pipelines. As indicated above, the EIS found that there was insufficient firm capacity available on existing pipeline systems to provide the service proposed by PennEast.

33. Moreover, the fact that 6 of the 12 shippers on the PennEast Project are affiliated with the project's sponsors does not require the Commission to look behind the precedent agreements to evaluate project need.[45] There is no evidence in the record of any

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[44] *Id.* at 3-7 - 3-8. The Atlantic Sunrise Project was authorized by Commission order issued February 3, 2017 (*see Transcontinental Gas Pipe Line Company, LLC,* 158 FERC ¶ 61,125 (2017)) and is currently under construction.

[45] *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 57 (2002) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project"); *Eastern Shore Natural Gas Co.*, 132 FERC ¶ 61,204, at P 31 (2010) ("the Commission gives equal weight to contacts with affiliates and non-affiliates." *See also* Certificate Policy Statement, 88 FERC at 61,748 (explaining that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize

impropriety or abuse in connection with any of the affiliate agreements. The mere fact that six of the shippers are affiliates of PennEast does not call into question their need for the new capacity or otherwise diminish the showing of market support. Indeed, three of the six affiliates, subscribing to 38 percent of the total project design capacity, are LDCs with service obligations toward their retail customers. The Commission has found it reasonable for LDCs seek additional sources of supply, and has emphasized its disinclination to second-guess reasoned business decisions by pipelines' customers evidenced by precedent agreements, as well as binding contracts.[46] Further, when considering applications for new certificates, the Commission's primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.[47] Here, no such allegations have been made, nor have we found that the project sponsors have engaged in any

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the project); *see also id*. at 61,744 (the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts) (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

[46] *See Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 201 (2002). *See also*, *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 42 (2006); *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, at 61,635 (1996), *order issuing certificate and denying reh'g*, 79 FERC ¶ 61,280 (1997), *order amending certificate and denying stay and reh'g*, 85 FERC ¶ 61,134 (1998), *aff'd Midcoast Interstate Transmission*, *Inc. v. FERC*, 198 F.3d 960 (D.C. Cir. 2000).

[47] *See* 18 C.F.R. § 284.7(b) (2017) (requiring transportation service to be provided on a non-discriminatory basis).

anticompetitive behavior. As discussed above, PennEast held an open season for capacity on the project and all potential shippers had the opportunity to contract for service. Moreover, PennEast's tariff, as discussed below, ensures that any future shipper will not be unduly discriminated against.

34. We also do not find merit in the commenters' assertion that the proposed project will be subsidized by the affiliated LDC shippers' captive customers. First, to the extent a ratepayer receives a beneficial service, paying for that service does not constitute a "subsidy."[48] Further, state regulatory commissions are responsible for approving any expenditures by state-regulated utilities. Moreover, PennEast is required to calculate its recourse rates based on the design capacity of the pipeline, thereby placing PennEast at risk for costs associated with any unsubscribed capacity.

35. Finally, allegations that the project is not needed because gas that is transported by it may be exported through an LNG terminal are not persuasive. There is no evidence in the record that indicates that the expansion capacity will be used to transport natural gas for export. A number of the project shippers are LDCs, which will locally distribute gas or use it to generate electricity. Further, even if there was evidence that some of the gas would be exported, the Commission does not have jurisdiction over the exportation or importation of natural gas. Such jurisdiction resides with the Secretary of Energy, who

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[48] *See* Certificate Policy Statement, 88 FERC ¶61,227 at 61,746.

must act on any applications for natural gas export or import authority.[49]

36. In conclusion, we find that the PennEast Project will provide reliable natural gas service to end use customers and the market. Precedent agreements signed by customers for approximately 90 percent of the project's capacity adequately demonstrate that the project is needed.

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[49] Section 3(a) of the NGA provides, in part, that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." 15 U.S.C. § 717b(a) (2012). In 1977, the Department of Energy Organization Act transferred the regulatory functions of section 3 of the NGA to the Secretary of Energy. 42 U.S.C. § 7151(b) (2012). Subsequently, the Secretary of Energy delegated to the Commission authority to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports." DOE Delegation Order No. 00-004.00A (effective May 16, 2006). The proposed facilities are not located at a potential site of exit for natural gas exports. Moreover, the Secretary of Energy has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity itself, or to consider whether the exportation or importation of natural gas is consistent with the public interest. *See Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at P 20 (2014) (*Corpus Christi*). *See also National Steel Corp.*, 45 FERC ¶ 61,100, at 61,332-61,333 (1988) (observing that DOE, "pursuant to its exclusive jurisdiction, has approved the importation with respect to every aspect of it except the point of importation" and that the "Commission's authority in this matter is limited to consideration of the place of importation, which necessarily includes the technical and environmental aspects of any related facilities").

3. Existing Pipelines and their Customers

37. PennEast's project is not intended to replace service on other pipelines, and no pipelines or their customers have filed adverse comments regarding PennEast's proposal. Thus, we find that PennEast's project will not adversely affect other pipelines or their captive customers.

4. Landowners and Communities

38. Regarding the project's impacts on landowners and communities, the project would impact approximately 1,588 acres of land during construction, and approximately 788.3 acres of land during operation. Approximately 44.5 miles, or 37 percent of the 120.2 mile-long pipeline route, will be located alongside existing rights-of-way.

39. While we are mindful that PennEast has been unable to reach easement agreements with a number of landowners, for purposes of our consideration under the Certificate Policy Statement, we find that PennEast has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities. The Commission encourages pipeline companies to engage with project stakeholders throughout the life of the project, and provide all stakeholders and potential impacted residents with informational materials, and hold community meeting to enable stakeholders to learn about the project, and educate project developers about local concerns.[50] PennEast participated in the

[50] Commission, Suggested Best Practices for Industry Outreach Programs to Stakeholders at 11-17 (2015).

pre-filing process, and held over 200 meetings with public officials, as well as 15 "informational sessions" for impacted landowners.[51] PennEast incorporated 70 of 101 identified route variations into its final proposed pipeline route for various reasons, including landowner requests, community impacts, and the avoidance of sensitive resources.[52] Accordingly, we find that PennEast's proposal has taken appropriate steps to minimize impacts on landowners and the surrounding communities.

5. Conclusion

40. Based on the benefits the project will provide to the shippers, the lack of adverse effects on existing customers, other pipelines and their captive customers, and effects on landowners and surrounding communities, we find, consistent with the Certificate Policy Statement and section 7 of the NGA, that the public convenience and necessity requires approval of PennEast's proposal, subject to the conditions discussed below.

B. Eminent Domain Authority

41. Several commenters assert that it is inappropriate for PennEast to obtain property for the project through eminent domain, as PennEast is a for-profit company, and has not shown that there is a genuine need for the project, or that the public it is intended to serve will benefit from it.[53]

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[51] PennEast Application at 5.

[52] Final EIS at 3-27 - 3-32.

[53] *See, e.g.,* Homeowners Against Land Taking-PennEast.

42. Under section 7 of the NGA, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, it is section 7(h) of the NGA that authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.[54] In constructing this provision, Congress made no distinction between for-profit and non-profit companies. Further, as discussed above, need for the project has been demonstrated by the existence of long-term precedent agreements for approximately 90 percent of the project's capacity. Just as the precedent agreements provide evidence of market demand/need, they are also evidence of the public benefits of the project.[55]

C. Blanket Certificates

43. PennEast requests a Part 284, Subpart G blanket transportation certificate to provide open-access transportation services to its shippers. Since a Part 284 blanket certificate is required for PennEast to offer these services, we will grant PennEast a Part 284, Subpart G blanket certificate, subject to the conditions imposed herein.

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[54] 15 U.S.C. § 717f(h) (2012).

[55] *See Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017); *see also Florida Southeast Connection, LLC*, 156 FERC ¶ 61,160, at P 5 (2016); *see also Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 111, at n.10 (D.C. Cir. 2014).

44. PennEast has also applied for a Part 157, Subpart F blanket construction certificate to automatically, or after prior notice, perform certain activities related to the construction, acquisition, abandonment, and replacement and operation of pipeline facilities. This blanket certificate includes requirements for landowner notification before construction may begin.

45. The Trustees of the Joseph D. Ceader Family Memorial Fund (Ceader Family) express concern over issuing PennEast a Part 157, Subpart F blanket certificate, alleging that doing so would grant PennEast "*carte blanche*" (emphasis included) authority to condemn land via eminent domain, and construct significant facilities that could have negative impacts on the environment and their property value, without "extensive environmental review" or findings of need. In addition, Hopewell Township Citizens Against the PennEast Pipeline, LLC, (Hopewell Township) oppose the issuance of a blanket certificate to PennEast as it would be a "'one size fits all solution'" that is inappropriate for such a project.

46. Neither the Ceader Family nor Hopewell Township) present any arguments why PennEast's specific request for a blanket certificate should be denied; rather they seem to take general issue with the Commission's blanket certificate program. Part 157, Subpart F of the Commission's regulations authorizes a certificate holder to engage in a limited number of routine activities under a blanket certificate, subject to certain reporting, notice, and

protest requirements.[56] The blanket certificate procedures are intended to increase flexibility and reduce regulatory and administrative burdens. Because the eligible activities permitted under a blanket certificate regulations can satisfy our environmental requirements and meet the blanket certificate cost limits, they will have minimal impacts, such that the close scrutiny involved in considering applications for case-specific certificate authorization is not necessary to ensure compatibility with the public convenience and necessity. For almost all eligible activities, a certificate holder seeking to engage in such activities must notify landowners prior to commencing the activity.[57] For activities that require prior notice, an opportunity to protest is afforded once notice of the certificate holder's request is issued to the public.[58] If a protest cannot be resolved, then the certificate holder may not perform the requested activity under a blanket certificate.[59]

47. Receipt of a Part 157 blanket certificate does confer the right of eminent domain authority under section 7(h) of the NGA.[60] However, Commission regulations require companies to include information

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[56] *See* 18 C.F.R. § 157.203 (2017).

[57] *See id.* § 157.203(d).

[58] *See id.* § 157.205.

[59] *See id.* § 157.205(f).

[60] *See* 15 U.S.C. § 717f(h) (2012); *also Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 314 (3rd Cir. 2014) (finding that the plain meaning of the Commission's Part 157 blanket certificate regulations grants the holder of a blanket certificate the right of eminent domain to obtain easements from landowners.).

on relevant eminent domain rules in notices to potentially affected landowners.[61] The compensation landowners receive for property rights is a matter of negotiation between the pipeline company and landowner, or is determined by a court in an eminent domain proceeding. In view of the above-noted blanket program procedures and protections, we expect the Ceader Family and Hopewell Township will have the opportunity to raise specific concerns and seek specific relief regarding PennEast's reliance on blanket authority in undertaking a future activity.

48. Because PennEast will become an interstate pipeline with the issuance of a certificate to construct and operate the proposed facilities, we will issue PennEast the requested blanket certificate authority under Parts 157 and 284 of the Commission's regulations.

D. Rates

1. Initial Rates

49. PennEast proposes an initial maximum reservation recourse charge of $16.0799 per Dth per month, and an initial usage charge of $0.0024 per Dth for firm transportation service under Rate Schedule FTS.[62] PennEast developed its proposed initial rates based on a total first-year cost of service of $224,270,492. The proposed cost-based rates reflect a Straight-Fixed Variable rate methodology. The FTS reservation rate is designed using the fixed costs of the

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[61] 18 C.F.R. § 157.203(d)(2)(v) (2017).

[62] Exhibit P, Schedule 2, of PennEast's Application.

project[63] and annual reservation design determinants of 13,905,896 Dth.[64] The FTS usage rate is derived using the variable costs of the project and billing determinants of 282,838,500 Dth, based on a 70 percent load factor of the project's annual design throughput.[65]

50. The proposed cost of service is based on a depreciation rate of 2.5 percent for pipeline facilities and 4 percent for compression and metering facilities.[66] PennEast proposes a capital structure of 40 percent debt and 60 percent equity. PennEast's proposed rates include a return on equity of 14 percent and a cost of debt of 6 percent. PennEast states that the overall rate of return of 10.8 percent is consistent with the range the Commission has found acceptable for new greenfield pipelines.[67] PennEast's proposed cost of service also includes a federal corporate income tax rate of 35 percent.[68]

51. PennEast proposes an initial charge of $0.5310 per Dth for interruptible service under Rate Schedule IT and for interruptible parking and lending service

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[63] *Id.* PennEast estimates the first year fixed costs of the project to be $223,604,821.

[64] *Id.* The annual reservation design determinants are based on the project's daily design capacity of 1,107,000 Dth plus 51,825 Dth of imputed IT billing determinants, as described further, times 12.

[65] The project's daily design capacity of 1,107,000 Dth, times 365, times 70 percent.

[66] Exhibits L, O and P of PennEast's Application.

[67] PennEast's Application at 32.

[68] *Id.*

under Rate Schedule PAL, based on a 100 percent load factor equivalent of its Rate Schedule FTS rates.[69]

52. Commission policy requires new pipelines to allocate costs to all services (including interruptible and short-term firm transportation) or credit revenues generated by these services to maximum rate shippers.[70] To comply with this policy, PennEast proposes to assign $10 million of costs to interruptible services, reflected as 51,825 Dth/d of imputed billing determinants for interruptible service. PennEast included the additional imputed billing determinants for interruptible service in the calculation of the FT reservation charge, which results in a lower FT reservation charge for firm shippers.

53. The Commission has reviewed PennEast's proposed initial rates, cost of service, use of the Straight Fixed-Variable method of cost classification, billing determinants, and the treatment of interruptible services and interruptible rate calculations, and finds they reasonably reflect current Commission policy, with the modifications and conditions imposed below.

Return on Equity, Capital Structure, Debt Costs, and Federal Corporate Tax Issues

54. In comments on the draft environmental impact statement, the NJRC argues that PennEast's requested 60 percent equity capitalization, 14 percent

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[69] Exhibit P, Schedule 2, of PennEast's Application.

[70] *Transcontinental Gas Pipe Line Corp.*, 78 FERC ¶ 61,057, at 61,209-61,210 (1997).

return on equity, and 6 percent debt costs are excessive.

Return on Equity and Capital Structure

55. NJRC asserts that a 14 percent return on equity is too high because PennEast faces little risk as a new market entrant constructing a new greenfield pipeline. In support, NJRC notes that PennEast's system capacity is 90 percent subscribed, and that the majority of that capacity is subscribed by local distribution companies that are "all but guaranteed to pay their bills."[71] In addition, NJRC claims that markets have changed significantly since the Commission began granting 14 percent returns nearly 20 years ago due to the increase in hydraulic fracturing and liquefied natural gas exports, and that current capital markets lack the risk to necessitate such high equity returns.[72]

56. NJRC also asserts that returns on equity have been trending down over the last few years as reflected in both pipeline rate cases and a number of Federal Power Act complaints regarding electric utilities, and points out that average approved rates of return over the last 5 years for LDCs has been less than 10 percent.[73] NJRC further points to a recent Commission order in which it claims the Commission "ordered a new pipeline" to use a 10.55 percent return

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[71] NJRC Comments at 11.

[72] *Id.* at 11-12 (citing *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149, at 61,552 (1997)).

[73] *Id.* at 9-13.

on equity,[74] and asserts that the Commission should not "reflexively" award PennEast a 14 percent return on equity "simply because earlier pipelines have received that return on equity."[75]

57. Alternatively, if the Commission approves a 14 percent return on equity, NJRC contends that recent Commission orders require the Commission to limit PennEast's capital structure to no more than 50 percent equity.[76]

Commission Determination

58. For new pipelines, the Commission has approved equity returns of up to 14 percent as long as the equity component of the capitalization is no more than 50 percent.[77] As pointed out by NJRC, PennEast has

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[74] *Id.* at 13 (citing *First ECA Midstream LLC*, 155 FERC ¶ 61,222, at P 23 (2016) (*First ECA Midstream*)).

[75] *Id.*

[76] *Id.* at 14 (citing *Ingleside Energy Center, LLC*, 112 FERC ¶ 61,101, at PP 32-33 (2005), *vacated on other grounds*, 136 FERC ¶ 61,114 (2011) (reducing a proposed 70% equity structure to 50%).

[77] S*ee, e.g., Florida Southeast Connection, LLC,* 154 FERC ¶ 61,080 (2016) (approving a 14 percent return on equity after requiring the capital structure be modified to include at least 50 percent debt), *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 27 (2008) (approving 14 percent return on equity based on 50 percent debt and 50 percent equity ratios); *Corpus Christi LNG, L.P.*, 111 FERC ¶ 61,081, at P 33 (2005) approving a 14 percent return on equity based on 50 percent debt and 50 percent equity ratios); *Gulfstream Natural Gas System*, L.L.C., 105 FERC ¶ 61,052, at n.26 (2003) and 91 FERC ¶ 61,119, at 61,463 (2000) (approving 14 percent return on equity based on 70 percent debt and 30 percent equity ratios); *Georgia Strait Crossing Pipeline LP*, 98 FERC ¶ 61,271, at 62,054 (2002) (approving 14 percent

proposed to establish its rates based only on a 40 percent debt capitalization. With such a debt ratio, everything else being equal, PennEast will not face the same level of financial risks as any of the new pipelines that have been previously granted a 14 percent return on equity. Imputing a capitalization containing a 60 percent equity ratio is more costly to ratepayers, since equity financing is typically more costly than debt financing, and also because the interest on indebtedness is tax deductible.[78] Accordingly, the Commission will approve PennEast's proposed 14 percent return on equity, but will require that it design its cost-based rates on a capital structure that includes at least 50 percent debt. As a result of the change to the capital structure required here, we will require PennEast to recalculate its rates in its compliance filing.

59. However, we reject NJRC's request that we reduce the proposed return of 14 percent, in addition to requiring a lower equity capitalization. In modifying PennEast's proposed capital structure, we are ensuring that consumers are protected and that PennEast's rates are on a level playing field with other new pipelines. The Commission's policy of approving equity returns of up to 14 percent with an equity capitalization of no more than 50 percent for new pipeline companies reflects the fact that greenfield pipelines undertaken by a new entrant in the market face higher business risks than existing pipelines proposing incremental expansion projects. For

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return on equity based on 70 percent debt and 30 percent equity ratios).

[78] *MarkWest Pioneer, L.L.C.,* 125 FERC ¶ 61,165, at P 27 (2008).

example, in contrast to an existing pipeline company, a new pipeline entrant does not have historical cost data on which to base its cost-of-service estimates. In addition, a new pipeline entrant is likely to face higher risks in securing financing than an existing pipeline.[79] Thus, approving PennEast's requested 14 percent return on equity in this instance is not merely "reflexive;" it is in response to the risk PennEast faces as a new market entrant, constructing a new greenfield pipeline system.

60. NJRC's reliance on the Commission's decision in *First ECA Midstream* is misplaced. That proceeding did not involve a greenfield project undertaken by a new entrant in the market. Rather, the applicant was an existing company proposing to operate its existing non-jurisdictional gathering system as an interstate pipeline. In approving a 10.55 percent return on equity, the Commission specifically found that the applicant had "more in common with existing pipelines than with the greenfield pipeline projects that have received returns of 14 percent."[80]

61. In addition, we find no support for NJRC's assertion that PennEast faces less risk than other new pipelines that have received returns of 14 percent due to its 90 percent subscription level. We have consistently approved equity returns of 14 percent for

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[79] *See, e.g., Rate Regulation of Certain Natural Gas Storage Facilities,* Order No. 678, 115 FERC ¶ 61,343, at P 127 (2006) ("As a going concern with existing customers and financial relationships, the risk associated with acquiring financing is lower for incremental expansions than the risk associated with a greenfield project undertaken by a new entrant in the market.").

[80] *First ECA Midstream* at P 23.

new pipelines that have firm contracts subscriptions equivalent or higher than PennEast's 90 percent subscription level.[81] Moreover, the returns approved for electric utilities and LDCs are not relevant because there is no showing that these companies face the same level of risk as faced by greenfield projects proposed by a new natural gas pipeline company.[82]

62. Further, as explained below, we are requiring PennEast to file a cost and revenue study at the end of its first three years of actual operation to justify its existing cost-based rates. The three-year study will provide an opportunity for the Commission and the public to review PennEast's original estimates, upon which its initial rates are based, to determine whether PennEast is over-recovering its cost of service with its approved initial rates, and whether the Commission should exercise its authority under section 5 of the NGA to establish just and reasonable rates. Alternatively, PennEast may elect to make a NGA section 4 filing to revise its initial rates. Should PennEast elect to make such a filing, the public would have an opportunity to review PennEast's proposed return on equity and other cost of service components

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[81] *See, e.g. Florida Southeast Connection, LLC.* 154 FERC ¶ 61,080 (2016). (approving a 14 percent return on equity where project was 94 percent subscribed); *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 (2014), *clarified* 149 FERC ¶ 61,101 (2014) (approving a 14 percent return on equity where project was fully subscribed).

[82] The Commission has previously concluded that distribution companies are less risky than a pipeline company. *See, e.g. Trailblazer Pipeline Co.,* 106 FERC ¶ 63,005, at P 94 (2004) (rejecting inclusion of LDCs in a proxy group because they face less risk than a pipeline company.).

at that time and would have an opportunity to raise issues relating to the rate of return, as well as all other cost components.

63. In section 7 certificate proceedings, the Commission reviews initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard, which is a less rigorous standard than the just and reasonable standard under NGA sections 4 and 5.[83] As

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[83] *Atlantic Refining Co. v. Public Serv. Comm'n of New York*, 360 U.S. 378, 390-391 (1959) (*Atlantic Refining*). In *Atlantic Refining,* the Court contrasted the Commission's authority under sections 4 and 5 of the NGA to approve changes to existing rates using existing facilities and its authority under section 7 to approve initial rates for new services and services using new facilities. The court recognized "the inordinate delay" can be associated with a full-evidentiary rate proceeding and concluded that was the reason why, unlike sections 4 and 5, section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certificates new facilities, expansion capacity, and/or services. *Id.* at 390. The Court stressed that in deciding under section 7(c) whether proposed new facilities or services are required by the public convenience and necessity, the Commission is required to "evaluate all factors bearing on the public interest," and an applicant's proposed initial rates are not "the only factor bearing on the public convenience and necessity." *Id.* at 391. Thus, as explained by the Court, "[t]he Congress, in §7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require when the Commission exercises authority under section 7," *id.*, and the Commission therefore has the discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-consuming ratemaking sections of the NGA. *Id.* at 392.

conditioned herein, we find that the approved initial rates will "hold the line" and "ensure that the consuming public may be protected," until just and reasonable rates can determined through the more thorough and time-consuming ratemaking sections of the NGA.[84]

Debt Costs

64. NJRC argues that PennEast has not supported its request for a 6 percent cost of debt. Referencing a Moody's report for Long-term Bond Yields in 2016, NJRC states that long-term utility bond rates have declined from January 2016 to July.[85] Thus, NJRC asserts that the Commission should impute a debt cost consistent with "actual debt market rates" and consistent with the Commission's approval of a debt cost of 3 percent.[86]

65. We find that PennEast's proposed 6 percent cost of debt is consistent with the cost of debt the Commission has approved for recent greenfield pipeline projects. The Commission has approved cost of debt percentages ranging from 4.8 to 9.3.[87] Moreover, as explained above, the initial rates established in *First ECA Midstream*, including

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[84] *Id.* at 392.

[85] NJRC Comments at 15.

[86] *First ECA Midstream LLC,* 115 FERC ¶ 61,222 at PP 22-23.

[87] *UGI Sunbury, LLC*, 155 FERC ¶ 61,115, at 20 (2016) (7 percent cost of debt); *Florida Southeast Connection, LLC,* 154 FERC ¶ 61,080 at n.141 (7 percent cost of debt); *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at P 43 (2009) (9.3 percent cost of debt); *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at P 40 (2014) (4.8 percent cost of debt).

approval of the applicant's proposed 3 percent cost of debt, are inapplicable to this proceeding. Therefore, we will approve PennEast's proposal to utilize a 6 percent cost of debt.

Federal Corporate Tax Issues

66. As noted above, PennEast used a federal corporate income tax rate of 35 percent in calculating its proposed cost of service. However, effective January 2018, the Tax Cuts and Jobs Act of 2017 changed several provisions of the federal tax code, including a reduction in the federal corporate income tax rate to 21 percent and allowing certain investments to receive bonus depreciation treatment. Because these changes impact PennEast's proposed cost of service and the resulting initial recourse rates, we direct PennEast to recalculate its initial recourse rates consistent with the new 2018 federal corporate tax law when it files actual tariff records. In order to ensure compliance with this directive, we also require PennEast to provide supporting work papers in electronic spreadsheet format, including formulas.

2. Negotiated Rates

67. PennEast states that it will provide service to the project's shippers under negotiated rate agreements pursuant to its negotiated rate authority in section 24 of its *pro forma* General Terms and Conditions (GT&C). PennEast must file either its negotiated rate agreements or tariff records setting forth the essential terms of the agreements in accordance with the Alternative Rate Policy Statement[88] and the

[88] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation*

Commission's negotiated rate policies.[89] PennEast must file the negotiated rate agreements or tariff records at least 30 days, but not more than 60 days, before the proposed effective date for such rates.[90]

3. Fuel

68. PennEast states it will use an in-kind fuel tracking mechanism to recover fuel and lost and unaccounted for gas (L&U) through a fuel retainage percentage (FRP). PennEast has proposed an initial FRP of 0.81 percent, calculated using engineering principles and manufacturer's specifications for the proposed compressor engines, and an L&U percentage of 0.00 percent. We will approve PennEast's proposed initial FRP rate of 0.81 percent, and its proposed initial L&U rate of 0.00 percent.

69. In addition, PennEast proposes a fuel tracker as part of its *pro forma* tariff. Section 20.3(a) of the GT&C of PennEast's *pro forma* tariff states:

> With each filing hereunder for a specified calendar period Pipeline shall calculate a FRP as the quotient obtained by dividing (a)

Services of Natural Gas Pipelines, 74 FERC ¶ 61,076 (1996); *clarification granted*, 74 FERC ¶ 61,194 (1996), *order on reh'g*, 75 FERC ¶ 61,024 (1996).

[89] *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006), *reh'g dismissed and clarification denied*, 114 FERC ¶ 61,304 (2006).

[90] Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement.

> the projected annual quantities of Fuel for the upcoming calendar period, plus the amount of any under-collection of Gas in-kind pursuant to the prior period FRP or less the amount of any over-collection of Gas in-kind pursuant to the prior period FRP and (b) the projected annual throughput for the upcoming calendar period.

70. Section 154.403(c)(10) of the Commission's regulations[91] states that "[a] step-by step explanation of the methodology used to reflect changes in the fuel reimbursement percentage including the allocation and classification of the fuel use and unaccounted-for natural gas" must be included in the GT&C. PennEast is directed to revise section 20 of the GT&C to include an explanation of how the projected annual quantities of fuel and projected annual throughput are determined.

71. In addition, PennEast's proposed language in section 20.3(b) of the GT&C explains that it will estimate the L&U quantities, but does not explain the methodology PennEast will use to calculate those estimates. Therefore, when PennEast files actual tariff records in accordance with the ordering paragraphs herein, it is directed to revise section 20 of the GT&C to include an explanation of how PennEast will calculate the estimates for the L&U quantities required for the upcoming calendar period.

4. Three-Year Filing Requirement

72. Consistent with Commission precedent, PennEast is required to file a cost and revenue study

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[91] 18 C.F.R. § 154.403(c)(10) (2017).

no later than three months after the end of its first three years of actual operation to justify its existing cost-based firm and interruptible recourse rates.[92] In its filing, the projected units of service should be no lower than those upon which PennEast's approved initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the Commission's regulations to update cost of service data.[93] PennEast's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, PennEast is advised to include as part of the eFiling description, a reference to Docket No. CP15-558-000 and the cost and revenue study.[94] After reviewing the data, the Commission will determine whether to exercise its authority under NGA section 5 to investigate whether the rates remain just and reasonable. In the alternative, in lieu of this filing, PennEast may make a NGA general section 4 rate filing to propose alternative rates to be effective no later than three years after the in-service date for its proposed facilities.

5. Tariff

73. As part of its application, PennEast filed a *pro forma* open-access tariff for the Commission's approval. PennEast proposed tariff generally

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[92] *Bison Pipeline,* LLC, 131 FERC ¶ 61,013, at P 29 (2010); *Ruby Pipeline, LLC,* 128 FERC ¶ 61,224, at P 57 (2009) (Bison); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 34 (2008).

[93] 18 C.F.R. § 154.313 (2017).

[94] *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 17 (2010).

conforms to the Commission's requirements. We will approve the tariff, as conditioned below.

Rate Schedule ITS

74. Section 2.5 of Rate Schedule ITS provides that the pipeline shall not be required to provide transportation service if the quantities tendered are so small as to cause operational difficulties, such as with measurement. Under sections 284.7(b) and 284.9(b) of the Commission's regulations, a transporter may not discriminate as to the level of volumes transported.[95] In previous determinations, however, the Commission has allowed a pipeline to include a minimum volume restriction in its tariff when the pipeline was able to show that the transportation of quantities below the threshold were too small to be metered, and where the company has provided operational and cost justification for the restriction.[96] For example, the Commission accepted a proposal for a 100 Dth/d threshold for connections of new receipt and delivery points, where the applicant demonstrated that serving

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[95] Section 284.7(b)(1) provides "[a]n interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under Subpart B, C, or G must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or *volumes of natural gas to be transported*, customer classification, or undue discrimination or preference of any kind." (emphasis added). Section 284.9(b) applies these provisions regarding non-discriminatory access to interruptible service.

[96] *See, e.g., Gulf South Pipeline Co., LP,* 103 FERC ¶ 61,105, at P 13, n.7 (2003) (*Gulf South*); *Trailblazer Pipeline Co.*, 39 FERC ¶ 61,103, at 61,336 (1987); *Texas Eastern Transmission Corp.*, 37 FERC ¶ 61,260, at 61,680-61,681 (1986).

small volume points presented operational challenges because these receipt points were difficult to measure, increasing the potential for lost system gas, and that the cost of operating these delivery points was greater than the maximum rate for service. In addition, the applicant demonstrated that the costs associated with operating small points would be greater than the maximum rate would cover.[97]

75. Here, PennEast has neither provided justification nor has it provided a proposed threshold for minimum volumes to be transported. Therefore, the Commission requires PennEast to eliminate the proposed minimum volume condition or, in the alternative, state what that minimum volume is and provide the justification to support it.

Rate Schedule PAL

76. Section 8.6 of Rate Schedule PAL provides that parked quantities of gas shall become the property of PennEast when: 1) a customer fails to comply with notifications that receipts of parked quantities are to be suspended or reduced; 2) a customer fails to comply with notifications that customer's parked quantities must be removed; or 3) a PAL account reflects a balance at the termination date of a PAL Service Agreement. The Commission has found that a pipeline's confiscation of gas is an operationally justified deterrent to shipper behavior that could threaten the system or degrade service to firm shippers. However, the Commission requires that the value of such confiscated gas be credited to existing

[97] *Gulf South,* 103 FERC ¶ 61,105, at PP 9-13.

customers.[98] PennEast has not proposed a crediting mechanism in its tariff. Therefore, we direct PennEast to revise its tariff to include a mechanism to credit the value of any confiscated gas, net of costs, to non-offending shippers.

GT&C Section 5: Service Nomination Procedures

77. PennEast proposes at section 5.1(c) of the GT&C:

> Pipeline shall have the right to refuse to receive or deliver any Gas not timely and properly nominated. Pipeline shall not be liable to Customer or any other person as a direct or indirect consequence of such refusal and Customer shall indemnify Pipeline from and against any and all losses, damages, expenses, claims, suits, actions and proceedings whatsoever threatened, incurred or initiated as a result of such refusal unless such refusal was due to Pipeline's gross negligence, undue discrimination or willful misconduct.

78. The Commission has found that a simple negligence standard is appropriate for the liability and indemnification provisions of open-access tariffs, as this standard prohibits pipelines from limiting their liability in a way that would immunize them from direct damages resulting from simple negligence and "gives service providers a powerful incentive to operate their systems in a reasonable and prudent

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[98] *AES Sparrows Point LNG, LLC and Mid-Atlantic Express*, LLC, 126 FERC ¶ 61,019, at P 42 (2009), (citing *Colorado Interstate Gas Co.*, 122 FERC ¶ 61,256, at P 102 (2008)).

manner."[99] The Commission, however, has allowed pipelines to limit their liability for simple negligence to direct damages, so that they are only liable for indirect, consequential, incidental or punitive damages where there is gross negligence, willful misconduct, or bad faith.[100]

79. PennEast's proposed liability standard is inconsistent with Commission policy because it immunizes the pipeline from direct damages resulting from simple negligence. Therefore, when it submits its actual tariff filing, the Commission will require PennEast to revise its liability standard proposed in section 5.1(c) of the GT&C so as to not exclude it from liability for direct damages arising from its own simple negligence. Similarly, PennEast must revise sections 8.6 (Curtailment), 12.5 (Quality of Gas), and 37 (Nonrecourse Obligation of Pipeline's Members and Operator) of the GT&C, which also immunize the pipeline from direct damages resulting from simple negligence.

GT&C Section 6: Service Scheduling

80. Section 6.1 of PennEast's GT&C lists the priority order in which quantities nominated for transportation will be scheduled. Section 6.1(c) states:

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[99] *See, e.g.*, *Trailblazer Pipeline Co. LLC*, 142 FERC ¶ 61,007, at P 8 (2012); *CenterPoint Energy Gas Transmission Co., LLC*, 139 FERC ¶ 61,064, at P 19 (2012); *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 58 (2009)).

[100] *See, e.g.*, *Bison*, 131 FERC ¶ 61,013, at P 37; *El Paso*, 130 FERC ¶ 61,096, at P 4-5; *ANR Pipeline Co.*, 100 FERC ¶ 61,132, at 61,505 (2002).

> Pro rata among firm service Customers utilizing a Secondary Point or Points with at least one of such points being outside the Contract Path *or the nominated quantity being in excess of the firm contractual entitlement(s) for any pipeline segment as described in subsection (g) below*. (emphasis added)[101]

The emphasized language above appears to address authorized overrun quantities. However, section 6.1(d) of the GT&C provides that authorized overrun quantities will have the same scheduling priority as interruptible services ("All interruptible service Customers, excluding park and loan service Customers, and Customers nominating authorized overrun quantities in sequence starting with the Customer paying the highest rate.").[102] Commission policy requires that nominations for authorized overrun and interruptible services should have the same scheduling priority.[103] Thus, we find that the

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[101] Section 6.1(g) of the GT&C provides, in part, "[i]n addition, for any movement of Gas that traverses a segment(s) in which the total nominated quantity for that contract exceeds the firm contractual entitlement, the quantity in excess of the contractual entitlement shall be deemed to be outside of the Customer's Contract Path."

[102] Section 6 of Rate Schedule FTS also provides that authorized daily overrun quantities will be transported on an interruptible basis.

[103] *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at P 66 (2014); *Central New York Oil and Gas Co., LLC*, 114 FERC ¶ 61,105, at P 9 (2006) (citing *CNG Transmission Corp.*, 81 FERC ¶ 61,346, at 62,592 (1997) and *Tennessee Gas Pipeline Co.*, 62 FERC ¶ 61,250, at 62,676 (1993)).

emphasized language in section 6.1 (c) of the GT&C that applies to authorized overrun quantities is inconsistent with Commission policy, as well as other provisions of PennEast's tariff. We direct PennEast to delete this provision.

GT&C Section 8: Curtailment

81. PennEast proposes at section 8.1 of the GT&C:

> Pipeline shall have the right to curtail or discontinue transportation services, in whole or in part, on all or a portion of its system at any time for reasons of Force Majeure *or when, in Pipeline's sole judgment, capacity or operating conditions so require or it is desirable or necessary to make modifications, repairs or operating changes to its system.* (emphasis added.)

82. The Commission has held that pipelines should plan routine repair, maintenance, and improvements through the scheduling process, and should not curtail confirmed scheduling nominations in order to perform such work.[104] The Commission has found that pipelines may only "curtail" service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled.[105] The term "modifications, repairs or operating changes" is not limited to an

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[104] *CenterPoint Energy Gas Transmission Co.*, LLC, 144 FERC ¶ 61,195, at P 75 (*CenterPoint*).

[105] *Id.*; *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at P 68 (2011); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 52 (2008).

emergency situation or an unexpected loss of capacity, and the pipeline should take outages required for routine repair, maintenance, and operating changes into account when it is scheduling service, rather than curtailing service after it is scheduled. Therefore, PennEast is required to revise the emphasized phrase to comply with Commission policy.

83. In sections 8.2 (a) through (e) of the GT&C, PennEast provides the order in which it would curtail service. Sections 8.2 (d) and (e) of the GT&C set forth the priorities for curtailing firm service and provide:

> (d) Fourth, Pipeline shall curtail scheduled service to those Customers receiving service under the firm rate schedule at a Secondary Point or Points, with at least one of such points being outside the Contract Path, if the operating condition that necessitates the curtailment affects a location outside of the Customers' Contract Path, on a pro rata basis among affected Customers;
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> (e) Fifth, Pipeline shall curtail scheduled service to those Customers receiving service under the firm rate schedule at Primary Points of Receipt and Primary Points of Delivery and at a Secondary Point or Points, which points are wholly within the Contract Path pro rata on the basis of scheduled quantities.

84. The Commission rejects PennEast's proposal as it relates to curtailing firm transportation services. Commission policy requires that once firm service is scheduled, all scheduled firm transactions, whether primary or secondary, must be curtailed on a *pro rata*

basis.[106] PennEast's proposed tariff is inconsistent with this policy because it would curtail certain types of scheduled firm transportation before other scheduled firm transportation. PennEast is required, in its tariff compliance filing, to revise sections 8.2 (d) and (e) to provide that scheduled firm volumes may only be curtailed on a *pro rata* basis.

85. Section 8.4 of PennEast's GT&C states:

> All volumes received and/or taken in violation of Pipeline's curtailment or interruption orders shall constitute unauthorized receipts or deliveries of Gas for which a penalty charge equal to the higher of $50.00 per Dth and 150% times the Platts *Gas Daily* "Daily Price Survey" High Common price for "Transco, zone 6 non- N.Y. North" per Dth shall be assessed, in addition to any other applicable rate, charge *or penalty*. (emphasis added).

86. In addition to the above penalty, PennEast's tariff contains a "Usage Rate outside Tolerances"[107] penalty provision that may result in penalizing the same infraction twice. Commission policy prohibits multiple

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[106] *Algonquin Gas Transmission Co.*, 104 FERC ¶ 61,118, at P 34 (2003); Order No. 636-B, 61 FERC ¶ 61,272, at 62,013 (1992).

[107] Sections 3.2.B(2) of Rate Schedule FTS and 3.2A(2) of Rate Schedule ITS provide, in part: "The Usage Charge outside Tolerances as set forth on the Statement of Rates for Rate Schedule FTS or the Statement(s) of Negotiated Rates, as applicable, multiplied by that portion of the total quantity of Gas deliveries on any Day pursuant to the effective Service Agreement, except for authorized overrun quantities, which is in excess of the lesser of 110% of scheduled service levels for such Day or 102% of MDQ."

penalties for the same infraction.[108] Therefore, PennEast is directed to revise its tariff to be consistent with Commission policy.[109]

GT&C Section 26: Force Majeure

87. PennEast's proposed definition of force majeure events in section 26.1 of the GT&C includes "compliance with any court order, law, regulation or ordinance promulgated by any governmental authority having jurisdiction, whether federal, Indian, state or local, civil or military, the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party)." PennEast's proposed tariff language conflicts with Commission policy because it can be interpreted to include regular, periodic maintenance activities required to comply with government actions as *force majeure* events. The Commission has clarified the basic distinction as to whether outages resulting from governmental actions are *force majeure* or non-*force majeure* events.[110] The Commission found that outages necessitated by compliance with government standards concerning the regular, periodic

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[108] *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,084, at P 201 (2002).

[109] *E.g. MoGas Pipeline LLC,* 151 FERC ¶ 61,201, at PP 22-23 (2015) (approving tariff language that permitted the imposition of the greater penalty).

[110] *Kinder Morgan Louisiana Pipeline LLC,* 154 FERC ¶ 61,145, at P 30 (2016); *DBM Pipeline, LLC,* 152 FERC ¶ 62,056, at 64,159 (2015); *TransColorado Gas Transmission Co., LLC,* 144 FERC ¶ 61,175, at PP 35-43 (2013); *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at PP 28-47 (2012), *order on reh'g*, 144 FERC ¶ 61,215, at PP 31-34 (2013).

maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including the Pipeline and Hazardous Materials Safety Administration's (PHMSA) integrity management regulations, are non-*force majeure* events requiring full reservation charge credits. Outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are *force majeure* events requiring only partial crediting.[111]

88. In addition, PennEast's proposed definition of *force majeure* events in section 26.1 includes "any other cause, whether of the kind herein enumerated, or otherwise, *not within the control of the party claiming suspension* and which by the exercise of due diligence such party is unable to prevent or overcome." (emphasis added). The Commission has defined *force majeure* outages as events that are both "unexpected and uncontrollable."[112] The Commission directs PennEast to revise section 26.1 of the GT&C to comply with Commission Policy, as discussed above.

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[111] *See Algonquin Gas Transmission LLC*, 153 FERC ¶ 61,038, at P 104 (2015).

[112] *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *aff'g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005). *See also Kinder Morgan Louisiana Pipeline LLC,* 154 FERC ¶ 61,145, at P 29 (2016); *Algonquin Gas Transmission LLC*, 153 FERC ¶ 61,038 at P 103.

GT&C Section 32: North American Energy Standards Board (NAESB)

89. PennEast adopted the Business Practices and Electronic Communications Standards of NAESB Wholesale Gas Quadrant's (WGQ) Version 2.0. PennEast has identified those standards incorporated by reference in GT&C Section 32. Those standards not incorporated by reference by PennEast have also been identified, along with the tariff record in which they are located. In the event an updated version of the NAESB WGQ standards is adopted by the Commission prior to PennEast's in-service date, the Commission directs PennEast to file revised tariff records, 30 to 60 days prior to its in-service date, consistent with the then current version.

GT&C Section 39: Reservation Charge Crediting

90. Sections 39.1 and 39.2 of the GT&C provide that the pipeline will provide full reservation charge credits to shippers during non-force majeure events and partial reservation credits during force majeure events, respectively, except as provided for in section 39.3.

91. Section 39.3 exempts PennEast from providing reservation charge credits in a number of circumstances including:

> (xi) if Customer is provided service pursuant to a negotiated rate agreement executed after November 1, 2017, or any successor negotiated rate agreement thereto, and such agreement does not explicitly require reservation charge credits."

92. The Commission has found that it is unreasonable for a pipeline to apply a proposed new contractual prerequisite for negotiated rate contracts to qualify for reservation charge credits to agreements entered into before the effective date of the proposed tariff language.[113] Although section 39.3 (xi) of the GT&C provides such protection to the agreements prior to the filing of PennEast's application, this provision does not address any agreements that may be reached with shippers before the effective date of the tariff. Acceptance of PennEast's proposal with respect to existing negotiated rate agreements would unreasonably deny reservation charge credits to shippers which may have been unaware of PennEast's future contracting requirement. Therefore, the Commission directs PennEast to revise this language to apply only to negotiated rate contracts entered into after the effective date of that tariff provision.

E. Environmental Analysis

1. Pre-filing and Application Review

93. Commission staff began a pre-filing environmental review of the project on October 10, 2014. On January 13, 2015, Commission staff issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned PennEast Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI). This notice was published in the *Federal Register* on February 3,

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[113] *Florida Southeast Connection, LLC, et al.*, 154 FERC ¶ 61,080, at P 176 (2016); *Iroquois Gas Transmission Sys., LP*, 145 FERC ¶ 61,233, at PP 67-71 (2013).

2015,[114] and sent to more than 4,300 interested entities, including representatives of federal, state, and local agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners as defined in the Commission's regulations (i.e., landowners crossed or adjacent to pipeline facilities or within 0.5 mile of a compressor station); concerned citizens; and local libraries and newspapers. The NOI briefly described the project and the environmental impact statement (EIS) process, provided a preliminary list of issues identified by staff, invited written comments on the environmental issues that should be addressed in the EIS, and listed the date and location of five public scoping meetings.[115] On January 28, 2015, Commission staff issued a *Notice of Extension of Comment Period and Clarification of Location of Public Comment Meetings for the PennEast Pipeline Project*, which extended the comment period until February 27, 2015.[116] At the public scoping meetings, a total of 250 speakers provided verbal comments about the project. In addition, more than 6,000 letters were filed providing comments about the project.[117]

94. To satisfy the requirements of the National Environmental Policy Act (NEPA), Commission staff

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[114] 80 Fed. Reg. 5744 (2015).

[115] Commission staff held the public scoping meetings between February 10 and 12, 2015 and February 25 and 26, 2015 in Bethlehem, Jim Thorpe, and Wilkes-Barre, Pennsylvania; and Trenton and Hampton, New Jersey.

[116] 80 Fed Reg. 4557 (2015).

[117] Table 1.4-1 of the final EIS provides a detailed and comprehensive list of issues raised during scoping.

prepared a draft EIS for the project. The U.S. Army Corps of Engineers (USACE), U.S. Environmental Protection Agency (EPA), and the U.S. Department of Agriculture's Natural Resources Conservation Service participated in the NEPA review as cooperating agencies. Commission staff issued the draft EIS for the project on July 22, 2016, which addressed the issues raised during the scoping period and included staff's independent analysis of the environmental impacts of the project.

95. Notice of the draft EIS was published in the *Federal Register* on July 29, 2016, establishing a 45-day public comment period that ended on September 12, 2016.[118] The draft EIS was mailed to over 4,280 stakeholders, which included the entities that were mailed the NOI and additional interested entities. Commission staff held six public comment sessions between August 15 and 17, 2016, to receive comments on the draft EIS.[119] Approximately 670 individuals attended these public sessions, including 420 who provided verbal comments. A total of 4,169 comment letters were filed in response to the draft EIS before the comment period closed on September 12, 2016. The transcript of the public comment sessions and all written comments on the draft EIS are part of the public record for the project.

96. On September 23, 2016, PennEast filed 33 route modifications, totaling 21.3 miles in length, to address

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[118] 82 Fed. Reg. 49,971 (2017).

[119] Commission staff held draft EIS comment sessions in Bethlehem, Pennsylvania; Jim Thorpe, Pennsylvania; Clinton, New Jersey; Lahaska, Pennsylvania; Wilkes-Barre, Pennsylvania; and Trenton, New Jersey.

environmental and engineering concerns. On November 4, 2016, Commission staff issued a letter to newly affected landowners describing the route modifications and inviting comments on the route modifications, and opening an additional 30-day comment period, which concluded on December 5, 2016. Comments received after the close of the comment periods (between September 12 and November 4, 2016, and after December 5, 2016) continued to be posted to the Commission's eLibrary website and were reviewed by staff for substantive concerns.

97. The final EIS for the project was issued on April 7, 2017, and a public notice of the availability of the final EIS was published in the *Federal Register* on April 14, 2017.[120] The final EIS addresses all substantive comments received on the draft EIS, the November 4, 2016 letter, and comments received prior to December 31, 2016.[121] The final EIS was mailed to the same parties as the draft EIS, as well as additional parties.[122] The final EIS addresses geology; soils; water resources; wetlands; aquatic resources; vegetation and wildlife; threatened, endangered, and special status species; land use, recreation, and visual resources; socioeconomics; cultural resources; air

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[120] 82 Fed. Reg. 17,988 (2017).

[121] All comments received prior to the end of the comment period and in response to the November 4, 2016 letter that included additional substantive concerns are included in the comment responses contained in Appendix M of the final EIS (Volume II). Any new issues raised after December 31, 2016, which were not previously identified, are addressed in this order.

[122] The distribution list is provided in Appendix A of the final EIS.

quality and noise; reliability and safety; cumulative impacts; and alternatives. The major environmental issues raised during this proceeding, and comments from stakeholders not addressed in the final EIS, as well as substantive comments on the final EIS, are discussed below.

98. The final EIS concludes that while the project will result in some adverse environmental impacts, these impacts will be reduced to less than significant levels with the implementation of PennEast's proposed impact avoidance, minimization, and mitigation measures, together with staff's recommended environmental conditions, now adopted, as modified, as conditions in the attached Appendix A of this order. While, the Commission recognizes that there are incomplete surveys due to lack of access to landowner property, the conclusions in the final EIS, and affirmed by the Commission here, were based on the information contained in the record, including PennEast's application and supplements, as well as information developed through Commission staff's data requests, field investigations, the scoping process, literature research, alternatives analysis, and contacts with federal, state, and local agencies, as well as with individual members of the public. As part of its environmental review, staff developed specific mitigation measures that we find will adequately and reasonably reduce the environmental impacts resulting from the construction and operation of the PennEast Project. We believe that the substantial environmental record and mitigation measures sufficiently support reaching a decision on this project.

99. Once a certificate is issued, the Commission's environmental staff is charged with ensuring that the project will be constructed in compliance with the Commission's order, including the conclusions regarding the project's expected impacts upon the environment. Recognizing that there are necessary field surveys that are outstanding on sections of the proposed route where survey access was denied, we are imposing several environmental conditions that require filing of additional environmental information for review and approval once survey access is obtained. This includes items such as site-specific plans, survey results, documentation of consultations with agencies, and additional mitigation measures. The additional information ensures the EIS's analyses and conclusions are verified based on the best available data, enabling us to improve and finalize certain mitigation plans and ensure stakeholder concerns are addressed. The information will also provide Commission staff with the site-specific details necessary to appropriately evaluate compliance during the construction process. In addition, Environmental Condition 10 requires that before construction can commence, PennEast must file documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

100. Further, the final EIS has adequately identified, as required by section 1502.22 of the Council on Environmental Quality (CEQ) regulations, where information is lacking.[123] CEQ regulations recognize that some information simply may not be

[123] 40 C.F.R. § 1502.22 (2017).

available.[124] Moreover, the final EIS contains mitigation plans that provide for using the correct mitigation measures, sediment control measures, and restoration requirements based on the actual site conditions experienced during construction. The conditions in the order will ensure that all environmental resources will be adequately protected.

101. The Commission needs to consider and study environmental issues before approving a project, but it does not require all environmental concerns to be definitively resolved before a project's approval is issued. NEPA does not require every study or aspect of an analysis to be completed before an agency can issue a final EIS, and the courts have held that agencies do not need perfect information before it takes any action.[125] In *U.S. Department of the Interior v. FERC*, the court held that "[v]irtually every decision must be made under some uncertainty; the question is whether the Commission's response, given uncertainty, is supported by substantial evidence and is not arbitrary and capricious."[126] Similarly, in *State of Alaska v. Andrus*, the court stated that "[i]f we were to impose a requirement that an impact statement can never be prepared until all relevant environmental

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[124] *Id.*

[125] *U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992); *State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in part sub nom. W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922, 99 S. Ct. 303, 58 L. Ed. 2d 315 (1978) ("NEPA cannot be 'read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken'").

[126] *U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 546.

effects were known, it is doubtful that any project could ever be initiated."[127] There must, however, be sufficient information in the record to enable the Commission to take the requisite "hard look" required by NEPA. As indicated above, we believe the record in this proceeding meets that requirement.[128]

2. The EIS Process and Procedural Concerns

102. Commenters requested public meetings be held in areas affected by PennEast's minor route modifications, as identified in PennEast's September 23, 2016 Supplemental Information filing. Commission staff mailed notice on November 4, 2016, to all landowners potentially affected by the modifications, government officials, and other stakeholders. The notice described the proposed route changes, invited participation, and opened a special 30-day limited scoping period. Over 400 comments were filed in response to the notice, which are addressed in the final EIS. Commission staff determined that additional public meetings were not required and that written comments received from the public were sufficient to identify potential concerns associated with the minor route changes.

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[127] *State of Alaska v. Andrus*, 580 F.2d 465, 473.

[128] *See also Independence Pipeline Co.*, 91 FERC ¶ 61,102, at 61,352 (2000) (finding that despite landowners denying survey access, the final EIS was sufficiently detailed to inform the Commission and the public for purposes of NEPA); *Southern Natural Gas Co.,* 85 FERC ¶ 61,134, at 61,512 (1998) (finding paper record sufficient even though landowners denied pipeline survey access).

103. In addition, several commenters asserted that the comment period for the draft EIS was not sufficient, and should have been extended in order to allow parties additional time to study the draft EIS and provide comment. Commission staff continued to accept and review comments after the close of the comment period for the draft EIS. All filings are available on the docket for public review and inspection. For these reasons, we concur that an extended comment period was not needed.

3. Major Environmental Issues and Comments on the Final EIS

a. Geology

104. Several commenters express concern regarding construction near active quarries and in karst terrain. Comments were also filed regarding the potential for naturally occurring arsenic to mobilize and contaminate groundwater, drinking water wells, and surface waters. Commenters also express concerns for landslide risks, as well as the potential for soil compaction.

105. After the close of the draft EIS comment period, United States Representative Matt Cartwright of Pennsylvania forwarded a letter from his constituent, Phyllis Jacewicz, particularly for residences on East Saylor Avenue in Plains Township, Luzerne County, Pennsylvania, citing concerns about construction of the project near an active quarry. As stated in the final EIS, PennEast has adjusted the pipeline route through Luzerne County to avoid future expansion of the quarry, PennEast also evaluated average quarry blasting vibration, concluding there would be no effect

from these activities on the pipeline.[129] Additionally, PennEast provided documentation regarding the expansion of the Trap Rock Quarry located at milepost (MP) 99 in Delaware Township, New Jersey, and provided a blasting assessment based on site-specific data (geology, distance and wave propagation) and a scaling relationship to solve for blast-induced effects (peak particle velocity) on the pipeline. Based on the blasting analysis, the EIS concludes that no impacts on the pipeline from quarry blasting are anticipated.[130] In response to comments received regarding the accuracy of the explosive weights for the blasting analysis, Environmental Condition 14 requires PennEast to file an updated report verifying the explosive weights used by the quarry operator; incorporate this information this into the final design of the project; and to seek concurrence from Trap Rock Quarry regarding the input parameters to the blasting analysis. The updated report will be reviewed by Commission staff prior to construction to confirm the conclusions in the EIS remain valid.

106. In comments on the final EIS, Susan D. Meacham discusses the potential risks of construction in karst areas and the potential risk for scouring where the pipeline will cross the floodplain along the New Jersey side of the proposed horizontal directional drill (HDD) crossing of the Delaware River. The final EIS determines that there are approximately 13.8 miles of the project, in Carbon, Northampton, and Bucks Counties, Pennsylvania, and Hunterdon

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[129] *See* final EIS at 4-5.

[130] *Id.* at 4-5.

County, New Jersey, where a karst hazard may be present; approximately 50 percent of the karst survey has been completed.[131] As discussed in the EIS, PennEast developed a project-specific Karst Mitigation Plan, as well as a specific HDD plan for drilling through karst terrain. The project-specific Karst Mitigation Plan, which provides guidance to mitigate karst-related concerns during construction, was developed using maps of known or suspected karst areas, and field investigations completed to-date. The HDD Drilling Plan for Karst Terrain establishes operational procedures and responsibilities for the prevention, containment, and clean-up of inadvertent returns of drilling muds and losses associated with HDD through karst areas. Further, we note that PennEast continues to complete additional geophysical investigations as landowner access becomes available, and will incorporate the findings into an updated Karst Mitigation Plan. The final updated plan will enable PennEast to finalize its HDD design based on a detailed understanding of the subsurface conditions, and more precisely identify locations where the approved mitigation procedures will be implemented. Accordingly, Environmental Condition 16 requires PennEast to file for approval a final Karst Mitigation Plan prior to construction, which includes the results of all outstanding field investigations, as well as requirements of the Pennsylvania Department of Environmental Protection (PADEP), New Jersey Department of Environmental Protection (NJDEP) and local planning commissions. Based on staff's review of the

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[131] *Id.* at 4-10.

Karst Mitigation Plan, the HDD Drilling Plan for Karst Terrain, and compliance with Environmental Condition 16, we agree with the final EIS's conclusion that PennEast will adequately minimize impacts in geologically sensitive areas.[132] Regarding the risk of scour, PennEast's HDD of the Delaware River will drill underneath the river's flood plain, with the HDD entry/exit point on the New Jersey side of the river approximately 1,100 feet east of the river's edge, outside of the flood zone and below the potential scour depth. The segment of pipeline installed by HDD will be considerably deeper than sections of pipeline installed by standard trenching and will be below the potential scour depths. Thus, scour from flooding on the Delaware River will not affect the pipeline.

107. Several commenters expressed concern that the final EIS contains an inadequate analysis of the potential for construction and operation of the project to contribute to arsenic contamination of groundwater and the release of radioactivity. Comments were filed from stakeholders, including a letter from Congressman Brian Fitzpatrick on behalf of Bucks County, Pennsylvania, from Dr. Tullis Onstott from the Princeton University Department of Geosciences, Dr. Julia Barringer, a retired U.S. Geologic Survey research geochemist, and from the Township of Kingwood, New Jersey, regarding the potential risk of arsenic contamination of groundwater. Drs. Onstott and Barringer contend that the final EIS fails to address the potential for the project to increase arsenic mobility, as well as the release of radioactivity. Drs. Onstott and Barringer also comment that the

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[132] *See* final EIS at ES-5.

pipeline has the potential to cause boron contamination of the Lambertville, New Jersey drinking water supply reservoir, and further state that cathodic protection on the pipeline has the potential to "promote the growth of microbes that stimulate arsenic" while a potential methane leak would input carbon into the soil, which could serve to stimulate microbial activity, which in turn could stimulate arsenic.[133] Further, Drs. Barringer and Onstott state that the final EIS fails to fully analyze the potential release of arsenic to local streams from HDDs. In addition, several comments were filed stating that the final EIS does not sufficiently address the risk of uranium and uranium decay product radionuclides potentially being released by blasting of Newark Basin sedimentary bedrock.

108. PennEast conducted a laboratory arsenic mobilization study, leaching experiments, and dilution modeling to determine if trench excavation and the use of HDDs will oxidize, release, and mobilize naturally occurring arsenic and potentially increase arsenic exposure to nearby groundwater users and/or ecological receptors within waterbodies. The results of the laboratory study demonstrate that broken fragments of naturally occurring arsenic-enriched rock generated during trenching activities and subsequently returned as backfill, would not result in an increased risk of arsenic mobilization in groundwater; that drilling mud would not become contaminated with particles of naturally occurring arsenic enriched rock; and that concentrations of

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[133] *See* Comments of Drs. Julia Barringer and Tullis Onstott, filed May 5, 2017 in Docket No. CP15-558-000.

arsenic in groundwater will be below the EPA maximum contaminant level (MCL) of 10 micrograms per liter (ug/L) for public water supplies and the New Jersey MCL of 5 micrograms per liter (µg/L) for both public and private water supplies. Regarding comments on the project's ability to contaminate Lambertville's water supply from boron, the EIS found that the pipeline alignment does not cross any stream that provides water to Lambertville's water supply and the Lambertville reservoir is located up-gradient of the planned PennEast pipeline.

109. As discussed in the final EIS, Drs. Onstott and Barringers' comments regarding the chemical mechanisms that could mobilize arsenic and other analytes during construction and operation were found to be speculative, based upon misapplication of physical principles, containing misinformation about pipeline corrosion and corrosion prevention systems, and not supported by empirical data for construction and operation of natural gas pipelines. Further, the final EIS found that radionuclides present in groundwater and household air are "absolutely not specific" to Newark Basin sedimentary bedrock (Stockton, Lockatong, and Passaic formations), and that human exposure issues related to radionuclides are not likely to play a role in the construction and operation of natural gas pipelines. Regarding the potential for methane leaks to increase arsenic mobility, PennEast has committed to several specific measures to reduce the risk of methane leaks, which

would in turn further reduce the risk of increased arsenic mobility.[134]

110. PennEast has prepared a Well Monitoring Plan and proposes to conduct groundwater quality testing of potentially affected wells prior to construction. This will provide a baseline to determine whether any arsenic increases in groundwater occur after the pipeline is installed. In the unlikely event that construction results in any arsenic impacts on a water-supply well, PennEast will provide a treatment system to remove arsenic from the drinking water at individual properties or find an alternative water source.

111. In its September 20, 2016 comments on the DEIS, the United States Department of the Interior (DOI) expressed concern regarding the potential for arsenic mobilization, and the potential for arsenic contamination of individual wells, drinking water, and groundwater. To address these concerns, we require in Environmental Condition 23 that PennEast revise and file for review and approval its above-described Well Monitoring Plan to incorporate the well sampling quality assurance/quality control elements suggested by the DOI into its well sampling protocol and to include provisions for treatment for groundwater users impacted by increased arsenic levels, as well as provisions for monitoring and maintaining such treatment systems.

112. In comments on the final EIS, Lorraine Crown of Holland Township expressed concern regarding Route Deviation 1710, which she claims would lead to

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[134] *Id.* at 4-250.

an increased risk of landslides on Gravel Hill. The final EIS' conclusion that that landslide incidences are low in New Jersey is based on PennEast's Phase I Terrain Mapping and Geohazard Risk Evaluation, which included the review of federal, state and local geographic information system data, published maps, available print and digitized terrain data, and site-specific data collected by PennEast. The final EIS notes that while generalized data from the United States Geological Survey indicates that there is a low risk of landslide potential for the New Jersey portion of the project, several locations in New Jersey have recorded landslides in close proximity to the proposed pipeline.[135] This includes the area near steep slopes 75 and 76 near route deviation 1710 as identified in Phase 1 of PennEast's Terrain Mapping and Geohazard Risk Evaluation Report. PennEast identified these as areas where it will conduct further field investigation and analysis. We require in Environmental Condition 15 that, prior to construction, PennEast shall file results of the outstanding site-specific Phase 2 and 3 portions of the Geohazard Risk Evaluation Report, which will include a final landslide hazard inventory. The finalized report will also include any specific measures and locations where PennEast will implement specialized pipeline design to mitigate for potential soil stability or landslide hazards; and include a post-construction monitoring plan.

113. In comments on the final EIS, the NJDEP submitted a letter referencing previous comments by the New Jersey Geological and Water Survey

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[135] *Id.* at 4-7.

(NJGWS) which indicate that there are important paleontological sites that are significantly closer than 0.25 mile to the proposed route. The NJDEP requests that PennEast consult with Dr. William Gallagher and provide him with the proposed project route alignment shape files as over 90 percent of the route crosses rock formations within the Newark Basin.

114. PennEast provided the NJGWS with updated mapping of the proposed pipeline route in relation to sites identified as significant paleontological locations containing trace Triassic-age fossils and various casts, including footprints. After analyzing the NJDEP comments on the final EIS, we determined there is potential for fossilized vertebrate footprints to be affected by construction of the project through Newark Basin sedimentary bedrock. Therefore, we have included a new condition to address potential discovery of paleontological resources during project construction. Environmental Condition 20 requires that PennEast prepare an unanticipated discovery plan for paleontological resources in coordination with the NJGWS and Dr. William Gallagher. The plan shall be focused on areas where bedrock would have allowed preservation of any significant paleontological resource. We believe that Environmental Condition 20 sufficiently addresses NJDEP's concerns and that any adverse impacts on significant paleontological resources will be appropriately mitigated.

b. Soils

115. The project will cross numerous soil types, which may be affected by pipeline construction activities, such as clearing, grading, trench

excavation, backfilling, and the movement of construction equipment along the right-of-way.

116. In comments on the final EIS, Emma A. Switzler discusses the potential for soil compaction from an HDD work space proposed on her property. PennEast identified certain measures which will be implemented to reduce the potential for soil compaction, including regular testing of topsoil and subsoil for compaction. PennEast indicated that it would avoid construction during periods of high soil saturation in order to minimize the risk of soil compaction. Severely compacted topsoil will be plowed or a green manure such as alfalfa will be planted and plowed to decrease bulk density and improve soil structure.[136] Given these measures and PennEast's adherence to the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan), which includes specific measures designed to mitigate for soil compaction, the final EIS finds that the project activities will not result in significant adverse soil structural damage or compaction.[137]

117. As stated in the final EIS, implementation of PennEast's *Erosion and Sediment Control Plan* (E&SCP), FERC's Plan and FERC's *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures), and other project-specific plans, will adequately avoid, minimize, or mitigate construction impacts on soil resources. Permanent impacts on soils will mainly occur at the aboveground facilities where the sites will be converted to industrial use. Based on

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[136] *Id.* at 4-28.

[137] *Id.* at 4-21 to 4-22.

the final EIS, we conclude that potential impacts on soils will be avoided or effectively minimized or mitigated.

c. Water Resources

118. The project will cross 269 waterbodies.[138] Approximately 74 percent of these waterbodies are classified as minor, 22 percent as intermediate, and 3 percent classified as major. Numerous commenters expressed concern regarding the potential effects of the construction and operation of the project on state designated streams, with a particular emphasis on locations where HDD crossing would occur. The final EIS states that while minor impacts on waterbodies may occur during construction, with the implementation of PennEast's planned, and the Commission's required mitigation plans, no long-term effects on surface waters are anticipated. In addition, PennEast will comply with state regulations regarding riparian buffers. Finally, PennEast will comply with regulatory permit conditions that address scour and sedimentation, flooding, or the introduction of foreign or toxic substances into the aquatic system. Accidental spills and leaks during construction and operations will be prevented or adequately minimized through implementation of PennEast's *Spill Prevention Control and Countermeasure Plan*.

119. Several comments addressed potential impacts on state-designated waterbodies. Appendices G-7 through G-9 of the final EIS provide state classifications for individual waterbody crossings in Pennsylvania and New Jersey by milepost. The final

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[138] Id. at 4-45 (table 4.3.2-1).

EIS analyzes construction impacts on waterbodies, and determines that the mitigation measures identified in our Procedures will adequately minimize impacts on Pennsylvania and New Jersey state-designated waters, including High Quality, Exceptional Value and Category 1 waters.[139] Generally, PennEast will minimize impacts on state-designated waterbodies and associated riparian zones by locating temporary workspace in actively disturbed areas with a vegetation buffer between the workspace and the riparian zone. Where the riparian zone cannot be avoided entirely, PennEast will reduce the workspace to 75 feet in width and relocate additional temporary workspaces upslope, or into actively disturbed areas, to the extent practicable. For dry-crossings, the workspace through the waterbody will be reduced to 60 feet in width and the workspace outside the waterbody will have a total width of 75 feet on both sides of the waterbody until actively disturbed areas are encountered. Where site constraints are favorable, PennEast will use the HDD method, which will not require tree clearing or workspace adjacent to the waterbody, to directly avoid impacts within the waterbody. PennEast has committed to preparing sitespecific plans prior to construction for each waterbody to be crossed via HDD. These site-specific HDD Plans would include a description of the HDD work site, justification of the work space required, cleanup plans in the event of the inadvertent release

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[139] *See* final EIS at 4-49.

of drilling mud, as well as a contingency plan in the event the HDD is unsuccessful.[140]

120. In comments on the final EIS, West Amwell Township, New Jersey, expresses concern regarding the crossing of Alexauken Creek, including the feasibility of and dangers associated with using the HDD crossing method; potential temperature and sedimentation impacts; and PennEast's plans for hydrostatic testing. The majority of the HDD crossings have had some geotechnical work performed, and staff reviewed this data along with PennEast's HDD Inadvertent Returns and Contingency Plan and HDD profiles. We require in Environmental Condition 19 that PennEast file the final design plans for each HDD crossing for review and approval. The final design plan will include the results for all geotechnical borings conducted at each HDD crossing (lithology, standard penetration testing and bedrock quality designation), and a HDD feasibility assessment based on the soil boring results, including an assessment of the risk for hydrofracturing and inadvertent return of drilling fluids at each crossing. Completion of all geotechnical borings for each specific crossing will allow for a comprehensive HDD feasibility and hydrofracture/ inadvertent return analysis that staff will review to ensure PennEast has adequately minimized environmental risks in the final design of the HDD.

121. Further, as indicated above and in the final EIS, PennEast will prepare a detailed plan for each waterbody that will be crossed via HDD that includes site-specific construction diagrams of work areas;

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[140] *Id.* at 4-62.

identification of any aboveground disturbance or clearing between the HDD entry and exit; and a contingency plan for crossing the waterbody or wetland in the event the HDD is unsuccessful. PennEast's HDD crossing of the Alexauken Creek will avoid any in-stream disturbance and any direct impact to the riparian areas between the drilling entry and exit sites, thus minimizing any potential for sedimentation or temperature changes. In the unlikely event that PennEast is required to cross this waterbody using an alternative crossing method, Commission staff must review and approve the plans to verify appropriate mitigation measures will be implemented to minimize sedimentation. Furthermore, PennEast's Erosion and Sedimentation Control Plan requires site-specific plans to mitigate sedimentation.

122. We reviewed the hydrostatic test water source and discharge locations provided by PennEast. However, during exceptional dry periods when low flow conditions may be encountered, PennEast will assess if alternative sources would be necessary. Thus, Environmental Condition 28 requires that PennEast file its final hydrostatic test plan identifying the final hydrostatic test water sources and discharge locations and provide documentation that it has obtained all necessary permits and approvals for withdrawal from each source prior to construction. PennEast has indicated that its hydrostatic testing program will comply with state- and Delaware River Basin Commission-issued water withdrawal and National Pollutant Discharge Elimination System permits.

123. Several comments were received regarding potential impacts on groundwater supplies, specifically supplies from private wells and community aquifers. The final EIS evaluates potential impacts on groundwater resources, and because PennEast has not yet completed surveys for water supply wells along the entire project, includes a recommendation that PennEast complete all necessary surveys for water supply wells and groundwater seeps and springs, identify public and private water supply wells within the construction workspace, and file a revised list of wells, seeps, and springs within 150 feet of any construction workspace (500 feet in areas characterized by karst terrain).[141] We incorporate this requirement as Environmental Condition 21 in Appendix A.

124. Although the precise locations of all water supply wells have not yet been determined, the avoidance and mitigation measures that will be implemented are evaluated in the EIS. The final EIS determines that no significant impacts to groundwater resources are anticipated from the construction or operation of the project. Installation of the pipeline would include digging a trench approximately 7-10 feet deep, which would have minor impacts on surficial aquifers, and not impact deeper bedrock or sole-source aquifers, including their discharge and recharge patterns.[142] In addition PennEast reviewed publicly available information regarding wellhead protection areas to formulate

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[141] *Id.* at 4-38.

[142] *Id.* at 4-42 - 4-43.

alternatives and has committed to several mitigation measures in order to further reduce the potential for impacts to wellhead protection areas, including prohibition of certain activities and material storage in proximity to these areas, and consultation with the appropriate wellhead protection authorities.[143]

125. Several comments were received regarding PennEast's Well Monitoring Plan. The final EIS concludes that the current Well Monitoring Plan contains acceptable measures. As part of its initial Well Monitoring Plan, PennEast commits to conduct pre- and post-construction monitoring for water quality and yield for private and public wells within 150 feet of the proposed construction workspace (500 feet in areas of karst terrain), with the well owner's permission.[144] However, the final EIS recommends additional information regarding DOI's comments on PennEast's initial Well Monitoring Plan, and landowner comments on the draft EIS. Therefore, as is discussed above, we require in Environmental Condition 23 that PennEast file a revised Well Monitoring Plan. The revised plan will provide responses to address the DOI's comments on the draft plan; include an analysis and mitigation for radon, radium 226, and radium 228; and provide more information regarding the types of treatment systems used, including provisions for monitoring and maintenance of any treatment systems PennEast provides.

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[143] *See* final EIS at 4-37.

[144] *See* final EIS at 4-38.

126. Several commenters raised concerns regarding impacts to the Swan Creek Upper Reservoir, which is the primary source of drinking water for the City of Lambertville. As discussed in the final EIS, the Swan Creek Upper Reservoir is located approximately 400 feet east of the proposed pipeline route, with the water supply intake structure located upstream of the pipeline. Due to the downstream location of the proposed pipeline crossing, water quality of the active reservoir will not be adversely affected. Blasting is not anticipated near the Swan Creek Reservoir; however, geotechnical evaluations are ongoing.[145] Therefore, we require in Environmental Condition 25 that PennEast provide the results of investigations regarding any anticipated blasting near the Swan Creek Reservoir prior to construction.

127. In comments on the final EIS, the EPA recommends that PennEast consult with state drinking water authorities to ensure state-defined source water protection areas are not crossed by the project. PennEast and Commission staff consulted with federal, state and regional entities to identify source water protection areas to be crossed by the project. As noted above, PennEast has proposed several mitigation measures to prevent impacts to wellhead protection areas that staff determined will adequately address potential impacts. In addition, the final EIS responds to concerns about blasting impacts on an existing water transmission tunnel managed by the Bethlehem Authority. The pipeline will be installed substantially above the location of the tunnel, with about 480 feet of clearance at the point

[145] *See* final EIS at 4-52.

where it first crosses the tunnel, and about 75 feet of clearance at the second crossing. Environmental Condition 44 requires that PennEast file additional information on the crossing, including a site-specific crossing plan and details regarding potential blasting within 2,000 feet of the water tunnel, and documentation of working meetings with water authority to ensure its concerns are adequately addressed, prior to construction.

128. Several commenters, including the USACE, PADEP, and the New Jersey Highlands Water Protection and Planning Council, commented on the final EIS and PennEast's PADEP/USACE Joint Permit Application, stating that more surveys needed to be completed before the applications could be processed, and the true environmental impacts could be assessed. On April 25, 2017, the PADEP filed a letter concerning the same application. The PADEP and USACE state that the application was incomplete due to lack of survey access. On April 26 and 28, 2017, the NJDEP commented on the final EIS and PennEast's freshwater wetlands individual permit application, stating that PennEast's application was determined administratively deficient, and that until an application is determined by the NJDEP to be complete, it is not possible to issue the permit or to determine a proposed permit issuance date.

129. As previously noted, we are aware that remaining field surveys need to be completed prior to construction. For areas where PennEast was unable to complete field surveys, remote-sensing resources were used to approximate the locations and boundaries of wetlands and waterbodies within the project area.

Remote-sensing delineations were conducted using a combination of high-resolution aerial photographic imagery, National Wetland Inventory data, National Hydrography Dataset data, hydric soil data maintained by the Natural Resources Conservation Service, floodplain and flood elevations maintained by the Federal Emergency Management Agency, watershed data from the USGS, and field survey results on adjacent land parcels where access could be obtained. Once surveys are completed following issuance of this order, PennEast will submit any outstanding survey information to the USACE, PADEP, and NJDEP to enable the final processing of its permit applications. Further, we require in Environmental Condition 10 that no construction will be allowed to commence until PennEast provides documentation that it has received all applicable authorizations required under federal law.

130. Sondra Wolferman filed comments on the final EIS regarding the potential impact to waterways and wetlands within Beltzville State park that could occur if inadvertent releases of HDD drilling muds were to occur. PennEast will be required to describe, in the site specific plan for Beltzville State Park and Reservoir, how an inadvertent release of drilling mud will be contained and cleaned up.[146] In the unlikely event of any release of drilling muds, including any occurring in or near the Beltzville State Park, PennEast will implement the mitigation measures in

[146] *See* final EIS at 2-12.

its HDD Inadvertent Returns and Contingency Plan.[147]

131. Based on the foregoing, and on PennEast's proposed and the Commission's required prevention and mitigation measures, we agree with the final EIS's conclusion that the construction and operation of the PennEast project will not have adverse longterm impacts on waterbodies, including surface water and groundwater resources.

d. Wetlands

132. Construction of the project will temporarily impact approximately 36 acres of wetlands (20 acres in Pennsylvania and 16 acres in New Jersey) and permanently impact about 20 acres of wetlands (12 acres in Pennsylvania and 8 acres in New Jersey). Construction impacts include 17.3 acres of forested wetlands, 3.0 acres of scrub-shrub wetlands, 6.6 acres of emergent wetlands, 0.2 acre of vernal pools, and 8.8 acres of modified agricultural wetlands.[148] With the exception of 0.01 acre of palustrine emergent wetland, no permanent fills or loss of wetlands will result from the construction or operation of the project.

133. As described in the final EIS, construction activities at wetland crossings will be performed in accordance with applicable regulatory requirements, PennEast's E&SCP, and FERC's Plan and Procedures. PennEast is currently developing project-specific mitigation measures in consultation with the USACE and state agencies.

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[147] *See* final EIS at 4-14.

[148] *See* final EIS at 4-81 (table 4.4.2-1).

134. PennEast will also conduct routine wetland monitoring of all wetlands affected by construction until revegetation is successful. Once wetland delineations are completed and available, we require in Environmental Condition 30 that PennEast file with the Commission its wetland delineation report as submitted to the USACE and applicable state agencies. As described above, the EIS utilized remote-sensing surveys to analyze wetlands for areas where access was denied. Completion of the wetland delineations will allow for a more precise determination of wetland boundaries in order for PennEast to accurately apply wetland construction and restoration methods in the appropriate locations.

135. In its comments on the final EIS, the EPA recommends that PennEast develop a compensatory mitigation plan for waterbodies and wetlands to include appropriate success criteria, compensation for exceptional value resources, and consideration of temporal loss. PennEast has agreed to provide offsite compensatory mitigation in accordance with agency-approved compensatory wetland mitigation plans. As mitigation design progresses, further coordination with USACE, PADEP, and the NJDEP Mitigation Unit will be required to incorporate site-specific design features and/or modifications, as applicable. Accordingly, we require in Environmental Condition 32 that PennEast file a final project-specific Wetland Restoration Plan developed in consultation with the USACE and applicable state agencies in Pennsylvania and New Jersey.

136. With implementation of the acceptable avoidance and minimization measures, as well as the

environmental conditions in Appendix A of this order, we agree with the final EIS's conclusion that impacts on wetland resources, including exceptional value wetlands, will be appropriately mitigated and reduced to less than significant levels.[149]

e. Vegetation, Forested Land, and Wildlife

137. The project area currently supports a diverse array of wildlife species, including wildlife adapted to natural forested and open habitat types, as well as disturbed habitats such as residential, industrial, and agricultural areas. Forested areas will be the most common habitat type affected by the project (consisting of approximately 37 percent of the project's impacts), followed by agricultural areas, residential/industrial/commercial areas, open lands, and open water habitats. The project will affect vegetation communities of special concern, including ephemeral/fluctuating natural pools, herbaceous vernal ponds, Leatherleaf—Cranberry bog shrubland, Pitch pine—rhodora—scrub oak woodland, and red spruce palustrine woodland. To avoid and minimize effects on interior forest habitat, PennEast routed the pipeline adjacent to existing rights-of-way when possible, with 44.5 miles of the pipeline collocated with existing right-of-ways.[150] The project will affect 220.6 acres of interior forest during construction and 63.6 acres during operation.[151] Additionally, the project will have an indirect impact (through edge effects,

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[149] *See* final EIS at 5-7.

[150] *See* final EIS at 4-101.

[151] *See* final EIS at 4-90 (table 4.5.1-2).

potentially resulting in avoidance of habitats or decreased habitat quality) on 1,725 acres of interior forest.[152]

138. In response to the final EIS, West Amwell Township discusses the Goat Hill Natural Heritage Priority site. West Amwell Township notes in its comments that PennEast has repeatedly and erroneously understated the impacts on the Goat Hill Natural Heritage Priority site, and misidentified its location. PennEast believed the priority site was strictly contained in the park near George Washington Road, but it has been demonstrated that in fact the Goat Hill Priority Site encompasses the entire hill (as West Amwell Township indicated in a map submitted to FERC showing the Priority Site Delineation, and where PennEast will be impacting it). The final EIS acknowledges the biological importance of Goat Hill and Gravel Hill,[153] and the potential for the area to contain sensitive biological resources. As identified in the final EIS, and based on consultations with the NJDEP, the Goat Hill Priority Site may contain several vegetative communities of special concern and is known to support three state endangered plant species. Though state-required mitigation measures have not been determined for state listed plant species, the EIS identifies procedures that have been successfully implemented for rare plants by similar projects, including flagging/fencing the plant or population to facilitate avoidance during construction, minor alignment shifts to avoid larger populations,

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[152] *See* final EIS at 4-90 (table 4.5.1-2).

[153] *See* Appendix M of the final EIS at M-266.

topsoil segregation, and relocation of individual plants and/or collection of seeds for cold storage/stockpiling and replanting at a later date. These measures also typically include monitoring to ensure that they are successful. PennEast will adhere to the recommendations and requirements of NJDEP-Division of Fish and Wildlife in order to avoid or minimize impacts on these species, including completing all necessary surveys for state species.[154]

139. The Goat Hill Priority Site is located in the Sourland Mountain region. The final EIS evaluated route alternatives in the Sourland Mountain area and determined that the proposed route will have less environmental impacts than the alternative routes. In addition, the pipeline will be collocated with an existing utility line in this area, further minimizing impacts. In addressing visual impacts, the pipeline will cross Sourland Mountain region for about 0.75 mile to the east of Goat Hill Overlook. The pipeline will be separated from the overlook by about 0.75 mile of mature forest and therefore will have minimal visual impact in this area. Once surveys are completed, PennEast will file its survey findings and documentation of consultations/permits required and Commission staff will review and verify that the new biological information does not alter the EIS conclusions.[155]

140. In comments on the final EIS, the EPA recommends that PennEast develop a revegetation plan for nature preserves and parklands and that

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[154] *See* final EIS at 4-139.

[155] *See* Appendix M of the final EIS at M-266.

PennEast plant larger plant stocks (as opposed to seedlings). Areas temporarily disturbed during construction will be reseeded in accordance with our Plan and Procedures, as well as any recommendations made by the local soil conservation district or land managing agency/individual. In accordance with PennEast's E&SCP, PennEast will implement and monitor revegetation efforts to ensure successful post-construction revegetation as outlined in our Plan and Procedures. The seed mixes used for reseeding will be selected based on consultation with local soil conservation districts, or appropriate land management agencies. Therefore, we find that recommending revegetation plans and additional measures regarding revegetation are not warranted.

141. In comments on the final EIS, the NJDEP comments that the project is subject to the New Jersey No Net Loss Compensatory Reforestation Act (NNLRA) and recommends that the Commission require compensatory mitigation for impacts on forested areas. To mitigate impacts on forested areas, the final EIS states that PennEast will assess the purchase and permanent conservation of forested lands in key watersheds and reforest areas within the same municipality in which the impact occurs; or develop mitigation measures for restoring areas of temporary project impacts in New Jersey. Compensation will be determined based on final project acreage impacts and grid method assessment techniques consistent with the NNLRA requirements.[156]

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[156] *See* final EIS at 4-91.

142. We received comments concerning construction impacts on forest disease, as well as concern with noxious weeds invading revegetation efforts. The final EIS addresses these issues and concludes that with implementation of the measures in the E&SCP and our Plan, the measures will minimize forest disease spread and deter noxious weeds from occurring/spreading. However, further mitigation measures are needed to address invasive species. Based on staff's analysis of the proposed project route, invasive species were observed in areas that were surveyed along the pipeline. An Invasive Species Management Plan has yet to be developed by PennEast. Therefore, we support the recommendation in the final EIS and require in Environmental Condition 33 that, prior to construction, PennEast file complete results of its noxious weed surveys and a final Invasive Species Management Plan for review and approval that includes measures PennEast will implement during construction and operation to minimize invasive and noxious species from occurring on the right-of-way.

143. Impacts will be short-term in non-forested areas, and it is expected that these non-forested areas will, with implementation of PennEast's E&SCP and the Commission's Plans and Procedures, be successfully restored within three years following construction.[157] However, all impacts on forested habitats will be considered long-term because of the time required to restore woody vegetation to preconstruction conditions (i.e., more than 30 years,

[157] *See* final EIS at 4-89.

and possibly hundreds of years for some forested areas).[158]

144. Regarding wildlife, PennEast will implement restrictions on the timing and location of construction, based on the requirements of local and state wildlife agencies, in order to mitigate impacts on wildlife and their habitat. Further, PennEast will prepare a Migratory Bird Conservation Plan, and implement the U.S. Fish and Wildlife Service's (FWS) recommended measures, to protect bald eagles and comply with the Migratory Bird Treaty Act. We require in Environmental Condition 34 that PennEast file a migratory Bird Conservation Plan developed in consultation with the FWS.

145. Based on the analysis in the final EIS, and PennEast's proposed and the Commission's required mitigation measures, we have determined that the project will not significantly impact vegetation, forested land or wildlife.

f. Threatened, Endangered, and Other Special Status Species

146. Based on input from the FWS, the final EIS identified eight federally-listed species that potentially occur in the project area: the Indiana bat, northern long-eared bat, bog turtle, dwarf wedge mussel, rusty patched bumble bee, northeastern bulrush, Atlantic sturgeon, and Shortnose sturgeon.[159] The final EIS concludes that the project may affect and is likely to adversely affect the

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[158] *See* final EIS at 4-89.

[159] Final EIS at 4-109 (table 4.6-1).

northern long-eared bat, Indiana bat, bog turtle, and northeastern bulrush, while it may affect but is not likely to adversely affect the dwarf wedge mussel.[160] The final EIS found that the Atlantic sturgeon and the Shortnose sturgeon, while found downstream of the project, do not occur in the project area and will not be affected. The final EIS concludes that the project may affect and is likely to adversely affect the rusty patched bumble bee; however, based on information made available by the FWS since issuance of the final EIS,[161] Commission staff has changed the determination for this species, finding that the project would not affect the rusty patched bumble bee. Complete surveys of all potentially suitable habitat within the project area have yet to be completed, due to lack of access granted by affected landowners. In accordance with section 7 of the Endangered Species Act, Commission staff prepared a Biological Assessment to support formal consultation with the FWS for the northern long-eared bat, Indiana bat, bog turtle, and northeastern bulrush. The Biological Assessment was submitted to the FWS on July 14, 2017.

147. On November 29, 2017, the FWS provided its biological opinion (BO) for the project, along with its recommended conservation measures. The FWS has determined that the project is not likely to adversely affect the dwarf wedge mussel, Indiana bat, and the northeastern bulrush. In addition, the FWS stated

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[160] *Id.*

[161] Notes from April 24, 2017 teleconference between FWS, Pennsylvania Field Office, and PennEast, as provided to Commission staff by the FWS via email on May 22, 2017.

that the project, as proposed, is not likely to jeopardize the continued existence of the bog turtle or northern long-eared bat. Accordingly, after receiving the FWS' BO, we are not including the final EIS's Environmental Conditions 33, 34, and 36 through 41 (which are obviated by the BO) in this order, and are adding to this order a new Environmental Condition 36, which requires that PennEast adopt the recommended measures in FWS' BO into its project-specific implementation plan. These include implementing reasonable and prudent measures, adopting terms and conditions for the bog turtle; avoidance measures for bulrush; and adopting monitoring and reporting requirements; consulting with the FWS regarding conservation recommendations for the bog turtle and the northern long-eared bat; and providing FWS with all remaining survey results for FWS comment. With implementation of these measures we conclude our consultation with the FWS under section 7 of the Endangered Species Act for the bog turtle, Indiana bat, northern long-eared bat, and northeastern bulrush.

148. Based on input from state wildlife management agencies, the EIS identified 24 state listed species that could potentially occur in the project area.[162] PennEast has stated that it will adhere to the recommendations and requirements of the respective state agencies with jurisdiction over state listed species and state species of concern (including the Pennsylvania Game Commission, Pennsylvania Fish

[162] Table 4.6-2 in the final EIS features a complete listing of all state listed species.

and Boat Commission, Pennsylvania Department of Conservation and Natural Resources (PADCNR), and NJDEP-Division of Fish and Wildlife) in order to avoid or minimize impacts on these species, including completing all necessary surveys for state species. PennEast has indicated that ongoing permit review by Pennsylvania and New Jersey wildlife agencies may result in the identification of additional avoidance, minimization, or mitigation measures that will be attached as permit conditions from respective state agencies with jurisdiction over state listed species and state species of concern. As recommended in the final EIS, we require in Environmental Condition 39 that prior to construction, PennEast file a comprehensive list of measures developed in consultation with applicable state wildlife agencies to avoid or mitigate impacts on state-listed species and state species of concern. Commission staff will review these measures prior to construction to verify consistency with the Commission's order.

149. Comments were received from several individuals regarding potential impacts on bird species, including bald eagles and peregrine falcons. The final EIS recommends that PennEast develop a Migratory Bird Conservation Plan and implement measures recommended by the FWS to protect bald eagles in order to comply with the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act. As a result, we require in Environmental Condition 34 that PennEast file a Migratory Bird Conservation Plan developed in consultation with the FWS. In addition, PennEast has committed to following the FWS' recommendations for implementation of adaptive management practices to minimize impacts

on migratory birds during construction and operation of the project, as well as adhering to a more restrictive window (September 11 to March 14) for vegetation maintenance activities.[163]

150. After the close of the draft EIS comment period, comments were filed on behalf of Dr. Ned Heindel, Dr. Linda Heindel, and the Linda Heindel Living Trust concerning potentially occurring threatened and endangered species on their property, including species within vernal pools. As stated above, we acknowledge that not all surveys for threatened and endangered species have been completed due to lack of survey access. To address sensitive vernal pools that may be crossed, we require in Environmental Condition 31 that PennEast survey all areas mapped as being potential vernal pool habitat and identify if any vernal pool habitat will be affected by project construction and/or operation. Such survey shall be submitted for review. Based on current information, the final EIS identifies less than 0.3 acre of vernal pool habitat that will be impacted by construction, with about 0.1 acre permanently impacted during operation. Should additional vernal habitats be discovered in supplemental surveys, PennEast will implement a time of year restriction if vernal habitats cannot be avoided. This time of year restriction would be observed during the key breeding period (i.e., March through June) for obligate and facultative amphibian species. All disturbed areas would be restored to pre-construction conditions following pipeline installation. Based on the mitigation measures and completion of remaining surveys, the

[163] *See* final EIS at 4-104 to 4-105.

EIS concludes that impacts on vernal pools would be effectively minimized or mitigated.[164]

151. In comments on the final EIS, Sondra Wolferman states that the Habitat Mitigation Plan discussed in the final EIS is insufficient to protect the northern flying squirrel, a Pennsylvania-listed endangered species, and suggests additions to the Habitat Mitigation Plan for the species in Hickory Run State Park. In general, PennEast has stated that it will adhere to the recommendations and requirements of the respective state agencies with jurisdiction over state-listed species and state species of concern. Pennsylvania Game Commission requires a northern flying squirrel mitigation plan related to the species' loss of habitat as a result of the project. PennEast has not yet developed this plan, but has committed to working with the state agencies to develop an adequate plan.[165] We are confident that the Habitat Mitigation Plan developed with Pennsylvania Game Commission will be sufficient to protect the northern flying squirrel.

152. In comments on the final EIS, NJDEP notes two discrepancies in tables 4.3.3-1 and G-13 of the final EIS. NJDEP notes that channel catfish (*Ictalurus punctatus*) and northern pike (*Esox luclus*) are listed in table 4.3.3 - twice. Both species are representative fish species in waterbodies crossed by the project in Pennsylvania and New Jersey, therefore they are listed twice. NJDEP also notes that Atlantic sturgeon (*Acipenser oxyrinchus*) is noted as "Not Listed" for

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[164] *See* final EIS at 5-7.

[165] *See* final EIS at 4-127 to 4-128.

Federal Status in table G-13. The Federal Status of this species is correctly identified in table 4.6-1 of the final EIS. There are four distinct population segments (DPS) of the Atlantic sturgeon that are listed as endangered: the New York Bight DPS, the Chesapeake Bay DPS, the Carolina DPS, and the South Atlantic DPS; the Gulf of Maine DPS is listed as threatened. None of these DPS occur within the project area, but the New York Bight DPS could occur downstream of the project area.[166] The final EIS concludes that there will be no effect on the Atlantic sturgeon, given that its known occurrence is at least 20 miles downstream of the Delaware River crossing, which will be avoided via HDD. We concur.

153. Based on implementation of these measures and the environmental conditions in Appendix A of this order, we agree with the final EIS's conclusion that impacts on special-status species will be adequately avoided or minimized.

g. Land Use, Recreation, and Visual Resources

154. Construction of the project will impact about 1,588 acres. About 61 percent of this acreage will be utilized for the pipeline facilities, including the construction right-of-way and additional temporary work space. The remaining acreage affected during construction will be associated with aboveground facilities (4 percent), pipe and contractor ware yards (25 percent), and access roads (9 percent).[167] During operation, the new permanent pipeline right-of-way,

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[166] *See* final EIS at (table 4.6-1).

[167] Due to rounding error, percentages do not add up to 100.

aboveground facilities, and permanent access roads will impact 788 acres.[168] Land uses impacted by the project will include forest, agriculture, open land, residential, industrial/commercial, and some open water. About 37 percent of the pipeline will be collocated with existing rights-of-way. We agree with the final EIS's conclusion that, with adherence to PennEast's proposed impact avoidance, minimization, and mitigation plans, and implementation of the environmental conditions in Appendix A of this order, the overall impacts on land use will be adequately minimized.

155. Several comments were received regarding the use of public and private roads as access roads, including driveways and the historic "Stymiest Road." The final EIS lists the access roads proposed for use for the project, whether their use is temporary or permanent, and considers these impacts. PennEast is committed to maintaining access for landowners to residences, driveways, fields, and other agricultural facilities during construction to the extent possible.[169] PennEast continues to communicate at the state, county, local, and private level in its effort to minimize impacts on access roads, and discuss potential post-construction restoration, and PennEast has stated it would repair any damage to public or private roadways resulting from construction. All temporary access roads used for construction will be restored in accordance with the provisions in PennEast's ECS&P, our Plan, and landowner agreements after

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[168] *See* final EIS at 4-140.

[169] *See* final EIS at 4-153.

construction. In addition, PennEast will determine current average daily transit and evaluate current conditions to finalize its Residential Access and Traffic Management Plan. To further ensure PennEast takes all appropriate mitigation measures to minimize impacts on traffic and landowner access, we require in Environmental Condition 40 that PennEast file a revised Residential Access and Traffic Management Plan which includes traffic counts, peak traffic volumes, and site-specific mitigations measures.

156. West Amwell Township filed comments on the final EIS regarding the impact on septic systems, contending that the final EIS and PennEast erred in stating that no septic systems were located within 150 feet of the pipeline and that such systems may be adversely impacted during construction and operation of the project. Because pipeline construction could damage septic systems, including septic tanks, distribution piping, and drain fields, we have included a new condition to address potential septic system impacts. Environmental Condition 22 requires that PennEast identify septic systems within 150 feet of any construction workspace and develop a plan that describes how PennEast will avoid impacts on septic systems where possible, as well as how PennEast will mitigate or restore impacted systems to applicable regulatory requirements.

157. William E. Markus filed comments regarding impacts on a structure on his property which could be damaged due to HDD operation and requests that PennEast re-route the project to the opposite side of the property. The final EIS points out that PennEast has responded to landowner concerns, and has

evaluated, and incorporated, several pipeline variations based on landowner requests. We acknowledge that PennEast will continue to evaluate minor route changes. To ensure that Residential Construction Plans address landowner comments such as Mr. Markus', we require in Environmental Condition 41 that PennEast file additional information for residences in close proximity to the project prior to construction.

158. Several comments were received discussing potential impacts on protected lands, including conservancies and lands held in trust. In addition, the EPA recommends that additional measures be taken to monitor whether protected land impacted by new easements lose quality and value to conservancy patrons. Impacts on conservation easements are addressed fully in section 4.7.2 of the final EIS. There are no changes expected in the conservation status of public lands crossed by the project, including state game lands and state highways and maintenance areas. No changes are expected in the conservation status of private lands crossed by the project in Pennsylvania. New Jersey parcels crossed by the project that are subject to types of conservation or open space protective easements will generally retain their conservation and open space characteristics, except with respect to the limited circumstance of New Jersey State Agriculture Development Committee (SADC) easements, as described in section 4.7.4 of the final EIS.

159. The SADC asserts that table G-17 from Appendix G of the final EIS is incomplete, as three New Jersey farms encumbered by farmland

preservation development easements and impacted by the project are not included. This comment is noted. The description of impacts and mitigation for impacts on farmlands with preservation easements included in sections 4.7.4.2 and 4.7.4.4 of the final EIS apply to the three farms identified from SADC, even though they are not listed in table G-17 of the final EIS.

160. The New Jersey Highlands Water Protection and Planning Council states that the final EIS does not adequately address the Highlands Region, nor the Highlands Regional Master Plan. The final EIS states that the New Jersey Highlands Water Protection and Planning Council will review the proposed project against the Highland Regional Master Plan and will be responsible for issuing a Consistency Determination in accordance with the Highlands Water Protection and Planning Act Rules.[170] Additionally, PennEast has indicated that it will voluntarily prepare a Comprehensive Mitigation Plan to detail proposed efforts to avoid, minimize, and mitigate impacts on resources associated with the New Jersey Highlands Region.[171] Based on PennEast's voluntary commitment to prepare the Comprehensive Mitigation Plan, we find these concerns have been adequately addressed.

161. In response to the USACE's Draft Finding of No Significant Impacts, Sondra Wolferman asserts that it will be impossible to restore Beltzville State Park to its original condition after project construction. Ms. Wolferman argues that the project right-of-way will

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[170] N.J. Admin. Code §§ 7:15, 7:38-1.1 (2017).

[171] *See* final EIS at 4-170 to 4-171.

permanently and significantly alter the appearance of the trails within the park. However, we believe that any impacts to visual of park patrons will be minimal, since PennEast will keep a 300-foot recreational and aesthetic buffer around these areas and adhere to any vegetation management request from the PADCNR.[172]

162. Several comments were filed regarding the potential for impacts on visual resources, particularly for recreational and conserved lands in New Jersey. PennEast prepared site-specific crossing plans for federal, state, and local lands that are used recreationally and the EIS concludes the mitigation measures proposed by PennEast, including site-specific safety measures, modified construction schedules, and the use of special construction techniques, adequately mitigate potential visual impacts resulting from the project.

163. In general, the final EIS concludes that the effects of the project on recreational and special interest areas occurring outside of forestland will be temporary and limited to the period of active construction, which typically lasts several weeks or months in any one area.[173] These effects will be minimized by implementing the measures in PennEast's E&SCP, FERC's Plan and Procedures, and other project-specific construction plans. In addition, we require in Appendix A of this order that PennEast continue to consult with the owners and managing agencies of recreation and special interest areas

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[172] *See* final EIS at 4-164.

[173] *See* final EIS at 5-11.

regarding the need for specific construction mitigation measures.[174]

h. Socioeconomics

164. Construction of the project will require approximately 2,400 workers, with a maximum of 600 people working on any one section at any one time. PennEast estimates that up to 40 percent of the workforce will consist of local hires; operation of the project will require 24 new permanent employees to operate the new pipeline and compressor station. Temporary impacts on traffic during construction will result from the workforce commuting daily to the construction site; however, PennEast will explore site-specific mitigation measures in its revised Residential Access and Traffic Management Plan that it may implement to minimize impacts on local traffic.[175] The project would cross one census block that could be considered a minority population, and one census block that could be considered low-income; however, construction and operation of the project is not expected to have high and adverse human health or environmental effects on any nearby communities or result in adverse and disproportionate human health or environmental effects to minority or low income communities.

165. After the close of the draft EIS comment period, Phyllis Jacewicz filed comments regarding the potential increase in homeowner's insurance due to proximity to the project. As noted in the final EIS, insurance advisors consulted on previous natural gas

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[174] *See* Environmental Conditions 42 and 43 in Appendix A.

[175] S*ee* Environmental Condition 40 in Appendix A.

projects have indicated that natural gas pipelines do not impact the rates or eligibility for residential insurance applications. The final EIS finds that homeowner's insurance rates would be unlikely to change due to construction and operation of the proposed project.[176] However, to address any potential insurance-related issues, we require in Environmental Condition 45 that PennEast file reports describing any documented complaints from a homeowner that the construction of a pipeline, or the existence of a pipeline right-of-way, directly impacted a homeowner's insurance. Additionally, as is typical for similar projects, PennEast will maintain insurance coverage for the project from the start of the survey process through the lifetime of the project, with coverage that will apply to qualifying claims from third-parties, including landowners.[177]

166. In comments on the final EIS, Kelly Kappler discusses potential impacts on local tourism. The final EIS finds that while the potential exists for the project to have localized effects on recreation resources, construction and operation of the project would not be expected to substantially impact the recreation and tourism sector in the affected counties.[178] We concur. Emma Switzler comments on the final EIS that noise from construction will impact her son's ability to teach tennis lessons. As discussed further below, any noise impacts from construction will be highly localized and temporary.

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[176] *See* final EIS at 4-195.

[177] *See* final EIS at 4-195.

[178] *See* final EIS at 4-185.

167. In its comments on the final EIS, the EPA recommends that meaningful coordination and outreach be conducted with communities of concern, including Environmental Justice communities. Consistent with Executive Order 12898, all public documents, notices, and meetings were made readily available to the public during the Commission's review of the project. The final EIS provides additional detail about coordination and outreach as well as an assessment of impacts on Environmental Justice communities. As noted above, the final EIS concludes that construction and operation of the project will not have high and adverse human health or environmental effects on any nearby communities or result in adverse and disproportionate human health or environmental effects to minority or low income communities.[179]

i. Cultural Resources

168. The final EIS identifies ten archaeological sites in Pennsylvania and three sites in New Jersey in the direct area of potential effect. Additionally, there are 110 aboveground historic resources identified in Pennsylvania and 41 in New Jersey. This is based on completed cultural resources identification surveys for 69 miles in Pennsylvania and 15 miles in New Jersey, as well as desktop research.[180] Although the Pennsylvania and New Jersey State Historic Preservation Offices (SHPOs) concurred with some of the final EIS recommendations, they did not agree with all of the recommendations by PennEast.

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[179] *See* final EIS at 4-197 to 4-202.

[180] *See* final EIS at 5-14.

Consultation is ongoing with the Pennsylvania and New Jersey SHPOs.

169. Commission staff consulted, and PennEast conducted outreach, with 15 federally recognized tribes, as well as several other non-governmental organizations, local historical societies, museums, historic preservation heritage organizations, conservation districts, and other potential interested parties to provide them an opportunity to comment on the project.[181] We have not received any responses to the letters sent to the federally recognized tribes.

170. On January 24, 2017, after the close of the draft EIS comment period, John P. Hencheck filed comments regarding potential impacts on "The Road Along the Rocks," a historic resource associated with the American Revolution. PennEast has a number of evaluation studies, reports, and potential treatment plans pending, including an architectural survey of The Road Along the Rocks.[182]

171. In letters dated August 7 and August 9, 2017, the New Jersey SHPO commented on two historic architecture survey report addenda for Hunterdon and Mercer Counties, New Jersey. The New Jersey SHPO agreed that no additional studies were necessary for ten of the properties investigated. Further, they stated that the John Moore Farmhouse and Angel Farmstead are considered eligible for listing on the National Register of Historic Places. However, five properties (Kappus Farm, Cedarknoll Farm, Flemington Branch of the Belvidere-Delaware

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[181] *See* final EIS at 4-210 to 4-211.

[182] *See* final EIS at 4-226 (table 4.9.2-7).

Railroad Historic District, Rock Road/Rocktown Road/Road Along the Rocks/Bungtown Road, and 1465 NJ Route 179- Olde York Road) would require additional information from PennEast for the New Jersey SHPO to provide comments. Additionally, the New Jersey SHPO noted that the Hopewell Township Historic Preservation Commission should be provided an opportunity to review and comment on cultural resources reports for the Hopewell Township within Mercer County. Environmental Condition 47 requires PennEast to file the results of the New Jersey SHPO's assessment of these properties, and any related site avoidance or mitigation plans. We find this adequate to address the concerns raised.

172. On May 25, 2017, in comments on the final EIS, the NJDEP submitted a letter noting that 68 percent of the project alignment in New Jersey still needed to be surveyed for historic properties. As identified in the final EIS, compliance with Section 106 of the NHPA is not complete due to pending surveys, evaluation of certain archaeological sites and historic architecture, as well as avoidance and potential treatment plans for the project, both in New Jersey and Pennsylvania. These activities are specifically identified in tables 4.9.2-2, 4.9.2-4, 4.9.2-5 and 4.9.2-7 of the final EIS. In addition, Environmental Conditions 46 through 50 identify certain assessments, mitigation plans, and consultations that PennEast must complete and file with the Secretary prior to construction to address stakeholder comments and address mitigation requirements identified by Commission staff. To ensure that our compliance with section 106 of the

National Historic Preservation Act,[183] we require in Environmental Condition 51 that PennEast not begin construction until any additional required surveys are completed, and survey reports and treatment plans (if necessary) have been reviewed by consulted parties, including the appropriate SHPO, and all appropriate documentation is filed with the Secretary. Commission staff will review all filings to ensure PennEast completes all pending activities identified in the final EIS, and required by Environmental Conditions 46 through 51. Fulfillment of these conditions will enable the Commission to complete section 106 consultation, thereby, along with the foregoing discussion, addressing all concerns on this subject.

j. Air Quality Impacts

173. General Conformity Determinations stem from section 176(c) of the Clean Air Act,[184] which requires a federal agency to demonstrate that a proposed action conforms to the applicable State Implementation Plan, a state's plan to attain the National Ambient Air Quality Standards (NAAQS) for nonattainment pollutants. A General Conformity Determination is required when the federal agency determines that an action will generate emissions exceeding conformity threshold levels of pollutants in the nonattainment area, in order to assess whether the federal action will indeed conform to the State Implementation Plan. Because portions of the project will be located in five different counties with a nonattainment or

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[183] 54 U.S.C.A. §§ 300101 et seq. (West 2016).

[184] 42 U.S.C. § 7506(c) (2012).

maintenance designation for at least one pollutant, Commission staff reviewed the criteria pollutant emissions expected to be generated during construction of the project and compared them to the General Conformity thresholds in section 93.153(b)(1) of the EPA's regulations.[185]

174. Based on PennEast's May 2016 revised construction emission estimates, the final EIS determines that project construction emissions will not exceed any General Conformity applicability thresholds.[186] Because no thresholds are triggered, a General Conformity Determination is not required to be made. To ensure this finding is based on the most up-to-date information, however, Environmental Condition 52 requires PennEast to file revised construction emissions estimates if changes to the project construction schedule and/or design occur that will materially impact the construction nitrogen oxide (NOx) emissions generated in a calendar year. If the revised emissions exceed a General Conformity applicability threshold, then the Commission will need to prepare a draft General Conformity Determination at that time and prior to any construction.

175. In comments on the final EIS, the NJDEP expresses concerns over the potential air emissions associated with the USACE permits, and whether these emissions were included in the General Conformity analysis, as well as the emission totals presented in tables 4.10.1-4 and 4.10.1-5 of the final

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[185] 40 C.F.R. § 93.153(b)(1) (2017).

[186] *See* final EIS at 4-240.

EIS. The project will not include any additional facilities related to the USACE permit. Therefore, no additional emissions are anticipated.

176. NJDEP states that its Bureau of Evaluation and Planning previously submitted a comment on the draft EIS asking whether air emissions associated with transporting pipe within the nonattainment/maintenance areas to the staging areas/worksites were included in tables 4.10.1-4 and 4.10.1-5, and states that Appendix M does not appear to respond to the Bureau of Evaluation and Planning's comment. These pipe transport emissions are accounted for by the "Float, Lowboy, Tractor Trucks" line items provided in Appendix L-2 of Resource Report 9 in PennEast's application, and are accounted for in Tables 4.10.1-4 and 4.10.1-5 in the final EIS.

177. NJDEP states that the Bureau of Evaluation and Planning previously submitted a comment on the draft EIS inquiring as to whether the construction equipment list included HDD, and if tables 4.10.1-4 and 4.10.1-5 included emissions associated with HDD activity, and states that Appendix M does not appear to respond to the Bureau of Evaluation and Planning's comment. NJDEP further comments that the 150 horsepower rating for the category of "Skidder, Trencher, Boring" equipment (as provided by PennEast in Appendix L-2 of Resource Report 9), may not be the appropriate horsepower rating for HDD equipment used on a "major" crossing such as the Delaware River. NJDEP requests that the horsepower rating used for the HDD equipment be re-evaluated and that the HDD air emissions for the Delaware River crossing, as well as the emission totals used in

the General Conformity analysis and in tables 4.10.1-4 and 4.10.1-5, be revised accordingly.

178. The comments from the Bureau of Evaluation and Planning that were included in NJDEP's September 12, 2016 letter on the draft EIS do not refer to HDD activity. Regardless, the construction equipment list, as provided by PennEast in Appendix L-2 of Resource Report 9, includes HDD equipment, and that tables 4.10.1-4 and 4.10.1-5 of the final EIS appropriately include air emissions associated with HDD activity. However, we acknowledge the possibility that the HDD crossing of the Delaware River may require HDD equipment with higher horsepower ratings than those used to estimate construction emissions in the EIS. Incorporating the increased emissions associated with using appropriately-sized HDD equipment for the Delaware River crossing into the General Conformity analysis will not change the conclusion, as the increase in emissions will be insignificant relative to overall total construction emissions. As demonstrated below, even by updating the General Conformity analysis to include updated HDD equipment, construction emissions in Bucks County, Pennsylvania, and Hunterdon County, New Jersey, will remain well below the applicability thresholds that would trigger the requirement for a General Conformity determination.

179. In order to approximate the potential increase in construction emissions due to higher-rated HDD equipment for the Delaware River crossing, we scaled up emissions provided for the "Skidder, Trencher, Boring" equipment in Pipeline Spread 3 (which

encompasses the Delaware River crossing), and applied the net emission increase to the values presented in tables 4.10.1-4 and 4.10.1-5 of the final EIS. The provided "Skidder, Trencher, Boring" emissions were based on a horsepower rating of 150, and we scaled these up by a factor of 3.33 to approximate a horsepower rating of 500 hp, which was the rating used by another similar pipeline project, as suggested by NJDEP. Tables 4.10.1-4 and 4.10.1.-5 of the final EIS are reproduced below with the emission increase applied, and show that the increased emissions will remain well below the General Conformity applicability thresholds.

TABLE 4.10.1-4

General Conformity Applicability Evaluation

Project Component	Location (County, State)	County Nonattainment or Maintenance Pollutants a/ b/	Construction Emissions c/	General Conformity "de minimis" rates for Nonattainment or Maintenance Areas	General Conformity Determination Required? (Yes/No)
23.1 miles of pipeline	Luzerne, PA	None	N/A	N/A	No
28.2 miles of pipeline, Compressor Station	Carbon, PA	O_3	28.2 tons NOx 3.4 tons VOC	100 tpy NOx 50 tpy VOC	No
24.8 miles of pipeline, 2.1 miles of lateral	Northampton, PA	$PM_{2.5}$ O_3	82.5 tons $PM_{2.5}$ 0.1 tpy SO2 21.7 tons NOx 2.7 tons VOC	100 tpy $PM_{2.5}$ 100 tpy SO2 100 tpy NOx 50 tpy VOC	No
1.7 miles of pipeline	Bucks, PA	$PM_{2.5}$ O_3	4.6 tons $PM_{2.5}$ 0.0 tpy SO2 1.9 tons NOx 0.3 tons VOC	100 tpy $PM_{2.5}$ 100 tpy SO2 100 tpy NOx 50 tpy VOC	No
26.6 miles of pipeline, 1.9 miles of lateral	Hunterdon, NJ	O_3	20.7 tons NOx 2.6 tons VOC	100 tpy NOx 50 tpy VOC	No
9.6 miles of pipeline	Mercer, NJ	O_3	25.0 tons $PM_{2.5}$ 0.0 tpy SO2 6.7 tons NOx 0.8 tons VOC	100 tpy $PM_{2.5}$ 100 tpy SO2 100 tpy NOx 50 tpy VOC	No

Notes:

a/ Marginal or Moderate Nonattainment for the 2008 8-hour Ozone standard

b/ Maintenance Area for the 1997 and/or 2006 $PM_{2.5}$ Standards

c/ Emissions of all major construction activities would occur during one calendar year

TABLE 4.10.1-5

Project Facility and Pipeline Construction Activity Combined Emissions

Project Total Emissions	Pollutants (Tons)							
	NO_x	CO	VOC	PM_{10}	$PM_{2.5}$	SO_2	CO_2e	HAPs
Pipeline Diesel Non-Road Equipment Totals	**95.9**	**25.1**	**9.9**	**6.3**	**6.1**	**0.27**	**30,227**	**0.72**
Diesel and Gas On-Road	5	22.8	2.53	0.29	0.17	0.03	1,690	0.18
Construction Activity Fugitive Dust	-	-	-	1,927	287	-	-	-
Roadway Fugitive Dust	-	-	-	132	21	-	-	-
Comp. Station Construction Sub-Total	**6**	**5**	**1**	**28**	**4**	**0.02**	**1,712**	**0.05**
Total	**107**	**53**	**13**	**2,093**	**318**	**0.32**	**33,629**	**0.95**

180. NJDEP comments on the final EIS that the emission factors and load factors used for on-road and off-road construction equipment appear to represent the use of (lower-emitting) Tier 3 and Tier 4 engines. NJDEP further notes that while the final EIS includes a recommendation that Tier 3 and Tier 4 engines be used when possible, it doesn't require this, leaving open the possibility that lower-tier, higher-emitting engines could be used. NJDEP therefore requests that the emission factors, load factors, and estimated construction emissions be re-evaluated to better reflect the actual equipment that may be used, and that the General Conformity analysis and tables 4.10.1-4 and 4.10.1-5 be revised accordingly.

181. Environmental Condition 53 requires that PennEast implement several measures for on-road vehicles and non-road diesel construction equipment, including a requirement that "all non-road diesel construction equipment greater than 100 horsepower used for more than ten days shall have engines that meet the EPA Tier 4 non-road emission standards or the best available control technology that is technologically feasible and verified by EPA or the California Air Resources Board as a diesel emission control strategy." This requirement will ensure that

PennEast will use low-emission-rated engines for all construction equipment that will be utilized long enough to potentially impact the construction emissions of the project.

182. Air quality impacts associated with construction of the project will include emissions from fossil-fueled construction equipment and fugitive dust. Local emissions may be elevated, and nearby residents may notice elevated levels of fugitive dust, but these will not be significant or permanent. We agree with the final EIS's conclusion that, with implementation of PennEast's proposed mitigation measures and the environmental conditions in Appendix A of this order, air quality impacts from construction activities, such as elevated dust levels near construction areas, will be temporary or short term, and will not result in a significant impact on local and regional air quality.[187]

183. PennEast conducted modeling of emissions from the proposed Kidder Compressor Station to analyze potential impacts associated with the operation of the proposed new sources, including monitored background. Based on this modeling analysis, the final EIS concludes the air quality impacts from the sources at the proposed Kidder Compressor Station are estimated to be below the NAAQS for all pollutants.[188]

184. We agree with the final EIS's conclusion that, with implementation of the environmental conditions in Appendix A of this order, operational emissions will

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[187] *See* final EIS at 4-245.

[188] *See* final EIS at 4-253.

not have a significant impact on local or regional air quality.[189]

k. Noise

185. Pipeline construction noise impacts would be temporary as construction activities move along the corridor. During construction, PennEast will employ a combination of noise mitigation methods, including equipment noise controls, temporary noise barriers, and administrative measures.[190]

186. The primary source of operational noise for the project will be the Kidder Compressor Station. Ambient sound measurements were collected in the vicinity of the Kidder Compressor Station location, as well as the vicinity of other operational sound sources like the mainline valves and meter stations, to establish existing conditions. PennEast will be required to meet the most restrictive noise level limits established by jurisdictional agencies. The Commission limit of 55 decibel A-weighted (dBA) day-night sound level (L_{dn}), which is equivalent to a continuous noise level of 49 dBA, would be the governing limit for those areas where a more restrictive county, local, or station-specific regulation does not exist.[191] We require in Environmental Condition 55 that PennEast conduct a noise survey of the Kidder Compressor Station area, while the station is operating at full load, to ensure that operational noise is at or below this limit. With the implementation of PennEast's proposed mitigation

[189] *See* final EIS at 5-15.

[190] *See* final EIS at ES-15.

[191] *See* final EIS at ES-15.

measures and Environmental Condition 55, we conclude that the compressor station's operational noise will not result in significant noise impacts on residents and the surrounding areas.

187. Notable sources of intermittent noise include blasting and drilling. PennEast's Blasting Plan includes mitigation measures related to blasting noise,[192] and Environmental Condition 54 requires that PennEast provide an HDD Noise Mitigation Plan, which must be approved prior to construction. On April 14, 2017, Emma A. Switzler commented on the final EIS regarding noise mitigation for HDD activities. However, with the implementation of PennEast's proposed mitigation measures and Environmental Condition 54, we conclude that construction of the project will not result in significant noise impacts on residents and the surrounding areas.

l. Safety

188. As described in the final EIS, PennEast will design, construct, operate, and maintain the proposed facilities to meet or exceed the U.S. Department of Transportation's (DOT) Minimum Federal Safety Standards set forth in Title 49 Code of Federal Regulations Part 192. DOT's Pipeline and Hazardous Materials Safety Administration's (PHMSA) Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of natural gas and other hazardous materials by pipeline.[193] In

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[192] *See* final EIS at 4-294.

[193] Final EIS at 4-30; *see also* 49 U.S.C. § 60112 (authorizing the Department of Transportation to determine that a pipeline

general, the Commission appropriately relies on PHMSA to monitor the pipeline's construction and operation of natural gas facilities to determine compliance with its design and safety standards.[194]

189. Based on available data, we agree with the final EIS's conclusions that PennEast's implementation of the above-mentioned DOT minimum Federal safety standards, and implementation of the required Environmental Conditions, will minimize the risk of public harm related to the construction and operation of the project.

190. Numerous commenters question the safety of the project, and take particular issue with the pipeline route's proximity to existing natural gas pipelines and quarries. In addition, several commenters, including the Medical Society of New Jersey, express concerns regarding potential effects of a pipeline rupture and natural gas ignition (the area of potential effect is sometimes referred to as the potential impact radius). While a pipeline rupture does not necessarily ignite in every instance, the DOT's regulations define high consequence areas where a gas pipeline accident could do considerable harm to people and property, and

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facility is hazardous and order the operator of the facility to take corrective action).

[194] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) (the "opinions and standards of—and [LNG operator's] future coordination with—federal and local authorities" were a reasonable component of the Commission's public safety evaluation); *City of Pittsburgh v. Fed. Power Comm'n,* 237 F.2d 741, 754 (D.C. Cir.1956) (explaining that the Commission "would . . . do well to respect the views of . . . other agencies as to those problems" for which those other agencies "are more directly responsible and more competent than this Commission").

require an integrity management program to minimize the potential for an accident in these areas. PennEast routed the pipeline to minimize risks to local residents and vulnerable locations/populations (e.g., hospitals, prisons, schools, daycare facilities, retirement or assisted-living facilities) and will follow federal safety standards for pipeline class locations based on population density. PennEast has also followed federal safety standards with respect to pipeline spacing.[195] The DOT regulations are designed to ensure adequate safety measures are implemented to protect all populations. In addition, PennEast will take specific measures to reduce the risk of methane and volatile organic compound leaks.[196]

191. In its comments on the final EIS, the EPA recommends that the pipeline design be upgraded to Class 2 pipe specifications where there are significant liquefaction or landslide hazards identified in Phases 2 and 3 of the Geohazard Risk Evaluation. Because PennEast is conducting further field investigation and analysis regarding geohazard risks, we require in Environmental Condition 15 that PennEast provide the results of the outstanding Phase 2 and 3 portions of the Geohazard Risk Evaluation Report, as well as any specific measures and locations where specialized pipeline design will be implemented to mitigate the potential for soil stability or landslide hazards for staff review and approval prior to construction.

192. Several commenters expressed concern that the final EIS does not sufficiently address safety concerns

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[195] *See* 40 C.F.R. § 192.325 (2017).

[196] *See* final EIS at 4-250.

regarding routing the pipeline near active quarries, specifically two quarries in Plains Township, New Jersey, which would be located within 0.23 mile of the project area. As noted in the final EIS, PennEast routed the project to avoid any future expansion of the quarries, and determined that the average radius of quarry blasting vibrations would have no effect on the pipeline.[197] PennEast conducted similar site-specific outreach and blast monitoring for other quarry locations, and we are satisfied that PennEast has routed the project to adequately minimize the risk from blasting and other quarry operations.

m. Upstream and Downstream Impacts

193. Several commenters, including U.S. Senators Cory Booker and Robert Menendez, and Oil Change International,[198] raise concerns regarding the potential for increased upstream natural gas production associated with construction and operation of the project. Commenters request that the final EIS include the greenhouse gas (GHG) emissions associated with the upstream production and downstream combustion of the natural gas to be transported by the project. Oil Change International also submitted a white paper, which states that the

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[197] *See* final EIS at 4-4 - 4-5.

[198] Oil Change International filed comments on behalf of the Sierra Club, Earthworks, Appalachian Voices, Chesapeake Climate Action, 350.org, Bold Alliance, Environmental Action, Blue Ridge Environmental Defense League, Protect Our Water, Heritage and Rights (Virginia & West Virginia), Friends of Water, Mountain Lakes Preservation Alliance, Sierra Club West Virginia, and Sierra Club Virginia.

final EIS fails to address upstream emissions, and takes issues with the final EIS' analysis of downstream emissions and methane leakage.

194. CEQ's regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.[199] Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[200] Further, indirect effects "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[201] Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

195. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"[202] in order "to make an agency responsible for a particular effect under NEPA."[203] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish

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[199] 40 C.F.R. § 1508.25(c) (2017).

[200] *Id.* § 1508.8(b).

[201] *Id.* § 1508.8(b).

[202] *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, at 767 (2004) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, at 774 (1983)).

[203] *Id.*

cause for purposes of NEPA]."[204] Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if the causal chain is too attenuated.[205] Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[206]

196. An effect is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[207] NEPA requires "reasonable forecasting," but an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough

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[204] *Id.*; *see also Freeport LNG*, 827 F.3d at 46 (FERC need not examine everything that could conceivably be a but-for cause of the project at issue); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (*Sabine Pass LNG*) (FERC order authorizing construction of liquefied natural gas export facilities is not the legally relevant cause of increased production of natural gas).

[205] *Metro. Edison Co.*, 460 U.S. at 774.

[206] *Pub. Citizen*, 541 U.S. at 770; *see also Freeport LNG*, 827 F.3d at 49 (affirming that *Public Citizen* is explicit that FERC, in authorizing liquefied natural gas facilities, need not consider effects, including induced production, that could only occur after intervening action by the DOE); *Sabine Pass LNG*, 827 F.3d at 68 (same); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955-56 (D.C. Cir. 2016) (same).

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

information is available to permit meaningful consideration."[208]

i. Impacts from Upstream Natural Gas Production

197. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.[209] 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).[210] To

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[208] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

[209] *See, e.g.*, *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion).

[210] *See cf. Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project). *See also Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport plan was not an indirect, "growth-inducing" impact); *City of Carmel-by-the-Sea v. U.S. Dep't of Transportation.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned

date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas.

198. Even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, we have found that the potential environmental impacts resulting from such production are not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. There are no forecasts in the record which would enable the Commission to meaningfully predict production-related impacts, many of which are highly localized. Thus, even if the Commission knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depending on the applicable regulations in the various states. Accordingly, the

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freeway, rather than the reverse, notwithstanding the project's potential to induce additional development).

impacts of natural gas production are not reasonably foreseeable because they are "so nebulous" that we "cannot forecast [their] likely effects" in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.[211]

199. Nonetheless, we note that the Department of Energy has examined the potential environmental issues associated with unconventional natural gas production in order to provide the public with a more complete understanding of the potential impacts.[212] The Department of Energy has concluded that such production, when conforming to regulatory requirements, implementing best management practices, and administering pollution prevention

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[211] *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with enough specificity to make their consideration meaningful need not be included in the environmental analysis). *See also Sierra Club v. U.S. Department of Energy*, D.C. Cir. No. 15-1489, slip op. at 16-18 (August 15, 2017) (accepting DOE's "reasoned explanation" as to why the indirect effects pertaining to induced natural gas production were not reasonably foreseeable where DOE noted the difficulty of predicting both the incremental quantity of natural gas that might be produced and where at the local level such production might occur, and that an economic model estimating localized impacts would be far too speculative to be useful).

[212] U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48,132 (Aug. 15, 2014) (DOE Addendum), http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf. The U.S. Court of Appeals for the D.C. Circuit upheld DOE's reliance on the DOE Addendum to supplement its environmental review of the proposed export of LNG. *See Sierra Club v. U.S. Department of Energy*, D.C. Cir. No. 15-1489, slip op. at 12, 19.

concepts, may have temporary, minor impacts to water resources.[213] With respect to air quality, the Department of Energy found that natural gas development leads to both short- and long-term increases in local and regional air emissions.[214] It also found that such emissions may contribute to climate change.[215] But to the extent that natural gas production replaces the use of other carbon-based energy sources, the U.S. Department of Energy found that there may be a net positive impact in terms of climate change.[216] We find the information provided in the Department of Energy (DOE) Addendum to be helpful to generally inform the public regarding potential impacts of increased natural gas production and therefore consider the DOE Addendum to be supplemental material to our environmental review.

200. The record in this proceeding does not demonstrate the requisite reasonably close causal relationship between the impacts of future natural gas production and the proposed project that would necessitate further analysis. The fact that natural gas production and transportation facilities are all components of the general supply chain required to

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[213] DOE Addendum at 19; *see also Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128, 16,130 (Mar. 26, 2015) (Bureau of Land Management promulgated regulations for hydraulic fracturing on federal and Indian lands to "provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health").

[214] DOE Addendum at 32.

[215] *Id.* at 44.

[216] *Id.*

bring domestic natural gas to market is not in dispute. This does not mean, however, that approving this particular project will induce further shale gas production. Rather, as we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs drive new drilling.[217] If this project were not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.[218] Again, any such production would take place pursuant to the regulatory authority of state and local governments.[219]

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[217] *Rockies Express Pipeline LLC,* 150 FERC ¶ 61,161, at P 39 (2015). *See also Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

[218] *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 at P 39.

[219] We acknowledge that NEPA may obligate an agency to evaluate the environmental impacts of non-jurisdictional activities. That states, however, not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting) supports the conclusion that information about the scale, timing, and location of such development and potential environmental impacts are even more speculative. *See Sierra Club v. U.S. Department of Energy*, D.C. Cir. No. 15-1489, slip op. at 18 (DOE's obligation under NEPA to "drill down into increasingly speculative projections about regional environmental impacts [of induced

201. Moreover, even if a causal relationship between our action here and additional production were presumed, the scope of the impacts from any induced production is not reasonably foreseeable. That there may be incentives for producers to locate wells close to pipeline infrastructure does not change the fact that the location, scale, and timing of any additional wells are matters of speculation, particularly regarding their relationship to the proposed project. As we have previously explained, a broad analysis, based on generalized assumptions rather than reasonably specific information, will not provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to a specific proposal.[220]

202. As noted above, upstream impacts of the type described by commenters do not meet the definition of indirect impact, therefore, they are not mandated as part of the Commission's NEPA review. However, to provide the public additional information, Commission staff, after reviewing publicly-available DOE and EPA methodologies, has prepared the following analyses regarding the potential impacts associated with unconventional natural gas

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natural gas production] is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects") (citing *Pub. Citizen*, 541 U.S. at 768).

[220] *Rockies Express Pipeline LLC,* 150 FERC ¶ 61,161 at P 40. *See also Sierra Club v. U.S. Department of Energy*, No. 15-1489, slip op. at 14 (D.C. Cir. August 15, 2017) (holding that the dividing line between what is reasonable forecasting and speculation is the "usefulness of any new potential information to the decision-making process").

production. As summarized below, these analyses provide only an estimate of the upper limit of upstream effects using general Marcellus shale well information.

203. The final EIS discusses the direct GHG impacts from construction and operation of the project and other projects that were considered in the Cumulative Impacts analysis, climate change impacts in the region, the regulatory structure for GHGs under the Clean Air Act. The final EIS quantified GHG emissions from PennEast Project construction (33,276 metric tons, CO_2 equivalent [metric tons per year (tpy) CO_{2e}[221]) and operation (259,717 metric tpy CO_{2e}).[222] The final EIS does not include upstream emissions. However, presuming all gas transported represents new, incremental production (as opposed, e.g., to production which would otherwise have been transported on another pipeline), Commission staff has conservatively estimated the upstream GHG emissions as 910,000 metric tpy CO_{2e} from extraction, 1.7 million metric tpy CO2e from processing, and 400,000 metric tpy CO_{2e} from the non-project pipelines (both upstream and downstream transportation pipelines). Again, this is an upper-bound estimate that involves a significant amount of uncertainty.

204. With respect to upstream impacts, Commission staff estimated the impacts associated with the production wells that would be required to provide 100 percent of the volume of natural gas to be transported by the PennEast Project, on an annual basis for GHGs.

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[221] *See* final EIS at 4-245 (Table 4.10.1-5).

[222] *See* final EIS at 4-250 (Table 4.10.1-9).

Commission staff also estimated land-use and water use within the Marcellus shale basin for the life of the project. Commission staff estimated that approximately 1.48 acres of land is required for each natural gas well pad and associated infrastructure (i.e., road infrastructure, water impoundments, and pipelines). Based upon the project volume and the expected estimated ultimate recovery of Marcellus shale wells, between 2,400 and 4,600 wells would be required to provide the gas over the estimated 30-year lifespan of the project. Therefore, on a normalized basis, these assumptions result in an estimate of an upper limit of an additional 120 to 230 acres per year that may be impacted by well drilling. This estimate of impacts is subject to a significant amount of uncertainty.

205. Commission staff also estimates the amount of water required for the drilling and development of these wells over the 30 year period using the same assumptions. Recent estimates show that an average Marcellus shale well requires between 3.88 and 5.69 million gallons of water for drilling and well development, depending on whether the producer uses a recycling process in the well development. Therefore, the production of wells required to supply the project could require the normalized consumptive use of as much as 300 to 880 million gallons of water per year over the 30-year life of the project.

206. Oil Change International's white paper provided an a estimated figure of 24 million metric tons of CO_{2e} per year from upstream natural gas production, using the Intergovernmental Panel on Climate Change's 20-year global warming potential

(GWP) for methane, rather than the 100-year GWP that is used by EPA in its official GHG inventories, as well as in its mandatory GHG emission reporting program.[223] The 20-year GWP for methane is 86, meaning that each unit of CH4 mass emissions is considered to have the same warming potential as 86 units of CO2 mass emissions. By comparison, the conventional 100-year GWP for methane is 25. EPA supported the 100-year time period over the 20-year time period in its summary of comments and responses in the final rulemaking, *2013 Revisions to the Greenhouse Gas Reporting Rule and Final Confidentiality Determinations for New or Substantially Revised Data Elements.*[224] Neither Sierra Club, nor Oil Change International present any reason why the 20-year GWP is preferable to the 100-GWP. Further, the final EIS notes that fugitive methane leaks along the PennEast pipeline would only increase the potential annual GHG emissions by approximately 0.05 percent.[225]

ii. Impacts from Downstream Combustion of Project-Transported Natural Gas

207. As noted above, Oil Change International takes issue with final EIS' analysis of impacts from the downstream combustion of natural gas transported by the project. The court in *Sabal Trail* held that where it is known that the natural gas transported by a project will be used for end-use combustion, the

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[223] 40 C.F.R. § 98, *et al.* (2017).

[224] 78 Fed. Reg. 71,904 (2013).

[225] *See* final EIS at 4-249.

Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible."[226] The final EIS does precisely this.[227] Thus, the Commission and the public were fully informed of the potential impacts from the project.

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[226] *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (*Sabal Trail*). The Commission's environmental review of the PennEast Project is distinguishable from its environmental review of the project at issue in Sabal Trail. In Sabal Trail, the court determined that the Commission should have examined the GHG impacts of burning the natural gas to be delivered by that project. In this case, as discussed above, the Commission has estimated the GHG emissions associated with burning the gas to be transported by PennEast, consistent with the quantification that the Sabal Trail court required. The methodology used here is similar to that in a number of recent cases. *See NEXUS Gas Transmission, LLC et al.*, 160 FERC ¶ 61,022 at PP 172-173 (NEXUS Project *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at PP 189-190 (Northern Access 2016 Project); *Dominion Carolina Gas Transmission, LLC*, 158 FERC ¶ 61,126, at P 81 (Transco to Charleston Project); *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 143 (Atlantic Sunrise Project); *Tennessee Gas Pipeline Co.*, 158 FERC ¶ 61,110, at P 104 (Orion Project); and *Rover Pipeline, LLC*, 158 FERC ¶ 61,109, at P 274 (Rover Pipeline Project). Further, Sabal Trail and this case are factually distinct, in that the record in Sabal Trail showed that the natural gas to be transported on the new project would be delivered to specific destinations—power plants in Florida—such that the court concluded that the burning of the gas in those plants was reasonably foreseeable and the impacts of that activity warranted environmental examination. In contrast, the gas to be transported by PennEast will be delivered on behalf of 12 separate shippers, consisting of LDCs, marketers, and an interstate pipeline, into the interstate natural pipeline grid, and will serve a variety of end-uses.

[227] *See* final EIS at 4-254.

208. The final EIS conservatively estimates that if all 1.1 million dekatherms per day of natural gas were transported to combustion end uses, downstream end-use would result in the emission of about 21.3 million metric tpy of CO_{2e}. We note that this CO_{2e} estimate represents an upper bound for the amount of end-use combustion that could result from the gas transported by this project. This is because some of the gas may displace fuels (i.e., fuel oil and coal) which could result in lower total CO_{2e} emissions. It may also displace gas that otherwise would be transported via different means, resulting in no change in CO_{2e} emissions or be used as a feedstock. This estimate also assumes the maximum capacity is transported 365 days per year, which is rarely the case because many projects are designed for peak use. As such, it is unlikely that this total amount of GHG emissions would occur, and emissions are likely to be significantly lower than the above estimate. In addition, these estimates are generic in nature because no specific end uses have been identified.

209. In an effort to put these emissions in to context, we examined both the regional[228] and national emissions of GHGs. If only the regions identified

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[228] Staff looked at the Transco, Columbia, and Texas Eastern systems to identify the states those pipeline systems serve. The natural gas can move anywhere on these systems. Thus we used the combined inventory of (1) states served by Transco's system, (2) states served by Transco and Columbia, and (3) states served by Transco and Texas Eastern (the Columbia system overlapped the Texas Eastern system). We compared the 2014 inventory of these states served by the three systems in comparison to the downstream emissions to arrive at the potential increase in GHG emissions.

potentially served by the Transco system and interstate interconnection are considered, the volume of GHG emissions by the PennEast Project will result in a 0.7-1 percent increase of GHG emissions from fossil fuel combustion in these states.[229] From a national perspective, combustion of all the gas transported by the PennEast Project will result in a 0.4 percent increase of national GHG emissions. Based on the myriad of existing and potential future interconnections with other pipeline systems, it is impossible to define which states and which facilities may ultimately consume gas transported by the PennEast Project. From a practical sense, we know that as more states are considered, the percentage of increase contributed by the PennEast Project would decline. Therefore, speculating on the wider distribution does little to clarify the impact. In any case, the greatest possible contribution to GHG emissions at a regional level is 1 percent.

210. The final EIS acknowledged that the emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change.[230] However, as the final EIS explained, because the project's incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined

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[229] The 22 states included in the GHG emissions analysis are: Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

[230] *See* final EIS at 4-335.

whether the project's contribution to cumulative impacts on climate change would be significant.[231]

n. Alternatives

211. Based on comments and feedback from landowners, agencies and municipalities, PennEast incorporated 70 route variations into the proposed route to avoid or reduce effects on environmental or other resources, resolve engineering or constructability issues, or address stakeholder concerns.[232] The total length of these 70 route variations is 68.4 miles.[233] Commission staff reviewed the route variations and agreed with PennEast's conclusions regarding their incorporation into the proposed route. Alternatives considered, which are described in the final EIS, include the No Action alternative, system alternatives, major pipeline route alternatives, minor pipeline route variations, and aboveground facilities alternatives.

212. Several commenters suggested renewable energy sources be considered as an alternative to the proposed project. As noted in the final EIS, electric generation from renewable energy sources is a reasonable alternative for reviewing generating facilities powered by fossil fuels. It is the states, however, not this Commission, that regulate generating facilities. Authorizations related to how markets would meet demands for electricity are not part of the applications before the Commission. Because the proposed project's purpose is to transport

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[231] *Id.*

[232] *See* final EIS at 3-24 to 3-32.

[233] *See* final EIS at 3-26 to 3-31 (Table 3.3.2-1).

natural gas, and electric generation from renewable energy resources is not a natural gas transportation alternative, it was not considered in the EIS.[234]

213. The final EIS evaluates five major route alternatives including three potential major route alternatives that would avoid the Sourland Mountain Region in New Jersey.[235] After the close of the draft EIS comment period, several comments were filed regarding the viability of Sourland Mountain Alternative 1, which would cross into Bucks County, Pennsylvania. Several of these comments appear to assume the Sourland Mountain Alternative 1 was incorporated into the proposed pipeline route, and expressed concern that there was not an opportunity to comment on the alternative, because it was filed by PennEast after the close of the draft EIS comment period. We clarify here that the Sourland Mountain Alternative 1 is not part of the proposed route, as the final EIS did not determine that the Sourland Mountain Alternative 1 was preferable to the proposed route.

214. The final EIS evaluates an alternate access road for the Kidder Compressor Station.[236] On January 9, 2017, after the close of the draft EIS comment period, Sondra Wolferman filed comments regarding the alternate access road adjacent to the existing pipeline right-of-way for access to the Kidder Compressor Station. Specifically, Ms. Wolferman disagrees with the claim that the access road will be

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[234] *See* final EIS at 3-3.

[235] *See* final EIS at 3-9 to 3-24.

[236] *See* final EIS at 3-16.

located on an existing road, and asserts that the I-80 alternative to the proposed access road is both reasonable and preferable. On November 28, 2016, PennEast filed a conceptual plan drawing and comparison of the proposed access road and the access road alternative in response to EPA's comments on the draft EIS. As discussed in the final EIS, the potential advantages of the access road alternative are collocation of most of the station's new permanent access road with the new and existing pipeline rights-of-way, and reduced forest clearing. Although the access road alternative would reduce forest clearing by about 2.3 acres and collocate the clearing with the pipeline right-of-way, it would result in greater permanent impacts on forested wetland, and would have to cross approximately 400 feet of waterbody, whereas the proposed access road would only cross approximately 120 feet of waterbody. PennEast has sited the proposed access road to partially utilize (approximately 400 feet of the 2,000-foot-long road) an existing road (which would need improvements), and to avoid wetland areas. Therefore, the final EIS determined that the compressor station access road alternative would not be environmentally preferable to the proposed access road location. We agree.

215. The final EIS evaluates an alternate site for the interconnection with Transco at a site approximately 2.1 miles southwest of the proposed interconnection.[237] PennEast filed an analysis of this alternative on November 23, 2016. The primary advantage of this alternative is that it would eliminate about 2.5 miles of the proposed pipeline within

[237] *See* final EIS at 3-37 to 3-39.

Hopewell Township, New Jersey, where the pipeline would cross residential areas, farmlands, a portion of planned Hopewell Township affordable housing, and a parcel planned for a Hopewell Township emergency services facility. PennEast states that the Transco Interconnect Alternative would not meet the project's delivery needs as negotiated with Transco. We believe that an alternative interconnect on the same Transco pipeline approximately 2.1 miles from the proposed interconnect may be similar enough to the proposed delivery point to allow the alternative to meet the project's delivery needs, and warrants further analysis. Therefore, we require in Environmental Condition 13 that, prior to construction, PennEast provide additional details on the feasibility of incorporating the Transco Interconnect Alternative site.

4. Environmental Analysis Conclusion

216. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the project, as well as other information in the record. We are adopting the environmental recommendations in the final EIS, as modified herein, and are including them as environmental conditions in Appendix A to this order. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with

the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

217. Based on our consideration of this information and the discussion above, we agree with the conclusions presented in the final EIS and find that the project, if constructed and operated as described in the final EIS, is an environmentally acceptable actions. Further, for the reasons discussed throughout the order, as stated above, we find that the project is in the public convenience and necessity.

218. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[238]

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[238] *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law)*; see also Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted)

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

The Commission orders:

(A) A certificate of public convenience and necessity is issued to PennEast, authorizing it to construct and operate the proposed PennEast Project, as described and conditioned herein, and as more fully described in the application.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on:

> (1) PennEast's proposed project being constructed and made available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
>
> (2) PennEast's compliance with all applicable Commission regulations, particularly the general terms and conditions set forth in Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and
>
> (3) PennEast's compliance with the environmental conditions listed in Appendix A to this order.

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and *Dominion Transmission, Inc. v. Summers,* 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

(C) A blanket construction certificate is issued to PennEast under Subpart F of Part 157 of the Commission's regulations;

(D) A blanket transportation certificate is issued to PennEast under Subpart G of Part 284 of the Commission's regulations;

(E) PennEast shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(F) PennEast's initial rates and tariff are approved, as conditioned and modified above.

(G) PennEast is required to file actual tariff records reflecting the initial rates and tariff language that comply with the requirements contained in the body of this order not less than 30 days and not more than 60 days prior to the commencement of interstate service consistent with Part 154 of the Commission's regulations.

(H) As described in the body of this order, PennEast must file any negotiated rate agreement or tariff record setting forth the essential terms of the agreement associated with the project at least 30 days, but not more than 60 days before the proposed effective date of such rates.

(I) No later than three months after the end of its first three years of actual operation, as discussed herein, PennEast must make a filing to justify its existing costbased firm and interruptible recourse rates. PennEast's cost and revenue study should be filed through the eTariff portal using a Type of Filing

Code 580. In addition, PennEast is advised to include as part of the eFiling description, a reference to Docket No. CP15-558-000 and the cost and revenue study.

(J) The requests for an evidentiary hearing are denied.

(K) PennEast shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies PennEast. PennEast shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Commissioners LaFleur and Chatterjee are concurring with separate statements attached. Commissioner Glick is dissenting with a separate statement attached.

(SEAL)

Nathaniel J. Davis, Sr.
Deputy Secretary.

Appendix A

Environmental Conditions for the PennEast Pipeline Project

As recommended in the final environmental impact statement (EIS) and otherwise amended herein, this authorization includes the following conditions. The section number in parentheses at the end of a condition corresponds to the section number in which the measure and related resource impact analysis appears in the final EIS.

1. PennEast Pipeline, LLC (PennEast) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EIS, unless modified by the order. PennEast must:
    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
    b. justify each modification relative to site-specific conditions;
    c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification**.
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the order, and take whatever steps are necessary to ensure the protection of all

environmental resources during construction and operation of the project. This authority shall allow:

a. the modification of conditions of the order;

b. stop-work authority; and

c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

3. **Prior to any construction**, PennEast shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EIs), and contractor personnel will be informed of the EIs' authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs before becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EIS, as supplemented by filed alignment sheets. **As soon as they are available**, **and before the start of construction**, PennEast shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the order. All requests for modifications of environmental conditions of the order or site-specific clearances must be written and must reference locations designated on these

alignment maps/sheets. PennEast's exercise of eminent domain authority granted under the Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the order must be consistent with these authorized facilities and locations. PennEast's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. PennEast shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage-yards, new access roads, and other areas that will be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species will be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of the OEP **before construction in or near that area**.

   This requirement does not apply to extra workspace allowed by the FERC's *Upland Erosion*

Control, Revegetation, and Maintenance Plan (Plan) and/or minor field realignments per landowner needs and requirements that do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

a. implementation of cultural resources mitigation measures;

b. implementation of endangered, threatened, or special concern species mitigation measures;

c. recommendations by state regulatory authorities; and

d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **At least 60 days prior to beginning construction**, PennEast shall file an Implementation Plan with the Secretary for review and written approval by the Director of the OEP. PennEast must file revisions to the plan as schedules change. The plan shall identify:

   a. how PennEast will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EIS, and required by the order;

   b. how PennEast will incorporate these requirements into the contract bid

documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to on-site construction and inspection personnel;

c. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;

d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;

e. the location and dates of the environmental compliance training and instructions PennEast will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);

f. the company personnel (if known) and specific portion of PennEast's organization having responsibility for compliance;

g. the procedures (including use of contract penalties) PennEast will follow if noncompliance occurs; and

h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:

   (i) the completion of all required surveys and reports;

(ii) the environmental compliance training of on-site personnel;

(iii) the start of construction; and

(iv) the start and completion of restoration.

7. PennEast shall employ a team of EIs (i.e., two or more or as may be established by the Director of the OEP) per construction spread. The EIs shall be:

   a. responsible for monitoring and ensuring compliance with all mitigation measures required by the order and other grants, permits, certificates, or other authorizing documents;

   b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;

   c. empowered to order correction of acts that violate the environmental conditions of the order, and any other authorizing document;

   d. a full-time position, separate from all other activity inspectors;

   e. responsible for documenting compliance with the environmental conditions of the order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and

   f. responsible for maintaining status reports.

8. **Beginning with the filing of its Implementation Plan**, PennEast shall file

updated status reports with the Secretary on a **weekly basis** until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

a. an update on PennEast's efforts to obtain the necessary federal authorizations;

b. the construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;

c. a listing of all problems encountered and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);

d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;

e. the effectiveness of all corrective actions implemented;

f. a description of any landowner/resident complaints that may relate to compliance with the requirements of the order, and the measures taken to satisfy their concerns; and

g. copies of any correspondence received by PennEast from other federal, state, or local

permitting agencies concerning instances of noncompliance, and PennEast's response.

9. PennEast shall develop and implement an environmental complaint resolution procedure, and file such procedure with the Secretary, for review and approval by the Director of OEP. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the right-of-way. **Prior to construction**, PennEast shall mail the complaint procedures to each landowner whose property will be crossed by the project.

    a. In its letter to affected landowners, PennEast shall:

        (i) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;

        (ii) instruct the landowners that if they are not satisfied with the response, they should call PennEast's Hotline; the letter should indicate how soon to expect a response; and

        (iii) instruct the landowners that if they are still not satisfied with the response from PennEast's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ ferc.gov.

b. In addition, PennEast shall include in its weekly status report a copy of a table that contains the following information for each problem/concern:

(i) the identity of the caller and date of the call;

(ii) the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;

(iii) a description of the problem/concern; and an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.

10. PennEast must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, PennEast must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

11. PennEast must receive written authorization from the Director of the OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.

12. **Within 30 days of placing the authorized facilities in service**, PennEast shall file an affirmative statement with the Secretary, certified by a senior company official:

a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or

b. identifying which of the Certificate conditions PennEast has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

13. **Prior to construction**, PennEast shall file with the Secretary further details on the feasibility of incorporating the Transcontinental Gas Pipe Line (Transco) Interconnect Alternative site along the CSX Railroad south of MP 111.8R2. At a minimum, PennEast shall include:

    a. a map showing the extent of the CSX Railroad right-of-way and Jersey Central Power & Light easement on the east side of the CSX right-of-way, and the CSX Railroad right-of-way adjacent to the Merrill Lynch property;

    b. a map showing apparently undeveloped parcels adjacent to the Transco right-of-way where the Transco right-of-way crosses the CSX Railroad, and that could potentially be used for the interconnect;

    c. a map showing wetlands along both the east and west sides of the CSX Railroad;

    d. records of consultation with Transco regarding feasibility of using the alternative

site as the project delivery point to the Transco system; and

e. details that support if the interconnect with Transco at the alternative site could meet delivery needs of the project shippers. *(Section 3.4.4)*

14. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, an updated report that verifies explosive weights used by the Trap Rock Quarry operator, including concurrence from Trap Rock Quarry that the correct inputs were used. The results of this study shall be incorporated in the final design of the project. *(Section 4.1.4)*

15. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, results of the outstanding Phase 2 and 3 portions of the Geohazard Risk Evaluation Report and include the following in its pipeline design geotechnical report:

    a. an evaluation of soil stability hazards along the pipeline route at the proposed compressor station site and at locations with above-ground facilities;

    b. a final landslide hazard inventory;

    c. any specific measures and locations where PennEast will implement specialized pipeline design to mitigate for potential soil stability or landslide hazards; and

    d. a post-construction monitoring plan. *(Section 4.1.5.2)*

16. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, a final Karst Mitigation Plan that incorporates the results of all outstanding geophysical and geotechnical field investigations in karst areas including stream crossings proposed with the horizontal directional drill (HDD) method. The final Karst Mitigation Plan shall incorporate all Best Management Practices developed based on the results of the final geophysical and geotechnical field investigations for construction through karst areas, including any requirements of the Pennsylvania Department of Environmental Protection (PADEP), New Jersey Department of Environmental Protection (NJDEP), and local planning commissions. *(Section 4.1.5.4)*
17. **Prior to construction**, PennEast shall file with the Secretary the results of its ongoing geotechnical evaluation of working, not active, and abandoned mines near the proposed crossing of the Susquehanna River. The evaluation shall include final documentation of coordination with the Pennsylvania Bureau of Abandoned Mine Reclamation, along with the results of the geotechnical investigation to confirm the final design. PennEast shall include this documentation in the Phase 2 and 3 portions of the Geohazard Risk Evaluation Report. *(Section 4.1.5.4)*
18. **Prior to construction**, PennEast shall file with the Secretary an updated table identifying all areas that may require blasting. This table shall

incorporate the results of the on-going geophysical and geotechnical evaluations. *(Section 4.1.6)*

19. **Prior to construction,** PennEast shall file with the Secretary the final design plans of each HDD crossing, for review and written approval by the Director of OEP. The final design plans will include the results for all geotechnical borings conducted at each HDD crossing (lithology, standard penetration testing, and bedrock quality designation), and an HDD feasibility assessment based on the soil boring results, including an assessment of the risk for hydrofracturing and inadvertent returns of drilling fluids at each crossing. *(Section 4.1.7)*

20. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, an unanticipated discovery plan for paleontological resources. The discovery plan shall be developed in coordination with the New Jersey Geological and Water Survey and Dr. William Gallagher. The significance of each resource shall be defined in the discovery plan. This plan shall describe proposed measures to avoid or minimize impacts on significant paleontological resources and include measures that will be implemented in the event of a discovery of paleontological resources during construction.

21. **Prior to construction**, PennEast shall complete all necessary surveys for water supply wells and groundwater seeps and springs, identify public and private water supply wells within the construction workspace, and file with the

Secretary a revised list of water wells and groundwater seeps and springs within 150 feet of any construction workspace (500 feet in areas characterized by karst terrain). *(Section 4.3.1.6)*

22. **Prior to construction**, PennEast shall identify all septic systems within the construction work space, and file with the Secretary a list of septic systems within 150 feet of any construction workspace. PennEast shall also file with the Secretary, a plan which describes how PennEast will avoid septic systems, as well as how PennEast will mitigate or restore septic systems to applicable regulatory requirements, for review and approval by the Director of OEP.

23. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, a final Well Monitoring Plan that incorporates:

    a. PennEast's response (Serfes 2016) to U.S. Department of the Interior (DOI) comments;

    b. an analysis for radon, radium 226, and radium 228 for wells in Hunterdon and Mercer Counties, New Jersey, in accordance with the New Jersey Private Well Testing Act; and

    c. revisions to section 3.0 of the Well Monitoring Plan to include the types of treatment that PennEast will provide to impacted groundwater users with increased arsenic in groundwater concentrations above the NJDEP established maximum contaminant level (MCL) of 5 microgram per liter (µg/L), and the U.S. Environmental Protection

Agency (EPA) MCL of 10 µg/L for wells in Pennsylvania, as well as other contaminants detected in post-construction monitoring that are above their respective NJDEP or EPA MCL, and provisions for monitoring and maintenance of any treatment systems PennEast provides to impacted groundwater users. *(Section 4.3.1.6)*

24. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, an updated Unanticipated Discovery of Contamination Plan for the project that identifies the management and field environmental professionals responsible for notification for contaminated sites. *(Section 4.3.1.8)*

25. **Prior to construction**, PennEast shall file with the Secretary the results of the investigations regarding any anticipated blasting near the Swan Creek Reservoir. *(Section 4.3.2.2)*

26. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, site-specific crossing plans for all waterbodies with contaminated sediments (see table 4.3.2-5). The crossing method shall ensure that the potential suspension of sediments during construction shall be avoided or minimized to the greatest extent possible to limit any change to the bioavailability of any potential contaminants present. PennEast shall include documentation of consultation with pertinent agencies and identify any recommended minimization measures. *(Section 4.3.2.2)*

27. **Prior to construction**, PennEast shall file a revised Erosion and Sediment Control Plan (E&SCP) with the Secretary for review and written approval by the Director of the OEP. The revised E&SCP shall:

    a. include a complete review of waterbody crossings with steep slopes; and

    b. address waterbody crossing methods for steep embankments and bank stabilization issues, and include site-specific measures to address erosion, sedimentation, and restoration of steep embankments. *(Section 4.3.2.2)*

28. **Prior to construction**, PennEast shall file with the Secretary its final hydrostatic test plan that identifies the final hydrostatic test water sources and discharge locations, and provides documentation that all necessary permits and approvals have been obtained for withdrawal from each source. PennEast's plan shall provide the approximate water volume that will be withdrawn and discharged as both a project-total amount, and a daily amount, for each pipeline segment. Also, PennEast's plan shall detail the decision process for determining when an alternative water source will be used during exceptional dry periods when low flow conditions may be encountered. *(Section 4.3.2.4)*

29. **Prior to construction,** PennEast shall file with the Secretary documentation after consulting with appropriate local, state, and federal agencies regarding any in-water timing restrictions which are more restrictive than those required by the Federal Energy Regulatory Commission (FERC)

Wetland and Waterbody Construction and Mitigation Procedures (Procedures) (e.g., June 1 through September 30 to protect coldwater fisheries; and June 1 through November 30 to protect coolwater and warmwater fisheries). *(Section 4.3.3.2)*

30. **Prior to construction**, PennEast shall file with the Secretary a complete wetland delineation report for the entire project that includes all wetlands delineated in accordance with the U.S. Army Corps of Engineers (USACE) and the applicable state agency requirements. *(Section 4.4.1)*

31. **Prior to construction**, PennEast shall survey all areas mapped as being potential vernal pool habitat and identify if any vernal pool habitat will be affected by project construction and/or operation. The results of these surveys shall be filed with the Secretary and the appropriate state agency(ies) for review. *(Section 4.4.1.2)*

32. **Prior to construction**, PennEast shall file with the Secretary a final project-specific Wetland Restoration Plan developed in consultation with the USACE and applicable state agencies in Pennsylvania and New Jersey, and file the plan with the Secretary. PennEast shall provide documentation of its consultation with the applicable federal and state agencies. *(Section 4.4.2)*

33. **Prior to the construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, an Invasive Species Management Plan that includes

documentation of consultation with the appropriate state agencies and measures it will implement during construction and operation to minimize the spread of invasive and noxious plant species. *(Section 4.5.1.2)*

34. **Prior to construction,** PennEast shall file with the Secretary, for review, a Migratory Bird Conservation Plan developed in consultation with the U.S. Fish and Wildlife Service (FWS), along with documentation of consultation with the FWS. *(Section 4.5.2.3)*

35. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of OEP, a list of locations by MP where the FWS will require tree clearing restrictions that are specifically applicable to federally listed bat species. *(Section 4.6.1.1)*

36. PennEast shall incorporate the conservation measures outlined in the FWS' November 29, 2017 Biological Opinion into its implementation plan, including:

    a. implementing the reasonable and prudent measures;

    b. abiding by the terms and conditions for the bog turtle;

    c. adopting the monitoring and reporting requirements;

    d. consulting with FWS on conservation recommendations for the bog turtle and northern long-eared bat; and

    e. implementing specific requirements for bulrush as specified in the FWS BO.

PennEast shall provide FERC and the FWS with all remaining survey results for their review and comment.

37. **Prior to construction,** if rare flora or fauna are discovered during PennEast's planned surveys of groundwater seeps, PennEast shall develop a plan to avoid or minimize impacts on these species and consult with the FWS. PennEast shall file with the Secretary documentation of its consultation with the FWS, as well as any recommended measures. *(Section 4.6.1.7)*

38. **Prior to construction**, PennEast shall consult with the NJDEP regarding timing and activity restrictions that shall be applied within 300 feet of streams that contain wood turtles. PennEast shall file with the Secretary documentation of this consultation with the NJDEP, as well as any recommendations made by the NJDEP, and whether PennEast agrees to implement these recommendations. Such information regarding this consultation process shall be filed with the Secretary. *(Section 4.6.2.7)*

39. **Prior to construction**, PennEast shall file with the Secretary a comprehensive list of measures developed in consultation with applicable state wildlife agencies to avoid or mitigate impacts on state-listed species and state species of concern, which shall include but not be limited to measures applicable to the eastern small-footed bat, timber rattlesnake, eastern box turtle, northern cricket frog, long-tailed salamander, and Cobblestone tiger beetle, as well as all other State listed species that may be impacted. The NJDEP has

recommended that PennEast use the State's "Utility Right-of-Way No-Harm Best Management Practices" document while developing these project specific measures. *(Section 4.6.2.28)*

40. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, a revised Residential Access and Traffic Management Plan which includes the results of traffic counts and an inventory of roadway and intersection geometry, peak hour traffic volume collection, and related observations of traffic operations in the project area. PennEast shall also file any additional site-specific mitigation measures that it will implement to minimize impacts on local traffic in the project area, including any recommendations from state, county, and municipal agencies. *(Section 4.7.1.6)*

41. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, the following information for residences in close proximity to the project:

    a. the results of previously unsurveyed areas along the pipeline route and an updated list of residences and commercial structures within 50 feet of the construction right-of-way;

    b. for all residences identified within 25 feet of a construction work area, a final site-specific construction plan that includes all of the following: a dimensioned site plan that clearly shows the location of the residence in

relation to the pipeline, the boundaries of all construction work areas, the distance between the edge of construction work areas and the residence and other permanent structures, and equipment travel lanes;

c. a description of how and when landowners will be notified of construction activities;

d. documentation of landowner concurrence if a structure within the construction work area will be relocated or purchased;

e. documentation of landowner concurrence if the construction work areas will be within 10 feet of a residence; and

f. a description of how PennEast will provide temporary housing for residents temporarily displaced during construction and whether PennEast will compensate landowners for this cost. *(Section 4.7.3.1)*

42. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, a final crossing plan for the Appalachian National Scenic Trail that includes: timing restrictions, closure schedules, and site-specific safety and mitigation measures including signage and barriers if needed; and documentation of consultation with the Pennsylvania Game Commission. *(Section 4.7.5.1)*

43. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval of the Director of the OEP, plans regarding a gating or boulder access system for the pipeline right-of-way across Pennsylvania state lands, developed

in consultation with the Pennsylvania Department of Conservation and Natural Resources (PADCNR), to prevent unauthorized vehicle access while maintaining pedestrian access. *(Section 4.7.5.2)*

44. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, additional information on the crossing of the Bethlehem Authority water transmission tunnel crossed at MPs 51.0R2 and 51.6R2. Additional information shall include, but not be limited to:

    a. a site-specific crossing plan for each crossing location, including construction methods and measures used to avoid impacts on the water transmission tunnel;

    b. identification of any blasting that will be required within 2,000 feet of the water tunnel;

    c. a vibration monitoring program that will be implemented during construction; and

    d. documentation of working meetings with the Water Authority to ensure that concerns related to construction and operation of the pipeline over the water transmission tunnel are adequately addressed. *(Section 4.7.5.3)*

45. PennEast shall file with the Secretary reports describing any documented complaints from a homeowner that a homeowner's insurance policy was cancelled, voided, or amended due directly to the grant of the pipeline right-of-way or installation of the pipeline and/or that the

premium for the homeowner's insurance increased materially and directly as a result of the grant of the pipeline right-of-way or installation of the pipeline. The reports shall also identify how PennEast has mitigated the impact. **During construction**, these reports shall be included in PennEast's **weekly** status reports (see recommendation 8) and in quarterly reports for a **2-year period** following in-service of the project. *(Section 4.8.8.2)*

46. **Prior to construction**, PennEast shall assess potential project impacts on the Hickory Run Recreation Demonstration Area and file with the Secretary a recommendation of effects and the Pennsylvania State Historic Preservation Office's (SHPO's) comments. *(Section 4.9.2.1)*

47. **Prior to construction**, PennEast shall file with the Secretary all effects assessments related to historic districts crossed in New Jersey. PennEast shall also include site avoidance or mitigation plans and documentation of New Jersey SHPO's comments. *(Section 4.9.2.2)*

48. **Prior to construction**, PennEast shall provide an assessment of potential project effects to Bridge #D-449 Worman Road along with comments of the New Jersey SHPO and any needed avoidance or treatment plans for the resource. *(Section 4.9.2.2)*

49. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, a final vibration monitoring plan for historic properties within 150 feet of the construction workspace in consultation

with the Pennsylvania and New Jersey SHPOs. *(Section 4.9.5)*

50. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, a revised Blasting Plan that includes a review of potential effects on cultural resources, including caves, rock shelters, and aboveground historic structures, and how those impacts will be addressed. *(Section 4.9.5)*

51. PennEast **shall not begin construction** of facilities and/or use of all staging, storage, or temporary work areas, and new or to-be-improved access roads **until**:

    a. PennEast files with the Secretary:

        (i) remaining cultural resources survey report(s);

        (ii) site or resource evaluation report(s) and avoidance/treatment plan(s), as required;

        (iii) the project's recommended effects to historic properties in Pennsylvania and New Jersey; and

        (iv) comments on the cultural resources reports and plans from the Pennsylvania and New Jersey SHPOs, as appropriate;

    b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties will be adversely affected; and

    c. the FERC staff reviews and the Director of the OEP approves the cultural resources reports and plans, and notifies PennEast in

writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership information** about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: **"CUI\\PRIV - DO NOT RELEASE."** *(Section 4.9.6)*

52. If changes to the project construction schedule and/or design occur that will materially impact the amount of construction nitrogen oxide (NOx) emissions generated in a calendar year, PennEast shall file with the Secretary, **prior to construction,** revised construction emissions estimates prior to implementing the revised construction schedule and/or design modification demonstrating that the annual NOx emissions resulting from the revised construction schedule and/or design do not exceed general conformity applicability thresholds. In addition, if any such project revised construction schedule and/or design changes result in emissions that will exceed the general conformity applicability thresholds, then a draft general conformity determination will need to be prepared at that time, as required under Section 93.157(d) of the Federal General Conformity regulation at 40 Code of Federal Regulations Part 93, Subpart B. *(Section 4.10.1.3)*

53. PennEast shall implement the following measures for on-road vehicles and nonroad diesel construction equipment used for construction of the project;

    a. all on-road vehicles and non-road construction equipment operating at, or visiting, a construction site shall comply with the three-minute idling limit, and anti-idling signs shall be posted;

    b. all non-road diesel construction equipment greater than 100 horsepower used for more than ten days shall have engines that meet the EPA Tier 4 non-road emission standards or the best available control technology that is technologically feasible and verified by EPA or the California Air Resources Board as a diesel emission control strategy; and

    c. all on-road diesel vehicles used to haul materials or traveling to and from a construction site shall use designated truck routes that are designed to minimize impacts on residential areas and sensitive receptors such as hospitals, schools, daycare facilities, senior citizen housing, and convalescent facilities. *(Section 4.10.1.4)*

54. **Prior to construction**, PennEast shall file with the Secretary, for review and written approval by the Director of the OEP, a HDD noise mitigation plan for each HDD location to reduce the projected noise level attributable to the proposed drilling operations at the 31 noise sensitive areas (NSAs) with the predicted noise levels above 55 decibel A-weighted (dBA) day-night sound level (Ldn).

During drilling operations, PennEast shall implement the approved plan for all HDDs, monitor noise levels, include the noise monitoring results in its **weekly** status reports, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than an Ldn of 55 dBA at the NSAs. *(Section 4.10.2.3)*

55. PennEast shall file a noise survey with the Secretary **no later than 60 days after placing the Kidder Compressor Station in service**. If a full load noise condition survey is not possible, PennEast shall provide an interim survey at the maximum horsepower load and provide the full load survey **within six months**. If the noise attributable to the operation of the compressor station at full load exceeds an Ldn of 55 dBA at any nearby NSA, PennEast shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within one year of the in-service date.** PennEast shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days after it installs the additional noise controls.** *(Section 4.10.2.3)*

56. **Prior to construction**, PennEast shall consult with the Federal Aviation Administration and the appropriate authority at the Trenton-Mercer Airport regarding any requirements or guidelines that need to be followed during construction or operation of the project. Records of these consultations, as well as any requirements made by the Federal Aviation Administration and the

Trenton- Mercer Airport, shall be filed with the Secretary. *(Section 4.11.3)*

LaFLEUR, Commissioner *concurring*:

In today's order, the Commission authorizes the development of the PennEast Project, a natural gas pipeline from Luzerne County, Pennsylvania to Mercer County, New Jersey. I write separately to provide additional context regarding my conclusion that the PennEast Project is in the public interest.

Deciding whether a project is in the public interest requires a careful balancing of the economic need for the project and its environmental impacts.[1] In applying this balancing test to the extensive record developed in this case, I am persuaded that on balance, the PennEast Project is in the public interest. PennEast has demonstrated that approximately 90 percent of the project's capacity has been subscribed, primarily by state-regulated local distribution companies and owners of natural gas-fired electric generation facilities. I believe that under existing Commission precedent, this evidence of precedent agreements supports the determination that the project is needed.

I have carefully considered the environmental impacts of the PennEast Project, and agree with the order's determination that, while the Project will result in some adverse environmental impacts, the environmental conditions imposed in today's order will ensure that such impacts are reduced to acceptable levels. I do share the concerns of my colleagues that the record reflects a significant

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[1] *See Atlantic Coast Pipeline*, LLC, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, *dissenting*); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, *dissenting*).

number of environmental surveys that are incomplete due to lack of access to landowner property. I am persuaded, however, that Commission staff has developed a sufficient record to adequately evaluate the environmental impacts resulting from the PennEast Project.[2] Moreover, today's order imposes a number of environmental conditions which are intended to specifically allow the Commission and Commission staff to carefully monitor PennEast's ongoing compliance obligations, particularly related to the completion of those surveys, and any necessary avoidance, minimization, and mitigation measures that may be needed.

I strongly support Chairman McIntyre's announcement that the Commission will undertake a generic proceeding to look broadly at our pipeline certificate policies. I believe this review should include both our needs determination and our environmental review of proposed projects. Today's order highlights the issue of how pipeline developers engage with landowners, which I believe should also be explored in the upcoming generic proceeding. For now, I will continue to take a case-by-case approach to pipeline applications, carefully applying the existing law that governs our certificate process to the factual record developed in each case. In this case, that review led

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[2] The order explains that the Commission relied upon "PennEast's application and supplements, as well as information developed through Commission staff's data requests, field investigations, the scoping process, literature research, alternative analyses, and contacts with federal, state, and local agencies, as well as with individual members of the public."

me to conclude that the proposed pipeline is in the public interest.

For these reasons, I respectfully concur.

Cheryl A. LaFleur
Commissioner

CHATTERJEE, Commissioner, *concurring*:

I concur in this order and agree with granting a certificate of public convenience and necessity to PennEast, authorizing it to construct and operate the proposed PennEast Project, subject to the conditions in the order. I believe a clear need has been demonstrated for the project. PennEast has executed long-term, firm precedent agreements with 12 shippers for approximately 90 percent of the project's capacity. This additional gas infrastructure will provide additional natural gas transportation capacity into Pennsylvania and New Jersey.

However, 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. Under section 7 of the Natural Gas Act, once the Commission grants a certificate, a certificate holder is authorized to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it 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.

I am supporting the project despite these concerns, because I believe the Commission has sufficient information in the record on which to make its decision—the certificate application and supplements, information developed through Commission staff's data requests, field investigations, the scoping process, literature research, alternatives

analysis, and contacts with federal, state, and local agencies, and individual members of the public. Additionally, the order imposes conditions requiring the filing of additional environmental information for review and approval once survey access is obtained.

But I would like to encourage pipeline companies and landowners to work with the Commission to maximize engagement and minimize the impacts on landowners going forward. I believe that a cooperative process leads to the best results for all stakeholders.

For these reasons, I respectfully concur.

Neil Chatterjee, Commissioner

GLICK, Commissioner, *dissenting*:

I respectfully dissent from today's order because I believe that the record in this proceeding fails to demonstrate that the PennEast Project satisfies the requirements for a certificate of public convenience and necessity under the Natural Gas Act. Section 7 of the Natural Gas Act requires that, before issuing a certificate for new pipeline construction, the Commission find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms.[1] I disagree with the Commission's conclusion that the PennEast Project meets these standards.

In today's order, the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed.[2] Pursuant to these agreements, PennEast's affiliates hold more than 75 percent of the pipeline's subscribed capacity.[3] While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline,[4]

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[1] 15 U.S.C. § 717f (2012).

[2] *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.").

[3] *Id.* P 6.

[4] *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

contracts among affiliates may be less probative of that need because they are not necessarily the result of an arms-length negotiation.[5] 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.

Under these circumstances, I believe that the Commission must consider additional evidence regarding the need for the pipeline. As the Commission explained in the Certificate Policy Statement, this additional evidence might include, among other things, projections of the demand for natural gas, analyses of the available pipeline capacity, and an assessment of the cost savings that the proposed pipeline would provide to consumers.[6] The Commission, however, does not rely on any such evidence in finding that there is a need for the PennEast Project.[7] Accordingly, I do not believe that the Commission's order properly concludes that the PennEast Project is needed.

In addition to determining the need for a pipeline, the Natural Gas Act requires the Commission to find

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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.").

[5] Certificate Policy Statement at 61,744.

[6] *Id.* at 61,747.

[7] Indeed, the Commission concludes that "the fact that 6 of the 12 shippers on the PennEast Project are affiliated with the project's sponsors does not require the Commission to look behind the precedent agreements to evaluate project need." *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 at P 33.

that, on balance, the pipeline's benefits outweigh its harms. This includes weighing the risk of harm to the environment, landowners, and communities, as well as public safety more generally.[8] And where, as in this proceeding, there is limited evidence of the need for the proposed project, it is incumbent on the Commission to engage in an especially searching review of the project's potential harms to ensure that the project is in fact in the public interest. In this case, PennEast's certificate application lacks evidence that I believe is important to making the public interest determination.[9]

The Commission addresses this lack of evidence by conditionally granting the certificate, subject to PennEast's compliance with the environmental conditions. I recognize that the courts have upheld the Commission's authority to issue conditional

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[8] As the United States Court of Appeals for the District of Columbia Circuit has explained, "[t]he broad public interest standards in the Commission's enabling legislation are limited to 'the purposes that Congress had in mind when it enacted this legislation.'" *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FERC*, 425 U.S. 662, 670 (1976)). The Court explained that, for the Natural Gas Act, these purposes include "'encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices'" as well as "'conservation, environmental, and antitrust issues.'" *Id.* (quoting *NAACP*, 425 U.S. at 670 n.6).

[9] For instance, 68 percent of the project alignment in New Jersey has yet to be surveyed for the existence of historic and cultural resources. *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 at P 172. In addition, PennEast has not yet completed the geotechnical borings work needed to ensure that the environmental impacts of planned horizontal directional drilling will be adequately minimized. *Id.* P 120.

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.[10] 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.[11] Further, under the Natural

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[10] 15 U.S.C. § 717f(h) (2012). State supreme courts, including New Jersey's and Pennsylvania's, have long recognized that the power of eminent domain is a harsh and extraordinary power that should be strictly construed. *See Levin v. Twp. Comm. of Twp. of Bridgewater*, 274 A.2d 1, 26 (N.J. 1971) ("Where . . . property is forcibly taken from one party for the purpose of being transferred to another, thereby excluding the consent of the owner and excluding all other prospective ultimate purchasers and developers except the one selected by the municipality, the facts which allegedly give rise to that municipal power should be closely scrutinized."); *Woods v. Greensboro Nat. Gas Co.*, 54 A. 470, 470-72 (Pa. 1903) ("The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right, and the rule in that case is that the authority is to be strictly construed." (internal citations omitted)); *see also Harvey v. Aurora & G. Ry. Co.*, 51 N.E. 163, 166 (Ill. 1898) (similar); *Chesapeake & O. Ry. Co. v. Walker*, 40 S.E. 633, 636 (Va. 1902) (similar); *City of Little Rock v. Sawyer*, 309 S.W.2d 30, 36 (Ark. 1958) (similar); *La. Power & Light Co. v. Lasseigne*, 257 La. 72, 89 (1970) (similar).

[11] *See, e.g.*, *Walker v. Gateway Pipeline Co.*, 601 So. 2d 970, 975 (Ala. 1992) (explaining that section 7(h) of the Natural Gas Act addresses eminent domain needed for the "actual construction of facilities, not entries that may take place prior to such construction and in preparation for acquiring a certificate of public convenience and necessity from the FERC").

Gas Act, this eminent domain authority is not limited to the extent needed to complete the surveys and other assessments used to satisfy the conditions imposed in the Commission's order. As a result, there will not necessarily be any restriction on a pipeline developer's ability to exercise eminent domain while the Commission waits to confirm that the pipeline is in the public interest.

I recognize that part of the reason that the record in this proceeding is incomplete is that landowners have denied PennEast access to their land for the purpose of conducting the necessary studies and assessments. 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 certification process as an end run around states and landowners that choose not to grant access to their property before a certificate is issued.[12]

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[12] Some states allow prospective interstate pipeline companies to rely on state law to access private property for surveying prior to obtaining a certificate of public convenience and necessity. *See, e.g.*, *Texas E. Transmission, LP v. Barack*, 2014 WL 1408058, at *3 (S.D. Ohio Apr. 11, 2014) (granting a pipeline company access under Ohio law to a property for purpose of surveying, appraising, and conducting any necessary examinations). Other states, including New Jersey and Pennsylvania, do not provide pipeline companies this right prior to obtaining a certificate of public convenience and necessity from the Commission.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

Order Granting Rehearings for Further Consideration, *PennEast Pipeline Co., LLC*, No. CP15-558-001 (Feb. 22, 2018)

Rehearings have been timely requested of the Commission's order issued on January 19, 2018, in this proceeding. *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (2018). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)[1] would be deemed denied. 18 C.F.R. § 385.713 (2017).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[1] *See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Order on Rehearing, *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 (Aug. 10, 2018)

1. On January 19, 2018, the Commission issued an order pursuant to section 7(c) of the Natural Gas Act (NGA) and parts 157 and 284 of the Commission's regulations authorizing PennEast Pipeline Company, LLC (PennEast) to construct and operate the PennEast pipeline system (PennEast Project).[1] The PennEast Project consists of a new, 116-mile greenfield natural gas pipeline extending from Luzerne County, Pennsylvania, to Mercer County, New Jersey, as well as three laterals, a new compressor station and appurtenant facilities. The PennEast Project is designed to provide up to 1,107,000 dekatherms per day (Dth/d) of firm transportation service to a diverse group of customers for a variety of purposes, including supply flexibility, diversity, and reliability.

2. In the Certificate Order, the Commission found that the benefits that the PennEast Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. The Commission concluded after preparing an Environmental Impact Statement (EIS) for the project to satisfy the requirements of the National Environmental Policy Act (NEPA) that, if constructed and operated as described in the Final EIS, the project will result in some adverse environmental impacts, but that these impacts will be

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[1] *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (Certificate Order).

reduced to less than significant levels with PennEast's implementation of the required mitigation measures as adopted as conditions of the order.[2]

3. Between January 23, 2018 and February 20, 2018, numerous parties filed, timely, unopposed requests for rehearing of the Certificate Order.[3] In addition, untimely requests for rehearing were filed by Food and Water Watch, Sourland Conservancy and the County of Mercer.

4. For the reasons discussed below, the requests for rehearing are rejected, dismissed, or denied and the requests for stay are dismissed as moot.

I. Procedural Matters

A. Party Status

5. Under NGA section 19(a) and Rule 713(b) of the Commission's Rules of Practice and Procedure, only a party to a proceeding has standing to request rehearing of a final Commission decision.[4] Any person seeking to become a party must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.[5] On February 16, 2018, New Jersey State Senator Kip Bateman and New Jersey State Assemblyman Reed Gusciora filed requests for rehearing of the Certificate Order. On February 20, 2018, New Jersey State Senator Shirley

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[2] Certificate Order, 162 FERC ¶ 61,053 at P 98.

[3] On February 20, 2018, Virginia Banks filed a timely request for rehearing. On August 2, 2018, Ms. Banks' request for rehearing was withdrawn.

[4] 15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713(b) (2017).

[5] 18 C.F.R. § 385.214(a)(3) (2017).

Turner filed a request for rehearing of the Certificate Order. Neither Senators Bateman or Turner, or Assemblyman Gusciora filed motions to intervene in this proceeding; therefore they are not parties to the proceeding, and their requests for rehearing must be rejected.

B. Untimely Requests for Rehearing

6. Pursuant to section 19(a) of the NGA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order.[6] Under Commission's regulations, read in conjunction with section 19(a), the deadline to seek rehearing was 5:00 pm U.S. Eastern Time, February 20, 2018.[7] Food & Water Watch's February 21, 2018 request for rehearing, the County of Mercer's February 27, 2018 request for rehearing, and

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[6] 15 U.S.C. § 717r(a) (2012) ("Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order"). The Commission has no discretion to extend this deadline. *See, e.g.*, *Transcontinental Gas Pipe Line Co.*, 161 FERC ¶ 61,250, at P 10, n. 13 (2017) (*Transco*) (collecting cases).

[7] Rule 2007 of the Commission's Rules of Practice and Procedure provides that when the time period prescribed by statute falls on a weekend, the statutory time period does not end until the close of the next business day. *See* 18 C.F.R. § 385.2007(a)(2) (2017). The Commission's business hours are "from 8:30 a.m. to 5:00 p.m.," and filings—paper or electronic—made after 5:00 p.m. will be considered filed on the next regular business day. Therefore, although the Certificate Order was issued on January 19, 2018, because February 19, 2018 fell on a federal holiday, the rehearing period closed on February 20, 2018. *See* 18 C.F.R. §§ 375.101(c), 2001(a)(2) (2017).

Sourland Conservancy's March 25, 2018 request for rehearing failed to meet this deadline. Because the 30-day rehearing deadline is statutorily based, it cannot be waived or extended, and their requests must be rejected as untimely.

C. Deficient Requests for Rehearing

7. The NGA requires that a request for rehearing set forth the specific grounds on which it is based.[8] Additionally, the Commission's regulations provide that requests for rehearing must "[s]tate concisely the alleged error in the final decision" and "include a separate section entitled 'Statement of Issues,' listing each issue in a separately enumerated paragraph" that includes precedent relied upon.[9] Consistent with these requirements, the Commission "has rejected attempts to incorporate by reference arguments from a prior pleading because such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant."[10] Finally, "parties are not permitted to

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[8] 15 U.S.C. § 717r(a) (2012).

[9] 18 C.F.R. § 385.713 (2017).

[10] *San Diego Gas and Electric Co. v. Sellers of Market Energy*, 127 FERC ¶ 61,269, at P 295 (2009). *See Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007, at P 7 (2016) ("the Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent. Bootstrapping of arguments is not permitted."). *See also ISO New England, Inc.*, 157 FERC ¶ 61,060, at P 4 (2016) (explaining that the identical provision governing requests for rehearing under the Federal Power Act "requires an application for rehearing to 'set forth specifically the ground or grounds upon which such application is based,' and the Commission has rejected attempts to incorporate by reference

introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality."[11]

8. Numerous petitioners filed brief requests for rehearing generally asserting that the Commission's Certificate Order did not comply with NEPA or the NGA, or otherwise failed to adequately address a host of issues. These petitioners did not include a concise statement of issues, and failed to make reference to specific findings in the Certificate Order, nor do they rely on Commission or other precedent to support their assertions.[12] In addition, several petitioners filed requests for rehearing in which they simply seek to incorporate by reference the requests for rehearing filed by Conservation Foundation, and/or the New Jersey Division of Rate Counsel (Rate Counsel). For the reasons discussed above, these pleadings[13] do not

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grounds for rehearing from prior pleadings"); *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 10 (2013) ("The Commission, however, expects all grounds to be set forth in the rehearing request, and will dismiss any ground only incorporated by reference.") (citations omitted).

[11] *PaTu Wind Farm, LLC v. Portland General Electric Co.*, 151 FERC ¶ 61,223, at P 42 (2015). *See also Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010).

[12] *See, e.g.*, *Boott Hydropower, Inc.*, 143 FERC ¶ 61,159 (2013) (dismissing request for rehearing that did not include a Statement of Issues and did not identify the specific error alleged).

[13] The requests for rehearing submitted by the following parties are dismissed as they failed to comply with Commission regulations: Elizabeth Balogh; Sari DeCesare, Linda and Ned Heindel; Scott Hengst, Fairfax Hutter; Kelly Kappler; Karen

comply with Commission regulations and are dismissed. In any event, however, the concerns of these parties are generally addressed in response to arguments properly raised by other parties on rehearing.

1. Delaware Riverkeeper's Rehearing Request

9. On January 24, 2018, five days after the issuance of the Certificate Order, Delaware Riverkeeper Network (Delaware Riverkeeper) filed a 190-page request for rehearing that lists 20 alleged errors that purportedly relate to the Certificate Order. For two of the alleged errors, there is no further discussion in the rehearing request and these arguments are dismissed.[14] For the 18 other alleged errors, Delaware Riverkeeper's request for rehearing is a verbatim or near-verbatim copy of Delaware Riverkeeper's September 12, 2016 comments on the Draft Environmental Impact Statement (Draft EIS) prepared for the project.[15] The aim of the NGA's rehearing requirement is "to give the Commission the first opportunity to consider challenges to its orders

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Mitchell; Elizabeth Peer; Laura Pritchard; Roblyn Rawlins; Sarah Seier; the City of Lambertville; the New Jersey Natural Lands Trust; the Pipeline Safety Coalition, Sierra Club; and Washington Crossing Audubon Society.

[14] The issues Delaware Riverkeeper does not discuss further are that the Final EIS did not perform an analysis of the economic impacts of the PennEast Project, and that the Final EIS failed to "undertake a healthy [sic] and safety impacts analysis".

[15] *Compare* Delaware Riverkeeper's January 24, 2018 Request for Rehearing at 7-158 *with* its September 12, 2016 Comments at 2-78.

and thereby narrow or dissipate the issues before they reach the courts."[16] Simply repeating prior arguments regarding an entirely separate document does not serve this purpose. Nor does it comport with Delaware Riverkeeper's obligation to "set forth specifically the ground or grounds upon which" a request for rehearing is based.[17] Delaware Riverkeeper, in essence, incorporates by reference their prior Draft EIS comments into their request for rehearing. Delaware Riverkeeper's request for rehearing further fails to address the Certificate Order itself, and in several instances cites to the Draft EIS, as opposed to the Final EIS, and otherwise contains generalized, unsupported statements of purported errors in the Final EIS. We find that these 18 assertions of error have not been properly raised and are thus dismissed.[18] Nevertheless, we find that these arguments are without merit, as discussed below.

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[16] *Sierra Club v. FERC*, 827 F.3d 59, 69 (D.C. Cir. 2016).

[17] 15 U.S.C. § 717r(a). *See also Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22 (D.C. Cir. 2006) ("Each quoted passage states a conclusion; neither makes an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows 'specifically ... the ground on which rehearing [i]s being sought'").

[18] These items include: (1) EIS does not support conclusion that construction of project will not have significant environmental impacts; (2) EIS assertion of need not supported by preponderance of evidence; (3) EIS fails to consider cumulative impacts; (4) EIS fails to consider impacts of induced shale gas production; (5) Economic benefits asserted in the EIS are unsupported and economic harms are overlooked; (6) Commission failed to consider greenhouse gas emissions and climate change; (7) EIS alternative analysis is flawed; (8) Commission improperly segmented its environmental

D. PennEast's Answer

10. On March 7, 2018, PennEast filed a motion for leave to answer and answer to the requests for rehearing and motions for stay. On March 15, 2018, the New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association (jointly, Conservation Foundation) filed a response to PennEast's answer. Rules 713(d)(1) and 213(a)(2) of the Commission's Rules of Practice and Procedure[19] prohibit answers to a request for rehearing, and answers to answers. Accordingly, we reject PennEast's answer and Conservation Foundation's response.

E. Lack of Evidentiary Hearing

11. Conservation Foundation asserts that the Commission erred in denying their request to hold an evidentiary hearing to address the existence of need for the project.[20] Conservation Foundation argues that

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analysis; (9) EIS fails to address comments that standard construction practices will result in environmental violations and degradation; (10) EIS misrepresents the legal authority of the Delaware River Basin Commission; (11) EIS is legally deficient; (12) EIS contains, inaccurate, misleading, and/or deficient assertions; (13) EIS contains an insufficient baseline for Threatened and Endangered species review; (14) EIS fails to adequately consider alternative routes or construction practices; (15) PennEast Project will harm the public and property rights; (16) Commission authorized tree felling prior to company's receipt of Clean Water Act Certification; (17) Commission failed to provide accurate baseline from which to conduct its environmental analysis; and (18) Commission relied on inaccurate or complete information. Delaware Riverkeeper's Request for Rehearing at 5-7.

[19] 18 C.F.R. § 385.213(a)(2); 713(d)(1) (2017).

[20] Conservation Foundation's Request for Rehearing at 85-87.

the Commission merely relied on precedent agreements, and that "critical information for evaluating public benefit… remains missing from the record."[21] Holding an evidentiary hearing, Conservation Foundation posits, would allow for greater public participation, while enabling an "independent assessment" of both the credibility of PennEast's evidence regarding need for the project, and whether demand for the project exists.[22]

12. As we stated in the Certificate Order, an evidentiary, trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.[23] Despite Conservation Foundation's assertions, they have not shown that a material issue of fact exists that the Commission could not, and cannot, resolve on the basis of the written record. As discussed in the Certificate Order and below, precedent agreements for project capacity are "significant evidence of project need or demand."[24] The written record contains sufficient evidence to establish that the project is needed, most notably from precedent agreements subscribing to approximately 90 percent of the project's capacity, as well as additional evidence of the various reasons project shippers sought to utilize the

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[21] *Id.,* at 85.

[22] *Id.,* at 86-87.

[23] *See, e.g.*, *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, at P 15 (2012).

[24] Certificate Order, 162 FERC ¶ 61,053 at PP 28, 36; *Infra* 16-17.

project.[25] Conservation Foundation, and all other parties to the proceeding had the opportunity to view, and respond to, this evidence. Thus, an evidentiary hearing was not warranted. To the extent that Conservation Foundation asserts that need for the project has not been demonstrated adequately, we address this issue below.

F. Motions for Stay

13. Michael Spille, The Township of Hopewell (Hopewell), Lower Saucon Township (Lower Saucon), Kingwood Township, Delaware Riverkeeper, Conservation Foundation, and New Jersey Department of Environmental Protection (NJDEP) request that the Commission stay the Certificate Order pending issuance of an order on rehearing. This order addresses and denies or dismisses the requests for rehearing; accordingly, we dismiss the requests for stay as moot.

II. Discussion

A. Public Convenience and Necessity

1. Project Need

14. Numerous parties assert that the Commission violated both the NGA and the Fifth Amendment by failing to demonstrate that the PennEast Project is required by the public convenience and necessity.[26] Specifically, it is alleged that the Commission's reliance on precedent agreements with PennEast's corporate affiliates as evidence of need for the project

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[25] Certificate Order, 162 FERC ¶ 61,053 at PP 28-36.

[26] *See, e.g.*, Lower Saucon's Request for Rehearing at 2; Rate Counsel's Request for Rehearing at 2.

is inconsistent with the Certificate Policy Statement,[27] and that the Certificate Order ignored record evidence showing that demand for the project is lacking.[28]

a. Precedent Agreements with Affiliated Shippers are Appropriate Indicators of Need

15. Several petitioners state that the Commission erred in relying on precedent agreements with PennEast's affiliates to determine whether the project was needed. Petitioners assert that these types of "self-dealing" precedent agreements are not indicative of the need for the pipeline,[29] rather, they merely reflect the desire of the pipeline's affiliates to earn a return on their investment.[30] Petitioners insist that the Commission must "question the business decisions" of the affiliated shippers, and "look behind" the precedent agreements before determining that need for a project exists.[31]

16. We affirm the Certificate Order's finding that the Commission is not required to look behind precedent

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[27] *See, e.g.*, Homeowners Against Land Taking—PennEast (HALT) Request for Rehearing at 11-12; Lower Saucon's Request for Rehearing at 11; Conservation Foundation's Request for Rehearing at 26-35.

[28] *See, e.g.*, Rate Counsel's Request for Rehearing at 9-13; Conservation Foundation's Request for Rehearing at 34-42; Hopewell's Request for Rehearing at 19- 21; Lower Saucon's Request for Rehearing at 10-12.

[29] *See* Conservation Foundation's Request for Rehearing at 27-28.

[30] *See* Conservation Foundation's Request for Rehearing at 27-28; Michael Spille's Request for Rehearing at 10.

[31] NJDEP's Request for Rehearing at 16-17; Michael Spille's Request for Rehearing at 10.

agreements to evaluate project need, regardless of the affiliate status of some of the project shippers.[32] As the Certificate Order discussed, the Certificate Policy Statement established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[33] These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to customers, or a comparison of projected demand with the amount of capacity currently serving the market.[34] The Commission stated that it would consider all such evidence submitted by the applicant

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[32] Certificate Order, 162 FERC ¶ 61,053 at P 33 (citing *Millennium Pipeline Co. L.P.*, 100 FERC ¶ 61,277, at P 57 (2002) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project")). *See also Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) (explaining that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project); *see also id.* at 61,744 (the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts) (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

[33] Certificate Order, 162 FERC ¶ 61,053 at P 27 (citing Certificate Policy Statement, 88 FERC at 61,747).

[34] Certificate Policy Statement, 88 FERC at 61,747.

regarding project need. Nonetheless, the policy statement made clear that, although companies are no longer required to submit precedent agreements for Commission review, these agreements are still significant evidence of project need or demand.[35] As the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed in *Minisink Residents for Environmental Preservation and Safety v. FERC*,[36] the Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers.[37] Moreover, it is current Commission policy not to look behind precedent or service agreements to make judgments about the needs of individual shippers.[38] The D.C. Circuit also confirmed in *Minisink Residents* that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must

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[35] *Id.*

[36] 762 F.3d 97 (D.C. Cir. 2014) (*Minisink Residents*).

[37] *Minisink Residents*, 762 F.3d at 110, n.10; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*) (finding that pipeline project proponent satisfied Commission's "market need" where 93 percent of the pipeline project's capacity has already been contracted).

[38] Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC at 61,316). *See Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at P 57 ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project").

look beyond the market need reflected by the applicant's contracts with shippers.[39]

17. A shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor.[40] As we stated in the Certificate Order, when considering applications for new certificates, the Commission's primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.[41] Here, no allegations have been made, nor have we found that the project sponsors have engaged in any anticompetitive behavior. PennEast held an open season for capacity on the project, and all potential shippers had an opportunity to contract for service. Further, because the project rates are calculated based on design capacity, PennEast will be at risk for unsubscribed capacity, thereby giving it a powerful incentive to market the remaining unsubscribed capacity and serving as a strong deterrent to constructing pipelines not supported by market demand.[42] In addition, to

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[39] *Minisink Residents*, 762 F.3d at 112, n. 10; *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting argument that precedent agreements are inadequate to demonstrate market need).

[40] *See, e.g.*, *Greenbrier Pipeline Co., LLC*, 101 FERC ¶ 61,122, at P 59 (2002), *reh'g denied*, 103 FERC ¶ 61,024 (2003).

[41] Certificate Order, 162 FERC ¶ 61,053, at P 33. *See also* 18 C.F.R. § 284.7(b) (2017) (requiring transportation service to be provided on a non-discriminatory basis).

[42] We also note that PennEast will be required to comply with the Commission's Part 358 Standards of Conduct, which require PennEast to treat all customers, whether affiliated or non-

confirm the legitimacy of the financial commitments agreed to in affiliate and non-affiliate precedent agreements, and thereby confirm the financial viability of the project, Ordering Paragraph (C) of the Certificate Order requires PennEast to file a written statement affirming it has executed contracts for service at the levels provided for in the precedent agreements prior to commencing construction.

18. Petitioners again contend PennEast's affiliated local distribution companies (LDC) bear a lesser market risk because they expect to pass PennEast transportation costs through to their customers, so that in the event of underutilization, it would be LDC customers, not PennEast or its affiliate LDCs that would be saddled with the financial risk. Our jurisdiction does not extend to costs incurred by LDCs or the rates they charge to their retail customers. As explained in the Certificate Order, state regulatory commissions will be responsible for approving any expenditures by state-regulated utilities. Further, we reiterate that because PennEast is required to calculate its recourse rates based on the design capacity of the pipeline, PennEast will bear the financial risk attributable to unsubscribed capacity. Therefore, the identified affiliations do not alter the basis for our finding there is a market need for the project and the project is required by the public convenience and necessity.

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affiliated, on a non-discriminatory basis. 18 C.F.R. Part 358 (2017). PennEast's tariff incorporates these requirements. *See* PennEast's Application, Exhibit P (Tariff).

b. The Commission did not Ignore Evidence of a Lack of Market Demand for the PennEast Project

19. Petitioners further allege that by basing its need determination solely on precedent agreements, the Commission "disregarded" its own Certificate Policy Statement, and ignored "substantial" evidence showing that the gas to be transported by the project is not needed by the present or future public convenience and necessity.[43] Rate Counsel asserts that the Commission could not have determined that the project is needed when presented with "unchallenged market data showing exactly the opposite"[44] that the Certificate Order "dismisses."[45]

20. Commission policy is to examine the merits of individual projects and each project must demonstrate a specific need.[46] Although the Certificate Policy Statement permits the applicant to show need in a variety of ways, it does not suggest that the Commission should examine a group of projects together and pick which projects best serve an estimated future regional demand. The Certificate Order specifically addressed load growth and supply

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[43] *See*, *e.g.*, Rate Counsel's Request for Rehearing at 9-13; Conservation Foundation's Request for Rehearing at 25; Hopewell's Request for Rehearing at 19.

[44] Rate Counsel's Request for Rehearing at 10.

[45] *Id.* at 25.

[46] With respect to comments requesting the Commission to assess the market demand for gas to be transported by other proposed interstate pipeline projects, we note

forecasts submitted by commenters in an attempt to show a lack of market demand for the project, and found them unpersuasive. The Certificate Order explains "projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states."[47] And to the extent petitioners would have the Commission look at information beyond precedent agreements, we would note that the record also contains evidence of market need for natural gas pipeline transportation capacity in the northeast region.[48] Given the uncertainty associated with long-term forecasts, such as those presented in this proceeding, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand. Thus, the Commission evaluates individual projects based on the evidence of need presented in each proceeding. Where, as here, it is demonstrated that specific shippers have entered

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[47] Certificate Order, 162 FERC ¶ 61,053 at P 29.

[48] In Exhibit F-1, Resource Report 5, PennEast submitted a study by Concentric Energy Advisors, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Serving Eastern Pennsylvania and New Jersey*) (Concentric Study) that finds that the project would provide increased access to low-cost natural gas in New Jersey and Pennsylvania that could save consumers nearly $900 million. Resource Report 5 also includes a study by Econsult Solutions & Drexel University, *Economic Impact Report and Analysis: PennEast Pipeline Project Economic Impact Analysis* (2015) (Econsult Study) that estimates the total (direct, indirect, and induced) jobs that would be supported during construction and operation of the project.

into precedent agreements for project service, the Commission appropriately places substantial reliance on those agreements to find that the project is needed.

21. In addition, the Certificate Order explained that the project shippers in this proceeding noted several reasons other than load growth for entering into precedent agreements with PennEast to source gas from the Marcellus region.[49] In this regard, the that the Commission will evaluate the proposals in those proceedings in accordance with the criteria established in our Certificate Policy Statement. project shippers stated that the project will provide a reliable, flexible, and diverse supply of natural gas that will lead to increased price stability, and the opportunity to expand natural gas service in the future.[50] Based on the record, we find no reason to second guess the business decisions of these shippers given the substantial financial commitment required under executed contracts.[51]

22. On rehearing, the Conservation Foundation asserts that there is no shortage of pipeline capacity to meet current or projected regional demand, and that therefore the PennEast project will result in

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[49] Certificate Order, 162 FERC ¶ 61,053 at P 30.

[50] *Id.*

[51] *See Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 201 (2002). *See also, Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 42 (2006); *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, at 61,635 (1996), *order issuing certificate and denying reh'g*, 79 FERC ¶ 61,280 (1997), *order amending certificate and denying stay and reh'g*, 85 FERC ¶ 61,134 (1998), *aff'd Midcoast Interstate Transmission, Inc. v. FERC,* 198 F.3d 960 (D.C. Cir. 2000).

overbuilding.[52] Rate Counsel claims that the Certificate Order ignored evidence that in recent years LDC's, including project shipper Public Service Electric & Gas Company, have turned back capacity.[53] We affirm our finding in the Certificate Order that there is not sufficient available capacity on existing pipeline systems to transport all of the volumes contemplated to be transported by the PennEast Project to the range of delivery points proposed by PennEast, and that the expansion of existing pipeline systems was not a feasible alternative.[54] Further, the report central to Conservation Foundation's argument, the "Skipping Stone Winter 2017-2018 Report" was released on February 11, 2018, nearly a month after the Certificate Order was issued, and therefore constitutes new evidence. It is improper to introduce new evidence at the rehearing stage.[55]

23. Moreover, Rate Counsel makes no showing that turn-back capacity on existing pipelines is sufficient for transporting the required volumes of natural gas

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[52] Conservation Foundation's Request for Rehearing at 36.

[53] Rate Counsel's Request for Rehearing at 10.

[54] Certificate Order, 162 FERC ¶ 61,053 at P 31.

[55] *Northeast Utilities Serv. Co.*, 136 FERC ¶ 61,123, at P 9 (2011) ("We will deny rehearing. CRS' attempt to introduce new evidence and new claims at the rehearing stage is procedurally improper"); *Commonwealth Edison Co.*, 127 FERC ¶ 61,301, at P 14 (2011) ("We reject as untimely the new affidavit which ConEd includes in its request for rehearing. Parties are not permitted to introduce new evidence for the first time on rehearing."); *New York Indep. Sys. Operator*, 112 FERC ¶ 61,283, at P 35 n.20 (2005) ("parties are not permitted to raise new evidence on rehearing. To allow such evidence would allow impermissible moving targets").

proposed by the PennEast, nor that this capacity would service all the required receipt and delivery points. Further, as stated in the Certificate Order "no pipelines or their customers have filed adverse comments regarding PennEast's proposal."[56] Those with interests the Rate Counsel purports to represent, i.e., pipelines that might compete with the PennEast Project, have not protested.

2. Balancing Project Need with Environmental Impacts

24. Conservation Foundation asserts that the Commission violated the NGA[57] by balancing the environmental impacts of the PennEast Project with its economic benefits, on the basis of its flawed, incomplete environmental review.[58] Conservation Foundation contends that due to incomplete surveys of environmental resources, as well as the Commission's insistence that it does not need to consider certain types of environmental impacts, the Commission did not have sufficient information to assess the full breadth of the impacts of the PennEast Project, therefore rendering the Commission unable to perform a proper balancing of the project's benefits and impacts.[59]

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[56] *Id.* at P 37.

[57] 15 U.S.C. § 717f (2012).

[58] Conservation Foundation's Request for Rehearing at 51-54.

[59] *Id.*

25. Consistent with the Certificate Policy Statement,[60] the need for and benefits derived from the PennEast Project must be balanced against the adverse impacts on landowners. The Commission must, and did, balance the concerns of all interested parties and did not give undue weight to the interests of any particular party.[61] The Commission found that PennEast incorporated 70 of 101 requested route variations into its proposal in order to reduce any adverse impacts on landowners and communities, and held over 200 meetings with public officials, and 15 "informational sessions" with impacted landowners in order to better assess local concerns.[62] Additionally, approximately 37 percent of the pipeline route will be collocated alongside existing rights-of-way. Thus, although we are mindful that PennEast has been unable to reach easement agreements with a number of landowners, we find that PennEast has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.

26. Regarding petitioners' assertions that the Commission balanced the project's benefits against "flawed and incomplete" findings of the project's adverse environmental effects, such as impacting New Jersey and Pennsylvania water resources, communities, and historic landmarks,[63] these issues

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[60] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744. *See also National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012) (*National Fuel*).

[61] Certificate Order, 162 FERC ¶ 61,053 at P 39.

[62] *Id.*

[63] *See* Hopewell's Request for Rehearing 19-20; Conservation Foundation's Request for Rehearing at 52.

are addressed below in our Environmental section. The Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic, not environmental analysis.[64] Only when the benefits outweigh the adverse effects on the economic interests will the Commission proceed to complete the environmental analysis where other interests are considered. However, we do ensure avoidance of unnecessary environmental impacts by including a certificate condition providing that authorization for the commencement of construction would not be granted until PennEast has successfully executed contracts for volumes and service terms equivalent to those in their precedent agreements.[65]

27. Based on the foregoing, we affirm the Certificate Order's conclusion that public need was demonstrated for the PennEast Project.

B. Eminent Domain

28. Several parties assert that the Commission violated the NGA and the Fifth Amendment by conferring eminent domain authority on PennEast. Petitioners allege that the Certificate Order failed to perform a "public use" determination, and instead cited precedent agreements as evidence of the public benefits of the project, which are not "substantial evidence" of the public benefits of the project.[66] Petitioners further contend that due to the "questionable benefits" of the project, the Commission

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[64] *National Fuel*, 139 FERC ¶ 61,037 at P 12.

[65] Certificate Order, 162 FERC ¶ 61,053 at ordering para. (E).

[66] *See* HALT's Request for Rehearing at 11, 15; Delaware Riverkeeper's Request for Rehearing at 23.

could not have determined that its benefits outweigh the adverse impacts on the public caused by widespread use of eminent domain, and that the Commission otherwise failed to consider the scale of eminent domain being employed.[67] HALT asserts that the Commission, in issuing PennEast a certificate of public convenience and necessity without waiting for other agencies to deny or issue PennEast other necessary permits, is "illegally preempting the authority of these agencies."[68] HALT further contends that the Commission's practice of issuing conditional certificates conferring eminent domain, which depend on additional federal and state authorizations before being constructed, violates the Due Process and Takings clauses of the Fifth Amendment as it enables PennEast to obtain land via eminent domain, even though PennEast has yet to satisfy certain conditions that could stop the project from being constructed. In addition, NJDEP asserts that it is "premature" to grant PennEast eminent domain authority as the final route is likely to change, and requests that the Commission limit PennEast's eminent domain authority to land necessary for PennEast to finish necessary surveys.[69]

29. We affirm that having determined that the PennEast Project is in the public convenience and necessity, we are not required to make a separate finding that the project serves a "public use" to allow

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[67] *See* Delaware Riverkeeper's Request for Rehearing at 25; Michael Spille's Request for Rehearing at 14-15.

[68] *See* HALT's Request for Rehearing at 6.

[69] *See* NJDEP's Request for Rehearing at 59.

the certificate holder to exercise eminent domain.[70] A lawful taking under the Fifth Amendment requires that the taking must serve a "public purpose."[71] The U.S. Supreme Court has broadly defined this concept, "reflecting [the court's] longstanding policy of deference to the legislative judgments in this field."[72] Here, Congress articulated in the NGA its position that "transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."[73] Congress did not suggest that there was a further test, beyond the Commission's determination under NGA section 7(c)(e),[74] that a proposed pipeline was required by the public convenience and necessity, such that certain certificated pipelines furthered a public use, and thus were entitled to use eminent domain, although others did not. The power of eminent domain conferred by NGA section 7(h) is a necessary part of the statutory scheme to regulate the transportation and sale of natural gas in interstate commerce.[75]

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[70] Certificate Order, 162 FERC ¶ 61,053 at PP 36, 42. *See Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 79 (2017).

[71] *Kelo v. City of New London*, 545 U.S. 469, at 479-480 (upholding a state statute that authorized the use of eminent domain to promote economic development).

[72] *Id.* at 480.

[73] 15 U.S.C. § 717(a) (2012).

[74] *Id.* § 717f(e).

[75] *See Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950); *Williams v.*

30. The Commission has interpreted the section 7(e) public convenience and necessity determination as requiring the Commission to weigh the public benefit of the proposed project against the project's adverse effects.[76] Our ultimate conclusion that the public interest is served by the construction of the proposed project reflects our findings that the benefits of a project will outweigh its adverse effects. Under section 7(h) of the NGA, once a natural gas company obtains a certificate of public convenience and necessity it may exercise the right of eminent domain in a U.S. District Court or a state court, regardless of the status of other authorizations for the project.[77] Therefore, after issuing PennEast its certificate of public convenience and necessity, the Commission lacks the authority to limit its exercise of eminent domain.

Transcontinental Gas Pipe Line Corp., 89 F. Supp. 485, 487-88 (W.D.S.C. 1950).

[76] As the agency that administers the NGA, and in particular as the agency with expertise in addressing the public convenience and necessity standard in the Act, the Commission's interpretation and implementation of that standard is accorded deference. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984); *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 392 (D.C. Cir. 2017); *Office of Consumers Counsel v. FERC*, 655 F.2d 1132, 1141 (D.C. Cir. 1980); *Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-1250, 2016 WL 3855865, at 21 (S.D. Tex. July 15, 2016), *aff'd*, 859 F.3d 325 (5th Cir. 2017); *see also MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011) (under Chevron, the Court "giv[es] effect to clear statutory text and defer[s] to an agency's reasonable interpretation of any ambiguity").

[77] 15 U.S.C. § 717f(h); *see also* at § 717n(a)-(c) (addressing process coordination for other federal permits or authorizations required for projects authorized under NGA section 7).

31. We further find that petitioners have failed to show that the Commission's decision to issue a conditional certificate violates due process, or the takings clause of the Fifth Amendment. The Commission has fully addressed the Fifth Amendment issues raised in other proceedings.[78] In addition, although PennEast, as a certificate holder under section 7(h) of the NGA,[79] can commence eminent domain proceedings in a court action if it cannot acquire the property rights by negotiation, PennEast will not be allowed to construct any facilities on subject property unless and until there is a favorable outcome on all outstanding requests for necessary federal and state approvals. Because PennEast may go so far as to survey and designate the bounds of an easement but no further, e.g., it cannot cut vegetation or disturb ground pending receipt of any federal approvals, any impacts on landowners will be minimized. Further, PennEast will be required to compensate landowners for any property rights it acquires.

32. We dismiss NJDEP's argument that the use of eminent domain is premature because the current route may be modified. Environmental Condition No.

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[78] *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at PP 30-35 (2017); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at PP 76-81; *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 at PP 58-63. *See Delaware Riverkeeper Network v. FERC*, No. 17-5084 (D.C. Cir. July 10, 2018) (rejecting Fifth Amendment Due Process challenge to (1) statutory scheme for Commission recovery of expenses from the regulated industry; and (2) Commission use of tolling orders to satisfy deadlines for acting on requests for rehearing).

[79] *Id.* § 717f(h) (2012).

4 requires that PennEast's exercise of eminent domain authority be consistent with the facilities and locations authorized in this proceeding. Although Environmental Condition No. 5 allows PennEast to request route realignments, such must be in writing, contain documentation of landowner approval, and must be approved by the Director of the Office of Energy Projects.

33. We also dismiss NJDEP's request to limit PennEast's use of eminent domain to land necessary for the completion of environmental assessments. Under NGA section 7, Congress gave the Commission the authority to determine if the construction and operation of the proposed project is in the public convenience and necessity. In the Certificate Order, the Commission found that the public convenience and necessity requires approval of PennEast's proposal.[80] Once the Commission has authorized pipeline construction, NGA section 7(h) authorizes a certificate holder to acquire the necessary land or property by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.[81] The Commission does not have the authority to limit a pipeline company's use of eminent domain once the company has received its certificate of public convenience and necessity. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the

[80] Certificate Order, 162 FERC ¶ 61,053 at P 40.

[81] 15 U.S.C. § 717f(h) (2012).

NGA are matters for the applicable state or federal court.[82]

C. Rates

1. Return on Equity

34. As part of a NGA section 7 proceeding, the Commission reviews initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard.[83] Unlike NGA sections 4 and 5, NGA section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certificates new facilities, expansion capacity, and/or services.[84] Recognizing that full evidentiary rate proceedings can take a significant amount of time, Congress gave the Commission discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-consuming ratemaking sections of the NGA.[85] The Certificate Order applied the Commission's established policy, which balances both the consumer and investor interests, in establishing PennEast's initial rates.

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[82] *Transco,* 161 FERC ¶ 61,250, at P 35 (citing *Rover Pipeline LLC*, 158 FERC ¶ 61,109 at PP 68, 70 (2017) (explaining that "[t]he Commission does not oversee the acquisition of property rights through eminent domain proceedings [.])).

[83] *See* Certificate Order, 162 FERC ¶ 61,053 at P 63.

[84] *See Atl. Refining Co. v. Pub. Serv. Comm'n of New York,* 360 U.S. 378, 390 (1959) (*CATCO*).

[85] *See id.* at 392.

Specifically, the Commission approved PennEast's proposed 14 percent return on equity (ROE) but required that PennEast design its cost-based rates on a capital structure that includes no more than 50 percent equity, rather than 60 percent equity proposed by PennEast.[86]

35. Rate Counsel argues that the Commission's approval of PennEast's requested 14 percent ROE is arbitrary and capricious, as the Certificate Order does not perform a discounted cash flow (DCF) analysis, or any other type of analysis to establish an appropriate ROE.[87] Rate Counsel takes issue with the Commission's policy of "awarding" new pipelines a 14 percent ROE due to the risk they face, asserting that the Commission should have quantified, or otherwise explained PennEast's risk before doing so.[88]

36. We disagree. The Certificate Order approved PennEast's proposed 14 percent ROE, but required the pipeline to design its cost-based rates using a capital structure that includes at least 50 percent debt,[89] consistent with Commission policy.[90] This

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[86] Certificate Order, 162 FERC ¶ 61,053 at P 58.

[87] *See* Rate Counsel's Request for Rehearing at 16.

[88] *Id.* at 17-18.

[89] Certificate Order, 162 FERC ¶ 61,053 at PP 58-63. Imputing a capitalization with more than 50 percent equity "is more costly to ratepayers, because equity financing is typically more costly than debt financing and the interest incurred on debt is tax deductible." *See MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 17 (2008).

[90] *See, e.g., Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080, *reh'g denied*, 156 FERC ¶ 61,160 (2016), *aff'd in relevant part sub nom*, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C.

requirement reduces the overall maximum recourse rate, which acts as a cap on a pipeline's rate of return.[91] The Certificate Order explained that the Commission's policy of accepting a 14 percent ROE in these circumstances reflects the increased business risks that new pipeline companies like PennEast face.[92] Because new entrants building greenfield natural gas pipelines do not have an existing revenue base, they face greater risks constructing a new pipeline system and servicing new routes than established pipeline companies do when adding incremental capacity to their systems.[93] This is the reason why Commission policy requires existing pipelines that provide incremental services through an expansion to use the ROE underlying their existing system rates and last approved in a section 4 rate case proceeding when designing the incremental rates. This tends to yield a return lower than 14 percent, reflecting the lower risk existing pipelines face when building incremental capacity.[94]

Cir. 2017) (finding that the Commission "adequately explained its decision to allow Sabal Trail to employ a hypothetical capital structure" of 50 percent debt and 50 percent equity).

[91] The maximum recourse rate is the maximum rate the pipeline is allowed to charge for transportation service.

[92] Certificate Order, 162 FERC ¶ 61,053 at P 59 (explaining that approving PennEast's requested 14 percent was "…not merely 'reflexive;' [but] in response to the risk PennEast faces as a new market entrant, constructing a greenfield pipeline system.").

[93] *Id.* P 59, n.79 (citing *Rate Regulation of Certain Nat. Gas Storage Facilities*, 115 FERC ¶ 61,343, at P 127 (2006)).

[94] *See, e.g., Gas Transmission Northwest, LLC,* 142 FERC ¶ 61,186, at P 18 (2013) (requiring use of 12.2 percent ROE from recent settlement, not the proposed 13.0 percent).

37. Rate Counsel cites to NGA section 4 rate proceedings as evidence of the "detailed analysis of capital markets that can be applied to rate review" and takes issue with the Commission's failure to do so in the Certificate Order.[95] Rate Counsel further asserts that the Commission's failure to perform a DCF analysis demonstrating that the 14 percent ROE is "just and reasonable renders the Commission's decision arbitrary and capricious."[96] As we explained in the Certificate Order, an initial rate is based on estimates until we can review Penn East's cost and revenue study at the end of its first three years of actual operation.[97] Conducting a more rigorous DCF analysis in an individual certificate proceeding when other elements of the pipeline's cost of service are based on estimates would not be the most effective or efficient way to determine an appropriate ROE. Although parties have the opportunity in section 4 rate proceedings to file and examine testimony with regard to the composition of the proxy group to use in the DCF analysis, the growth rates used in the analysis, and the pipeline's position within the zone of reasonableness with regard to risk, it would be difficult, if not impossible, to complete this type of analysis in section 7 certificate proceedings in a timely manner, and attempting to do so would unnecessarily delay proposed projects with time sensitive in-service schedules.[98] The Commission's current policy of

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[95] *See* Rate Counsel's Request for Rehearing at 14.

[96] *Id.* at 16.

[97] Certificate Order, 162 FERC ¶ 61,053 at P 98.

[98] *See Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 39 (2017).

calculating incremental rates for new pipelines using equity returns of up to 14 percent, as long as the equity component of the capitalization is no more than 50 percent, is an appropriate exercise of its discretion to approve initial rates under the "public interest" standard of section 7. As conditioned herein, the approved initial rates will "hold the line" and "ensure that the consuming public may be protected" until just and reasonable rates are adjudicated under section 4 or 5 of the NGA.[99] Here, that opportunity for review is required no later than three years after the in-service date for PennEast's facilities.[100]

2. Cost of Debt

38. Rate Counsel similarly argues that the Commission's approval of a 6 percent cost of debt for PennEast's initial rates was arbitrary and capricious, as there is an "absence of supporting rationale" for the decision.[101] Rate Counsel asserts that the Certificate Order did not include any analysis demonstrating why a 6 percent cost of debt is appropriate. Rate Counsel states that the Certificate Order should have looked at "financial backing, state of capital markets, or any other material factor" in supporting a 6 percent cost of debt. Rate Counsel states that the as of October, 2017, Moody's Baa utility yield was 4.26 percent and the junk bond yield 5.49 percent in January 2016, and declined to 4.16 percent by July 2016.

39. As discussed above and in the Certificate Order, initial rates are meant to "hold the line" and protect

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[99] *CATCO* 360 U.S. at 392.

[100] Certificate Order, 162 FERC ¶ 61,053 at P 72.

[101] Rate Counsel's Request for Rehearing at 19.

the consuming public until just and reasonable rates can be determined through a more rigorous process pursuant to the ratemaking sections of the NGA.[102] Therefore, the Commission approved PennEast's requested initial debt cost after determining that it was within a range of previously approved, reasonable cost of debt percentages for greenfield pipeline projects. We also disagree with Rate Counsel's assertion that a 6 percent cost of debt is out of line with capital markets. Moody's Baa utility yield for 2015, the year Penn East filed its application, was 5.06 percent and for 2016 was 4.68 percent. Providing a 6 percent debt cost reasonably reflects the higher business risks faced by a new entrant constructing a greenfield pipeline, as well as the fact that utilities are less risky than interstate pipeline companies.[103] Moreover, when PennEast files its three-year cost and revenue study, the Commission will have the information necessary to determine whether or not PennEast's initial rates, including its cost of debt, are just and reasonable.[104]

D. Environmental

1. Final EIS Deficiencies

40. Numerous parties allege that the Commission relied on incomplete and/or inaccurate information

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[102] *See supra* P 34; Certificate Order, 162 FERC ¶ 61,053 at P 63.

[103] The Commission has previously concluded that local distribution companies are less risky than a pipeline company. *See, e.g. Trailblazer Pipeline Co.*, 106 FERC ¶ 63,005, at P 94 (2004) (rejecting inclusion of local distribution companies in a proxy group because they face less risk than a pipeline company.).

[104] Certificate Order, 162 FERC ¶ 61,053 at P 72.

when assessing the environmental impacts of the PennEast Project and thus the Final EIS fails to comply with the requirements of NEPA.[105]

41. Specifically, NJDEP and Hopewell argue that the Final EIS did not contain sufficient information to evaluate environmental impacts for 65 percent of the project's route in New Jersey.[106] By relying on survey data for only 35 percent of the project route in New Jersey, the parties claim that the Commission did not have sufficient information to take the "hard look" required by NEPA. Specifically, petitioners assert that surveys are incomplete for several resources including, water wells, wetlands, protected species, cultural resources, and vernal pools.[107] Further, NJDEP and Hopewell claim that the Commission failed to follow NEPA regulations requiring agencies to identify incomplete or unavailable information.[108]

42. In addition, a number of parties argue that the environmental conditions in the Final EIS and Certificate Order require information that should have been received and analyzed prior to certificate

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[105] *See, e.g.,* Conservation Foundation's Request for Rehearing at 64-84; Hopewell's Request for Rehearing at 25-38; Delaware Riverkeeper's Request for Rehearing at 164-188.

[106] NJDEP's Request for Rehearing at 18; Hopewell's Request for Rehearing at 30.

[107] NJDEP's Request for Rehearing at 21-24; Hopewell's Request for Rehearing at 29; Conservation Foundation's Request for Rehearing at 78-79.

[108] NJDEP's Request for Rehearing at 27; Hopewell's Request for Rehearing at 27-28.

issuance.[109] Conservation Foundation argues that the Final EIS violated NEPA because it is based on incomplete information, evidenced by the Certificate Order's adoption of numerous environmental conditions requiring the completion of surveys and finalized mitigation plans. Several petitioners also claim that the Commission must prepare a supplemental EIS.

43. We disagree that the Final EIS for the PennEast Project was based on inadequate information. As we explained in the Certificate Order,[110] although the Commission needs to consider and study environmental issues before approving a project, it does not require all environmental concerns to be definitively resolved before a project's approval is issued. NEPA does not require every study or aspect of an analysis to be completed before an agency can issue a Final EIS, and the courts have held that agencies do not need perfect information before it takes any action.[111]

44. The Certificate Order specifically recognized the existence of incomplete surveys, primarily due to lack

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[109] *See, e.g.*, Conservation Foundation's Request for Rehearing at 83-84.

[110] Certificate Order, 162 FERC ¶ 61,053 at P 101.

[111] *U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992); *State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in part sub nom. W. Oil & Gas Ass'n v. Alaska,* 439 U.S. 922, 99 S. Ct. 303, 58 L. Ed. 2d 315 (1978) ("NEPA cannot be 'read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken'").

of access to landowner property.[112] However, the Certificate Order explains that the conclusions in the Final EIS, affirmed by the Certificate Order, were based on sufficient information contained in the record, including PennEast's application and supplements, as well as information developed through Commission staff's data requests, field investigations, the scoping process, literature research, alternatives analysis, and contacts with federal, state, and local agencies, as well as with individual members of the public, to support our findings.

45. Moreover, where access to property has been denied, the Final EIS is not the end of our review of the project. As discussed below, recognizing that there are necessary field surveys that are outstanding on sections of the proposed route where survey access was denied, the Certificate Order imposed several environmental conditions that require the filing of additional environmental information for review and approval once survey access is obtained. The additional information ensures that the Final EIS's analyses and conclusions are based on the best available data, and that PennEast and Commission staff will be better positioned to finalize mitigation plans, address stakeholder concerns, and evaluate

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[112] Certificate Order, 162 FERC ¶ 61,053 at PP 98-99. We note that where, as here, landowners deny an applicant access to survey sites, any argument challenging the sufficiency of the Final EIS as incomplete can, taken to its logical conclusion, preclude the Commission from certificating natural gas infrastructure projects, and therefore allow protesting landowners to exercise veto power over such projects.

compliance during construction.[113] As the Certificate Order emphasized, compliance with environmental conditions appended to our orders is integral to ensuring the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses.[114] Commission staff carefully reviews all information submitted in response to the environmental conditions adopted in the Certificate Order. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued.

46. Contrary to petitioners' claim, our environmental conditions that require PennEast to file mitigation plans and additional survey information do not violate NEPA. For each relevant resource area, the Final EIS identified where and why information was incomplete, what methods were used to best analyze the resource impacts given the incomplete information, and any additional measures to mitigate any potential adverse environmental impacts on the resource. For example, the Final EIS and Certificate Order explain that, where survey access was unavailable, wetlands crossed by the project were identified using site-specific field delineation results, and estimation of wetland boundaries using FWS National Wetlands Inventory (NWI) mapping in Pennsylvania, and NJDEP wetland mapping for Hunterdon and Mercer

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[113] *Id.* at P 99.

[114] Certificate Order, 162 FERC ¶ 61,053 at P 216.

counties.[115] Specifically, the Final EIS noted that PennEast used remote-sensing resources to approximate the locations and boundaries of wetlands within the project area using a combination of: high-resolution aerial photographic imagery; NWI data; National Hydrography Dataset data; hydric soil data maintained by the National Resources Conservation Service; and floodplain and flood elevations maintained by the Federal Emergency Management Agency, and field survey results on adjacent land parcels.[116] The Final EIS recommended, as adopted by the Commission, that no construction will be allowed to commence until PennEast submits outstanding survey information, and affirms that it has received all applicable authorizations required under federal law.[117]

47. Similarly, the Final EIS discussed geotechnical investigations needed to understand if the existing conditions would be suitable to use the horizontal direction drill (HDD) method and to help design each HDD crossing. As discussed in the Final EIS and Certificate Order, PennEast completed desktop analyses of geological conditions at each of the proposed HDD crossings; although the majority of the HDD crossings had some geotechnical work performed, and staff reviewed this data along with PennEast's HDD Inadvertent Returns and Contingency Plan, and HDD profiles. The Final EIS

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[115] Final EIS at 4-76; Certificate Order, 162 FERC ¶ 61,053 at P 129.

[116] *Id.*

[117] *Id.*

noted that the geotechnical evaluation was incomplete primarily because of lack of permission to access the right-of way to install borings.[118] Accordingly, the Final EIS recommended, as adopted by the Commission, that prior to construction, PennEast file final plans for each HDD crossing that include results of all outstanding geophysical and geotechnical field investigations.[119]

48. As another example, as discussed in the Final EIS, PennEast conducted surveys for potential impacts on groundwater supplies, including supplies from private and public wells located along the pipeline construction workplace in both New Jersey and Pennsylvania. Although PennEast was unable to identify the precise locations of all water supply wells, the Final EIS found that no significant impacts on groundwater resources are anticipated from the construction or operation of the project because of the avoidance and mitigation measures set forth in the Final EIS.[120] In any event, the Final EIS recommended, as adopted by the Commission, that prior to construction, PennEast complete all necessary surveys to identify water supply wells.[121]

49. Finally, we disagree that there was a need to issue a revised or supplemental EIS. The Council on Environmental Quality (CEQ) regulations

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[118] *Id.* at 4-17.

[119] *Id.*; *see also* Certificate Order, 162 FERC ¶ 61,053 at PP 120-121.

[120] *Id.* at 4-38. PennEast identified two public wells in New Jersey, and found no public or private wells in Pennsylvania.

[121] *Id.*; *see also* Certificate Order, 162 FERC ¶ 61,053 at P 123.

implementing NEPA require agencies to prepare supplements to either draft or final environmental impact statements if: (i) the agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impact.[122] The Environmental Conditions requiring site-specific plans, survey results, and additional mitigation measures are not designed to allow significant departures from the project as certificated. Rather, the requirement that PennEast file additional information once survey access is obtained will enable Commission staff to verify that the Final EIS's analyses and conclusions are based on the best available data, enabling us to improve and finalize certain mitigation plans and ensure stakeholders concerns are addressed, as well as evaluate compliance during construction.[123]

50. The dissent cites *LaFlamme* in support of its contention that the Commission did not adequately consider the environmental effects of the project before issuing the certificate.[124] The proceeding in *LaFlamme*, however, is entirely distinguishable from the instant proceeding. *LaFlamme* involved a proceeding in which Commission issued a license for an unconstructed hydroelectric project without preparing an EIS or environmental assessment (EA), and relied solely on a two-season post-licensing

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[122] 40 C.F.R. § 1502.9(c)(1) (2017).

[123] *Id.*, *see also* Certificate Order, 162 FERC ¶ 61,053 at P 99.

[124] *LaFlamme v. FERC*, 852 F.2d 389 (9th Cir. 1988) (*LaFlamme*).

recreation study to mitigate the project's effects.[125] By contrast, here Commission staff prepared an EIS which fully considered the range of potential impacts from the construction and operation of the project.[126] The Commission has acknowledged that several surveys must be completed as a result of landowners denying access to their property, and stated that construction of the project will only be allowed to proceed once these surveys, and additional studies, have been completed.[127] The 9th Circuit, in upholding the Commission's issuance of a license on remand after preparing an EA in *LaFlamme II*, held that after "full consideration of the environmental issues" it is permissible to "leave open the possibility" of potential modifications to a Commission authorization based on the results of post-issuance studies.[128] As the Commission has stated previously, "perfect information" need not be obtained before an action may be taken;[129] rather, as the 9th Circuit stated in *Yakima*, prior to issuing an authorization, the Commission "must study the effect of a project…and consider possible mitigative measures."[130] This is precisely what has been done here.

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[125] *Id.* at 399-400.

[126] *Supra* P 44.

[127] *See* Certificate Order, 162 FERC ¶ 61,053 at PP 98-101, *supra* PP 45-46.

[128] *LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991).

[129] *See PP&L Montana, LLC*, 97 FERC ¶ 61,060 at p. 61,323 (2001); *see also* Certificate Order, 162 FERC ¶ 61,053 at P 101.

[130] *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 471 (9th Cir. 1984).

51. In summary, our review of Penn East's application under the requirements of the NGA and NEPA, discusses and identifies the NEPA issues requiring further study treatment and requires their completion and review prior to commencement of construction. The extensive record on environmental issues provided sufficient information regarding the proposed action to be able to fashion adequate mitigation measures to conclude that although the project will result in some adverse environmental impacts, these impacts will be reduced to less than significant levels with the implementation of PennEast's proposed impact avoidance, minimization, and mitigation measures, together with the environmental conditions adopted in the Certificate Order.

2. Conditional Certificates

52. Several parties contend that the Commission's issuance of a conditional certificate for the PennEast Project violates federal statutes including the NGA, Clean Water Act (CWA), National Historic Preservation Act (NHPA), and Delaware River Basin Compact by authorizing project construction before PennEast has acquired other, necessary federal authorizations.

a. Clean Water Act

53. Section 401(a)(1) of the CWA provides that an applicant for a federal license to conduct an activity that "may result in any discharge into navigable waters" must obtain a water quality certification and, further, that "[n]o license or permit shall be granted until the certification required by the section has been

obtained or has been waiver . . . ."[131] The Pennsylvania Department of Environmental Protection (PADEP) and the NJDEP are the state regulatory authorities that have delegated authority under the CWA. PADEP issued a water quality certification on February 7, 2017, for the portion of the project located in Pennsylvania. NJDEP to date has not issued a water quality certification for the portion of the project located in New Jersey.

54. Although we have found that the PennEast Project is consistent with the public interest under the NGA, we recognize that the project cannot proceed until it receives all other necessary federal authorizations. As the parties have noted here, these include relevant authorizations under the CWA. Accordingly, as permitted by NGA section 7(e),[132]132 the Commission subjected its authorization of the PennEast Project to conditions that must be satisfied before commencing construction or operation of the project.[133] Among these conditions is the requirement that PennEast receive the necessary state approvals under this federal statute prior to construction.[134]

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[131] 33 U.S.C. § 1341(a)(1) (2012).

[132] Section 7(e) of the NGA grants the Commission the "power to attach to the issuance of the certificate and to the exercise of rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2012).

[133] *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003) (citations omitted), *aff'd sub nom.*, *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

[134] Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Condition 10. Environmental Condition 10 applies to *all* federal authorizations, including any necessary

55. We disagree with the petitioners' assertions that the issuance of our order authorizing the PennEast Project prior to receipt of the section 401 water quality certification is impermissible. Although the Commission issued authorizations under the NGA for the PennEast Project, states' rights under the CWA and other federal statutes are fully protected. PennEast must receive the necessary state approvals under these federal statutes prior to construction. Nor does our authorization in the Certificate Order impact any substantive determinations that need to be made by the states under these federal statutes. PADEP and NJDEP, the state agencies with federally-delegated section 401 certification authority, retain full authority to grant or deny the specific requests.[135] Moreover, because construction cannot commence before all necessary authorizations are obtained,[136]

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authorizations and/or permits required by the Delaware River Basin Commission, under the Delaware River Basin Compact.

[135] NJDEP argues that Ordering Paragraph (B)(1) of the Certificate Order, which conditions the certificate on "PennEast's proposed project being constructed and made available for service within two years of the date of this order . . ." impermissibly reduces the time state regulatory agencies have to review permit applications under the CWA. NJDEP's Request for Rehearing at 39. NJDEP is mistaken. The two year window to construct and operate the project is a certificate requirement that applies only to PennEast and does not impact the timing of any permits to be issued by state regulatory agencies pursuant to federal authorizations. In any event, we find this argument unpersuasive as the CWA explicitly contemplates that a "reasonable period of time" to consider such permits "shall not exceed one year." 33 U.S.C. § 1341(a)(1) (2012).

[136] *See* Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Condition 10. Delaware Riverkeeper claims, without elaboration, that the Commission "regularly issues letter

there can be no impact on the environment until there has been full compliance with all relevant federal laws.

56. The Commission's approach appropriately respects the integration of the various permitting requirements for interstate pipelines, as reflected in the NGA and the CWA. As we have stated before, it is also a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a natural gas project in advance of the Commission's issuance of its certificate without unduly delaying the project.[137] To rule otherwise could place the Commission's administrative process indefinitely on hold until states with delegated federal authority choose to act. Such an approach, which would preclude companies from engaging in what are sometimes lengthy pre-construction activities while awaiting state or federal agency action, would likely delay the in-service date of natural gas infrastructure projects to the detriment of consumers and the public in general. The Commission's conditional approval

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orders to proceed with tree felling construction activity prior to the issuance of the CWA Section 401 water quality certifications." Delaware Riverkeeper's Request for Rehearing at 157. Delaware Riverkeeper mischaracterizes the Commission's post-certificate compliance process. PennEast is prohibited from commencing construction, including any tree clearing activities, until PennEast obtains all authorizations required under federal law and receives written authorization from the Director of the Commission's Office of Energy Projects.

[137] *See, e.g.*, *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 59 (2008); *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 26 (2006); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at PP 225-231.

process complies with the dictates of the CWA, as well as other federal statutes.[138]

57. Hopewell and Conservation Foundation cite to *City of Tacoma, Washington v. FERC*[139] for the proposition that the Commission lacks authority to issue a license without a CWA section 401 certification.[140] But the court's general statements regarding section 401 in *City of Tacoma* are not relevant here, where the Commission has issued only a conditional certificate, a practice that the courts have found does not violate section 401.[141]

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[138] *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 397 (D.C. Cir. 2017) ("Because the Certificate Order expressly conditioned FERC's approval of potential discharge activity on Transco first obtaining the requisite § 401 certification, and was not itself authorization of any potential discharge activity, the issuance of the Certificate Order before Pennsylvania's issuance of its § 401 certificate did not violate § 401 of the [Clean Water Act]."). *See also Pub. Util. Comm'n of the State of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (an agency can make "even a final decision so long as it assessed the environmental data before the decision's effective date"); *Del. Dept. of Nat. Res. and Envtl. Control v. FERC*, 558 F.3d 575, 578 (2009) (dismissing state's appeal of conditional authorization "in light of [the Commission's] acknowledgment of Delaware's power to block the project" under the CZMA); *City of Grapevine, Tex. v. Dept. of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) *cert. denied*, 513 U.S. 1043 (1994) (upholding Federal Aviation Administration's approval of a runway, conditioned upon the applicant's compliance with the NHPA) (*City of Grapevine*).

[139] 460 F.3d 53 (D.C. Cir. 2006) (*City of Tacoma*).

[140] Hopewell's Request for Rehearing at 13; Conservation Foundation's Request for Rehearing at 57.

[141] *See supra* P 56, n. 137.

58. Finally, we disagree with Hopewell that the Commission's January 2018 Order "improperly stifles" states' rights because it provides that "any state or local permits issued with respect to the project must be consistent with the conditions of the certificate."[142] The CWA section 401 certification is a federal authorization delegated to the state rather than a "state or local permit."[143] Thus, Hopewell's argument lacks merit.

b. National Historic Preservation Act

59. Similarly, Conservation Foundation argues that the Certificate Order is invalid because it was issued prior to completing surveys and consultation required by section 106 of the NHPA.[144] The Commission previously affirmed that a conditional certificate could be issued prior to completion of cultural resource surveys and consultation procedures required under the NHPA because destructive construction activities would not commence until surveys and consultation are complete.[145] As the Certificate Order

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[142] Hopewell's Request for Rehearing at 15-16.

[143] *See e.g.*, *Islander East Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) ("In conjunction with the [Commission's] review of a natural gas project application, it must ensure that the project complies with the requirements of all relevant *federal* laws, including NEPA, 42 U.S.C. §§ 4321-4370f, the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1465, and the CWA, 33 U.S.C. §§ 1251-1387.") (emphasis added).

[144] Conservation Foundation's Request for Rehearing at 60-61.

[145] *See generally Iroquois Gas Transmission System, L.P.*, 53 FERC ¶ 61,194, at 61,758-61,764 (1990). *See also City of Grapevine*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (upholding the

acknowledged, Environmental Conditions 46 through 50 require PennEast to complete project impact assessments, mitigation plans, and consultation related to specific historic properties in Pennsylvania and New Jersey in order to address stakeholder comments and mitigation requirements.[146] Additionally, to ensure compliance with NHPA section 106, the Certificate Order included Environmental Condition 51, which prohibits PennEast from beginning project construction until it files with the Commission all remaining cultural resources survey reports; site or resource evaluation reports and avoidance/treatment plans; the project's recommended effects to historic properties in Pennsylvania and New Jersey; and comments on the cultural resources reports and plans from the Pennsylvania and New Jersey SHPOs.[147]

c. Conditional Certificate Authority

60. In addition, HALT asserts that the Commission's issuance of conditional certificates exceeds the authority given to it by sections 7 and 15 of the NGA. HALT cites *CATCO*[148] and *FPC v. Hunt*[149] as support for its assertion that the Commission's authority to

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agency's conditional approval because it was expressly conditioned on the completion of section 106 process).

[146] Certificate Order, 162 FERC ¶ 61,053 at P 172; Appendix A, Environmental Conditions 46-50.

[147] Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Condition 51.

[148] 360 U.S. 378.

[149] 376 U.S. 515 (1964).

place "reasonable terms and conditions" on certificates of public convenience and necessity is limited to "the rates and terms of the initial delivery of gas" and does not extend to conditioning certificates on pending determinations under different federal and state agencies.[150] HALT argues that the Commission's practice of issuing conditional certificates in this manner under section 7 exceeds its authority under section 15 of the NGA to act as the lead agency when coordinating the NEPA review of a project.[151]

61. Despite HALT's assertions, neither Congress nor the courts intended to limit the Commission's authority to attach conditions to certificates to "the rates and terms of the initial delivery of gas"[152] Section 7(e) of the NGA states that the Commission has the authority to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require."[153] As the Court in *CATCO* noted, rates are not "the only factor bearing on the public convenience and necessity;" rather, section 7(e) "requires the Commission to evaluate all factors bearing on the public interest."[154] As such, the Commission considers a wide-range of factors when evaluating the public convenience and necessity, including market need, environmental, and landowner impacts, among others. The conditions

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[150] HALT's Request for Rehearing at 7.

[151] *Id.* at 8 (citing *Panhandle Eastern Pipe Line Co.*, 613 F.2d 1120 (D.C. Cir. 1979) (*Panhandle*)).

[152] HALT's Request for Rehearing at 7.

[153] 15 U.S.C. § 717f(e) (2012).

[154] *CATCO*, 360 U.S. at 391.

attached to the Certificate Order limit PennEast's activities where necessary to ensure that the project is consistent with the public convenience and necessity.

62. HALT argues that because section 15(c) of the NGA cross-references section 19(d) of the NGA when discussing the right of an applicant to pursue remedies against an agency that fails to meet the Commission's schedule for federal authorizations, the Commission's requirement to keep a consolidated record of proceedings in section 15(d), without a cross reference to section 7, indicates that Congress "obviously expected FERC to wait for other agencies to act before issuing its certificate."[155]

63. HALT's assertion is without support, or merit. As discussed above, neither Congress nor the courts have placed any such limitation on the Commission's NGA section 7(e) conditioning authority. To the contrary, the Commission's practice of issuing conditional certificates has consistently been affirmed by courts as lawful.[156]

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[155] HALT's Request for Rehearing at 8.

[156] *See Del. Riverkeeper Network v. FERC*, 857 F.3d at 399 (upholding Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the CWA); *see also Myersville*, 783 F.3d at 1320- 1321 (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state); *Del. Dep't. of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 578-579 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from the Commission's conditional approval of a natural gas terminal construction despite statutes requiring states' prior approval because the Commission conditioned its approval of construction

3. Insufficient Public Participation

64. Conservation Foundation alleges that the Commission violated NEPA's public participation requirements.[157] Conservation Foundation and Delaware Riverkeeper claim that because the Draft and Final EIS lacked large amounts of data and survey information, the public and federal and state resource agencies were not afforded an opportunity to meaningfully comment or scrutinize the project proposal.[158] Hopewell states that although the Certificate Order requires PennEast to resubmit several reports and plans pursuant to completion of studies and surveys, no public comment period was identified.[159] Hopewell asks the Commission to extend the comment period to allow the public to review and comment on the final plans, surveys, and mitigation strategies that PennEast must submit to comply with the Certificate Order's environmental conditions.[160] In order to ensure compliance with state water quality standards, NJDEP asserts that it needs an opportunity to review, modify, or reject proposed plans related to the Geohazard Risk Evaluation Report (Environmental Condition 15), Karst Mitigation Plan (Environmental Condition 16), Geotechnical

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on the states' prior approval); *Pub. Utils. Comm'n. of State of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding the Commission had not violated NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

[157] *See* Conservation Foundation's Request for Rehearing at 83-84 (citing 40 C.F.R. § 6.203; 40 C.F.R. § 1500.1(b)).

[158] Conservation Foundation's Request for Rehearing at 83-84.

[159] Hopewell's Request for Rehearing at 49-50.

[160] *Id.* at 50.

Evaluation of Mines (Environmental Condition 17), Final Design Plans for HDD Crossings (Environmental Condition 19), and Final Hydrostatic Test Plan (Environmental Condition 28) before they are finalized and filed with the Commission.

65. Contrary to the claims of various petitioners, the public had sufficient information and time to meaningfully comment on the PennEast Project. There were numerous opportunities for the public to comment on the project's potential impacts. PennEast began the pre-filing process to get early stakeholder involvement more than a year before filing its application. Early opportunities for public involvement included companysponsored open house meetings, public scoping meetings, and several comment periods (including an additional comment period following PennEast's submittal of route modifications in response to environmental and engineering concerns).

66. The fact that many of the permits, approvals, consultations, and variances required for the PennEast Project have been or will be filed after the formal public notice and comment periods does not mean that the public is excluded from meaningful participation. The Draft EIS put interested parties on notice of the types of activities contemplated and of their impacts. The Draft EIS is a draft of the agency's proposed Final EIS and, as such, its purpose is to elicit suggestions for change. Petitioners have not shown that any "omissions in the [Draft EIS] left the public unable to make known its environmental concerns

about the project's impact."[161] Although the Draft EIS serves as "a springboard for public comment,"[162] any information that is filed after the comment period is accessible to the public in the Commission's electronic database, eLibrary.

67. As noted in the Certificate Order, the Final EIS addressed all substantive comments received prior to December 31, 2016.[163] Comments filed too late to be included in the Final EIS or filed after issuance of the Final EIS were addressed in the Certificate Order to the extent that they raised substantive concerns.

68. Moreover, as explained above, the environmental conditions requiring site-specific plans, survey results, and additional mitigation measures are not designed to allow significant departures from the project as certificated. Rather, the requirement that PennEast file additional information once survey access is obtained, will enable Commission staff to verify that the EIS's analyses and conclusions are based on the best available data, enabling us to improve and finalize certain mitigation plans and ensure stakeholders concerns are addressed, as well as

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[161] *Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399, 2018 WL 3595760, at *10 (4th Cir., July 27, 2018) (rejecting petitioners claim that FERC's Draft EIS precluded meaningful comment where the applicant had not yet filed an erosion and sediment control plan at the time the Draft EIS was published) (citing *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004)).

[162] *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989).

[163] Certificate Order, 162 FERC ¶ 61,053 at P 97.

evaluate compliance during construction.[164] Accordingly, we find that it would be unnecessary and inefficient to permit entities to "re-litigate" matters that were fully addressed in the certificate proceeding.

69. In any event, any reports, plans or mitigation measures filed in accordance with the cited conditions are filed in the docket for these proceedings and available for public review and inspection. To the extent any of the pending consultations or studies indicate a need for further review, or indicate a potential for significant adverse environmental impacts, the Director of the Office of Energy Projects will not provide the necessary clearances for commencement of construction. For these reasons, we find that a formal comment period to allow the public to review and comment on any final plans, surveys, and mitigation strategies is not necessary.

70. We also do not find it is necessary for this Commission to require PennEast to submit various plans and reports required in Environmental Conditions 15, 16, 17, 19 and 28 to the NJDEP for its review, modification, or rejection. The NJDEP has independent authority under the Clean Water Act to require PennEast to submit any information necessary for that agency to fulfill its responsibilities under its delegated authority under that statute.

4. Final EIS Bias Due to Tetra Tech's Conflicts of Interest

71. Lower Saucon contends that the Commission's use of third-party contractor Tetra Tech to assist in

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[164] *Id.* P 99.

the environmental review was improper.[165] By selecting Tetra Tech as the third-party contractor to assist in the preparation of the Draft and Final EIS, Lower Saucon argues that the Commission ignored evidence of bias and conflicts of interest that should have disqualified Tetra Tech under NEPA regulations intended to preclude contractor conflicts of interest.[166] Lower Saucon alleges that Tetra Tech has a financial interest—both as a business and as a member of a natural gas industry group—in promoting natural gas pipeline projects in the Marcellus Shale region, calling into question Tetra Tech's impartiality.[167] Finally, Lower Saucon points to a prior allegation of misconduct as evidence the Commission should have disqualified Tetra Tech.[168]

72. Third-party contracting involves the use of an independent contractor to assist Commission staff in its environmental analyses and review of a proposal.

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[165] Lower Saucon's Request for Rehearing at 12-24.

[166] *Id.* at 12 (citing 18 C.F.R. § 1506.5 (2017)).

[167] *Id.* at 13-17.

[168] *Id.* at 17-19 (citing *Colorado Wild, Inc. v. U.S. Forest Serv.,* Civil Action No. 06-CV-020829-JLK-DLW (D. Colo. 2007) (citing "Findings of Facts and Conclusions of Law Regarding Plaintiffs' Motion to Complete and Supplement the Administrative Record, and for Leave to Conduct Limited Discovery" finding administrative record incomplete due to the destruction of a computer hard drive belonging to a Tetra Tech employee); *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213 (2007) (granting motion to continue preliminary injunction preventing Forest Service from implementing an Final EIS and Record of Decision related to its grant of a special use authorization to a real estate developer for right-of-ways across National Forest System lands)).

Under this voluntary program, the independent contractor is selected by the Director of the Commission's Office of Energy Projects and works solely under the direction of the Commission staff. The contractor is responsible for conducting environmental analyses and preparing environmental documentation, and is paid by the project applicant. The process provides Commission staff with additional flexibility in satisfying the Commission's NEPA responsibilities.[169]

73. CEQ's regulations provide conflict of interest standards for contractors. Per CEQ regulations:

> Contractors shall execute a disclosure statement prepared by the lead agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents.[170]

74. CEQ has issued guidance to aid agencies attempting to comply with their responsibilities under NEPA. While stressing the need for maintaining the appearance of impartiality in the NEPA process, CEQ cautions against an overly restrictive interpretation of

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[169] *See generally, FERC Handbook for Using Third-Party Contractors to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects* (August 2016) (https://www.ferc.gov/industries/hydropower/enviro/tpc/tpc-handbook.pdf).

[170] 40 C.F.R. § 1506.5(c) (2017).

the conflict of interest provision. For example, it states that, "[i]n some instances, multidisciplinary firms are being excluded from environmental impact statements preparation contracts because of links to a parent company which has design and/or construction capabilities."[171] CEQ adds:

> Section 1506.5(c) prohibits a person or entity from entering into a contract with a federal agency to prepare an [Environmental Impact Statement (EIS)] when that party has at that time and during the life of the contract pecuniary or other interests in the outcome of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist.[172]

75. In addition to CEQ guidelines, the Commission has organizational conflict of interest (OCI) procedures that it uses to identify real and perceived conflicts of interest associated with its third-party contractors. Each prospective contractor must disclose any recent or ongoing work and revenues for an

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[171] 48 Fed. Reg. 34,266 (July 28, 1983).

[172] *Id.*

applicant or its affiliates. In general, where only one percent or less of a contractor's business (for each of the current and two preceding calendar years)[173] involves a party that could be affected by the work, the contractor would not have a disqualifying OCI.[174]

76. Lower Saucon's allegations that Tetra Tech has a "financial, business, and corporate interest" in promoting natural gas infrastructure in the Marcellus Shale region do not demonstrate that Tetra Tech has an OCI that necessitates an invalidation of the Final EIS.[175] Lower Saucon points to a Tetra Tech subsidiary that describes itself as a "pipeline engineering company" and website descriptions of previous Tetra Tech design projects for natural gas pipelines in the Marcellus Shale region.[176] These generic assertions are not sufficient to cause the Commission to question Tetra Tech's impartiality. Further, in the event that Lower Saucon "had

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[173] In August 2016, the Commission revised its *Handbook for Using Third-Party Contractors to Prepare Environmental Documents for Natural Gas Facilities and Hydropower Projects* to require that the third-party contractor submit financial information based on the calendar year as opposed to the fiscal year.

[174] The one percent threshold applied by staff is based on well-established ethical standards, which recognize that a financial interest of one percent or less would not typically compromise impartiality. For example, the Office of Government Ethics recognizes that an employee may ethically perform work while maintaining a *de minimis* financial interest that could well exceed one percent of his or her total income. *See* 5 C.F.R. § 2640.202 (2017).

[175] Lower Saucon's Request for Rehearing at 13-15.

[176] *Id.* at 13.

identified an actual conflict of interest, it would afford a ground for invalidating the [EIS] only if it rose to the level of 'compromis[ing] the objectivity and integrity of the NEPA process.'"[177]

77. Nor do we believe that Tetra Tech's membership in, or role as a technical consultant to, a trade organization that promotes the development of natural gas supplies in the Marcellus Shale region constitutes a disqualifying OCI.[178] It would be inappropriate to disqualify Tetra Tech from serving as a third-party contractor for belonging to a professional organization. Were this the standard for conflicts of interest, nearly all third-party contracts would likely be disqualified for conflicts of interest. Moreover, Commission staff's oversight over all environmental analyses and work product would be more than sufficient to cure the low likelihood of contractor bias arising merely from a contractor's affiliation with a trade group.

78. Finally, we are not persuaded by Lower Saucon's attempts to use a prior allegation of misconduct involving one Tetra Tech employee to demonstrate that impropriety was present during the Commission's environmental review of this project. The allegation of prior misconduct arose during a legal challenge of a 2006 environmental document issued by the U.S. Forest Service and prepared by Tetra Tech, and has no bearing on the Commission's oversight and

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[177] *Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399, 2018 WL 3595760, at *10 (4th Cir., July 27, 2018) (citing *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 686 (D.C. Cir. 2004).

[178] *Id.* at 14-15.

responsibility for the work of its third-party contractors or the environmental review of the PennEast Project.

79. In sum, we disagree with the contention that the Commission's use of Tetra Tech as a third-party contractor during the environmental review process "threatens the integrity of the NEPA process."[179] We believe that the procedures outlined above ensured the integrity of the environmental review process in this case and deny rehearing on this issue.[180]

5. Project Scope and Alternatives

80. Several parties, including Hopewell, Lower Saucon, and the NJDEP, and Conservation Foundation allege that the Commission failed to properly identify or evaluate the project's purpose and need, and therefore, failed to evaluate a reasonable range of alternatives.[181] Hopewell and Conservation Foundation argue that such a narrow view of the need for the project resulted in a "completely deficient"[182] alternatives analysis, especially in its consideration of

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[179] Lower Saucon's Request for Rehearing at 16-17.

[180] Lower Saucon requests additional information regarding Tetra Tech's disclosures on the OCI Disclosure Statement. Lower Saucon's Request for Rehearing at 17. As noted above, the Commission received sufficient information in the OCI review to determine that there was no disqualifying conflict of interest.

[181] *See* Hopewell's Request for Rehearing at 33-37; Lower Saucon's Request for Rehearing at 34-36; NJDEP's Request for Rehearing at 32-37; Conservation Foundation's Request for Rehearing at 70-77.

[182] Hopewell's Request for Rehearing at 33.

the no-action alternative.[183] Hopewell and Lower Saucon contend that the Final EIS failed to adequately consider system alternatives including the location of the interconnection with Transcontinental Gas Pipeline Company, LLC (Transco), and the Hellertown Lateral.[184] In addition, NJDEP asserts that the Final EIS and Certificate Order ignored suggested route alternatives which would have avoided several environmental resources, as well as the need for HDD.[185]

a. Statement of Purpose and Need

81. Several petitioners contend that the Commission viewed the purpose of the project too narrowly, which led to an insufficient analysis of the alternatives to the project.[186] Delaware Riverkeeper states that by viewing the purpose of the project so narrowly, "all alternatives are preordained to fail in comparison."[187] Conservation Foundation asserts that the statement of purpose and need merely "parrots PennEast's stated purposes" resulting in an "improper formulation of the purpose and need statement" and a subsequent alternatives analysis that did not adequately consider the no-action alternative, and

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[183] *Id.* at 34, Conservation Foundation's Request for Rehearing at 70-76.

[184] Hopewell's Request for Rehearing at 34-37; Lower Saucon's Request for Rehearing at 34-36.

[185] *See* NJDEP's Request for Rehearing at 32.

[186] Conservation Foundation's Request for Rehearing at 64-65; NJCF's Request for Rehearing at 14; Delaware Riverkeeper's Request for Rehearing at 99.

[187] Delaware Riverkeeper's Request for Rehearing at 99.

other alternatives including renewable energy.[188] Similarly, Lower Saucon contends that the 2.1-mile-long Hellertown Lateral is not needed, as it will "simply provide an interconnection point with the UGI distribution system, which is more than adequately served with existing natural gas supplies and pipeline systems."[189] Lower Saucon maintains that without the lateral "[t]he overall objectives of the project could still be met, with the only impact being to one shipper who might fail to gain the advantage of capturing 'pricing differentials' by obtaining transportation of gas via the lateral."[190]

82. Other petitioners assert that the purpose and need statement is flawed based on what they deem the erroneous underlying assumption that the service region suffers from unserved need for additional pipeline capacity, and that the Commission "has made no attempt to question much less scrutinize the assumption of need underlying PennEast's stated project objectives."[191]

83. CEQ regulations state that an EIS must include a statement to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[192] Thus, the EIS need only describe the purpose and need of the project to the extent necessary to inform its alternatives analysis. Courts have upheld

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[188] Conservation Foundation's Request for Rehearing at 71-72.

[189] Lower Saucon's Request for Rehearing at 34.

[190] *Id.*

[191] *Id.* at 68-70.

[192] 40 C.F.R. § 1502.13 (2018).

federal agencies' use of applicants' project purpose and need as the basis for evaluating alternatives.[193] When an agency is asked to consider a specific plan, the needs and goals of the parties involved in the application should be taken into account.[194] We recognize that a project's purpose and need should not be so narrowly defined as to preclude consideration of what may actually be reasonable alternatives.[195] Nonetheless, an agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is "shaped by the application at issue and by the function that the agency plays in the decisional process."[196]

84. Here, the EIS appropriately recited the project's objective as stated by the applicant, that being "to provide about 1.1 million dekatherms per day (MMDth/d) of year-round natural gas transportation service from northern Pennsylvania to markets in New Jersey, eastern and southeastern Pennsylvania, and surrounding states."[197]

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[193] *See, e.g.*, *City of Grapevine*, 17 F.3d 1502, 1506.

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

[195] *Id.* at 196.

[196] *Id.* at 195, 199.

[197] Final EIS at 3-1; PennEast's Certificate Application at 3. Note that courts have upheld federal agencies' use of an applicant's stated purpose and need as the basis for evaluating project alternatives. *See, e.g., City of Grapevine*, 17 F.3d 1502, 1506-07 (D.C. Cir. 1994). *See also Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399 2018 WL 3595760, at *10 (4th Cir., July 27, 2018) ("[T]he statement [of purpose and need] allows for a wide range of alternatives but is narrow enough (i.e., it explains where the

85. This statement of purpose and need mirrors that for other gas pipeline projects, wherein the proposal is described as a means to transport a specific volume of gas from one or more receipt points to one or more delivery points.[198]198 Although this description limits some types of alternatives considered, it does not preordain that the project being proposed will be the sole way to satisfy the specified purpose and need. In this case, we were able to identify several reasonable alternative means (summarized below) to satisfy the stated objective of the PennEast Project. As discussed in greater detail below, we found none of the alternatives identified by petitioners would be technically and economically feasible and/or offer a significant environmental advantage over PennEast's proposed project or any of its segments, or otherwise meet the project's purpose and need.[199] We affirm this finding.

86. We also find no merit in Conservation Foundation's argument that what it deemed the

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gas must come from, where it will go, how much it would deliver) that there are not an infinite number of alternatives.")

[198] Agencies are afforded considerable discretion in defining the purpose and need of a project. *See, e.g.*, *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066- 1067 (9th Cir. 1998).

[199] *See City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2017) (defining "reasonable alternatives" as those "that are technically and economically practical or feasible and meet the purpose and need of the proposed action"). Note that NEPA does not compel the selection of the most environmentally benign alternative; rather, NEPA is intended to ensure that the basis for reaching a decision be informed by an awareness of the environmental impacts of a proposed action.

improper formulation of the purpose and need resulted in an inadequate discussion of the "no action" alternative, as the purpose and need of a proposed project does not inform the no action alternative. The CEQ regulations require the alternatives analysis to include the "no action alternative."[200] CEQ advises that the "no action" alternative in cases, such as here, involving federal decisions on proposals for projects, would "mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity…."[201] Accordingly, regardless of how the purpose and need is "formulated," the no action alternative means the Commission would not authorize the PennEast Project. As discussed in the Final EIS,[202] staff found that the alternative of not authorizing the PennEast Project would result in no environmental impacts.

87. Moreover, with respect to petitioner's argument that the Commission accepted without questioning the applicant's assertion that there is a need for the project, we find that petitioners appear to conflate the description of the purpose of and need for the project, required by NEPA, with the Commission's determination of "public need" under the public convenience and necessity standard of section 7(c) of the NGA. As discussed above, when determining "public need," the Commission balances public

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[200] 40 C.F.R. § 1502.14(d) (2017).

[201] Council on Environmental Quality, *CEQ 40 Most Asked Questions*, at 3 (Mar. 1981) https://www.energy.gov/sites/prod/files/G-CEQ-40Questions.pdf.

[202] Final EIS at 3-3.

benefits, including market need, against project impacts.[203] The Final EIS appropriately explained that it was not a "decision document," and that, under NGA section 7(c), the final determination of the need for the projects lies with the Commission.[204] Neither NEPA nor the NGA requires the Commission to make its determination of whether the project is required by the public convenience and necessity before its final order.

88. Although Lower Saucon dismisses UGI Utilities, Inc.'s need for project capacity that would be provided via the Hellertown Lateral, the Hellertown Lateral was designed as part of the PennEast Project, and the lateral's delivery points are located specifically in order to enable Columbia Gas Transmission, LLC and UGI Utilities, Inc. to connect to the PennEast system. We find Columbia and UGI's contracting for capacity as sufficient evidence of need for the lateral.

b. Need and the No-Action Alternative

89. In arguing for the no-action alternative, several petitioners contend that existing pipeline capacity, renewable energy resources, and increased efficiency and conservation measures could eliminate the need for the project, and urge the Commission to reconsider the no-action alternative.[205]

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[203] *See supra* PP 14-27 (affirming the Certificate Order's public needs determination).

[204] Final EIS at 1-3 - 1-4.

[205] Conservation Foundation's Request for Rehearing at 74-76; Delaware Riverkeeper's Request for Rehearing at 100-101; Lower Saucon's Request for Rehearing at 36.

90. The Final EIS found that taking no action would avoid adverse environmental impacts, but would fail to fulfill the objective of the proposed project.[206] Although such alternatives could be environmentally preferable, there are no projects currently being considered that would rely on renewable sources to supply target-market consumers with, or reduce consumption by, the energy-equivalent of the gas the PennEast Project will provide. Further, as the Final EIS points out, generating electricity from renewable sources and increasing energy efficiency and conservation are not alternatives that satisfy the purpose of the PennEast Project, which is to transport gas along a particular production-to-consumption pathway.[207] Accordingly, we reiterate our prior finding that these are not reasonable alternatives to review, and that adoption of the no-action alternative was not appropriate.

c. System Alternatives

91. System alternatives modify or add to existing or proposed pipeline systems to meet the objective(s) of the proposed project. As potential means to meet the proposed project's objective, the Final EIS reviewed four major route alternatives,[208] three of which would have made modifications to the existing pipeline systems of Transco, Columbia Gas, and Texas

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[206] Final EIS at 3-3.

[207] *Id. See also Transco*, 161 FERC ¶ 61,250 at P 50 (stating that renewable energy is not an alternative to natural gas transportation).

[208] The Final EIS also reviewed 83 route variations identified by PennEast or by commenters, 39 of which were incorporated into the approved route.

Eastern. We found capacity would not be available on these existing systems to transport PennEast's volumes to the designated delivery points. Also, with the exception of Transco's Leidy Line, none of the existing pipelines are in close proximity to the production areas of northern Pennsylvania that are intended to supply the PennEast Project. Accordingly, we found that these are not reasonable alternatives.

i. Leidy Line

92. Delaware Riverkeeper claims the Final EIS did not adequately explain why we did not deem rerouting the PennEast pipeline to track Transco's Leidy Line to be a preferable alternative, and promote various means to make use of other existing easements. Despite Delaware Riverkeeper's assertion, the Leidy Line system alternative is discussed in detail in the Final EIS.[209] The Final EIS acknowledged that although collocation within an existing right-of-way is generally preferable, placing PennEast's new pipeline within existing easements would be "generally not feasible, primarily because there is not enough space for the addition of the proposed pipeline and new required easement," given that "[t]he width of existing easements are limited to that needed to safely operate and maintain the utility and do not include extra width that would accommodate the PennEast pipeline."[210] The Final EIS further concluded that routing the PennEast pipeline adjacent to the Leidy

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[209] Final EIS at 3-12 - 3-16.

[210] *Id.* at 3-15. PennEast seeks a new permanent easement width of 50 feet to operate and maintain the pipeline in accordance with the Department of Transportation's safety standards.

Line would require an additional 54 miles of pipeline; disturb 602 more acres during construction; require 142 more acres of operational rightof- way; impact about 94 more acres of wetlands during construction; and be within 50 feet of an estimated 325 more residences.[211] In view of this, we affirm our finding that rerouting the PennEast pipeline proximate to the Leidy Line would not be environmentally preferable and that using other existing easements would not be feasible.[212]

93. As a means to assess the alternative of placing the new PennEast pipeline alongside the existing Leidy Line, we constructed a table that numerically compared the impacts (e.g., miles of pipe and acres of construction) of this option with the proposed project.[213] Delaware Riverkeeper faults the EIS for not

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[211] *Id.* at 3-13.

[212] As another alternative, the Final EIS considered Transco's Atlantic Sunrise Project. We found that because there were commitments for firm service for its full capacity, along with commitments for approximately 90 percent of the capacity of the PennEast Project, there was customer demand for both projects. Consequently, the Atlantic Sunrise Project could not serve as a PennEast substitute unless it were to be significantly expanded. Also, the Atlantic Sunrise Project, like Transco's Leidy Line, could not bring gas to the same delivery points as the PennEast Project. In view of this, we affirm our prior determination that expanding the Atlantic Sunrise Project would not be a practicable or environmentally preferable alternative. *See* Final EIS at 3-7 – 3-8.

[213] *See* Final EIS Table 3.3.1-2 at 3-10. NJDEP faults this table's numerical summary of comparative impacts, along with other instances when data are presented in the Final EIS, for failing to describe "the data's source or veracity." NJDEP's Request for Rehearing at 47. It has not been our practice to footnote and

similarly quantifying the impacts of the proposed project versus the alternative of expanding the Leidy Line. We find that choosing not to do so was appropriate in view of our finding that boosting capacity on the Leidy Line by looping and compression would not fulfill the objective of the PennEast Project, since the Leidy Line does not provide access to the same delivery points or to an interconnection with Algonquin Gas Transmission, LLC and Texas Eastern Transmission, LP at one location.[214] For the Leidy Line expansion to function as a feasible system alternative, i.e., for gas flowing on an expanded Leidy Line to be able to reach the PennEast Project's market area, new lateral lines would need to be built from the Leidy Line to the designated delivery points.[215] Further, as discussed in the EIS, there are 30 locations along the Leidy Line, totaling about 20.3 miles, with dense residential or commercial development along both sides of the pipeline that

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cross-reference the source of all data in our environmental review, since the origin of any particular piece of information is generally either available in or referenced in the record of a proceeding. The veracity of data submitted to the Commission is subject to challenge by the Commission or any interested person. When data needed to assess the environmental impacts of a proposed project is unavailable, typically because a project sponsor has been unable to gain access to complete an on-site survey, we require that such data be submitted prior to undertaking construction. *See, e.g.*, Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Conditions 21, 31, 41, and 51.

[214] Final EIS at 3-9.

[215] *Id.* at 3-6.

preclude looping within the existing right-of-way.[216] Thus, expanding the Leidy Line would require routing loop lines outside the existing right-of-way to avoid existing development. We anticipate the environmental impacts of greenfield looping and new laterals would be comparable to rerouting PennEast's pipeline along the Leidy Line right-of-way. In addition, as noted above, because adding capacity to the Leidy Line would not serve as a viable alternative to PennEast's proposal, we found no reason to quantify impacts of a Leidy Line expansion.

ii. Adelphia Gateway

94. Numerous petitioners assert that the Adelphia Gateway, LLC (Adelphia), Docket No. CP18-46-000, should have been considered as an alternative to the PennEast Project. The Adelphia application was filed on January 12, 2018, a week before the Certificate Order was issued and nine months after the Final EIS was completed. It is impractical for an agency to supplement an EIS every time new information comes to light after the EIS is finalized, and "[t]o require otherwise would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."[217] Consequently, agencies are expected to follow a rule of reason in deciding how to incorporate the continuously updating stream of data.[218]

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[216] *Id.* at 3-7.

[217] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989) (citation omitted).

[218] *Marsh,* 390 U.S. at 374.

95. In this case, we considered all reasonable alternatives to the PennEast project pending during the preparation of the Final EIS. To have included Adelphia—which had yet to be proposed when the EIS was completed in April 2017—we would have had to refrain from acting on PennEast and start preparing a supplemental EIS after Adelphia submitted its application, resulting in what we believe would been an unwarranted delay. Thus, we believe our decision to issue the PennEast order, rather than hold it in abeyance to be able to assess Adelphia, was appropriate and reasonable.

96. Had we considered Adelphia, we would have found it to be an impractical system alternative. Although both projects are designed to receive gas from production areas in northeast Pennsylvania, from there the pipelines diverge; PennEast tracks east to deliver gas to markets in eastern Pennsylvania and New Jersey, and Adelphia would direct gas south to Philadelphia and Delaware. Because each project serves a different market area, without extensive additional construction, neither could deliver gas to the other's intended customers. Further, Adelphia is a smaller scale project, and currently can accommodate approximately 150,000 Dth/d (approximately 13.5 percent of PennEast's capacity of 1,107,000 Dth/d) along only the southern portion of its pathway. Thus, an expansion of Adelphia would not be a preferable alternative to PennEast.

d. Route Alternatives

97. Hopewell continues to advocate for relocating PennEast's planned interconnection with Transco to a site that would be located about 0.5 mile southwest at

MP 111.8R2, and that would, according to Hopewell, eliminate approximately 2.1 miles of pipeline running through the town. This alternative interconnection is addressed in the Final EIS[219] and Certificate Order.[220] The Final EIS concluded that although the alternative may meet the project's delivery needs, without further information we could not determine if it would be feasible.[221] Consequently, the Certificate Order includes Environmental Condition 13, which bars PennEast from commencing construction until it submits additional details on this alternative's feasibility.[222] Because PennEast has yet to do so, we have yet to reach a decision on whether to adopt the PennEast or Hopewell Township interconnection. In response to NJDEP's objection to issuance of the Certificate Order prior to a full review of the alternative's impacts, we stress that until PennEast submits additional information to allow us to fully review the alternative, neither of the proposed Transco interconnections can go forward.

98. NJDEP states that if an HDD fails, it would most likely not allow open trenching of sensitive habitat and instead recommends an alternate route.[223] In

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[219] *Id.* at P 33, n. 46. The fact that the shipper and LDC may be affiliates, and thereby have additional insight into future developments, only strengthens the claim for the Hellertown Lateral as a necessary component of the PennEast Project.

[220] Final EIS at 3-37 – 3-39; Certificate Order, 162 FERC ¶ 61,053 at P 215.

[221] Final EIS at 3-39.

[222] *See* Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Condition 13.

[223] NJDEP's Request for Rehearing at 34-37.

view of this, NJDEP maintains the EIS should have assessed routing alternatives that may be needed if an HDD fails.[224]

99. NEPA does not require an agency to assess potential project modifications that may be undertaken in response to every conceivable adverse contingency. Because we believe an HDD failure is unlikely when conducted in a suitable location in accordance with the regulatory requirements, we believe reviewing routing alternatives in anticipation of an HDD failure to be unwarranted. However, if there is such a failure, and if we find that relocating the pipeline along a previously unstudied route would be a preferable way to effect a water-body crossing, then we will evaluate the route variation requested by PennEast in accordance with Environmental Conditions 1 and 5 of the Certificate Order. All appropriate agency(ies) will be consulted with respect to any alternative water-body crossing methods.

100. Delaware Riverkeeper urges the selection of routing alternatives it believes would offer environmental advantages.[225] These alternatives have already been assessed, and rejected, in the Final EIS and/or Certificate Order.[226] Delaware Riverkeeper complains that although our review of alternatives "gives numbers of stream crossings, wetlands cut, forest acres lost," it "fails to provide an

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[224] *Id.* at 37.

[225] Delaware Riverkeeper's Request for Rehearing at 146.

[226] Final EIS at 3-9 – 3-32; Certificate Order, 162 FERC ¶ 61,053 at PP 211-215.

adequate level of detail regarding the selection of the proposed preferred route."[227]

101. We believe that in our consideration of alternatives, the data presented and our interpretation thereof are adequate to support the rationale for our decision. Delaware Riverkeeper questions our rejection of alternatives with a reduced footprint, such as the Luzerne and Carbon Counties alternative. The Final EIS considered the advantages of this alternative route, noting it would be shorter (27.2 versus 28.9 miles), and impact less wetland, agricultural and special interest land.[228] However, the alternative could only be collocated along an existing right-of-way for 0.2 miles, as compared to 23 miles for the approved route, and the alternative would require seven additional waterbody crossings and clearing an additional 15 acres of forest land.[229] Delaware Riverkeeper challenges what it views as our "[presumption] that if the pipeline is co-located with a preexisting linear project that its impacts have been avoided or been minimized as compared to other options," because when collocation does not take place within an existing right-of-way, "it actually creates a second, adjacent footprint, thereby expanding the ROW footprint."[230] The Final EIS took this outcome into account, but reasoned that "[w]hile collocation with another existing right-of-way would not eliminate the need for new right-of-way and land

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[227] Delaware Riverkeeper's Request for Rehearing at 150.

[228] Final EIS at 3-9 – 3-12.

[229] *Id.*

[230] Delaware Riverkeeper's Request for Rehearing at 151.

impacts, it would place the new impacts adjacent to existing cleared right-of-way," and may "allow some construction work area to overlap the existing easement, therefore reducing the area of new vegetation clearing required."[231] Accordingly, we affirm the selection of the approved route.

e. Construction Alternatives

102. Delaware Riverkeeper argues that we should compel PennEast to use construction practices it deems environmentally preferable, such as using HDD to bore under road and stream crossings, and the selection of construction practices to avoid soil compaction.[232] The construction practices we require PennEast to use reflect our experience with previous, similar projects, and incorporate mitigation measures we have found ensure there will be no significant adverse environmental impacts. No more is required.

103. Delaware Riverkeeper is concerned about post-construction practices as well, in particular damage on the right-of-way due to access by vehicular traffic, including off-road vehicles.[233] PennEast's E&SCP provides that it will "[m]ake efforts to control unauthorized off-road vehicle use, in cooperation with the landowner, throughout the life of the project."[234] Further, Environmental Condition No. 43 of the Certificate Order responds to this concern by requiring that prior to construction PennEast must submit for approval "plans regarding a gating or

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[231] Final EIS at 3-12.

[232] Delaware Riverkeeper's Request for Rehearing at 146-152.

[233] *Id.* at 153.

[234] Application, Appendix E at 45.

boulder access system for the pipeline right-of-way across Pennsylvania state lands, developed in consultation with the Pennsylvania Department of Conservation and Natural Resources, to prevent unauthorized vehicle access while maintaining pedestrian access."

6. Indirect Impacts

104. Several petitioners allege that the EIS failed to account for the indirect impacts of upstream natural gas production, and the downstream GHG emissions from the gas transported along the system, and the resulting climate change impacts from these emissions.[235] They assert the project would be responsible for enabling upstream gas production and downstream gas consumption, and therefore the Commission must consider "their attendant environmental consequences."[236]

105. The Certificate Order provided extensive discussion on why the Commission is not required under NEPA to analyze, as indirect impacts, the environmental impacts from upstream natural gas development. On rehearing, parties raise no new arguments disputing the Commission's reasoning, therefore we need not address them in detail. Petitioners further fail to acknowledge, much less identify error with, the Commission's analysis of

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[235] Delaware Riverkeeper's Request for Rehearing at 50-60, Conservation Foundation's Request for Rehearing at 13, 93.

[236] Conservation Foundation's Request for Rehearing at 17.

either the estimated upstream or downstream impact analyses.[237]

106. As discussed in the Certificate Order, CEQ defines "indirect impacts" as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[238] With respect to causation, "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause" in order "to make an agency responsible for a particular effect under NEPA."[239] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."[240] Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation" will not fall within NEPA if the causal chain is too

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[237] The dissent relies on *Mid States Coalition for Progress v. Surface Transportation Board* (*Mid States*) 345 F.3d 520 (8th Cir. 2003) to argue that the Commission must "engage in reasonable forecasting" and "at the very least, examine the effects that an expansion of pipeline capacity might have on production." For the same reasons we have previously explained, *Mid States* is distinguishable from the circumstances here. *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 64-66 (2018); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190, at PP 64-66 (2018); *Nexus Gas Transmission, LLC*, 164 FERC ¶ 61,054, at P 96 (2018); and *National Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084, at PP 166-167 (distinguishing *Mid States*).

[238] Certificate Order, 162 FERC ¶ 61,053 at P 194.

[239] *Id.* P 195 (citing *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, at 767 (2004) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, at 774 (1983))).

[240] *Id.*

attenuated."[241] Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.[242]

107. The Certificate Order thoroughly discussed the Commission's reasons for concluding that the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline, nor are they reasonably foreseeable consequences of an infrastructure project, as contemplated by the CEQ regulations.[243] With respect to causation, we noted that 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).[244]

108. The Certificate Order added that even accepting, *arguendo*, that a specific pipeline project

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[241] *Id.* (quoting *Metropolitan Edison Co. v. Pub. Citizen*, 460 U.S. at 774).

[242] *Id.* (quoting *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 770).

[243] *See* Certificate Order, 162 FERC ¶ 61,053 at PP 197-210 (explaining that upstream production impacts are not indirect impacts of the Project, as they are neither causally related nor reasonably foreseeable, as contemplated by the CEQ regulations). *See also id.* PP 203-206; Final EIS at 4-25 (Table 4.10.1-5); 4-250 (Table 4.10.1-9); and 4-249.

[244] Certificate Order, 162 FERC ¶ 61,053 at P 197.

will cause natural gas production, such potential impacts, including GHG emissions impacts, resulting from such production are not reasonably foreseeable. Courts have found that an impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[245] Although courts have held that NEPA requires "reasonable forecasting," an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."[246]

109. The Certificate Order explained that the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline, and that states, rather than the Commission, have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. Moreover, there are no forecasts on record which would enable the Commission to meaningfully predict production-related impacts, many of which are highly localized.[247] Thus, we found that, even if the Commission knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed

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[245] *EarthReports, Inc, v. FERC*, 828 F.2d 949, 955 (D.C. Cir. 2016) (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[246] *N. Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011).

[247] Certificate Order, 162 FERC ¶ 61,053 at P 198.

information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary by producer and depending on the applicable regulations in the various states.[248] Accordingly, we found that here, the impacts of natural gas production are not reasonably foreseeable because they are "so nebulous" that "we cannot forecast [their] likely effects" in the context of an environmental analysis of the impacts of a proposed interstate natural gas pipeline.[249]

110. Notwithstanding our conclusions regarding indirect impacts, the EIS for the project provided a general analysis of the potential impacts, including GHG emissions impacts, associated with unconventional natural gas production, based on publicly-available Department of Energy (DOE) and Environmental Protection Agency (EPA) methodologies.[250]

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[248] *Id.*

[249] *Id.*

[250] *Id.* PP 199, 202-206 (incorporating U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48,132 (Aug. 15, 2014) (DOE Addendum), http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf. The U.S. Court of Appeals for the D.C. Circuit upheld DOE's reliance on the DOE Addendum to supplement its environmental review of the proposed export of LNG. *See Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017). *See also Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128, 16,130 (Mar. 26, 2015) (Bureau of Land Management promulgated regulations for hydraulic fracturing on federal and Indian lands to "provide significant

111. The Final EIS also went beyond that which is required by NEPA and quantified the estimated downstream GHG emissions, assuming that the project always transports the maximum quantity of natural gas each day and that the full quantity of gas is used for additional consumption.[251] As we have previously stated, where the record does not show a specific end use of the gas transported by the project, downstream emissions from the consumption of that natural gas are not indirect effects as defined by CEQ.[252]

7. Cumulative Impacts

112. Several parties assert that the Commission failed to adequately consider cumulative impacts related to: (a) upstream natural gas development; (b) the resulting climate change impacts from

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benefits to all Americans by avoiding potential damages to water quality, the environment, and public health").

[251] Certificate Order, 162 FERC ¶ 61,053 at PP 207-210; Final EIS at 4-254; and 4-335.

[252] *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 39, 40-42 (2018) (explaining that the upper-bound estimates of downstream consumption provide the worst-case scenarios of peak use and are therefore inherently speculative when "there is nothing in the record that identifies any specific end use or new incremental load downstream of the []Project. [K]nowledge of these and other facts would indeed be necessary in order for the Commission to fully analyze the effects related to the . . . consumption of natural gas."). *See also Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190, at P 61 (2018) (explaining that the downstream consumption of transported gas is not an indirect impact because the gas to be transported by the Broad Run Expansion Project will be delivered by the project's sole shipper, a producer, into the interstate natural pipeline grid and not to a specific end user).

upstream and downstream GHG emissions; (c) impacts on specific resources; and (d) the construction and operation of other pipeline projects in the area.[253] Conservation Foundation asserts that the "Commission engaged in only a cursory and analytically shallow assessment of cumulative impacts, and makes "conclusory" findings that those impacts would be minor or insignificant."[254] We disagree.

113. The CEQ regulations define cumulative impact as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[255] The D.C. Circuit has held that a meaningful cumulative impact analysis must identify: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.[256] The geographic scope of our cumulative impact analysis varies from case to

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[253] *See, e.g.* Delaware Riverkeeper's Request for Rehearing at 25, Conservation Foundation's Request for Rehearing at 81.

[254] *Id*. at 81-82.

[255] 40 C.F.R. § 1508.7 (2017).

[256] *Sierra Club v. FERC (Freeport LNG)*, 827 F.3d 36, 39 (D.C. Cir. 2016) (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) and *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002)).

case, and resource to resource, depending on the facts presented.

a. Upstream Natural Gas Production

114. As explained above, because the impacts of upstream natural gas production are not reasonably foreseeable, such impacts were correctly excluded from the Final EIS' cumulative impacts analysis to the extent that they were outside the geographic scope of the project.

115. Conservation Foundation argues that the PennEast Project "should be viewed in the context of the Marcellus Shale fracking boom and attendant pipeline construction" which, it asserts, is causing, among other things, erosion and runoff, habitat destruction and alteration, wildlife displacement and population stress.[257] Consistent with the CEQ guidance and case law, the EIS identified the criteria that defined the project's geographic scope which was used in the cumulative impact analysis to describe the general area for which the project could contribute to cumulative impacts.[258] For example, the EIS noted that impacts on geology and soils, land use, residential areas, visual resources, air quality, and noise by the project would be highly localized. For cumulative impacts on these resources, the EIS evaluated other projects (e.g. residential development, small commercial development, and small transportation projects) within 0.25 mile of the construction work areas for the project. On the other hand, the EIS also

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[257] Conservation Foundation's Request for Rehearing at 81.

[258] Final EIS at 4-320 - 4-321.

concluded that the PennEast Pipeline Project's Kidder Compressor Station would result in long-term impacts on air quality in the 81.55 Northeast Pennsylvania-Upper Delaware Valley Interstate Air Quality Control Region (AQCR). Therefore, the EIS analyzed other projects with the potential to result in long-term impacts on air quality (e.g. natural gas compressor stations or industrial facilities) within the same AQCR. On rehearing, the parties do not dispute that the EIS identified the appropriate scope for its cumulative impact analysis.[259]

116. The EIS further found that there is no current or foreseeable well development or use within 10 miles of the project, so project construction and operation would not be expected to result in cumulative impacts on any resources within the geographic scope of the analysis.[260] However, the EIS acknowledged natural gas production in its cumulative impact analysis, noting that "recent activity has shown that development creates potentially serious patterns of land disturbance on the landscape."[261]

117. Even if we vastly expanded our cumulative impact analysis, which would be inappropriate, the impacts from natural gas development are not reasonably foreseeable. The Commission does not have sufficient information to determine the origin of the natural gas that will be transported on the PennEast Project, much less any impacts from potential development associated with the natural gas

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[259] Conservation Foundation's Request for Rehearing at 81.

[260] Final EIS at 4-231.

[261] *Id.* at 4-322.

production. When the Commission lacks meaningful information about potential future natural gas production within the geographic scope of a project-affected resource, then production-related impacts are not reasonably foreseeable, and therefore cannot be included in a cumulative impact analysis.[262]

b. GHG Emissions Impacts on Climate Change

118. Sierra Club-New Jersey generally asserts that the Commission was required to consider GHG emissions and climate change implications of the project primarily because "the U.S. Court of Appeals for the District of Columbia…expressed deep concerns regarding FERC's treatment of downstream greenhouse gas emissions."[263] The EIS and Certificate Order fully considered GHG emissions and climate change and went beyond that which is required by NEPA by assessing direct and indirect GHG emissions. Although not required, in an effort to put the estimated GHG emissions into context, the Commission examined both regional and national GHG emissions.[264] On rehearing, petitioners do not take issue with the quantification of the GHG emissions. Rather, petitioners contend that the Commission failed to undertake a meaningful analysis of the climate change impacts stemming from the

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[262] *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 34 (2018); *Columbia Gas Transmission*, 149 FERC ¶ 61,255, at P 120 (2014).

[263] Sierra Club—New Jersey's Request for Rehearing at 2 (providing no case citation).

[264] *See* Certificate Order, 162 FERC ¶ 61,053 at P 209.

project's GHG emissions.[265] As the Commission has explained, it cannot find a suitable method to attribute discrete environmental effects to GHG emissions.[266] CEQ guidance, now withdrawn, for assessing the effects of climate change in NEPA reviews does not specifically list a threshold for determining significance.[267] Rather, the guidance suggests that agencies "discuss relevant approved federal, regional, state, tribal, or local plans, policies, or laws for GHG emission reductions or climate change adaptation to make clear whether a proposed project's GHG emissions are consistent with such plans or laws."[268]

119. Further, it is, as the Commission did in this case, appropriate to qualitatively discuss climate change effects and quantify GHG emissions as a proxy for climate change effects when the emissions are related to the project. The courts have found that

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[265] *See* Delaware Riverkeeper's Request for Rehearing at 68-99, Sierra Club—New Jersey's Request for Rehearing at 2.

[266] *Florida Southeast Connection*, 162 FERC ¶ 61,233 at P 27 (2018).

[267] CEQ, *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* at 28-29 (Aug. 1, 2016), Notice of Availability, 81 Fed. Reg. 51,866 (Aug. 5, 2016) (Final Guidance). The Final Guidance, which is "not a rule or regulation" and "does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable," was subsequently withdrawn. *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*, 82 Fed. Reg. 16,576 (Apr. 5, 2017).

[268] Final Guidance at 28-29.

"qualitative analyses are acceptable in an [environmental document] where an agency explains 'why objective data cannot be provided,'"[269] which is what the EIS did here.[270] The CEQ recommended in its guidance, "that agencies use projected GHG emissions . . . as a proxy for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action."[271] CEQ added that quantifying GHG emissions together with providing a qualitative summary discussion of the impacts of GHG emissions allows an agency to present the impacts of a proposed action "in clear terms and with sufficient information to make a reasoned choice between no action and other alternatives and appropriate mitigation measures, and to ensure the professional and scientific integrity of the NEPA review."[272]

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[269] *Klamath-Siskiyou Wildlands Ctr. V. Bureau of Land Management*, 387 F.3d 989, 994 & n.1 (9th Cir. 2004). *See also League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060 (9th Cir. 2012) ("Here, the EIS discusses the expected tree mortality under the no-action alternative and provides a reasonable 'justification regarding why more definitive information could not be provided.'") CEQ regulations address procedures for "evaluating reasonably foreseeable significant adverse effects" when there is "incomplete or unavailable information." 40 C.F.R. § 1502.22 (2017). We believe that the discussion herein is consistent with the procedures for addressing incomplete or unavailable information.

[270] EA at 164-166.

[271] *See* CEQ, *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* at 10 (Aug. 1, 2016).

[272] *Id.*

120. Here, the EIS explained that GHG emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to future climate change impacts.[273]

121. The Final EIS and the Certificate Order exceeded this guidance by quantifying the GHG emissions for both direct project emissions and non-unrelated emissions, comparing those unrelated downstream emissions to the regional and nationwide GHG emissions inventory, and discussing qualitatively the link between the direct project and unrelated downstream GHG emissions and climate impacts. Nothing more was required.

122. Delaware Riverkeeper claims that in determining the significance of GHG emissions, the Commission is required to use the Social Cost of Carbon methodology, or "at the very least," include a discussion of why the Commission elected not to use such methodology in determining the significance of GHG emissions, in accordance with the *Sabal Trail* decision.[274]

123. Delaware Riverkeeper misstates the Sabal Trail holding. There, the court directed the Commission on remand to explain whether, and why, the Commission holds to the position, which was accepted by the court in *EarthReports, Inc. v.*

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[273] Certificate Order, 162 FERC ¶ 61,053 at P 210; Final EIS at 4-335.

[274] *Id.* at 36, (citing *Sabal Trail*, 867 F.3d 1357, 1374). The Social Cost of Carbon tool estimates the monetized climate change damage associated with an incremental increase in CO_2 emissions in a given year.

FERC,[275] that the Social Cost of Carbon tool is not useful for the Commission's NEPA reviews because several of the components of its methodology are contested and because not every harm it accounts for is necessarily significant with the meaning of NEPA.[276] On remand, the Commission provided extensive discussion on why the Social Cost of Carbon tool is not appropriate in project-level NEPA review, and cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the NGA.[277] Moreover, EPA recently confirmed to the Commission that the tool, which "no longer represents government policy," was developed to assist in rulemakings and "was not designed for, and may not

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[275] 828 F.3d 949, 956 (D.C. Cir. 2016).

[276] *Sabal Trail*, 867 F.3d at 1375.

[277] *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at PP 30-51 (2018) (rehearing pending). *See also Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at PP 275-297 (2018), (reiterating reasons Social Cost of Carbon tool is not useful in informing the Commission). The dissent relies on *High Country Conservation Advocates v. U.S. Forest Service* (*High Country*), 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014) and *Montana Environmental Information Center v. U.S. Office of Surface Mining (Montana Environmental Information Center*) No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017) to argue that the Commission must calculate the Social Cost of Carbon. For the same reasons we have previously explained, *High Country* and *Montana Environmental Information Center* are distinguishable from the circumstances here. *See Millennium Pipeline Co., L.L.C.*, 164 FERC ¶ 61,039 at PP 23-28 (2018) (distinguishing *Montana Environmental Information Center*); *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095 (2015) (distinguishing *High Country*), *aff'd sub nom. EarthReports,* 828 F.3d 949.

be appropriate for, analysis of project-level decisionmaking."[278] We adopt that reasoning here.[279]

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[278] *See* EPA July 26, 2018 Comments in PL18-1-000 ("Further, with regard to the discussion of the social cost of carbon, EPA notes that tool was developed to aid the monetary cost-benefit analysis of rulemakings. It was not designed for, and may not be appropriate for, analysis of project-level decision-making.") In support, the EPA cites the Technical Support Document—Social Cost of Carbon for Regulatory Impact Analysis—Under Executive Order 12866, Interagency Working Group on Social Cost of Carbon, at 1 (Feb. 2010) (citing Executive Order 12866's requirement to "assess both the costs and the benefits of the intended regulation" and observing that the "purpose of the 'social cost of carbon' (SCC) estimates presented here is to allow agencies to incorporate the social benefits of reducing carbon dioxide . . . emissions into cost-benefit analyses of regulatory actions . . . ."). Even if the Commission were an "agency" to which Executive Order 12866 applied, section 3(e) of the order defines "regulatory action" as "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Project-specific NGA section 7 certificate proceedings do not fall within that definition.

[279] In our view, arguments with respect to upstream and downstream impact analysis is based on the petitioners' desire for the Commission to conduct a programmatic NEPA review of natural gas production in the Marcellus shale region, an area that potentially covers thousands of square miles. We decline to do so. As the Commission has previously explained, there is no Commission program or policy to promote additional natural gas development and production in shale formations. *See National Fuel Gas Supply Corp.,* 150 FERC ¶ 61,162, at P 55 (2015), *order on reh'g*, 154 FERC ¶ 61,180, at P 54 (2016).

c. Cumulative Impacts on Resources

124. Some parties assert that the EIS did not conduct a sufficiently rigorous cumulative impact analysis. Conservation Foundation claims that even where the EIS acknowledges cumulative impacts on various resources, it "simply makes the conclusory finding that those impacts would be minor…" through mitigation or other permit requirements.[280] Conservation Foundation adds that the EIS's discussion of cumulative impacts, which it contends has "minimal qualitative" and "essentially no quantitative" analysis, "cannot pass for proper analytical rigor in an EIS."[281] Delaware Riverkeeper asserts that the EIS failed to consider the cumulative impacts associated with pipeline construction, operation, and maintenance on impacted ecological systems over the lifetime of the project.[282]

125. We disagree. The "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies."[283] CEQ has explained that "it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are

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[280] Conservation Foundation's Request for Rehearing at 82.

[281] *Id.*

[282] Delaware Riverkeeper's Request for Rehearing at 41-48.

[283] *Kleppe v. Sierra Club*, 426 U.S. 390, 414 (1976).

truly meaningful."[284] Further, a cumulative impact analysis need only include "such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible."[285] Moreover, although NEPA requires the Commission to consider the impacts on resources, it does not mandate a particular outcome.[286]

126. Here, the EIS provided extensive discussion of the potential cumulative impacts on a number of resources, including soils, water resources, socioeconomics, cultural resources, air quality, noise, reliability, and safety, within the project's geographic scope for each particular resource.[287] The EIS identified over 30 activities that have been recently constructed, are being constructed, or are planned or proposed within the project's geographic scope, and provided: the project description; approximate permanent impact area; the resources cumulatively affected; the relevant watershed; and the Air Quality Control Region.[288] Although the EIS found that the

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[284] CEQ, Considering Cumulative Effects Under the National Environmental Policy Act, at 8 (January 1997).

[285] *Natural Res. Def. Council, Inc. v. Calloway*, 524 F.2d 79, 88 (2d. Cir. 1975).

[286] *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 335.

[287] Final EIS at 4-312 – 4-335.

[288] *Id.* at 4-313-420. The four types of actions that would potentially result in a cumulative impact included: other natural gas projects (both FERC-jurisdictional and non-jurisdictional); electric generation and transmission projects; transportation

majority of cumulative impacts would be temporary and minor when considered in combination with past, present, and reasonably foreseeable activities, it identified and considered long-term cumulative impacts that would occur on various resources including wetland and forested and upland vegetation and associated wildlife habitats;[289] and air quality and noise impacts.[290]

127. Moreover, the EIS analyzed the cumulative impacts associated with the operational-phase emissions of the Kidder Compressor Station over the lifetime of the project;[291] the magnitude of the one-time release of sequestered CO2 caused by the initial clearance of 601 acres of forested land, and also the ongoing loss of carbon sequestration capacity for the 452 acres of forested land that would remain permanently cleared during the project's lifetime;[292] and, notwithstanding our finding that GHG emissions impacts from natural gas production are not reasonably foreseeable, the cumulative impact analysis discussed the 2014 U.S. Global Change Research Program report, Climate Change Impacts in the United States (2014 USGRP report), which summarizes the impacts that climate change has had on the United States and what projected impacts climate change may have in the future. Although the

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projects; and commercial and large-scale residential developments.

[289] *Id.* at 4-329.

[290] *Id.* at 4-332.

[291] *Id.* at 4-246 - 4-248.

[292] *Id.* at 4-254 - 4-255.

EIS notes that climate change is a global concern, it focused on the 2014 USGRP report's projections for potential climate change in the Northeast region of the United States during the expected project lifetime.[293]

128. Accordingly, we find that the level of detail in the EIS was appropriate to ensure that the Commission was fully informed on the potential cumulative impacts of the PennEast Project. Petitioners do not identify any particular issues that were overlooked in the Commission's analysis of cumulative impacts on the various resources considered. Instead, they take issue with the breadth and depth of some of the discussion. However, NEPA does not prescribe a certain level of detail, and certainly does not dictate a minimum amount of information required, to inform the decisionmaker. Although "[i]t is of course always possible to explore a subject more deeply and to discuss it more thoroughly," agencies must make "[t]he line-drawing decisions necessitated by this fact of life."[294]

d. Cumulative Impacts of Additional Pipeline Projects

129. Delaware Riverkeeper asserts that the Final EIS failed to examine the "cumulative impact[s] of multiple … linear projects that are being proposed or

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[293] *Id.* at 4-334 - 4-335.

[294] *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir, 1987). *See also Sierra Club v. DOE*, 867 F.3d at 196; *Freeport LNG*, 827 F.3d at 46 (explaining that "our task is not to 'flyspeck' the Commission's environmental analysis for 'any deficiency no matter how minor'") (quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011)).

constructed in the Delaware River watershed[.]"[295] In support, Delaware Riverkeeper identifies several natural gas pipeline projects it asserts will impact the watershed. Delaware Riverkeeper's arguments in fact appear to be a call for the Commission to perform a programmatic review of interstate natural gas pipeline projects in the region. As we discussed above, there is no Commission program or policy which seeks to promote additional natural gas infrastructure development.[296]

8. Segmentation

130. On rehearing, Delaware Riverkeeper argues that the EIS improperly segmented the environmental review of the PennEast Project from the Texas Eastern Marcellus to Market Project (M2M Project) and the Greater Philadelphia Expansion Project, both of which it claims are "interconnected projects obviously being contemplated and planned for in the same time frame by the same owner for delivery of the gas…"[297]

131. Hopewell and Sierra Club-New Jersey assert that the Final EIS improperly segmented from the analysis the environmental impacts of (1) Transco's Garden State Expansion Project; and (2) New Jersey Natural Gas' Southern Reliability Link (Southern Reliability Project) intrastate pipeline. Hopewell asserts that without a fully operational PennEast Pipeline, the Garden State Expansion and Southern

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[295] Delaware Riverkeeper's Request for Rehearing at 38-41.

[296] *Supra* n.279.

[297] *Id.* at 102-108.

Reliability Projects would "otherwise have no independent utility."[298]

132. The CEQ regulations require the Commission to include connected, cumulative, and similar actions in its NEPA analyses.[299] An agency impermissibly "segments" NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration. The CEQ regulations define connected actions as those that: (1) automatically trigger other actions, which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; (3) are interdependent parts of a larger action and depend on the larger action for their justification.[300] In evaluating whether multiple actions are, in fact, connected actions, a "substantial independent utility" test helps inform the Commission's analysis. The test asks "whether one project will serve a significant purpose even if a second related project is not built."[301]

133. Hopewell and Sierra Club-New Jersey raise the segmentation argument with respect to the Garden State Expansion and Southern Reliability Projects for the first time on rehearing. For the reasons discussed

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[298] Hopewell's Request for Rehearing at 40-42

[299] 40 C.F.R. § 1508.25(a)(1)-(3) (2017).

[300] *Id.*

[301] *See Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69. *See also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether a project "can stand alone without requiring construction of the other [projects] either in terms of other facilities required or of profitability").

above, parties are not permitted to introduce new evidence for the first time on rehearing, therefore we need not address their segmentation arguments.[302] However, even if they had timely raised the segmentation issue, we would have dismissed their arguments, for the reasons set forth below.

a. M2M Project and Greater Philadelphia Expansion Project

134. The CEQ regulations require that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement."[303] For the purposes of segmentation, a "project proposal" is one in which action is imminent.[304]

135. The Texas Eastern M2M Project and the Greater Philadelphia Expansion Project are not connected actions that should have been considered in the EIS, as they were not imminent.[305] The

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[302] Sierra Club-New Jersey also failed to specify error, as it asserted in general terms that the Commission is "allowing PennEast to segment this project and separate it from" the Garden State Expansion and Southern Reliability Projects. As discussed above, the NGA requires parties to present their arguments to the Commission in such a way that the "Commission knows specifically . . . the ground on which rehearing [i]s being sought."

[303] 40 C.F.R. § 1502.4(a) (2017).

[304] *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, at 236 (citing 40 C.F.R. § 1508.23 (2017)).

[305] *See generally City of Boston Delegation v. FERC*, D.C. Cir. Nos. 16-1081, *et al.*, slip op. at 14-16 (July 27, 2018) (FERC did not impermissible segment its environmental review of Algonquin's three upgrade projects on its northeast pipeline system where

Commission has no information on them, as nothing has been filed with the Commission, either in the form of a request to initiate the early pre-filing process, much less as a project application.

b. Garden State Expansion Project

136. In approving Transco's Garden State Expansion Project,[306] the Commission addressed several parties' assertions that the PennEast Project and Southern Reliability Project, together with the proposed Garden State Expansion Project, constituted a single interdependent pipeline system. The Commission evaluated whether the PennEast and Garden State Expansion Projects are connected actions, and concluded they are not. We found that the Garden State Expansion and PennEast Projects are physically distinct, noting that the Garden State Expansion Project consists primarily of compressor facilities and a meter station on Transco; none of these facilities directly connect with the PennEast Project, and indeed the PennEast Project terminates approximately 2.5 miles south of the Compressor Station 205 in Mercer County, New Jersey.[307]

137. We further found that neither the PennEast Project nor the Garden State Expansion Project are

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FERC's review of the projects was not contemporaneous and where the projects had substantial independent utility).

[306] *Transcontinental Gas Pipe Line Co., LLC*, 155 FERC ¶ 61,016, *order on reh'g*, 157 FERC ¶ 61,095 (2016).

[307] *Transcontinental Gas Pipe Line Co., LLC,* 155 FERC ¶ 61,016 at PP 66-68; *order on reh'g*, 157 FERC ¶ 61,095 at P 12.

functionally dependent on each other.[308] We noted that although New Jersey Natural Gas is a shipper on both projects, if the Garden State Expansion Project did not proceed, the PennEast Project would still be supported by the need to deliver natural gas for its other shippers, including six anchor shippers.[309] Similarly, if the PennEast Project did not proceed, New Jersey Natural Gas' demand for 180,000 Dth/d would still support the Garden State Expansion Project.[310]

138. Both Hopewell and Sierra Club-New Jersey participated in the Garden State Expansion proceeding; on rehearing, they raise generally the same arguments that were addressed in the Garden State Expansion Project proceeding. Accordingly, even if Hopewell and Sierra Club-New Jersey had timely raised their segmentation arguments, we would have rejected them as an impermissible collateral attack on the Garden State Expansion orders.[311]

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[308] *Transcontinental Gas Pipe Line Co., LLC*, 155 FERC ¶ 61,016 at PP 66-68; *order on reh'g*, 157 FERC ¶ 61,095 at PP 12-15.

[309] *Id.*

[310] *Transcontinental Gas Pipe Line Co., LLC*, 155 FERC ¶ 61,016 at P 66.

[311] We note that, contrary to Hopewell's assertion, the Final EIS appropriately included the Garden State Expansion Project in its cumulative impact analysis at 4-314, 4-323. Moreover, the Final EIS did not address the cumulative impacts of the Southern Reliability Project because it occurs outside the geographic scope. However, the November 4, 2015 NEPA analysis for the Garden State Expansion Project analyzed its cumulative impacts with the Southern Reliability Project. *See* Garden State Expansion Project EA at 46-47; 50-56.

c. Southern Reliability Link Project

139. Connected actions, for purposes of a NEPA analysis, only extend to federal actions.[312] As noted above, the Southern Reliability Project is an intrastate pipeline under the jurisdiction of the New Jersey Board of Public Utilities. Accordingly, the Southern Reliability Project was appropriately excluded from review as a connected action.[313]

9. Forest Impacts and Conservation Easements

140. Lower Saucon argues that the Commission's order enables PennEast to violate the terms of conservation easements that Lower Saucon holds over forested lands.[314] Lower Saucon states that, pursuant to the Pennsylvania Conservation and Preservation Easements Act, industrial and commercial activity, forest clear-cutting, and soil removal are prohibited on conservation easement lands.[315] Lower Saucon alleges that pipeline construction will result in the "continued and perpetual violation" of the terms of the easements,

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[312] *See Big Bend Conservation Alliance v. FERC*, No. 17-1002, 2018 (WL 341729, at 4 (D.C. Cir. July 17, 2018); *Sierra Club v. Army Corps of Eng'r*, 803 F.3d 31, 33-37 (D.C. Cir. 2015).

[313] Although the Final EIS did not address the cumulative impacts of the Southern Reliability Project because it occurs outside the geographic scope, the November 4, 2015 Environmental Assessment (EA) for the Garden State Expansion Project analyzed the cumulative impacts of the Southern Reliability Project. *Supra* n. 311.

[314] Lower Saucon's Request for Rehearing at 43-46.

[315] Conservation and Preservation Easements Act, 32 Pa. Cons. Stat. § 5051, *et seq.* (2017).

and that the Certificate Order improperly concluded that no changes are expected in the conservation status of private lands crossed by the project in Pennsylvania. Lower Saucon further alleges that the Final EIS failed to meaningfully analyze the "unavoidable impacts" to conservation lands.

141. NJDEP alleges that the Certificate Order is "contrary to state [forestry] law."[316] NJDEP states that pipeline construction will require tree removal on state-owned and state-preserved lands, which are subject to New Jersey's No Net Loss Compensatory Reforestation Act (NNLRA).[317] The Certificate Order allows PennEast to compensate for forest loss by purchasing and conserving existing forested areas, which NJDEP argues is not an authorized means of deforestation mitigation under the NNLRA. NJDEP also argues that the Final EIS and Certificate Order failed to adequately address long-term visual impacts from deforestation, and that the Certificate Order should have provided a time frame for when PennEast must restore forested lands and should have included EPA's restoration recommendation that PennEast reseed with "larger plant stocks," as opposed to seedlings.[318]

142. As discussed in section 4.7.4.4 of the EIS (Land Conservation Programs), the project will cross approximately 21.7 miles of conservation easement lands. Of the conservation easement lands crossed by the project, 336 acres will be temporarily affected

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[316] NJDEP's Request for Rehearing at 49-51.

[317] N.J. Stat. Ann. § 13:1L-14.2, *et seq.* (West 2017).

[318] *See* NJDEP's Request for Rehearing at 51-52.

during construction, whereas only 130 acres of conservation easement lands will be located in the project's permanent right-of-way.[319] The Final EIS further notes that for lands permanently or temporarily impacted, "following pipeline installation all activities and accesses currently available to the public would be returned to their original state" and that "during operation, there would be nothing that would prevent public access to or normal administration of these lands."[320] Conservation easement lands located within PennEast's permanent easement area would lose their conservation status, however "only in that PennEast would acquire the development rights to install and maintain the pipeline."[321] The majority of conservation easement land crossed by the project would retain current conservation restriction status.[322] Therefore, the Certificate Order concluded that the project will generally have temporary, limited impacts on special interest areas (including conservation easement lands), which will be further minimized with the implementation of measures in PennEast's Erosion and Sediment Control Plan (E&SCP), the Commission's *Upland Erosion Control, Revegetation and Maintenance* Plan (Plan), *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures), and additional project-specific construction plans.[323]

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[319] Final EIS at 4-173.

[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] Certificate Order, 162 FERC ¶ 61,053 at P 163.

143. Regarding NJDEP's concerns over PennEast's method of compensation per the requirements of the NNLRA, the Certificate Order states that in addition to purchasing and conserving forested lands, PennEast will "reforest areas within the same municipality in which the impact occurs[,]" and restore areas of temporary impacts via the development of mitigation measures.[324] The Certificate Order further notes that although final compensation has yet to be determined, it will be consistent with NNLRA requirements.[325]

144. The EIS notes that the extent and duration of visual impacts depends on the type of vegetation that is cleared. Smaller-scale vegetation in open areas generally regenerates in less than five years, with "large specimen trees" taking considerably longer. The EIS further acknowledges that visual impacts on forest lands would be greater where regeneration on PennEast's 30-foot-wide permanent right-of-way is prevented.[326] It would be impractical for the Commission to impose on PennEast a specified time-frame for revegetation, given the wide range of different vegetation communities that will be crossed by the project, as well as their varied re-growth times. Contrary to NJDEP's assertion, the Certificate Order did not "ignore" the EPA's recommendation that we require larger plant stock be used during revegetation as opposed to seedlings.[327] The Commission addressed

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[324] *Id.* P 141.

[325] *Id.*

[326] Final EIS at 4-175.

[327] NJDEP's Request for Rehearing at 52.

these comments when NJDEP raised them in response to the Draft EIS, and explained in the Certificate Order that in addition to reseeding in accordance with PennEast's E&SCP and the Plan and Procedures, PennEast would consult with "local soil conservation districts, or appropriate land management agencies" to determine the best plan for reseeding.[328] The Certificate Order concluded that this would be appropriate to adequately address revegetation, and we affirm that finding.

10. Threatened and Endangered Species

145. Delaware Riverkeeper and Conservation Foundation express concern that the Final EIS' findings regarding threatened and endangered species improperly relied on surveys with missing, inadequate, or otherwise inaccurate information.[329] Delaware Riverkeeper further asserts that the Final EIS failed to appropriately analyze the project's impacts on threatened or endangered bats, birds, sturgeons, snakes, turtles and mussels. NJDEP argues that the Final EIS did not give sufficient consideration to state-listed species and state species of concern.[330] Further, NJDEP states that the Certificate Order should explicitly require PennEast to comply with all NJDEP threatened and endangered species conditions and that the Final EIS should have considered an alternative to HDD crossings of C1

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[328] Certificate Order, 162 FERC ¶ 61,053 at P 140.

[329] *See* Conservation Foundation's Request for Rehearing at 78; Delaware Riverkeeper's Request for Rehearing at 136-145.

[330] NJDEP's Request for Rehearing at 47-49.

streams,[331] which could have adverse impacts on wood turtle and longtailed salamander habitats. In addition, NJDEP argues that that the Certificate Order failed to include or respond to NJDEP's Rare Plant Species Survey Target List and Rare Plant Species Survey Protocol.[332]

146. As part of Commission staff's formal consultation with the United States Fish and Wildlife Service (FWS), a biological assessment was prepared which analyzed impacts on threatened and endangered species, and subsequently submitted to the FWS.[333] As noted in the Certificate Order, the findings in the Final EIS were considered best available information from surveys conducted on parcels for which landowner permission was obtained; due to certain affected landowners refusing to grant surveyors' access to their property, not all surveys were completed.[334] Environmental Condition 36 of the Certificate Order requires PennEast to complete all remaining surveys prior to construction, and provide survey reports to the appropriate agencies.[335] The FWS issued its Biological Opinion for the project on November 29, 2017, and Commission staff incorporated FWS' conclusions into the Certificate

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[331] C1 Streams are "classified as waters to be maintained based on their clarity, color, scenic setting, and other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resources." *See* Final EIS at 4-49.

[332] *Id.* at 52-53.

[333] Final EIS at 4-107.

[334] Certificate Order, 162 FERC ¶ 61,053 at P 146.

[335] *Id.* at Appendix A, Environmental Condition 36.

Order's Environmental Conditions.[336] FWS' Biological Opinion determined that that the project is not likely to adversely affect the dwarf wedge mussel, Indiana bat, and the northeastern bulrush, and is not likely to jeopardize the continued existence of the bog turtle or northern long-eared bat. As a result of these findings, eight of the Final EIS' recommended mitigation measures (conditions 33, 34, and 36-41) were deemed unnecessary for inclusion in the Certificate Order.[337] Further, PennEast is required under Environmental Condition 36 to incorporate conservation measures outlined in the Biological Opinion, including its Terms and Conditions.[338]

147. NJDEP's concerns regarding the Final EIS' analysis of state-listed species, and state species of concern are unfounded. Section 4.6.2 of the Final EIS' fully addresses the project's potential impacts on New Jersey and Pennsylvania listed species, or species of concern.[339] Environmental Condition 39 requires PennEast to file a list of measures to be developed through consultation with state wildlife agencies to avoid or mitigate impacts on several state-listed species and species of concern, including the long-tailed salamander; Environmental Condition 39 further notes that NJDEP recommends PennEast utilize New Jersey's "Utility Right-of-Way No-Harm Best Management Practices" when preparing these

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[336] *Id.* at P 147.

[337] *Id.*

[338] *Id.*

[339] Final EIS at 4-124 – 4-139.

measures.[340] The Certificate Order further adopts as Environmental Condition 38 the Final EIS' recommended mitigation measure 43, which requires PennEast to consult with NJDEP regarding any timing and/or activity restrictions that should be applied when project construction occurs within 300 feet of streams containing wood turtles.[341] As noted in the Certificate Order, the Final EIS identified procedures that have been used in similar projects for the avoidance of impacts on rare plants; the Certificate Order further states that PennEast will adhere to NJDEP's recommendations and requirements regarding state-listed and state species of concern.[342]

11. Safety and Property Impacts

148. Lower Saucon and Delaware Riverkeeper assert that the Commission "completely failed" to take a hard look at the PennEast Pipeline's safety risks and the consequences of potential accidents to residents, property, and resources along the pipeline route.[343] Delaware Riverkeeper, in a verbatim recitation of its comments on the Draft EIS, asserts that the Commission "diminish[es]" the threats posed by natural gas pipelines, as well as the impacts to the

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[340] Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Condition 39.

[341] *See* Final EIS at 4-131; Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 38.

[342] *See* Final EIS at 4-139; Certificate Order, 162 FERC ¶ 61,053 at P 138.

[343] Lower Saucon's Request for Rehearing at 37-39.

public.[344] Lower Saucon further states that the Commission "provided only industry-wide, generic" information.[345] In addition, Lower Saucon argues that the Final EIS failed to adequately consider the risks and consequences associated with a physical or cyber terrorist attack.[346]

149. Contrary to petitioners' assertions, the Final EIS and the Certificate Order fully considered the safety risks associated with the project, including specific risks along the project route. As explained in the Final EIS, pipeline safety standards are mandated by regulations adopted by the Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA).[347] DOT has the exclusive authority to promulgate federal safety standards used in the transportation of natural gas.[348] As the Final EIS further specifies, PennEast has designed and will construct, operate, and maintain the project in accordance with DOT's pipeline safety regulations.[349]

150. The Final EIS and Certificate Order's safety analysis was not, as Lower Saucon characterizes it, generic, nor did it fail to evaluate the risks or

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[344] Delaware Riverkeeper's Request for Rehearing at 155-156.

[345] Lower Saucon's Request for Rehearing at 42-43.

[346] *Id.* at 39-43.

[347] Final EIS at 4-301.

[348] *See FERC Memorandum of Understanding Between the Department of Transportation and FERC Regarding Natural Gas Transportation Facilities* (Jan. 15, 1993), http://www.ferc.gov/legal/mou/mou-9.pdf.

[349] *See* Final EIS at 4-304.

consequences of a pipeline accident, as Delaware Riverkeeper alleges.[350] The Final EIS utilized data obtained from the PHMSA repository of thousands of miles of natural gas pipeline throughout the United States. In addition, Appendix G-21 of the Final EIS provided a list of all highconsequence areas[351] along the project route, delineated by milepost. Both the Certificate Order and the Final EIS state that high-consequence areas are defined based on where a pipeline accident could cause considerable harm to people and their property; PHMSA further requires pipeline operators to apply its integrity management program[352] to sections of the pipeline within high-consequence areas.[353] As noted in the Certificate Order, PennEast designed its pipeline route to minimize risks to "local residents and vulnerable locations/populations", and followed federal safety standard regarding pipeline spacing, and will follow federal safety standards regarding pipeline class locations.[354] In addition to these safety measures, PHMSA requires PennEast to establish an emergency response plan that would include procedures to

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[350] Lower Saucon's Request for Rehearing at 38, Delaware Riverkeeper's Request for Rehearing at 155-156.

[351] For more information on high consequence areas, *see* 49 C.F.R. § 192.903 (2017) (defining high consequence areas); 49 C.F.R. § 192.905 (2017) (discussing how pipeline operators may identify high consequences areas).

[352] For more information on pipeline integrity management in high consequence areas, *see* 49 C.F.R. § 195.492 (2017).

[353] *See* Final EIS at 4-302 – 4-303; Certificate Order, 162 FERC ¶ 61,053 at P 190.

[354] Certificate Order, 162 FERC ¶ 61,053 at P 190.

minimize the hazards in a natural gas pipeline emergency.[355] A required element of the emergency management plan is a method for evacuating individuals and rerouting traffic as necessary to avoid any area that is deemed to be unsafe. Accordingly, we find that the safety risks of the PennEast Project were addressed adequately.

151. The Final EIS fully considered, to the extent possible and practicable, the risks of terrorism associated with the PennEast Project. The Final EIS stated that PennEast, in accordance with DOT surveillance requirements, will incorporate air and ground inspections into its inspection program, and will implement security measures including secure fencing around aboveground facilities.[356] However the Final EIS ultimately concludes that while the combined efforts of the Commission, the DOT, and the Department of Homeland Security continue to address the risk of terrorism on the PennEast Project, and other natural gas infrastructure, the possibility of terrorism is unpredictable, and therefore not a basis to deny PennEast a certificate. We affirm this finding.

12. Violation of Standard Construction Practices

152. Delaware Riverkeeper asserts that the Final EIS improperly assumes that the project will be "constructed in full compliance with all applicable laws" and Delaware Riverkeeper states that "the reality of pipeline construction" is that "construction is fraught with environmental violations" resulting in

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[355] *See* Final EIS at 4-304; *see also* 49 C.F.R. § 192.615 (2017).

[356] Final EIS at 4-311.

potentially significant environmental impacts that the Final EIS ignores.[357] Delaware Riverkeeper points to instances of noncompliance with environmental laws, standard construction practices, and best management practices during the construction of Tennessee Gas Pipe Line Company's 300 Line Upgrade and Northeast Upgrade projects, as well as Columbia Gas Transmission's Line 1278 project, in an attempt to demonstrate that pipeline construction "results in unavoidable, unmitigated and irreparable harm[.]"[358] Delaware Riverkeeper further claims that the Commission, with knowledge of these violations, "turn[s] a blind eye".[359]

153. The Commission takes matters of non-compliance seriously, but such matters must be addressed in the proper venue. The non-compliance issues that Delaware Riverkeeper raises here involve completely different proceedings and are properly addressed in those proceedings, not here. It is often the case during construction that circumstances may be encountered in the field that are slightly different from what was expected. For this reason, the environmental conditions in most Commission orders prescribe the criteria under which changes can be made.

154. We find that the conditions imposed in the Certificate Order, viewed as a whole, are sufficient to ensure PennEast's compliance with the requirements of the Certificate Order. The EIS notes PennEast's

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[357] Delaware Riverkeeper's Request for Rehearing at 108.

[358] *Id.* at 110.

[359] *Id.*

environmental inspection program, which will consist of two environmental inspectors (EIs) assigned to each of the four construction spreads, as well as a third-party monitoring oversight program to ensure implementation of appropriate measures to minimize impacts and ensure compliance with federal, state, and local permit stipulations. The EIs have the authority to stop work activities if any environmental conditions, including those in PennEast's permits and the Certificate Order, are violated. The third-party monitors will represent the Commission, and be onsite daily during construction and restoration.[360] Environmental Condition 3 requires the EIs be trained in the proper implementation of environmental mitigation measures, and Environmental Condition 7 authorizes the EIs to order the correction of acts violating the environmental conditions of the Certificate Order, and requires the EIs to maintain status reports, and document compliance with the environmental conditions and/or permit requirements of the Certificate Order, and any other federal, state, or local permits or authorizations. We impose sanctions and/or penalties for non-compliance on a case-bycase basis in order to tailor our remedies to the specific facts presented (e.g., degree of non-compliance and resulting impacts). If PennEast fails to comply with the conditions of the order, it is subject to sanctions and the potential assessment of civil penalties.[361]

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[360] Final EIS at 2-16 – 2-17.

[361] *See* 15 U.S.C. § 717t-1(c) (2012).

13. Water Resources, Well Safety, and Wetland Impacts

155. NJDEP states that the Certificate Order "inappropriately conflates mitigation requirements with minimization and avoidance requirements" and improperly relies on mitigation to ensure there will be no significant adverse impacts on wetlands.[362] Consequently, NJDEP argues that the Certificate Order should be rescinded and a supplemental EIS be issued, which considers alternatives that avoid impacts on wetlands. Delaware Riverkeeper argues that the Final EIS contained multiple deficiencies regarding the size and quality of wetlands that could be impacted by the project and failed to examine the functions and values of wetlands.[363] Therefore, Delaware Riverkeeper argues that the Commission could not determine the appropriate scope of mitigation necessary to compensate for impacts on wetlands.[364] In addition, NJDEP states that if the water needs for project construction exceed 100,000 gallons per day, PennEast will be required to obtain either a short term water use permit or a dewatering permit.[365] NJDEP contends that the Certificate Order should have required that PennEast obtain any necessary water use permit before beginning construction.[366] NJDEP and Hopewell further assert

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[362] NJDEP's Request for Rehearing at 4 and 28-31.

[363] Delaware Riverkeeper's Request for Rehearing at 119-121 and 159-164.

[364] *Id.*

[365] *See* N.J. Admin Code § 7:19-1.1 *et seq.* (2017).

[366] NJDEP's Request for Rehearing at 47.

that in order to ensure drinking water safety, additional post-construction well-monitoring should be required.[367] Hopewell further requests that the Commission require PennEast to comply with Hopewell's tree removal permit process, in order to protect Hopewell's groundwater supply, as well as compliance with Hopewell's regulation of disturbances to a waterbody's steep slopes.[368]

156. Contrary to Delaware Riverkeeper's assertions, the Final EIS described the features of the various types of wetlands the PennEast Project would cross, as well as the important role they play within the ecosystem.[369] The Final EIS notes, however, that because PennEast had not been granted survey access for the project route, wetland delineations were incomplete.[370] In order to ensure PennEast has a precise determination of wetland boundaries with which to apply proper wetland construction and restoration methods, the Commission requires PennEast to prepare a wetlands delineation report, prepared in accordance with the U.S. Army Corps of Engineers (USACE) and all appropriate state agencies.[371] PennEast will also incorporate several measures to avoid and reduce the impacts project construction will have on wetlands. The Final EIS notes that PennEast would incorporate measures

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[367] *Id.* at 45-46; Hopewell's Request for Rehearing at 47-48.

[368] Hopewell's Request for Rehearing at 44-47.

[369] Final EIS at 4-77 – 4-80.

[370] *Id.* at 4-77

[371] Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 30.

including minimizing the time topsoil is segregated during open trench construction, the utilization of timber mats to minimize disturbances to wetlands, and minimizing erosion during trench dewatering.[372] The Certificate Order further requires PennEast to file a completed Wetland Restoration Plan in consultation with the USACE and state agencies, and provide documentation of this consultation.[373] Due to the avoidance, mitigation and restoration measures proposed by PennEast and required by the Commission, the Certificate Order appropriately supported the Final EIS' conclusion that impacts on wetlands will be reduced to less than significant levels, and we affirm this conclusion.[374]

157. Environmental Condition 28 requires PennEast to file, prior to construction, its final hydrostatic test plan, and states that the plan must identify the final hydrostatic test water sources and discharge locations, provide the appropriate documentation showing that all necessary permits (which would include, if necessary, short term water use permits and/or dewatering permits) have been obtained, and provide the approximate water volume that will be withdrawn and discharged in project-total and daily amounts.[375] The Certificate Order further notes that PennEast has stated that its hydrostatic testing program will comply with all state- and Delaware River Basin Commission-issued water withdrawal

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[372] Final EIS at 4-81.

[373] *Id.* Appendix A, Environmental Condition 32.

[374] *Id.* P 136.

[375] *Id.* Appendix A, Environmental Condition 28.

and National Pollutant Discharge Elimination System permits.[376] To protect drinking water safety, Environmental Condition 23 requires PennEast to file, prior to construction, a final Well Monitoring Plan that addresses comments from stakeholders, and includes pre- and post-construction monitoring of wells.[377]

158. The Final EIS explains that clearing vegetation (including tree removal) would enhance sedimentation and remove the natural filtration layer provided by the vegetation, resulting in enhanced runoff in the disturbed areas, the potential for changes in groundwater percolation rates.[378] However, the Final EIS determines that these impacts would be localized and temporary, and minimized with the implementation of the E&SCP.[379] The Final EIS ultimately determined, and the Commission agreed, that construction and operation of the project would not result in adverse, long-term impacts on groundwater resources[380] Hopewell correctly notes that Environmental Condition 27 requires PennEast to revise and submit its E&SCP for review and approval by Commission staff, which will include a "complete review of waterbody crossings with steep slopes" and "site-specific measures to address erosion, sedimentation, and restoration of steep

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[376] *Id.* P 122.

[377] *Id.* Appendix A, Environmental Condition 23.

[378] Final EIS at 4-43.

[379] *Id.*

[380] *Id.* at 4-43; Certificate Order, 162 FERC ¶ 61,053 at P 131.

embankments."[381] Thus, the Final EIS determined that with the implementation of the E&SCP, impacts on steep slopes would be appropriately mitigated.

14. Requests for Additional Environmental Conditions

159. NJDEP requests that the Commission modify and add numerous environmental conditions, including conditions pertaining to well-monitoring, water use, state-listed threatened and endangered species, and reforestation mitigation measures.[382]

160. We need not do so, because the Certificate Order and its Environmental Conditions address NJDEP's concerns. For example, NJDEP requests that the Commission include environmental conditions that address state threatened and endangered species.[383] Environmental Condition 39 requires PennEast to consult with state wildlife agencies to avoid and/or mitigate state-listed species and species of concern.[384] Environmental Condition 39 further notes that NJDEP has recommended PennEast utilize the state's "Utility Right-of Way No-Harm Best Management Practices" when developing measures. Similarly, NJDEP requests that the Commission include environmental conditions to avoid impacts on state-owned or preserved lands.[385]

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[381] *Id.,* Appendix A, Environmental Condition 23, *see also* Final EIS at 4-57 – 4-58.

[382] NJDEP's Request for Rehearing at 9-10.

[383] *Id.* at 9.

[384] Certificate Order, 162 FERC ¶ 61,053 at Appendix A, Environmental Condition 39.

[385] NJDEP's Request for Rehearing at 10.

However, both the Final EIS and Certificate Order determined that potential visual impacts would be mitigated through the implementation of PennEast's E&SCP, FERC's Plan and Procedures, and other construction plans.[386] Thus, an additional environmental condition addressing visual impacts is not necessary. As a final example, NJDEP requests a condition requiring a "firm time frame" for revegetation, including on stateowned or state-preserved land,[387] however, as discussed in greater detail above, although PennEast will adhere to the Commission's Plan for revegetation, requiring a firm timeframe for revegetation is impractical.[388] Thus, the concerns NJDEP wishes to resolve through the addition of modification of environmental conditions have already been addressed in the Final EIS or the Certificate Order. As indicated above, NJDEP has the authority to include environmental conditions in its respective state permits and authorizations.

15. Additional Delaware Riverkeeper Arguments

a. Socioeconomics

161. Delaware Riverkeeper asserts that "FERC's consideration of economic benefits is so misleading, inaccurate and deficient as to be a meaningless element of the EIS…" and particularly alleges that the Final EIS "ignores the economic harms inflicted by construction and operation of PennEast."[389] Delaware

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[386] Certificate Order, 162 FERC ¶ 61,053 at P 162.

[387] NJDEP's Request for Rehearing at 10.

[388] *Supra* P 144.

[389] Delaware Riverkeeper's Request for Rehearing at 51.

Riverkeeper's argument fails to cite to any specific page of the Final EIS, or Certificate Order, as proof of the supposed shortcomings.

162. Contrary to Delaware Riverkeeper's assertion, the Final EIS identifies and quantifies the impacts of constructing and operating the project on towns and counties in the vicinity of the project. The Final EIS discusses not only the employment the PennEast Project will generate, but the property value impacts of PennEast, as well as PennEast's commitment to reimburse landowners and producers for the loss of the use of their property as a result of the project. The Final EIS and Certificate Order further discuss the project's potential adverse impacts on recreation and tourism.[390] Thus, we deny Delaware Riverkeeper's request for rehearing.

b. Delaware River Basin Commission's Legal Authority

163. Delaware Riverkeeper, without reference to specific sections of the Final EIS or Certificate Order, states that "[t]he mission and authority ascribed to the [Delaware River Basin Commission] in the [final] EIS is flagrantly incorrect and misleading."[391] Delaware Riverkeeper further asserts that the Delaware River Basin Commission's authority is "far broader than asserted . . . " by the Commission, and that this "fails to ensure full and accurate information has been provided to the public . . . . "[392]

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[390] *See* Final EIS section 4.8.2, *Socioeconomics*; *see also* Certificate Order, 162 FERC ¶ 61,053 at PP 164-167.

[391] Delaware Riverkeeper's Request for Rehearing at 111.

[392] *Id.*

164. Delaware Riverkeeper's vague assertions of a failure by the Commission to "give due regard to [the Delaware River Basin Commission's] authority" fail to point to any specific inaccuracy in either the Final EIS or the Certificate Order. Table 1.3-1 in the Final EIS lists the Delaware River Basin Commission as among the agencies that PennEast must obtain permits and approvals from, namely a water withdrawal approval.[393] The Final EIS further notes that because the Delaware River Basin Commission itself stated that its permits are not federal actions for the purposes of NEPA review, additional analysis of the Delaware River Basin Commission's authority was not necessary. Therefore, as the Final EIS correctly stated the Delaware River Basin Commission's role regarding its authority to issue PennEast a water withdrawal permit, and Delaware Riverkeeper does not state with specificity any shortcoming in this determination, we deny Delaware Riverkeeper's request for rehearing.

c. Final EIS Inaccuracies

165. Delaware Riverkeeper asserts that the environmental impacts of the PennEast Project are inaccurately reported or are otherwise incomplete. Delaware Riverkeeper's argument consists of over 20 pages[394] of bulleted accusations that are vague and unsupported and without citation to the Final EIS or to the Certificate Order. In no instance does Delaware Riverkeeper provide additional information that would enable the Commission to respond to its claims.

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[393] *Id.* at 1-12, 4-62.

[394] *See id.* at 164-188.

The Commission orders:

(A) The requests for rehearing filed by Jacqueline Evans, Home Owners Against Land Taking—PennEast, Michael Spille, The Township of Hopewell, Kingwood Township, Lower Saucon Township, the New Jersey Department of Environmental Protection and Delaware and Raritan Canal Commission, the New Jersey Division of Rate Counsel, Sierra Club—New Jersey, and the New Jersey Conservation Foundation—Stony Brook Millstone Watershed Association are denied.

(B) The requests for rehearing filed by New Jersey State Senators Kip Bateman and Shirley Turner, and New Jersey State Assemblyman Reed Gusciora are rejected.

(C) Food and Water Watch's February 21, 2018 request for rehearing, the County of Mercer's February 27, 2018 request for rehearing, and Sourland Conservancy's March 15, 2018 request for rehearing are rejected as untimely.

(D) The requests for rehearing filed by Elizabeth Balogh, Sari DeCesare, Delaware Riverkeeper Network, Linda and Ned Heindel, Scott Hengst, Fairfax Hutter, Kelly Kappler, the City of Lambertville, Karen Mitchell, the New Jersey Natural Lands Trust, Elizabeth Peer, the Pipeline Safety Coalition, Laura Pritchard, Roblyn Rawlins, Sarah Seier, Sierra Club, and the Washington Crossing Audubon Society are dismissed as deficient.

(E) PennEast's March 7, 2018 answer, and New Jersey Conservation Foundation—Stony Brook Millstone Watershed Association's March 15, 2018 response are rejected.

(F) The requests for stay filed by Delaware Riverkeeper Network, Hopewell Township, Kingwood Township, Lower Saucon Township, Michael Spille, New Jersey Conservation Foundation—Stony Brook-Millstone Watershed Association, and the New Jersey Department of Environmental Protection are dismissed as moot.

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

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

LaFLEUR, Commissioner, *concurring in part and dissenting in part*:

Today's order denies rehearing of the order authorizing the construction and operation of the PennEast Project, a natural gas pipeline from Luzerne County, Pennsylvania to Mercer County, New Jersey.[1] I supported the Commission's original authorization of the project, finding that on balance, the project was in the public interest.[2] While I continue to believe the PennEast Project is in the public interest, I am compelled to dissent in part today because I think the Commission's policy approach to certain aspects of its environmental review of the PennEast Project is fundamentally flawed. For the reasons set forth below, I am concurring in part and dissenting in part.

As I explained in my concurrence in *Broad Run*,[3] despite my ongoing disagreement with the Commission's approach to its environmental review of pipeline projects, I have attempted to address each case based on the facts in the record and the governing law as I read it. I do believe that many pipelines are needed and in the public interest, and I have been focusing my efforts on determining if, and how, I can support these projects despite my strong disagreement on the Commission's policy and practice on addressing the climate change impact of pipeline projects. This has become particularly difficult in

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[1] *PennEast Pipeline, LLC*, 164 FERC ¶ 61,098 (2018) (Rehearing Order).

[2] *PennEast Pipeline, LLC*, 162 FERC ¶ 61,053 (2018) (LaFleur, Comm'r, *concurring*) (Certificate Order).

[3] *Tennessee Gas Pipeline Company*, 163 FERC ¶ 61,190 (2018) (LaFleur, Comm'r, *concurring*) (*Broad Run*).

recent months since the *Sabal Trail* remand order,[4] and the subsequent decision in *New Market*[5] to change our policy on disclosure and consideration of downstream and upstream GHG emissions in our pipeline review.

In this case, I supported the original authorization of the PennEast Project. I found that the record demonstrated sufficient need for the proposed project, and I carefully considered all of the environmental impacts in this case, balanced them against economic need, and ultimately concluded the project was in the public interest. While I still believe that to be the case, I must nonetheless dissent in part because I fundamentally disagree with the majority's approach to its consideration of climate change impacts as part of our environmental review of the proposed project.

At the time the Commission originally authorized the PennEast Project, the Commission's approach to evaluating downstream GHG emissions was largely reliant on full-burn estimates of downstream GHG emissions for proposed projects.[6] The Commission

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[4] *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018) (LaFleur, Comm'r, *dissenting in part*) *(Sabal Trail*).

[5] *Dominion Transmission Inc.*, 163 FERC ¶ 61,128 (2018) (LaFleur, Comm'r, *dissenting in part*) (*New Market*).

[6] Since late 2016, the Commission has included increasing amounts of information on downstream GHG emissions in our pipeline orders. Initially, the Commission estimated downstream GHG emissions by assuming the full combustion of the total volume of gas being transported by the project, which was what was done in this case. Commission orders that included the full-burn calculation. *E.g.*, *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046, at P 120 (2017); *Algonquin Gas Transmission,*

included such analysis in the Certificate Order.[7] While that approach has its limitations, I have viewed the full-burn estimate of downstream GHG emissions as important to our environmental review,[8] and necessary for our public interest determination under NEPA.

While I support the quantification and disclosure of the upper-bound estimate of GHG emissions, I strongly disagree with the majority's continued refusal to ascribe significance to this identified environmental impact. I believe that the majority's stated approach for determining the significance of those impacts does not comply with NEPA. The majority once again concludes, "it cannot find a suitable method to attribute discrete environmental

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LLC, 158 FERC ¶ 61,061, at P 121 (2017); *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 274 (2017); *Tennessee Gas Pipeline Co., L.L.C.*, 158 FERC ¶ 61,110, at P 104 (2017); *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at P 189 (2017); *Dominion Carolina Gas Transmission, LLC*, 158 FERC ¶ 61,126, at P 81 (2017); *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 173 (2017); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 298 (2017); *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,229, at P 164 (2017); *Florida Southeast. Connection, LLC,* c, at P 22 (2018); *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at P 56 (2018).

[7] Certificate Order at P 208.

[8] As I have said repeatedly, this upper-bound GHG quantification and analysis is the bare minimum we should be doing as part of our environmental review of pipeline projects when we do not have more evidence in the record to calculate the gross and net GHG emissions. *See Broad Run,* 163 FERC ¶ 61,190 (LaFleur, Comm'r, *concurring*); *Millennium Pipeline Company, L.L.C.,* 164 FERC ¶ 61,039 (2018) (LaFleur, Comm'r, *concurring in part and dissenting in part*).

effects to GHG emissions."[9] The majority has made this same argument in a number of recent pipeline orders to justify its conclusion that it cannot determine whether a particular quantity of GHG emissions poses a significant impact on the environment.[10]

Yet, the majority appears to reframe its approach for considering downstream GHG impacts, notwithstanding the language cited above, by claiming that it has been evaluating the impacts of downstream GHG emissions all along by using a qualitative approach.[11] The majority suggests that quantifying the downstream GHG emissions, comparing the project's emission to the regional and nationwide emissions inventory, and reciting generic

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[9] Rehearing Order at P 117.

[10] *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036, at P 57 (2018) ("no standard methodology, including the Social Cost of Carbon tool, exists to determine how a project's contribution to greenhouse gas emissions would translate into physical effects on the environment for the purposes of evaluating the project's impacts on climate change. In the absence of an accepted methodology, the Commission is unable to make a finding as to whether a specific quantify of greenhouse gas emissions presents a significant impact on the environment […]."); *Broad Run*, 163 FERC ¶ 61,190 at P 67 ("We continue to find that no standard methodology exists. Without an accepted methodology, the Commission cannot make a finding whether a particular quantity of GHG emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that impact would contribute to climate change."). *See also New Market*, 163 FERC ¶ 61,128 at P 67; *Florida Southeast Connection, L.L.C.*, 162 FERC ¶ 61,233, at PP 26-27, 30-51 (2018).

[11] Rehearing Order at P 118.

information acknowledging that GHGs contribute to climate change, satisfies our obligations to under NEPA.[12] I do not agree that this is sufficient. Under NEPA, when evaluating the significance of a particular impact, the Commission must consider both context[13] and intensity.[14] By evaluating how the emissions from the PennEast Project would impact the regional[15] and nationwide emissions inventories, the majority contends it provides context for the environmental impact, but, even assuming that is true, the analysis does not address the intensity of the impact.

I recognize that determining the severity of a particular impact would require thoughtful and complex analysis, and I am confident that the Commission could perform that analysis if it chose to do so; indeed, we routinely grapple with complex issues in many other areas of our work.[16] In fact, this

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[12] Rehearing Order at P 120.

[13] 40 C.F.R. § 1508.27(a) (2017) (Context means "that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests and the locality.").

[14] 40 C.F.R. § 1508.27(b) (2017) (Intensity refers to "the severity of the impact").

[15] The 22 states included in the regional GHG emissions analysis include: Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia. I find that this "regional" comparison provides little context for a project that based in Pennsylvania and New Jersey.

[16] Many of the core areas of the Commission's work have required the development of analytical frameworks, often a combination

is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.[17] However, the majority rejects the use of the Social Cost of Carbon as

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of quantitative measurements and qualitative assessments, to fulfill the Commission's responsibilities under its broad authorizing statutes. This work regularly requires that the Commission exercise judgment, based on its expertise, precedent, and the record before it. For example, to help determine just and reasonable returns on equity (ROEs) under the Federal Power Act, NGA, and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a discounted cash flow method to determine a range of potentially reasonable ROEs (i.e., the zone of reasonableness), and then considers various factors to determine the just and reasonable ROE within that range. *See also*, *e.g.*, *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (establishing Commission regulations and policy for reviewing requests for transmission incentives); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000- A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring, among other things, the development of regional cost allocation methods subject to certain general cost allocation principles); *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (conducting a prudence review of a significant expansion of the Trans Alaska Pipeline System).

[17] *See*, *e.g.*, Environmental Protection Agency Fact Sheet—Social Cost of Carbon, *available at* https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf; *see also*, *e.g.*, *Sabal Trail,* 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

a method for meaningfully measuring climate change impact, noting "several of the components of its methodology are contested […]."[18] I continue to disagree with the technical and policy arguments relied upon by the majority to attack the usefulness of the Social Cost of Carbon, many of which I addressed in my dissent on the *Sabal Trail* remand order.[19]

Finally, the majority cites recent comments from the Environmental Protection Agency (EPA) in our Certificate Policy Statement, Notice of Inquiry docket generally explaining that the Social Cost of Carbon is not appropriate for "project-level decision making."[20] I note that in prior comments submitted by the EPA in the same docket, the EPA offered specific views on how the Social Cost of Carbon can be utilized in our environmental reviews. The EPA specifically concludes that "even absent a full [benefitcost analysis], [Social Cost of Carbon and other greenhouse gases] estimates may be used for project analysis when FERC determines that a monetary assessment of impacts associated with the estimated net change in GHG emissions provides useful information in its environmental review or public interest determination."[21] As I have said repeatedly, I believe the Social Cost of Carbon can meaningfully inform the Commission's decision-making to reflect the climate

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[18] Rehearing Order at P 122.

[19] *Sabal Trail,* 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

[20] EPA, Comments, Docket No. PL18-1-000 at 2 (filed July 25, 2018).

[21] EPA, Comments, Docket No. PL18-1-000 at 4 (filed June 21, 2018).

change impacts of an individual project, and these comments support that position.

For all of these reasons, I concur in part and dissent in part.

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Cheryl A. LaFleur
Commissioner

GLICK, Commissioner, *dissenting*:

Today's order denies rehearing of the Commission's decision to authorize the PennEast Project (Project) under section 7 of the Natural Gas Act (NGA).[1] I dissent from the order because—for several reasons—it fails to comply with our obligations under the NGA and the National Environmental Policy Act (NEPA).[2] First, I disagree with the Commission's conclusion that the Project is needed, which is based only on the existence of precedent agreements, including contracts with the project developers' affiliates accounting for 74 percent of the Project's subscribed capacity.[3] Second, I disagree with the Commission's conclusion that the Final Environmental Impact Statement (Final EIS) adequately assessed the environmental harms caused by the Project. The Commission, in this proceeding, determined that the Project will be environmentally acceptable even though the record lacks information that is critical to assessing the Project's environmental impact. The absence of this information should have prevented the Commission from concluding that the Project was in the public interest—a fatal flaw that is not cured merely by designating the certificate "conditional." Finally, I disagree with the Commission's assertion that it does not need to consider the harm from the Project's

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[1] 15 U.S.C. § 717f (2012).

[2] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

[3] *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098, at P 20 (2018) (Rehearing Order); *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at P 6 (2018) (Certificate Order).

contribution to climate change. While the Commission quantified the Project's upstream and downstream greenhouse gas (GHG) emissions, the Commission nonetheless maintains that these emissions are not reasonably foreseeable and that it is not obligated to determine whether the resulting impact from climate change is significant.[4] Today's order simply is not the product of reasoned decisionmaking.

I. The Commission Fails to Demonstrate That the Project Is Needed

Section 7 of the NGA requires that, prior to issuing a certificate for new pipeline construction, the Commission must find both that the pipeline is needed, and that, on balance, the pipeline's benefits outweigh its harms. In today's order, the Commission reaffirms its exclusive reliance on the existence of precedent agreements with shippers to conclude that the Project is needed.[5] While PennEast's affiliates hold 74 percent of the pipeline's subscribed capacity,[6] the Commission rejects the notion that it is necessary

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[4] Rehearing Order, 164 FERC ¶ 61,098 at PP 105, 107, 109, 111, 118-121.

[5] Rehearing Order, 164 FERC ¶ 61,098 at P 20 ("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.").

[6] Certificate Order, 162 FERC ¶ 61,053 at P 6 (explaining that six of the 12 shippers are affiliates of PennEast Pipeline Company, subscribing to 735,000 dekatherms (Dth) per day, or 74 percent of the 990,000 Dth per day of subscribed capacity).

to look behind precedent agreements in any circumstance "regardless of the affiliate status."[7]

As I have stated previously,[8] precedent agreements are one of several types of evidence that can be valuable in assessing the market demand for a pipeline. However, contracts among affiliates are less probative of that need because they are not necessarily the result of an arms-length negotiation. Indeed, the Commission itself has recognized that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates."[9] I could not agree more. It does not take much imagination to understand why an affiliate shipper might be interested in contracting with a related pipeline developer for capacity that may not be needed, such as the parent company's prospect of earning a 14 percent return on equity on an

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[7] Rehearing Order, 164 FERC ¶ 61,098 at P 16 (further explaining that "it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers").

[8] Certificate Order, 162 FERC ¶ 61,053 (Glick, Comm'r, dissenting); *see also Spire STL Pipeline LLC,* 164 FERC ¶ 61,085, at 1-4 (2018) (Glick, Comm'r, dissenting); *NEXUS Pipeline Company, L.L.C.*, 164 FERC ¶ 61,054, at 2-4 (2018) (Glick, Comm'r, dissenting); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at 2-4 (2018) (Glick, Comm'r, dissenting in part).

[9] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

investment,[10] or increased profits earned by an affiliated electric generator if new gas pipeline capacity frees up congestion that has been restraining gas and electric prices in a particular zone.

I agree with the protesting parties[11] that affiliate precedent agreements cannot be sufficient in and of themselves to demonstrate that a pipeline is needed. In such cases, the Commission must review additional evidence in the record. As the Certificate Policy Statement explains, this evidence might include, among other things, "demand projections, potential cost savings to consumers, or comparison of projected demand with the amount of capacity currently serving the market."[12] Yet, the Commission dismisses any need to consider evidence beyond precedent agreements, stating that it is not current policy to look beyond the "market need reflected by the applicant's contract with shippers."[13] That conclusion belies the Commission's assertion that it evaluates individual projects based on the evidence of need presented in each proceeding.[14] If precedent agreements are the only evidence it seriously considers, it cannot simultaneously claim to have given the record

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[10] Rehearing Order, 164 FERC ¶ 61,098 at P 34; Rate Counsel's Request for Rehearing at 9-10.

[11] Rate Counsel's Request for Rehearing at 9-10; New Jersey Conservation Foundation's Request for Rehearing at 26.

[12] Certificate Policy Statement, 88 FERC at 61,747.

[13] Rehearing Order, 164 FERC ¶ 61,098 at P 16.

[14] *Id.* (stating that the Commission "evaluates individual projects based on the evidence of need presented in each proceeding").

evidence the review it deserves and that the Administrative Procedures Act[15] demands.

The Commission attempts to support its stubborn reliance on affiliated precedent agreements by citing to *Minisink Residents for Environmental Preservation and Safety v. FERC*.[16] *Minisink* is readily distinguished. In that case, the D.C. Circuit concluded that the Commission could rely generally on a precedent agreement as a reflection of market need. But the Court neither considered nor addressed whether affiliate precedent agreements should be viewed similarly, as the issue was not raised in the proceeding. In fact, no court has found that the Commission can rely solely on affiliated precedent agreements to demonstrate need.[17]

In cases, such as this, where the record contains evidence raising fundamental questions about the Project's underlying need, the Commission must look beyond precedent agreements to determine need.[18] Here for instance, the Rehearing Parties point out that existing pipeline infrastructure can satisfy the current demand for natural gas of New Jersey and

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[15] 5 U.S.C § 706 (2012); *see Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[16] *Id.* (citing *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014)).

[17] The Commission refers only to prior Commission decisions to directly support reliance on affiliated precedent agreements to support a finding of need. Rehearing Order, 164 FERC ¶ 61,098 at P 16 n.38.

[18] *See, e.g.*, Rate Counsel's Request for Rehearing at 9-13; Conservation Foundation's Request for Rehearing at 25; Hopewell's Request for Rehearing at 19.

Pennsylvania local distribution companies, and projections of natural gas demand suggest "peak day requirements will remain relatively stable through 2020," "indicat[ing] that there is no imminent need for significant amounts of additional capacity."[19] Evidence showing declining utilization of existing pipeline infrastructure further calls into question whether there is sufficient market demand to justify a new pipeline.[20] The Commission, however, refuses to even consider the evidence suggesting a lack of market demand for the Project, arguing that "[p]rojections regarding future demand often change" and "[g]iven this uncertainty associated with long-term demand projections . . . the Commission deems precedent agreements to be the better evidence of demand."[21]

While the Commission declines to rely on such record evidence for the purposes of establishing need, to counter the Rehearing Parties' arguments the Commission nonetheless suggests, *if it were* to consider other record evidence in the case, it would point to evidence supporting a market need for the Project. The Commission cannot have it both ways. Selectively highlighting evidence of market demand when it supports the Commission's position, while *summarily* ignoring the same type of evidence when it does not, is arbitrary and capricious.

My point is not that precedent agreements can never be a meaningful indication of the need for a project. Indeed, there may be some instances when

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[19] Rate Counsel's Request for Rehearing at 5.

[20] *Id.* at 6.

[21] Rehearing Order, 164 FERC ¶ 61,098 at P 20.

precedent agreements, between unaffiliated entities, can serve as a strong indicator of need. But that does not mean that the Commission should rely uncritically on precedent agreements, especially when they are between affiliates. The Commission itself has recognized a broad spectrum of evidence that can bear on the need for a particular project. Reasoned decisionmaking requires that the Commission grapple with this evidence, rather than merely brushing it off and restating its absolute commitment not to look behind precedent agreements.

II. The Final EIS Is Deficient

Section 7 requires the Commission to balance "'the public benefits [of a proposed pipeline] against the adverse effects of the project,' including adverse environmental effects."[22] And where, as in this proceeding, there is limited evidence of the need for the proposed project, it is incumbent on the Commission to engage in an especially searching review of the project's potential harms to ensure that the project is in the public interest.[23] In this case, the

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[22] *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (quoting *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)); *Pub. Utils. Comm'n of Cal. v. FERC,* 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FERC,* 425 U.S. 662, 670 (1976)). The Court explained that, for the Natural Gas Act, the purposes that Congress has in mind when enacting the legislation include "'encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices'" as well as "'conservation, environmental, and antitrust issues.'" *Id.* (quoting *NAACP,* 425 U.S. at 670 n.6).

[23] Certificate Policy Statement, 88 FERC at 61,748 ("The amount of evidence necessary to establish the need for a proposed project

Rehearing Parties are right to question whether the Final EIS is sufficient in light of the incomplete record concerning the Project's environmental impact. For instance, PennEast has yet to complete the geotechnical borings work, which is needed to ensure that the environmental impacts of planned horizontal directional drilling will be adequately minimized.[24] In addition, 68 percent of the Project alignment in New Jersey has yet to be surveyed for the existence of historic and cultural resources.[25] These are critical aspects of the Commission's review of the proposed pipeline that should not be lightly brushed aside.

The Commission argues that the insufficient environmental record can be remedied by granting the certificate subject to PennEast's compliance with certain conditions.[26] Furthermore, the Commission asserts that NEPA does not require all environmental concerns to be definitively resolved before a project's approval is issued.[27] While that may be true in certain cases, there must be a limit to that principle, such that the Commission cannot grant a certificate based on little more than a premise that it will compile an adequate record that a project is in the public interest at some point in the future. "NEPA clearly requires that consideration of the environmental impacts of proposed projects take place *before* any [] decision is

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will depend on the potential adverse effects of the proposed project on the relevant interests.").

[24] *Certificate Order,* 162 FERC ¶ 61,053 *at* P 120.

[25] *Id.* P 172.

[26] Rehearing Order, 164 FERC ¶ 61,098 at PP 43-45.

[27] *Id.* P 43.

made"[28] and "[t]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action."[29] Today's order defies both NEPA and the NGA's public interest standard by accepting an inadequate Final EIS without explaining how the incomplete information is sufficient to permit the Commission to adequately balance the Project's adverse effects against its benefits. At a minimum, a significant amount of missing information on environmental impacts fails to meet a basic threshold of ensuring that the Federal agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts" and that this information will also be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[30]

The Commission suggests that the Final EIS does not violate NEPA because it identifies where and why information was incomplete, includes mitigation plans on resources where information was lacking, and promises to continue working to collect the missing data.[31] Although mitigation measures can help inform

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[28] *La Flamme v. FERC*, 852 F.2d 389, 400 *(9th Cir. 1988).*

[29] *Id. (citing Found. for N. Am. Wild Sheep v. U.S. Dep't of Agriculture,* 681 F.2d 1172, 1179 (1982)).

[30] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

[31] Rehearing Order, 164 FERC ¶ 61,098 at P 46.

an agency's conclusion that a project's impact is not significant,[32] mitigation plans are no substitute for providing a detailed statement on the actual environmental impact of the proposed action, as NEPA requires.[33] More fundamentally, the Commission's reliance on mitigation plans and postdecision information suggests that it is treating NEPA review as a "check-the-box" exercise instead of providing the "hard look" that Congress intended.

I appreciate that some of the information is not available because some landowners have refused the project developer access to their lands. But that does not change the fact that the Commission does not have the information it needs to properly perform its responsibilities under both NEPA and the NGA. It is the project developer's responsibility to reach agreements with landowners so that necessary surveys can be performed. Their difficulties in satisfying that responsibility is no reason to shirk our statutory mandates.

I believe it is a particularly cynical approach for the Commission to participate in a scheme designed to resolve this concern by granting certificate authority to the pipeline developer so that it can use eminent domain authority to gain access to land for the purpose of gathering missing information that is necessary to inform a finding of public interest in the first place. This is not only circular logic, but an outright abuse of the eminent domain authority that a section 7

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[32] *LaFlamme*, 852 F.2d at 399; *see also Jones v. Gordon*, 792 F.2d at 829.

[33] 42 U.S.C. § 4332 (2012).

certification conveys. Today's order makes clear that the Commission is using its certificate authority with little heed for the rights of landowners or the harms they may suffer as a result of the Commission's decision to grant a pipeline on inadequate record. As we can all agree, the rights of landowners must not be circumvented and the impacts to landowners cannot be an afterthought in the Commission's assessment of a pipeline's adverse impacts.[34]

III. The Commission Fails To Consider the Impacts of Climate Change

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 the consumption of natural gas. Accordingly, it is critical that the Commission carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is in the public interest under the NGA. The Commission, however, goes out of its way to avoid seriously addressing the Project's contributions to the harm caused by climate change. The Commission contends that it is not required to consider the impacts of upstream and downstream GHG emissions because the record in this proceeding does not demonstrate that the emissions are indirect effects of the Project.[35]

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[34] *E.g.,* Certificate Order, 162 FERC ¶ 61,053, at 1 (Chatterjee, Comm'r, concurring).

[35] Rehearing Order, 164 FERC ¶ 61,098 at PP 105, 107, 109, 111.

While quantifying the annual upstream and downstream GHG emissions from the Project in the Certificate Order,[36] the Commission continues to refuse to consider these emissions as reasonably foreseeable indirect effects. The Commission suggests that there is insufficient information about the production and consumption activities associated with the pipeline to render the effects reasonably foreseeable. Regarding upstream emissions, the Commission claims that it can conclude that GHG emissions from upstream activities are reasonably foreseeable only where it has definitive information about the specific, number, location, and timing of production wells, as well as production methodologies.[37] Similarly, the Commission suggests that it cannot determine whether downstream GHG emissions are reasonably foreseeable because "where the record does not show a specific end use of the gas transported by the project, downstream emissions from the consumption of that natural gas are not indirect effects."[38] But such definitions of indirect effects are circular and overly narrow.[39] In adopting them, the Commission disregards the Project's central

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[36] Certificate Order, 162 FERC ¶ 61,053 at PP 203, 208.

[37] Rehearing Order, 164 FERC ¶ 61,098 at P 109.

[38] *Id.* P 111.

[39] *See San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, No. 16-CV-376- MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (holding that it was arbitrary for the Bureau of Land Management to conclude "that consumption is not 'an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption'" as "this statement is circular and worded as though it is a legal conclusion").

purpose—to facilitate natural gas production and consumption.

The Commission claims that the impacts of GHG emissions associated with natural gas production are not reasonably foreseeable because they are "so nebulous" that the Commission "cannot forecast [their] likely effects" in the context of an environmental analysis of the impacts of a proposed natural gas pipeline.[40] But the evidence in the record shows that the applicant "designed its Project to provide a direct and flexible path for transporting natural gas produced in the Marcellus Shale production area in northeastern Pennsylvania."[41] Similarly, the Commission's assertion that there is a lack of information about end-use consumption directly conflicts with record evidence suggesting the gas will be consumed, at least in part, for the purposes of electric generation.[42] Under NEPA's obligation to

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[40] Rehearing Order, 164 FERC ¶ 61,098 at P 109 (citing Certificate Order, 162 FERC ¶ 61,053 at P 198). Furthermore, the Commission seems to rely on a criteria of its own creation to determine indirect effects by asserting that the Commission is not obligated to consider upstream impacts unless the Commission knows definitively that the "production would not occur in the absence of the pipeline," suggesting the record must also prove a negative in order to qualify an impact as indirect. Certainly, this is not what NEPA meant in the obligation for federal agencies to take a "hard look" at environmental impacts.

[41] Exhibit F-1, Resource Report 5, PennEast submitted a study by Concentric Energy Advisors, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Service Eastern Pennsylvania and New Jersey* (Concentric Study) at 5-1.

[42] Certificate Order, 162 FERC ¶ 61,053 at P 28 ("PennEast has entered into precedent agreements for long-term, firm service with 12 shippers. Those shippers will provide gas to a variety of

engage in reasonable forecasting[43] and make assumptions where necessary,[44] combined with the record provided, it is entirely foreseeable that the incremental transportation capacity of the Project will spur upstream production and will be combusted, both resulting in GHG emissions that contribute to climate change.[45]

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end users, including local distribution customers, electric generators, producers, and marketers.").

[43] Forecasting environmental impacts is a regular component of NEPA reviews and a reasonable estimate may inform the federal decisionmaking process even where the agency is not completely confident in the results of its forecast. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (2014) (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); *see Sierra Club*, 867 F.3d at 198 ("In determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation.'") (quoting *Del. Riverkeeper*, 753 F.3d at 1310)).

[44] As the D.C. Circuit explained in *Sierra Club*, in the face of indefinite variables, "agencies may sometimes need to make educated assumptions about an uncertain future." 867 F.3d at 1357.

[45] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). In evaluating the upstream and downstream impacts of a pipeline that are reasonably foreseeable results of constructing and operating that pipeline, I am relying on precisely the sort of "reasonably close causal relationship" that the Supreme Court has required in the NEPA context and analogized to proximate cause. *See id.* at 767 ("NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause. The Court [has] analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774 (1983)); *see also Paroline v. United States,* 134 S. Ct. 1710, 1719 (2014) ("Proximate cause is

As the U.S. 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.[46] Put differently, the fact that an agency may not know the exact location and amount of GHG emissions to attribute to the federal action is no excuse for assuming that impact is zero. Instead, the agency must engage in a case-by-case inquiry into what effects are reasonably foreseeable and estimate the potential emissions associated with that project—making assumptions where necessary—and then give that estimate the weight it deserves.

Quantifying the GHG emissions that are indirect effects of the Project is a necessary, but not sufficient, step in meeting the Commission's obligation to consider the Project's environmental effects associated with climate change. As required by NEPA, the Commission must also identify, and determine the

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often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Staelens v. Dobert,* 318 F.3d 77, 79 (1st Cir. 2003) ("[I]n addition to being the cause in fact of the injury [the but for cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well. To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct.") (internal quotation marks and citations omitted).

[46] *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

significance of, the harm caused by those emissions.[47] Absent such consideration, the Commission failed to undertake a meaningful analysis of the climate change impacts stemming from the Project's GHG emissions.

The Commission again rejects the use of the Social Cost of Carbon to provide meaningful information to evaluate the environmental impact of the GHG emissions associated with a certificate decision.[48] I disagree. The CEQ Guidance further recognizes that monetized quantification of an impact is appropriate to be incorporated into the NEPA document, if doing so is necessary for an agency to fully evaluate the environmental consequences of its decisions.[49] Similarly, the U.S. Environmental Protection Agency (EPA) explains that "even absent a full [cost-benefit analysis]," 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."[50]

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[47] 40 C.F.R. § 1502.16 (2017).

[48] Rehearing Order, 164 FERC ¶ 61,098 at P 123.

[49] See CEQ, *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* at 32-33 (Aug. 1, 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

[50] Although the Rehearing Order cites revised comments submitted by the EPA, in the original comments submitted in the

Similarly, several courts have found that it is arbitrary and capricious to monetize some benefits but not utilize the Social Cost of Carbon to consider the harm caused by GHG emissions associated with the federal action.[51] By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon provides a meaningful method for linking GHG emissions to particular climate impacts for quantitative and qualitative analyses. The pertinent question is whether the Commission's consideration of the harm caused by the Project's contribution to climate change is consistent with how the Commission considers the Project's other effects, including benefits. In today's order, the Commission fails this

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Commission's pending review of the natural gas certification process, the EPA recommended a number of tools the Commission can use to quantify the reasonably foreseeable "upstream and downstream GHG emissions associated with a proposed natural gas pipeline." These include "economic modeling tools" that can aid in determining the "reasonably foreseeable energy market impacts of a proposed project." U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 3-4 (filed June 21, 2018) (explaining that the "EPA has emission factors and methods" available to estimate GHG emissions—both net and gross—from activities upstream and downstream of a proposed natural gas pipeline, including the Greenhouse Gas Reporting Program and the U.S. Greenhouse Gas Inventory); *see Certification of New Interstate Natural Gas Facilities,* Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

[51] *High Country Conservation Advocates,* 52 F. Supp. 3d at 1191 ("Even though NEPA does not require a cost-benefit analysis, it was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible . . . ."); *see also Montana Envt'l Info.* Ctr., 274 F. Supp. 3d at 1095-96.

test by simultaneously refusing to use the Social Cost of Carbon to monetize the impact of GHG emissions while monetizing the Project's longterm socioeconomic benefits related to construction and operations from employment, tourism, and local taxes construction, operation and consumption,[52] as well as the consumption-related benefits of access to lower-cost fuel due to access to new production.[53]

Ultimately, the Commission claims that it has satisfied its obligation under NEPA to consider the harm caused by the Project's contribution to climate change by providing a qualitative discussion that concludes it cannot accurately assess the impacts of GHG emissions generally. The reality is the Commission has still failed to make an explicit determination of whether the harm associated with the Project's contribution to climate change is significant.[54] In order to satisfy NEPA, the environmental review documents must both disclose direct and indirect impacts, which can include quantitative and qualitative considerations, and disclose their significance.[55] To support this directive that NEPA explicitly requires, CEQ regulations expressly outline a framework for determining whether the Project's impacts on the environment will be considered significant—and this CEQ framework

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[52] Final EIS at 4-181–4-186.

[53] Exhibit F-1, Resource Report 5, PennEast submitted a study by Concentric Energy Advisors, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Service Eastern Pennsylvania and New Jersey* (Concentric Study) at tbl. 5.4-6.

[54] Rehearing Order, 164 FERC ¶ 61,098 at P 121.

[55] 40 C.F.R. § 1502.16.

requires considerations of both *context* and *intensity*, noting that significance of an action must be analyzed in several contexts.[56]

Today's order makes it abundantly clear that the Commission does not take environmental impacts into account when finding that a proposed project is in the public interest. The Commission cannot legitimately suggest it is fulfilling its obligations under the NGA to "evaluate all factors bearing on the public interest"[57] while simultaneously relying solely on economic factors in its determination. I do not believe the Commission's finding of public interest in this proceeding is a product of reasoned decisionmaking. Moreover, the record is insufficient to demonstrate that the Project is needed or that its potential benefits outweigh the adverse effects inclusive of the environment.

For all of these reasons, I respectfully dissent.

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Richard Glick
Commissioner

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[56] 40 C.F.R. § 1508.27 (setting forth a list of factors agencies should rely on when determining whether a project's environmental impacts are "significant" considering both "context" and "intensity").

[57] *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (Section 7 of the NGA "requires the Commission to evaluate all factors bearing on the public interest."); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce "necessarily and typically have dramatic natural resource impacts.").

NO. 19-1039

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX
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JEREMY M. FEIGENBAUM
Counsel of Record
OFFICE OF THE NEW JERSEY ATTORNEY GENERAL
25 Market Street
Trenton, NJ 08611
(609) 376-2690
jeremy.feigenbaum@njoag.gov

Counsel for Respondents State of New Jersey, et al.

PAUL D. CLEMENT
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

(*Additional Counsel Listed on Inside Cover*)

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MATTHEW LITTLETON
Counsel of Record
DONAHUE, GOLDBERG,
WEAVER & LITTLETON
1008 Pennsylvania Avenue, SE
Washington, DC 20003
(202) 683-6895
matt@donahuegoldberg.com

JENNIFER L. DANIS
EDWARD LLOYD
MORNINGSIDE HEIGHTS
LEGAL SERVICES
435 W. 116th Street
New York, NY 10027
(201) 306-3382
jld2228@columbia.edu
elloyd@law.columbia.edu

Counsel for Respondent New Jersey Conservation Foundation

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Appendix A

Declaratory Order, *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064 (Jan. 30, 2020)

1. On October 4, 2019, PennEast Pipeline Company, LLC (PennEast) filed a petition for a declaratory order (Petition) following a decision from the U.S. Court of Appeals for the Third Circuit (Third Circuit) in *In re PennEast Pipeline Company, LLC*.[1] PennEast seeks the Commission's interpretation of the scope of the eminent domain authority in section 7(h) of the Natural Gas Act (NGA).[2] The Commission grants the Petition in part, and denies it in part, as discussed below.

I. Background

2. PennEast is a Delaware limited liability company, managed by UGI Energy Services, LLC, pursuant to a Project Management Agreement.[3] On January 19, 2018, in Docket No. CP15-558-000, the Commission issued a certificate of public convenience and necessity for the PennEast Project, an approximately 116-mile greenfield natural gas pipeline designed to provide firm natural gas transportation service from receipt points in the eastern Marcellus Shale region, in Luzerne County, Pennsylvania, to delivery points in

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[1] 938 F.3d 96 (3d Cir. 2019) (*PennEast*).

[2] 15 U.S.C. § 717f(h) (2018).

[3] PennEast is a joint venture owned by Red Oak Enterprise Holdings, Inc., a subsidiary of AGL Resources Inc. (20 percent interest); NJR Pipeline Company, a subsidiary of New Jersey Resources (20 percent interest); SJI Midstream, LLC, a subsidiary of South Jersey Industries (20 percent interest); UGI PennEast, LLC, a subsidiary of UGI Energy Services, LLC (20 percent interest); and Spectra Energy Partners, LP, a subsidiary of Enbridge Inc. (20 percent interest). Petition at 3-4.

New Jersey and Pennsylvania, terminating at an interconnection with Transcontinental Gas Pipe Line Company, LLC in Mercer County, New Jersey.[4] The project's total certificated capacity of 1,107,000 dekatherms per day[5] is approximately 90 percent subscribed pursuant to long-term agreements for firm transportation service and will provide service to markets in New Jersey, New York, Pennsylvania, and surrounding states.[6] Upon commencement of activities authorized in the Certificate Order, PennEast will become subject to the Commission's

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[4] *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 1 (Certificate Order), *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Certificate Rehearing Order), *petitions for review pending sub nom*. *Del. Riverkeeper Network v. FERC*, D.C. Cir. Nos. 18-1128, et al. (first petition filed May 9, 2018) (argument held in abeyance October 1, 2019, "pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit's decision").

[5] *Id*. A dekatherm is approximately equal to 1000 cubic feet of natural gas. To put this number in perspective, the Energy Information Administration records that New Jersey consumed 44,410 million cubic feet of natural gas in January 2019, its peak demand month last winter. *See* https://www.eia.gov /opendata/qb.php?sdid=NG.N3010NJ2.M. On average, that would be 1,432,580 dekatherms per day. Thus, the PennEast project here could serve 77 percent of New Jersey's last peak winter demand.

[6] Certificate Order, 162 FERC ¶ 61,053 at PP 4, 6. The twelve shippers that have subscribed capacity on the PennEast Project will use the gas for a variety of purposes, including but not limited to, local distribution service for end-use consumers and electric generation; the additional capacity will also support supply diversity and reliability. *Id.* PP 4, 28.

jurisdiction as a natural gas company under NGA section 2(6).[7]

3. PennEast states that, following issuance of the certificate, it was unable to reach agreement with the State of New Jersey to acquire easements for the portions of its proposed pipeline route that would cross land in which New Jersey holds a property interest.[8] Consequently, PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey (District Court) in order to obtain these and other necessary easements.[9] The State of New Jersey and its agencies (collectively, "State" or "New Jersey") claimed property interests in forty-two parcels of land that PennEast sought access to via condemnation: two parcels in which New Jersey holds fee simple ownership interests, and forty parcels in which New Jersey claims non-possessory property interests, including conservation easements and restrictive covenants mandating under state law a particular land use.[10]

4. New Jersey moved to dismiss the condemnation actions for lack of jurisdiction, asserting that the Eleventh Amendment grants New Jersey sovereign immunity from suit by private parties such as PennEast in federal court.[11] The District Court

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[7] 15 U.S.C. § 717a(6).

[8] Petition at 5-6.

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.* The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

granted PennEast's application for orders of condemnation, and rejected New Jersey's sovereign immunity argument.[12] Responding to New Jersey's assertion that "their arguments would [have been] different if the United States government were pursuing eminent domain rights[,]" the District Court found that PennEast "has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign."[13] The District Court further reasoned that "the NGA expressly allows" certificate holders to utilize eminent domain in District Court, and as "PennEast holds a valid certificate . . . issued by the FERC[,]" New Jersey's Eleventh Amendment arguments failed.[14]

5. New Jersey then appealed to the United States Court of Appeals for the Third Circuit, which held that the NGA does not abrogate New Jersey's sovereign immunity and vacated the District Court's order.[15] The Third Circuit found that while the NGA delegates eminent domain authority to certificate holders, the text of "the NGA does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity."[16] In the

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States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[12] *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893, at *12, 25 (D.N.J. Dec. 14, 2018).

[13] *Id.* at *12.

[14] *Id.*

[15] *In re PennEast*, 938 F.3d at 99, 111-13 (3d Cir. 2019) (*In re PennEast*), *reh'g en banc denied* (Nov. 5, 2019).

[16] *Id.* at 112-13; *accord id.* at 99-100; *see id.* at 111-12.

court's view, "there are powerful reasons to doubt the delegability of the federal government's exemption from Eleventh Amendment immunity,"[17] particularly when that delegation occurs through a statute enacted pursuant to the Commerce Clause.[18] However, the court consciously avoided that constitutional question[19] by holding that the text of the NGA failed to provide an "unmistakably clear" delegation of the federal government's exemption from Eleventh Amendment immunity.[20] Ultimately, the Third Circuit declined to "assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."[21]

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[17] *Id.* at 105; *accord id.* at 111; *see id.* at 100; *id.* at 107-11 (reviewing precedent).

[18] *Id.* at 105, 108 & nn.13, 15 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996) (*Seminole Tribe of Fla.*)); *see also id.* at 108 & n.13 (explaining that *Seminole Tribe* abrogated *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (*Union Gas Co.*)).

[19] *See id.* at 111 (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008) ("As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.")); *id.* at 111-12 (quoting *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (describing the "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (citation and alterations omitted)).

[20] *Id.* at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *see id.* at 107-08 & n.12 (discussing *Dellmuth* and *Atascadero*).

[21] *Id.* at 112.

6. On October 4, 2019, PennEast petitioned the Commission to issue a declaratory order providing the Commission's interpretation of three questions under NGA section 7(h). Specifically, PennEast requests a declaratory order that addresses the following:

> 1) Whether a certificate holder's right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest;
>
> 2) Whether NGA section 7(h) delegates the federal government's eminent domain authority solely to certificate holders; and
>
> 3) Whether NGA section 7(h) delegates to certificate holders the federal government's exemption from claims of state sovereign immunity.[22]

II. Public Notice, Interventions, Protests and Comments

7. Notice of the Petition was published in the *Federal Register* on October 10, 2019.[23] The notice established October 18, 2019, as the deadline for filing comments and interventions.[24] Timely, unopposed motions to intervene were filed by the entities listed in Appendix A. These motions to intervene are granted automatically by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[25] During the comment period, the New Jersey

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[22] *See* Petition at 2.

[23] 84 Fed. Reg. 54,600.

[24] *Id.*

[25] 18 C.F.R. § 385.214(c)(1) (2019).

Conservation Foundation and Niskanen Center (collectively, Niskanen), Maya K. van Rossum and the Delaware Riverkeeper Network (collectively, Riverkeeper),[26] the Township of Hopewell, U.S. Senator Cory A. Booker, the Environmental Defense Fund, the New Jersey Division of Rate Counsel, and the State of New Jersey[27] filed protests of the Petition, and numerous commenters, including landowners, filed comments in opposition to the Petition. After the comment deadline, U.S. Representatives from New Jersey filed a letter in opposition to the Petition.[28] Several protestors assert that it is inappropriate for the Commission to grant the instant Petition when the Third Circuit has already spoken on the matter and argue that submitting a brief as amicus curiae would be a more proper avenue for the Commission to express its opinion.[29] Protestors also agree with the Third Circuit's decision that the NGA does not provide delegated authority for a pipeline to condemn lands in which a state has a property interest.[30]

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[26] The protests are substantially identical; hereinafter, we cite only the Delaware Riverkeeper Network protest.

[27] The State of New Jersey includes the New Jersey Department of Environmental Protection, the New Jersey Board of Public Utilities, and the Delaware and Raritan Canal Commission.

[28] Letter from, Tom Malinowski and Bonnie Watson Coleman, U.S. Representatives (Oct. 29, 2019).

[29] *See* New Jersey Protest at 14; New Jersey Division of Rate Counsel (Rate Counsel) Protest at 5; Riverkeeper Protest at 2, 5; *see also* Niskanen First Protest at 5-6, 8-9 (omitting suggestion that the Commission file an amicus brief); Senator Cory A. Booker Protest at 1 (same).

[30] *See* New Jersey Protest at 2-3, 6-7, 14; Riverkeeper Protest at 9-10; Township of Hopewell, Mercer County, New Jersey Protest

8. Numerous parties, including natural gas transporters, local distribution companies, and associations within the natural gas industry, commented in support of the Petition. Several parties state that the text and legislative history of NGA section 7(h) demonstrates that Congress specifically intended to delegate federal eminent domain authority to certificate holders against all owners of property needed for a project with whom a certificate holder cannot reach agreement, including states, and that this eminent domain authority has been an essential part of a comprehensive regulatory scheme since the statute was amended to include that authority in 1947.[31] Commenters note that certificates of public convenience and necessity may only be obtained through a quasi-judicial adjudicatory process administered by Commissioners appointed by the President and confirmed by the Senate and that this adjudicatory process is replete with robust opportunities for public participation.[32] Commenters further contend that the Commission grants certificate holders only a limited authority to condemn specific rights of way with little ability to alter the route without further Commission approval, a process heavily regulated by federal oversight and

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at 1; Township of Kingwood Motion to Intervene at 1; Township of Holland Comments at 1.

[31] *See* Interstate Natural Gas Association of America (INGAA) Comments at 4-6; Transcontinental Gas Pipe Line Company, LLC Comments at 4; TC Energy Corporation Comments at 15-18; American Gas Association (AGA) Comments at 11; American Public Gas Association (APGA) Comments at 3-6.

[32] INGAA Comments at 6-9; TC Energy Corp. Comments at 5, 12-14.

enforcement.[33] Finally, commenters assert the Third Circuit's decision will have significant adverse consequences on end-use consumers, local distribution companies, and the natural gas industry as a whole.[34] Commenters support the Petition because they agree that a decision of this magnitude should not be made without input from the regulatory agency charged with administration of the statute.[35]

9. On October 11, 2019, the New Jersey Conservation Foundation and Niskanen Center jointly filed a motion to extend the deadline for comments until November 1, 2019. The Commission's Secretary denied the motion for extension of time by notice issued on October 16, 2019. Niskanen criticized the length of the comment period.[36] However, "[t]he Commission, like other agencies, is generally master of its own calendar and procedures."[37] The

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[33] INGAA Comments at 8-9; TC Energy Corp. Comments at 14-16.

[34] *See* New Jersey Natural Gas Company Comments at 3-6; INGAA Comments at 10-13; TC Energy Corp. Comments at 18-20; AGA Comments at 9-13.

[35] *See* AGA Comments at 7-9, 12; TC Energy Corp. Comments at 2, 5-7; APGA Comments at 5-7.

[36] Niskanen Request for Extension at 2-3; Niskanen First Protest at 3-4; Niskanen Second Protest at 1-2.

[37] *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984); *see id.* at 61,002 n.3 (collecting precedent); *see, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) ("[A] reviewing court may not . . . dictat[e] to the

Commission's discretion to issue declaratory orders includes the discretion to expedite requests and deny extensions as "time, the nature of the proceeding, and the public interest" dictate.[38] We reject Niskanen's argument that the initial comment period was too short in these circumstances. The length of the initial comment period was driven by PennEast's request for expedited action in light of then-applicable deadlines for appellate litigation in the Third Circuit; furthermore, the comment period was also plainly sufficient to allow interested parties—including Niskanen—to submit robust comments, all of which have been thoroughly considered by the Commission

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agency the methods, procedures, and time dimension of the needed inquiry . . . ."); *Richmond Power & Light v. FER*C, 574 F.2d 610, 624 (D.C. Cir. 1978) ("Agencies have wide leeway in controlling their calendars . . . .") (citing *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967)); *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977) (deferring to an agency's choice of procedures and allocation of resources because "[t]he Commission should 'realistically tailor the proceedings to fit the issues before it'") (quoting *Mobil Oil Corp. v. Fed. Power Comm'n*, 483 F.2d 1238, 1252 (D.C. Cir. 1973) (quotation marks omitted)); *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1266 (3d Cir. 1974) ("[T]he ultimate choice of procedure . . . is left to the discretion of the agency involved, and will be reversed only for an abuse of discretion."); *see also Public Administrative Law and* Procedure, 73A C.J.S. *Public Administrative Law & Procedure* § 543 (2019) ("The ultimate choice of procedure by an agency in making its orders is not ordinarily subject to judicial revision.").

[38] 5 U.S.C. § 554(c)(1) (2018). Niskanen's contrary argument rests on a case involving a rulemaking proceeding under 5 U.S.C. § 553 (2018). *See* Niskanen Second Protest at 4 (citing *Ober v. EPA*, 84 F.3d 304, 314 (9th Cir. 1996)). That reliance was misplaced. *Compare* 5 U.S.C. § 553(b)-(c) (rulemaking), *with id.* § 554 (adjudications).

in the development of this order. Further, we considered late comments as they were not so late as to delay the proceeding or prejudice any party.

10. On October 28, 2019, PennEast filed a motion for leave to answer and answer to the protests and comments. Although the Commission's Rules of Practice and Procedure do not permit answers to protests,[39] our rules also provide that we may waive this provision for good cause.[40] On October 30, 2019, Niskanen filed a protest to PennEast's October 28, 2019 answer, urging the Commission to deny PennEast's motion to answer.[41] However, we will accept PennEast's Answer here because it has provided information that has assisted us in our decisionmaking.[42]

III. Discussion

A. The Commission's Authority to Act on the Petition

11. We start with our jurisdiction to act on this petition: protesters claim we have none; we disagree.

12. New Jersey contends[43] that issuing an order in this case would contradict our prior statement in the underlying proceedings that "[i]ssues related to the

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[39] 18 C.F.R. § 385.213(a)(2) (2019).

[40] *See* 18 C.F.R. § 385.101(e).

[41] *See* Niskanen Second Protest at 4.

[42] Niskanen objects to PennEast filing an answer after the initial comment deadline, but this is not unusual. *See, e.g.*, *Gulf Crossing Pipeline Co. LLC*, 169 FERC ¶ 61,169, at P 10 (2019); *Transcon. Gas Pipe Line Co., LLC*, 169 FERC ¶ 61,051, at P 11 (2019).

[43] New Jersey Protest at 15-18.

acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court."[44] However, New Jersey omits the context of that statement in the Certificate Rehearing Order. That order rejected New Jersey's request that we limit the land on which PennEast may exercise eminent domain because "[t]he Commission does not have the authority to *limit* a pipeline company's *use of eminent domain* once the company has received its certificate of public convenience and necessity."[45] Courts have consistently affirmed that position.[46]

13. Contrary to New Jersey's overbroad reading of the word "related," the Certificate Rehearing Order did

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[44] *E.g.*, *id.* at 5, 16, 20 (quoting Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33); *accord id.* at 17, 19 (eliding portions of same).

[45] Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 (emphasis added).

[46] *See, e.g.*, *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that the NGA section 7(h) "contains no condition precedent" to right of eminent domain other than issuance of the certificate when a certificate holder is unable to acquire a right-of-way by contract); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) ("Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. . . . Thus FERC does not have discretion to withhold eminent domain once it grants a Certificate." (citation omitted)); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. . . . The Commission does not have the discretion to deny a certificate holder the power of eminent domain." (citation omitted)).

not disclaim Commission jurisdiction over all "issues related to the acquisition of property rights by a pipeline," because every certificate order must necessarily consider and decide such issues in connection with approving the route in the first place. Importantly, the issue before the Commission here relates to an interpretation of NGA section 7(h), which the Commission has been given authority to apply and interpret. As the Commission has more fully explained in other certificate orders, the issues appropriately addressed in judicial eminent domain proceedings are those related to "the timing of acquisition or just compensation."[47] Nothing in this order contradicts any

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[47] *E.g.*, *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018) ("Nonetheless, the Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of NGA section 7(h), *including issues regarding the timing of acquisition and just compensation* are matters for the applicable state or federal court." (emphasis added)); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018) (same). Some orders have followed the formula used in the Certificate Rehearing Order and have not specified the relevant eminent domain issues. *See, e.g.*, *Nexus Gas Transmission, LLC*, 162 FERC ¶ 61,011, at P 6 (2018); *Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 35 (2017), *cited in* Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 n.82. Other orders have specified the applicable issue. *Compare Millennium Pipeline Co., L.L.C.*, 158 FERC ¶ 61,086, at P 6 (2017) ("Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the Natural Gas Act, *including issues regarding compensation*, are matters for the applicable state or federal court." (emphasis added)), *Nw. Pipeline, LLC*, 156 FERC ¶ 61,086, at P 12 (2016) (same), *and Fla. Se. Connection, LLC*, 154 FERC ¶ 61,264, at P 10 (2016) (same); *with Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 68 (2017) ("Issues related to the acquisition of property

of our findings in the orders that are currently pending review in the D.C. Circuit.

14. Some parties oppose the issuance of a declaratory order on separation of powers grounds.[48] Riverkeeper emphasizes that it is the role of the judiciary, not the Commission, to decide sovereign immunity issues and to interpret the law.[49] Senator Booker similarly states that it is the role of Congress and the courts, not the Commission, to consider constitutional issues, and that Congress is the appropriate body to resolve any pipeline siting obstacles or implications stemming from the Third Circuit's decision.[50] Senator Booker argues that the Commission should not weigh in on sovereign immunity because Congress did not provide the Commission with that authority.[51] The Watershed Institute[52] submits that the Petition serves as "an improper attempt to circumvent" the Third Circuit.[53] New Jersey and Riverkeeper state that a declaratory order would not assist any court and not be entitled

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rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA, *including issues regarding the timing of acquisition*, are matters for the applicable state or federal court." (emphasis added)).

[48] *See, e.g.*, Senator Cory A. Booker's Protest at 1; Niskanen First Protest at 5; Riverkeeper Protest at 2-4.

[49] Riverkeeper Protest at 3-4.

[50] Senator Cory A. Booker Protest at 1-2; *see also* Letter from Tom Malinowski and Bonnie Watson Coleman, U.S. Representatives (Oct. 29, 2019).

[51] *Id.*

[52] Stony Brook Millstone Watershed Association refers to itself as Watershed Institute.

[53] Watershed Institute Motion to Intervene at 2.

deference.[54] Niskanen and New Jersey claim that the Commission has previously stated that it does not have jurisdiction or expertise to resolve constitutional challenges pertaining to the NGA eminent domain provision.[55] Fund argue that interpretation of the Eleventh Amendment does not fall within the ambit of the Commission's expertise.[56] New Jersey also contends that the Commission deserves no deference "when its interpretation runs headlong into the canon of constitutional avoidance."[57] However, consistent with the *Mountain Valley* and *Atlantic Coast* certificate orders New Jersey cited[58] and as discussed below, we decline to address the constitutional issues raised in the Petition.

15. We emphasize that this declaratory order sets forth the Commission's interpretation of the NGA, and thereby does not implicate any separation of powers concerns. It is well within our authority to interpret the NGA and our own regulations, particularly when we issue our interpretation in the form of a declaratory

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[54] Riverkeeper Protest at 2, 4; New Jersey Protest at 22.

[55] New Jersey Protest at 20 (citing *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 63 (2017) ("[O]nly the courts can determine whether Congress'[s] action in passing section 7(h) of the NGA conflicts with the Constitution."); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 81 (2017) (same));Niskanen First Protest at 9.

[56] Environmental Defense Fund Protest at 3; Riverkeeper Protest at 9.

[57] New Jersey Protest at 22.

[58] *See supra* note 55.

order.[59] Moreover, our interpretation of NGA section 7(h) merits deference.[60] The Third Circuit's ruling does not diminish the Commission's authority to speak on a statute that we administer.[61] Because the Third Circuit did not "hold[] that its construction follows from the unambiguous terms of the statute," its construction of the NGA does not foreclose a subsequent or different Commission interpretation of

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[59] *See Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 19 (2008) ("The declaratory order process can be very useful to persons seeking reliable, definitive guidance from the Commission. . . . As with other formal Commission actions, a declaratory order represents a binding statement of policy that provides direction to the public and our staff regarding the statutes we administer and the implementation and enforcement of our orders, rules and regulations. A declaratory order is therefore the most reliable form of guidance available from the Commission.") (discussion of supporting precedent omitted).

[60] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

[61] The gravamen of the Third Circuit's decision is that NGA section 7(h) is either silent or lacks the requisite specificity to support a delegation of the federal government's exemption from assertions of state sovereign immunity under the Eleventh Amendment. *See PennEast*, 938 F.3d at 112 ("[W]e will not assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."); *see id.* ("[N]othing in the text of the statute even 'remotely impl[ies] delegation[.]'") (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)); *id.* at 111 ("[N]othing in the NGA indicates that Congress intended to do so."); *id.* at 100 ("[N]othing in the text of the NGA suggests that Congress intended to do so.").

that statute.[62] Nor does that court's construction bind other courts of appeals.[63]

16. New Jersey, Division of Rate Counsel (Rate Counsel), Niskanen, and Senator Booker assert that it would violate Commission regulations for the Commission to order declaratory relief.[64] Again, we disagree. As those parties note, the relevant regulation specifies that a person must file a petition when seeking "[a] declaratory order or rule to terminate a controversy or remove uncertainty."[65] The Commission's regulation does not define what sort of uncertainty may be appropriate to justify a petition for declaratory relief, and the New Jersey parties offer no precedent on this score either. In our view, as we will describe more fully below, the Third Circuit's opinion creates sufficient uncertainty as to the proper role of the Commission in condemnation proceedings such

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[62] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (finding that an appellate court's prior interpretation of an ambiguous statutory provision did not preclude a federal agency from adopting a contrary reasonable interpretation in subsequent proceedings); *cf. also United States v. Mendoza*, 464 U.S. 154, 158 (1984) (*Mendoza*) (finding the doctrine of nonmutual offensive collateral estoppel inapplicable against non-private litigants).

[63] *See, e.g.*, *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 429 (3d Cir. 2018); *Schnitzer v. Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004) (citing *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1490 n.17 (D.C. Cir. 1984)); *Humphreys v. DEA*, 105 F.3d 112, 117 (3d Cir. 1996); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1257-58 (D.C. Cir. 1996).

[64] Senator Cory A. Booker Protest at 1; New Jersey Protest at 2; Rate Counsel Protest at 4; Niskanen First Protest at 7-9.

[65] 18 C.F.R. § 385.207(a)(2) (2019).

that it is appropriate for us to address these issues in this order.[66] That the New Jersey parties agree with the Third Circuit and perceive no uncertainty, of course, does not prevent the Commission from considering petitions submitted under its regulations.

17. Niskanen and New Jersey argue that a declaratory order in this instance would be unprecedented and that "PennEast can point to no Commission Declaratory Orders that wade into already-adjudicated constitutional waters."[67] Riverkeeper states that the Commission has previously declined to issue a declaratory order that would result in a "generic finding," and that a declaratory order granting a petition should be based on specific facts and circumstances.[68] Contrary to

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[66] *See* 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 18 C.F.R. § 385.207(a)(2) (providing for a party to petition for "[a] declaratory order or rule to terminate a controversy or remove uncertainty"). In any event, the Commission's regulations also provide for a party to petition for "[a]ny other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading." 18 C.F.R. § 385.207(a)(5).

[67] Niskanen First Protest at 8; *see* New Jersey Protest at 19-20.

[68] Riverkeeper Protest at 6 (citing *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016)). The Commission's finding that a declaratory order was not appropriate to deal with the specific requests in ITC's petition is limited to that particular case. *See ITC Grid Dev., LLC*, 154 FERC ¶ 61,206 at P 48. We note that the cited order also states that the Commission's determinations in its declaratory orders are "generally legal in nature" and may "cover a broad range of issues, including jurisdictional issues and the applicability to specific parties of specific *rights and duties arising under the statutes* that the Commission administers." *Id.*

protesters' assertions, the Commission remains consistent in its use of declaratory orders to provide authoritative guidance to regulated entities on important questions of interpretation regarding statues, regulations, tariffs, or precedent.[69] Though it is uncommon, the Commission has acted on petitions for declaratory order filed in response to adverse judicial determinations.[70] In our view, this order is

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P 42 (emphasis added) (citations omitted). Nothing in our regulations prevents the issuance of a declaratory order to address the rights and duties of certificate holders under the NGA.

[69] *See, e.g.*, *Placer Cty. Water Agency*, 167 FERC ¶ 61,056, at PP 15, 17-18, *order denying reh'g*, 169 FERC ¶ 61,046 (2019) (clarifying the application of a D.C. Circuit decision regarding waiver of section 401 water quality certification under the Clean Water Act to related cases); *Nat. Gas Pipeline Co. of Am.*, 56 FERC ¶ 61,250, at 61,939- 40 (1991) (clarifying the extension of jurisdiction to account for state court monetary judgments under its interpretation of D.C. Circuit precedent).

[70] *See Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 263 (10th Cir. 1989) (*Williams Nat. Gas Co.*) (upholding FERC's denial of a rehearing request that "completely disapproved of the conflicting state opinion") (citing *Williams Nat. Gas Co.*, 47 FERC ¶ 61,308, at 62,103 n.5 (1989)); *S. Union Co. v. FERC*, 857 F.2d 812, 817-18 (D.C. Cir. 1988) (vacating the Commission's denial of a petition for a declaratory order on the merits in response to adverse state court judgments, because the Commission erroneously determined the matter was not controlled by relevant precedent); *NextEra Energy, Inc.*, 166 FERC ¶ 61,049, at PP 23, 27 (2019) (acknowledging contrary court authority in the issuance of a declaratory order); *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 5 (acting on a petition for a declaratory order filed after a circuit court found that it lacked jurisdiction), *order on reh'g*, 164 FERC ¶ 61,029 (2018); *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,183, at PP 3, 27 (2012) (declaring, contrary to a state court order denying summary

warranted because it will remove uncertainty about the Commission's interpretation of the NGA.

18. New Jersey and Rate Counsel argue that the Commission should have intervened in the Third Circuit appeal or sought leave to file an amicus curiae brief, instead of issuing a declaratory order.[71] Homeowners Against Land Taking—PennEast, Inc. (HALT) and the State of New Jersey contend that the Commission has no authority to re-interpret judicial decisions, and that the Commission can file an amicus brief with either the Third Circuit or the United States Supreme Court, if PennEast petitions for a writ of certiorari.[72] New Jersey and Niskanen similarly assert that the Commission has implicitly conceded jurisdiction by consistently declining to participate, either by filing an intervention or filing as amicus curiae, in other cases where this issue was raised.[73]

19. Despite protesters' contention that the Commission has somehow waived the ability to speak on these issues by not intervening in other proceedings, the Third Circuit never sought the Commission's opinion in this matter. Moreover, it would be impractical for the Commission to intervene in every federal court proceeding involving an interstate pipeline company, particularly those where the validity of a Commission-issued certificate is not

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judgement in a tort action, that negligence claims are limited against Regional Transmission Organizations).

[71] New Jersey Protest at 14; Rate Counsel Protest at 8-9.

[72] HALT Motion to Intervene at 1; New Jersey Protest at 14, 21.

[73] Niskanen First Protest at 9-10; New Jersey Protest at 2.

in question.[74] We also disagree that the optimal way for the Commission to express its interpretation of the statutes and regulations it superintends is through *ad hoc* litigation pleadings filed by Commission staff rather than through an order issued by the Commission itself. Protesters themselves concede that "agency 'litigating positions' raised for the first time on judicial review" are entitled to no deference.[75] As PennEast acknowledges, the Commission "has not had frequent occasion" to speak to many of the issues present in the Petition,[76] namely, the operation of section 7(h) and Congress's intent in amending the NGA to include it. Therefore, any brief filed by Commission staff as amicus curiae would not have benefitted from the Commission's articulation of a

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[74] With a few exceptions, the Commission has traditionally refrained from exercising its independent litigation authority to intervene in appellate proceedings in the absence of an invitation to do so. For example, the Commission previously accepted the Third Circuit's invitation to participate as an amicus in *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), but did not participate in the Fourth Circuit's parallel consideration of a closely-related preemption question in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (*Hughes*). Similarly, the Commission participated as an amicus by invitation in *Electric Power Supply Ass'n v. Star*, 904 F.3d 518, 522 (7th Cir.), *reh'g denied* (Oct. 9, 2018), *cert. denied*, 139 S.Ct. 1547 (2019), but did not participate in the consideration of a closely-related preemption question in *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2d Cir. 2018), *cert. denied sub nom. Elec. Power Supply Ass'n v. Rhodes*, 139 S.Ct. 1547 (2019).

[75] Riverkeeper Protest at 4 (citing *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (2011)).

[76] Petition at 24.

formal interpretation of NGA section 7(h) and the critical role that provision has in the Commission's successful administration of the NGA's "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce."[77]

20. We disagree with protesters' argument that issue preclusion and claim preclusion doctrines barred PennEast from seeking a declaratory order, or bar us from acting on the Petition.[78] Courts have long understood that preclusion principles are applied differently in administrative proceedings.[79]

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[77] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (*Schneidewind*) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963) (*N. Nat. Gas Co.*) (internal quotation marks omitted); *see also* 15 U.S.C. § 717(b).

[78] *See* New Jersey Protest at 9-14; Rate Counsel Protest at 5-8.

[79] *Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982) (finding that collateral estoppel "does not apply when a judgment of policy is reconsidered by an agency in quasi-legislative proceedings"). Other courts have explained that preclusion principles are limited in administrative agency proceedings when, unlike here, the agency is acting in a judicial capacity and reviewing previously "resolved disputed issue of fact properly before it." *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966); *cf. also Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand."); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930) ("A rate order is not res judicata."); *Duvall v. Atty. Gen.*, 436 F.3d 382, 387-88 (3d Cir. 2006) (finding collateral estoppel applicable to a factual dispute so long as "application of the doctrine does not frustrate congressional intent or impede the effective functioning of the agency"). Even if we were in a quasi-judicial proceeding instead of a quasi-legislative proceeding, as here, typical preclusion principles would not apply because the question

Administrative agencies like the Commission are "not in a position identical to that of a private litigant."[80] Protesters' assertions that the Commission is precluded from acting on the petition lack merit.[81] In light of the Commission's statutory responsibilities under the NGA, and the possibility that other circuits not bound by the Third Circuit's opinion may face similar questions, the Commission is not barred from declaring its interpretation of a statute it implements.[82] Indeed, the Supreme Court has

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presented is a pure question of statutory interpretation. *See, e.g.*, *United States v. Moser*, 266 U.S. 236, 242 (1924) ("[Res judicata] does not apply to unmixed questions of law.").

[80] *Mendoza*, 464 U.S. at 159 (quoting *INS v. Hibi*, 414 U.S. 5, 8 (1973)).

[81] *Cf. Montana v. United States*, 440 U.S. 147, 157 (1979) (finding estoppel where, unlike here, the government was a party to the proceeding and the "'question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged' adversely to the Government in state court") (citation omitted); *United States v. Utah Constr. and Mining Co.*, 384 U.S. at 422 (holding that res judicata applies to the parties "[w]hen an administrative agency is acting in a judicial capacity.").

[82] *See, e.g.*, *Mendoza*, 464 U.S. at 160 ("A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."); *Harris v. Martin*, 834 F.2d 361, 365 (3d Cir. 1987) (following *Mendoza*); *see also* Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 683, 719 (1989) (explaining that "in pursuing a policy of intercircuit nonacquiescence, by definition the agency is not acting inconsistently with the case law of the court of appeals that will review its action" and concluding that there is no "per se constitutional bar against nonacquiescence").

recognized that a contrary rule—in which a single court of appeals can bind subsequent agency interpretations of a statute that Congress has delegated to the agency—would "lead to the ossification of large portions of our statutory law."[83] Furthermore, the Supreme Court has implicitly approved this practice by routinely granting certiorari for the purpose of vacating and remanding prior appellate court decisions in light of subsequent agency action.[84]

21. In acting on a straightforward question of law—the Commission's interpretation of NGA section 7(h)—we are not proceeding in the traditional civil-litigation setting in which the doctrines of issue and claim preclusion typically apply.[85] As such, the dual purposes of preclusion doctrines, i.e. "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless

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[83] *Brand X*, 545 U.S. at 982-83 (internal quotation marks and citation omitted) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

[84] *See, e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 135 S.Ct. 2886 (2015) (remanding for further consideration in light of new regulations promulgated by an agency); *Aetna Life Ins. Co. v. Kobold*, 135 S.Ct. 2886 (2015) (same); *see also Mouelle v. Gonzales*, 548 U.S. 901 (2006) (remanding for further consideration in light of interim rule promulgated by an agency); *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006) (remanding in light of informal guidance); *Slekis v. Thomas*, 525 U.S. 1098 (1999) (same).

[85] *See supra* note 79 and accompanying text.

litigation," would not be served by restraining the Commission from acting through this declaratory order.[86] Preclusion is particularly unwarranted here because we make no attempt to address the Eleventh Amendment question left unanswered by the Third Circuit:[87] whether the NGA's delegation of the federal government's exemption from state sovereign immunity was a valid, constitutional exercise of federal power.[88] Our more limited focus here is whether the text of the statute itself, along with its legislative history, suggests any limit on the exercise of eminent domain under NGA section 7(h) based on the owner of the property at issue. As clarified in PennEast's Answer, the Petition does not request that the Commission interpret the Eleventh Amendment, but rather states that its request concerns the scope of NGA section 7(h).[89]

22. Moreover, New Jersey cannot use claim or issue preclusion doctrines to bind the Commission to a judgment in an adjudication in which the Commission

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[86] *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979) (citation omitted); *see also Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519, 525 (3d Cir. 2002) (noting issue preclusion doctrine's "twin goals of fairness and efficient use of private and public litigation resources").

[87] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 342 F.3d 242, 252 (3d Cir. 2003) (describing the elements for collateral estoppel, including that the issue sought to be precluded is the same as that involved in the prior action).

[88] *In re PennEast*, 938 F.3d at 112-13 (holding that "the NGA does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity").

[89] PennEast Answer at 6.

was not a party.[90] Nor can New Jersey argue that the Commission is precluded by attempting to apply the "first-filed" rule to this proceeding.[91] The "first-filed" rule only arises when "two cases between the same parties . . . are commenced in two different Federal courts."[92] Moreover, the Commission is not bound by the Third Circuit's passing reference to a possible "work-around" that would allow some federal official (perhaps the Commission) to bring a condemnation action in a pipeline's stead—this reference was not "essential to the judgment," so issue preclusion does not apply.[93] Furthermore, PennEast's Answer points out that "[a] substantially identical petition could have been (and still could be) filed by any . . . other companies with a stake in these issues."[94] Denying the Petition on a strained preclusion theory would likely result in a subsequent duplicative agency proceeding,

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[90] *See, e.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (holding that "[litigants] who never appeared in a prior action—may not be collaterally estopped without litigating the issue"); *United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 173 (3d Cir. 2009) (noting that res judicata requires a showing that the prior suit involved "the same parties or their privies," while collateral estoppel requires a showing that "the party being precluded from relitigating the issue was fully represented in the prior action") (internal citations and quotation marks omitted).

[91] New Jersey Protest at 11.

[92] *Washington Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980); *see Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960).

[93] *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006) (quoting Restatement (Second) of Judgments § 27 (1982)).

[94] PennEast Answer at 20.

pointlessly elevating form over substance.[95] For this reason, we conclude that granting the Petition is appropriate.

23. Before we move to the merits of the Petition, we must clarify the extent of our authority. Numerous parties express concern about the Commission "attempt[ing] to overrule the Third Circuit."[96] It should go without saying that we can do no such thing. Nor are we attempting to "subvert the judicial process," as Niskanen suggests.[97] As a "creature of statute,"[98] the Commission—like any administrative agency—has no power to act "unless and until Congress confers power upon it."[99] We have no authority to "overrule" a precedential opinion of a

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[95] Here, for example, another certificate holder that has intervened in this proceeding is currently encountering similar obstacles in exercising eminent domain against the State of Maryland. *See infra* P 64.

[96] Riverkeeper Protest at 7; *see* New Jersey Protest at 3 ("FERC should not break procedures and misread the law to indulge PennEast's efforts to overrule that correct holding."); Rate Counsel Protest at 1 ("That decision [by the Third Circuit] is authoritative and binding as to PennEast, and the Commission cannot overrule it by declaration."); Niskanen First Protest at 6 ("[I]t is not within the Commission's power to upend a federal court's constitutional holding by issuing a declaratory order that purports to overrule that decision."); Letter from Tom Malinowski and Bonnie Watson Coleman, U.S. Representatives (Oct. 29, 2019) (agreeing with Rate Counsel that the Third Circuit's decision cannot be overruled by the Commission).

[97] Niskanen First Protest at 4.

[98] *Tesoro Alaska Co. v. FERC*, 778 F.3d 1034, 1038 (D.C. Cir. 2015) (citing *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (*Atl. City Elec.*)).

[99] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

United States Court of Appeals. PennEast refutes the notion that its Petition requests that the Commission overrule the Third Circuit; rather, PennEast states that its Petition serves to "allow the Commission to provide its considered interpretation of [s]ection 7(h) of the NGA, without negating the role of the Third Circuit."[100] Furthermore, this order does not incentivize forum shopping, as Environmental Defense Fund claimed,[101] because it does not provide an avenue by which losing parties can circumvent appellate courts: this order neither compels the Third Circuit to reverse its decision, nor compels New Jersey to consent to suit, nor compels any landowner to transfer its property. This order does nothing more than set out the Commission's interpretation of a statute it administers.

B. PennEast's Request for a Declaratory Order

24. In the Petition, PennEast requests the Commission's interpretation of NGA section 7(h).[102] As discussed below, we grant the Petition in part and deny it in part.

25. First, PennEast requests the Commission address whether a certificate holder's right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest.[103] We grant this request and find that NGA section 7(h) does not limit a certificate holder's right to exercise eminent domain

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[100] PennEast Answer at 32.

[101] Environmental Defense Fund Protest at 3.

[102] Petition at 2.

[103] *See id*.

authority over state-owned land.[104] The text of NGA section 7 is expansive and NGA section 7(h) contains no limiting language concerning state land;[105] the legislative history of NGA section 7(h) describes a specific intent to prevent states from conditioning or blocking the use of eminent domain by certificate holders;[106] and caselaw—including both federal precedent shortly after the statute's enactment[107] and the Commission's earliest hearing orders[108]—supports this view. Additionally, Congress's decision to amend an analogous statute to expressly carve out state lands, but not to similarly amend NGA section 7(h), indicates its understanding that the eminent domain authority exercised by certificate holders under NGA section 7 does, in fact, apply to state lands.[109]

26. Second, PennEast requests the Commission clarify to whom the federal government's eminent domain authority has been granted.[110] We grant this request and find that NGA section 7(h) delegates

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[104] *See infra* PP 28-48.

[105] *See* 15 U.S.C. § 717f(h).

[106] *See* S. Rep. No. 80-429, at 1-4 (1947).

[107] *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950) (*Thatcher*).

[108] *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, at 65,203-04 (1977) (*Tenneco Atlantic*) ("[T]the eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands."); *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. 810, 1454 (1977) (same).

[109] *See infra* note 170 (quoting Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992); H.R. Rep. No. 102-474, at 99 (1992)).

[110] *See* Petition at 2.

eminent domain authority solely to certificate holders and not to the Commission.[111] It is "beyond dispute" that the federal government has the constitutional power to acquire property by exercise of eminent domain.[112] The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of a certificate of public convenience and necessity, when needed to fulfill the certificate.[113] Critically, the Commission itself was never granted the authority to exercise eminent domain. Although we are responsible for the public convenience and necessity determination that then, by operation of law under a separate statutory provision, automatically confers federal eminent domain authority over a specified route to certificate holders,[114] we do not subsequently grant, exercise, or oversee the exercise of that eminent domain authority.[115]

27. Finally, PennEast requests the Commission address whether NGA section 7(h) necessarily

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[111] *See infra* PP 49-53.

[112] *Tenneco Atlantic*, 1 FERC at 65,203 (citing *United States v. Carmack*, 329 U.S. 230 (1946) (Carmack)); *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

[113] *Tenneco Atlantic*, 1 FERC at 65,203-04 & n.53 (citing *Thatcher*, 180 F.2d 644); *see also E. Tenn. Nat. Gas Co.*, 102 FERC ¶ 61,225, at P 68 (2003) (*East Tennessee*); *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at PP 128, 131 (2003) (*Islander East*).

[114] 15 U.S.C. § 717f(c).

[115] Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 (citing *Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250 at P 35); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018).

delegates the federal government's exemption from state sovereign immunity.[116] We agree that is how the statute reads and was intended to operate, but we deny PennEast's petition to the extent that it would require the Commission to evaluate the constitutional sufficiency of NGA section 7(h) for purposes of abrogating state sovereign immunity or delegating federal authority under the Eleventh Amendment.[117] Although the Commission typically refrains from opining on the constitutionality of the statutes it superintends,[118] we find it appropriate to address the necessity of broad eminent domain powers for the successful administration of the NGA's "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce."[119] To that end, we discuss the potential implications of

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[116] *See* Petition at 2.

[117] *See infra* PP 54-55.

[118] *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974) (explaining that administrative agencies "have neither the power nor the competence to pass on the constitutionality of administrative or legislative action," except when "called upon to determine facts or to apply its expertise") (quoting *Murray v. Vaughn*, 300 F.Supp. 688, 695 (D.R.I. 1969)); *see, e.g.*, *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984) ("[A]dministrative bodies like the Board do not have the authority to adjudicate the validity of legislation which they are charged with administering."); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976) (finding that the federal agency erred by making a constitutional determination); *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.").

[119] *Schneidewind*, 485 U.S. at 300; *see supra* note 77.

the Third Circuit's decision on the natural gas industry.[120]

1. NGA Section 7(h) Delegates the Authority to Certificate Holders to Condemn State Property

28. PennEast asserts that Congress possesses the authority both to condemn state property and to delegate that authority to private companies.[121] PennEast states that federal eminent domain authority has been accepted for well over a century and "does not depend on having the consent of the state in which the property is located."[122] To require a state's consent to the condemnation of its property pursuant to Congressional authority, effectively allowing a state to "block the federal government's use of eminent domain in furtherance of Congress's other constitutional authorities," would allow a state to render a "constitutional grant of authority . . . nugatory."[123]

29. This interpretation of the federal eminent domain scheme is consistent with longstanding Commission precedent holding that "it is beyond dispute" the federal government can acquire property through eminent domain and may delegate this authority to a certificate holder "when needed to fulfill the

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[120] *See infra* PP 56-65.

[121] Petition at 16-18.

[122] *Id.* at 16 (citing *Kohl v. United States*, 91 U.S. 367, 372 (1875) (*Kohl*)).

[123] *Id.* (citing *Kohl*, 91 U.S. at 371).

certificate."[124] The Third Circuit's opinion does not dispute this scheme.

30. Central to this grant of authority, PennEast asserts, is Congress's intent to "authorize certificate holders to condemn any necessary lands, including state-owned lands."[125] PennEast further suggests that as NGA section 7(h) contains no language limiting the type of property a certificate holder may acquire through the exercise of eminent domain, Congress intended to delegate to certificate holders the right to condemn state-owned land.[126] Riverkeeper argues that if Congress intended to prevent state sovereign immunity in terms of interstate natural gas pipelines, it could have done so when drafting the NGA.[127] Further, Riverkeeper contends that Congress did not delegate the federal government's eminent domain power to certificate holders.[128]

31. The Commission's principal obligation under the NGA is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[129] Specifically, the NGA provides the

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[124] *Infra* notes 146 and 147 (quoting precedent).

[125] Petition at 19.

[126] *Id.* at 20.

[127] Riverkeeper Protest at 10.

[128] *Id.* at 12.

[129] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (citing *NAACP v. Fed. Power Comm'n*, 425 U.S. at 669-70); *see, e.g.*, *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,743, 61,751 (1999) (Certificate Policy Statement), *clarified on*

Commission with jurisdiction over the "transportation of natural gas in interstate commerce . . . [and] the sale in interstate commerce of natural gas for resale."[130] In NGA section 7(c), Congress gave the Commission jurisdiction to determine whether the construction and operation of proposed pipeline facilities are in the public convenience and necessity.[131] Once the Commission has made that determination, NGA section 7(h) provides the certificate holder with eminent domain authority to acquire the land necessary to construct the approved facilities, in the event the certificate holder cannot acquire the land by other means.[132] Section 7(h) further states that when the value of the property to be condemned is greater than $3,000, the condemnation proceeding may be heard in United States district court.[133]

32. Based on the text of NGA section 7(h), and as confirmed by the legislative history, we believe it is evident that Congress, in delegating to certificate holders its power of eminent domain, provided broad eminent domain authority in order to achieve the objectives of the NGA without interference from states and to preserve the Commission's exclusive jurisdiction over the transportation and sale of natural gas for resale in interstate commerce.

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other grounds, 90 FERC ¶ 61,128, *further clarified on other grounds*, 92 FERC ¶ 61,094 (2000).

[130] 15 U.S.C. § 717(b) (2018).

[131] *Id.* § 717f(c).

[132] *Id.* § 717f(h).

[133] *Id.*

a. Statutory Text and Precedent

33. The "starting point for interpreting a statute is the language of the statute itself."[134] NGA section 7(h) provides, in its entirety, that:

> 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 pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-ofway, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner

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[134] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987).

> of the property to be condemned exceeds $3,000.[135]

34. Immediately apparent in the text of NGA section 7(h) is that it is the "holder of the certificate" that is granted the power of eminent domain. NGA section 7 establishes a multi-step process for pipeline companies seeking to acquire land via eminent domain.[136] NGA section 7(c) requires that the pipeline company first receive its certificate of public convenience and necessity from the Commission pursuant to its authority under NGA section 7(e). The pipeline company then must attempt to obtain land identified in the certificate as necessary for the project through purchase or contract.[137] If the certificate holder is still unable to obtain this land, NGA section 7(h) permits it to acquire the land necessary for the project by the exercise of eminent domain.[138] Critically, as PennEast notes, NGA section 7(h) contains no language limiting that exercise of eminent domain "based on the status of the property's owner."[139] And the Commission has previously rejected arguments to limit the exercise of eminent domain over state-owned property, relying on the broad and unqualified reference to "the necessary land or other property" in section 7(h).[140]

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[135] 15 U.S.C. § 717f(h).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Petition at 20.

[140] *Islander East*, 102 FERC ¶ 61,054 at P 131 ("[I]n NGA section 7(h), Congress gave the natural gas company authorization to

35. Judicial review of NGA section 7(h) shortly following its enactment supports this view. *Thatcher*,[141] decided in 1950, squarely confronted the constitutionality of the delegation of eminent domain authority to pipelines under NGA section 7(h), which was enacted three years earlier. *Thatcher* did not address the Eleventh Amendment, but resolved several other constitutional objections, including claims that NGA section 7(h) invaded authority reserved to the States under the Tenth Amendment.[142] As relevant here, *Thatcher* held:

> Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application the Act has received, leaves us in no doubt that the grant by Congress of the power of eminent domain to a natural gas company, within the terms of the Act, and which in all of its operations is subject to the conditions and restrictions of the statute, is clearly within the constitutional power of Congress to regulate interstate Commerce. Indeed when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas as provided by the Act of 1938 and the amendment of 1942, so that companies engaged in such business not only could not

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acquire the necessary land or property to construct the approved facilities by the exercise of eminent domain . . . ."); *East Tennessee*, 102 FERC ¶ 61,225 at P 68 (same).

[141] 180 F.2d at 646-47.

[142] *See id.* at 645.

> operate except under the authority provided by the statute, but could also be required to provide additions and extension of service, it was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, by the grant to such company of the right of eminent domain. The possession of this right could well be considered necessary to insure ability to comply with the Commission requirements as well as with all phases of the statutory scheme of regulation.
>
> There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign.[143]

This reasoning in *Thatcher* was followed in contemporaneous decisions of state courts[144] and federal courts[145] regarding the constitutionality of pipeline eminent domain authority.

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[143] *Id.* at 647 (listing Supreme Court precedent).

[144] *See Parkes v. Nat. Gas Pipe Line Co.*, 249 P.2d 462, 467 (Okla. 1952) ("The power of the United States to authorize the exercise of eminent domain within the limits of the several states is not limited to the taking of property by the government itself for its own proper uses, but includes the right to delegate the power of eminent domain to corporations . . . .").

[145] *See Williams v. Transcon. Gas Pipe Line Corp.*, 89 F. Supp. 485, 487 (W.D.S.C. 1950) ("Earlier decisions of the Supreme

36. And this Commission has uniformly held this view from its inception[146] through today.[147] One of the Commission's earliest hearing orders, *Tenneco Atlantic Pipeline Co.*, merits restatement because it squarely addressed the question presented here: "may the Congressional grant of eminent domain powers be exercised by a person holding a Commission certificate of public convenience and necessity to acquire a right-of-way through state lands?"[148] *Tenneco Atlantic* answered that question in the affirmative, finding that "the eminent domain grant to persons holding

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Court uphold the authority of Congress to grant eminent domain powers to private corporations in furtherance of interstate commerce."); *id.* at 489 ("[W]hen the Legislature provides for the taking of private property for a public use it may either prescribe specifically the property that may be taken, or delegate that determination to the agency, either public or private, which is charged with developing the public use.").

[146] *See Tenneco Atlantic*, 1 FERC at 65,203-04 ("It is beyond dispute that the federal government has the constitutional power to acquire state property by exercise of eminent domain. In addition, the federal government can delegate to a private party, such as the recipient of a Section 7 certificate, the power to exercise eminent domain when needed to fulfill the certificate.") (internal citations omitted).

[147] *See, e.g.*, *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100 at P 87 ("It is beyond dispute that the federal government has the constitutional power to acquire property by exercise of eminent domain. The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of an NGA section 7 certificate, when needed to fulfill the certificate[.]") (internal citations omitted); *Mountain Valley*, 163 FERC ¶ 61,197 at P 75 (same).

[148] *Tenneco Atlantic*, 1 FERC at 65,203.

Section 7 certificates applies equally to private and state lands" for the following reasons:[149]

> It is beyond dispute that the federal government has the constitutional power to acquire state property by exercise of eminent domain. In addition, the federal government can delegate to a private party, such as the recipient of a Section 7 certificate, the power to exercise eminent domain when needed to fulfill the certificate. At issue here is whether such a delegatee has lesser powers of eminent domain than does the delegator, the federal government.
>
> On its face, there is nothing in Section 7(h) that compels a reading of the language "owner of property" to exclude a state. On the contrary, although "owner of property" is not defined in Section 2 of the Natural Gas Act, it is reasonable to include a state within the plain meaning of that term, since states can own land. Looking behind the statutory language, there is no legislative history that warrants any other reading. The language of Section 7(h) indicates a Congressional grant of plenary eminent domain power to certificate holders, such a grant satisfying the dictum in [*United States v.*] *Carmack*, [] 329 U.S. [230,] at 243, n.13 [(1946)].
>
> While there are no judicial pronouncements resolving this question explicitly with respect to Section 7(h) of the Natural Gas Act,

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[149] *Id.*

> consideration of the analogue and predecessor of this provision under the Federal Power Act is instructive. Section 21 of the Federal Power Act is the model for Section 7(h) of the Natural Gas Act. The corresponding language relevant to this inquiry is identical, and accordingly it is proper to look to judicial decisions interpreting Section 21 to aid in the statutory construction of Section 7(h). When this is done, it is clear that Congress intended to grant recipients of Section 7 certificates the full powers of eminent domain. Specifically, hydroelectric project licensees under Part I of the Federal Power Act have eminent domain power under Section 21 to condemn state land.
>
> Thus, Rhode Island's assertion that a private party possessing eminent domain power conferred by a certificate pursuant to Section 7(h) cannot prevail against a state's ownership interest must be rejected.[150]

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[150] *Id.* at 65,203-04 (footnotes citing supporting authority omitted). The passage from *Tenneco Atlantic* replicated here was itself borrowed nearly verbatim from the Federal Power Commission's formal *Recommendation to the President* regarding the administration of Alaska Natural Gas Transportation System, *supra* note 108. The passage from *Carmack* addressed in *Tenneco Atlantic* and in *Recommendation to the President* describes the distinction between statutes that "authorize *officials* to exercise the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, *such as public utilities*, a right to exercise the power of eminent domain on behalf of themselves." *Carmack*, 329 U.S. at 243 n.13 (emphasis added). The Supreme Court explained that statutes in

37. We continue to think that *Tenneco Atlantic* was correctly decided as a matter of *statutory* interpretation. As elucidated throughout this order, this view is supported by the text and legislative history of the amendment, contemporaneous precedent, and analysis of an analogous provision under the FPA. However, whether the text, context, and legislative history of NGA section 7(h) are sufficient to meet *constitutional* requirements for purposes of the Eleventh Amendment is a question that is beyond the scope of this order.[151]

38. More recently, in 2003, the Commission addressed Eleventh Amendment claims to certificate proceedings in *Islander East*,[152] which found the

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that second category—in which NGA section 7(h) appears to fall—"are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or *necessarily implied*, especially against others exercising equal or greater public powers. In such cases the absence of an *express grant of superiority* over conflicting public uses reflects an absence of such superiority." *Id.* (emphasis added). Thus, when the decision in *Tenneco Atlantic* states that it "satisf[ied] the dictum in *Carmack*," 1 FERC at 65,204, it meant the delegation to certificate holders to condemn state land was either "necessarily implied," or reflected "an express grant of superiority," or both. We think both elements were satisfied because the authority to condemn state land is necessary to effectuate the express purposes of Congress in granting the Commission exclusive authority to regulate the transportation and sale of natural gas in interstate commerce under 15 U.S.C. § 717(b), including the authority to issue certificates of public convenience and necessity under 15 U.S.C. § 717f.

[151] *See supra* P 27; *infra* P 55.

[152] 102 FERC ¶ 61,054 at P 123 ("The NGA does not address 'any suit in law or equity' against a state. Therefore, the application of the Eleventh Amendment and the Court's ruling in *Seminole*

Eleventh Amendment did not apply to NGA section 7(h) eminent domain proceedings because condemnation actions do not constitute "any suit in law or equity" under the Eleventh Amendment.[153] The Third Circuit criticized the Commission's holding in *Islander East* as insufficiently supported,[154] and we agree that decision was terse. That does not, however, obviate the validity of that final holding. PennEast argues that *Islander East* was correctly decided, citing Supreme Court authority for the proposition that the Eleventh Amendment does not bar certain types of *in rem* suits against property in which a state has an interest.[155] The Third Circuit found those cases "are confined—by their terms—to the specialized areas of bankruptcy and admiralty law"[156] and contrasted

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Tribe has no significance here."). The Commission emphasized the preemptive sweep of the NGA as a "comprehensive scheme of federal regulation," *id.* (quoting *Schneidewind*, 485 U.S. at 300-01), and denied Connecticut's Tenth Amendment arguments for the same reason. *See id.* P 131. A month later, in *East Tennessee*, the Commission similarly denied a claim that the Tenth Amendment bars a certificate holder from acquiring state-owned land under NGA section 7(h). 102 FERC ¶ 61,225 at P 68.

[153] *Islander East*, 102 FERC ¶ 61,054 at P 123.

[154] *In re PennEast*, 938 F.3d at 111 n.19.

[155] *See* Petition at 37-44 (citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004) ("[C]onclud[ing] that a proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment[.]"); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 494-95 (1998) ("We conclude that the Eleventh Amendment does not bar jurisdiction of a federal court over an *in rem* admiralty action where the *res* is not within the State's possession.")).

[156] *In re PennEast*, 938 F.3d at 110.

authority holding "that sovereigns can assert their immunity in *in rem* proceedings in which they own property."[157] In the Third Circuit's view, such specialized precedent was unable to overcome "the general rule" that "[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."[158]

39. The question whether an eminent domain proceeding to effectuate a Commission certificate under NGA section 7(h) is properly characterized as a "suit in law or equity" or an *in rem* action for purposes of the Eleventh Amendment is outside the heartland of our quotidian ambit. It involves esoteric matters of constitutional law better suited for review by the Supreme Court on certiorari from the Third Circuit. We decline to umpire that particular dispute unless we must and—unlike the contested certificate proceeding in *Islander East*—we are not obliged to address that distinction again in response to this discretionary petition for declaratory order.[159] Our prior decision in *Islander East*, like our decisions in

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[157] *Id.* (citing *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality)); *id.* at 110-11 n.17 (citing *Aqua Log, Inc. v. Georgia*, 594 F.3d 1330, 1334 (11th Cir. 2010)).

[158] *Id.* at 110 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 289, (1997) (O'Connor, J., concurring)); *see id.* at 111 n.18 (examining *Coeur d'Alene*).

[159] *See* 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2); *see, e.g.*, *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at P 35 (2013) ("Section 554(e) of the Administrative Procedure Act and section 207(a)(2) of the Commission's Rules of Practice and Procedure provide us the authority and discretion to rule on a petition for declaratory order . . . .").

East Tennessee and *Tenneco Atlantic*, was grounded in the view that it would defeat the core purposes of the NGA if states were able to nullify a Commission certificate of public convenience and necessity that affects state land by simply refusing to participate in an eminent domain proceeding brought to effectuate that federal certificate.[160] We continue to adhere to that position now—and, as we next explain, that position is entirely consistent with the legislative history of NGA section 7(h) and with Supreme Court precedent construing the original text of FPA section 21, which is materially identical to NGA section 7(h).

b. Legislative History

40. The language of NGA section 7(h) is expansive. This is consistent with the legislative history which indicates that the absence of limiting language regarding state land was not an oversight; rather, in amending the NGA to include section 7(h), Congress purposely delegated its eminent domain authority to certificate holders to prevent states from nullifying the effect of Commission certificate orders. The Senate Report for NGA section 7(h) is reproduced, in relevant part, below.

> This bill follows substantially the wording of the eminent domain provision of the Federal Power Act (U.S.C.A., title 16, sec. 814) which

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[160] *See supra* notes 150, 152, and accompanying text. We note that neither *Coeur d'Alene* nor any of the other cases the Third Circuit addressed in connection with the *in rem* issue, including the cases cited by PennEast, appears to involve a condemnation action to enforce compliance with a federal agency order. The authorities construing FPA section 21, by contrast, are more directly on point. *See infra* PP 45-47.

confers upon concerns that have acquired licenses from the Federal Power Commission to operate certain power projects, the right to condemn the necessary property for the location and operation of the projects. When the Congress passed the Natural Gas Act, it failed to include a similar provision of eminent domain to those concerns which qualified as natural gas companies under the act and obtained certificates of public convenience and necessity for the acquisition, construction, or operation of natural gas pipe lines.

....

Thus, an interstate natural gas pipe line which is constructed across several States for the purpose of distributing natural gas in a particular area authorized by the Federal Power Commission and which does not distribute natural gas in each of the States crossed, would not have the right of eminent domain under the constitutions and statutes of such States authorizing the taking of property for a public use. The operation of the pipe line would not be for the benefit of the public in those States crossed by the pipe line but in which there is no distribution of natural gas by such line. But it is necessary to cross those States in carrying out the certificate granted by the Federal Power Commission.

....

Therefore, the Congress of the United States in carrying out its constitutional authority to regulate interstate commerce, should correct this deficiency and omission in the Natural Gas Act by the passage of Senate bill 1028 which confers the right of eminent domain upon those natural gas companies which have qualified under the Natural Gas Act to carry out and perform the terms of any certificate of public convenience and necessity acquired from the Federal Power Commission under the act.

....

It has also been suggested that the granting of the right of eminent domain is a matter peculiarly within the legislative and constitutional purview of the States and that it is proper that such rights should rest with the States in order that the States may therefore be in a position to require a natural-gas pipe-line company entering the State to serve the people of that State as a condition to obtaining the right of eminent domain. This argument defeats the very objectives of the Natural Gas Act. Under the Natural Gas Act, the Federal Power Commission is given exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and natural-gas companies engaged in such transportation or

> sale. The Commission, through its certificate power, is authorized to grant certificates of convenience and necessity for the construction of interstate natural-gas pipe lines from points of supply to certain defined and limited markets. If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.[161]

41. As indicated above, the Senate Report squarely acknowledged objections to the adoption of NGA section 7(h) on the ground "that the granting of the right of eminent domain is a matter peculiarly within the legislative and constitutional purview of the States."[162] Nevertheless, the Senate Report concluded that it would "defeat[] the very objectives of the Natural Gas Act,"[163] including the Commission's "exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce,"[164] if states were permitted to "nullif[y]"[165] the Commission's certificate orders by conditioning or withholding a pipeline's exercise of the right of eminent domain over land located in such states. In light of the purpose given for enacting NGA section 7(h), it is reasonable to interpret the absence of limitation in that provision as

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[161] S. Rep. No. 80-429, at 1-4.

[162] *Id.* at 3.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 4.

authorization for a certificate holder to condemn state land when necessary "to carry out and perform the terms of *any* certificate of public convenience and necessity acquired from the [] Commission under the act."[166]

c. FPA section 21

42. Precedent construing FPA section 21 further strengthens our view that Congress provided the right of eminent domain under NGA section 7(h) so as to prevent states from interfering with the Commission's regulation of interstate natural gas facilities. As noted in the Senate Report[167] and in the Petition,[168] FPA section 21 served as the model for NGA section 7(h). FPA section 21 provides eminent domain authority to a licensee for a Commission-approved hydroelectric project for lands necessary to project "construction, maintenance, or operation."[169]

43. In the Energy Policy Act of 1992, Congress amended FPA section 21 to restrict a licensee's ability to exercise eminent domain to acquire state-owned lands.[170] While Congress also amended parts of the

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[166] *Id.* at 3 (emphasis added).

[167] *Id.* at 1.

[168] Petition at 23.

[169] 16 U.S.C. § 814 (2018).

[170] *See* Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992) (limiting the ability of a hydroelectric licensee to use "the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law."); *see also* H.R. Rep. No. 102-474, at 99 (noting that

NGA, it left section 7(h) unchanged. Notably, NGA section 7(h) was drafted to "follow[] substantially" the *unamended* version of the eminent domain provision of section 21 of the FPA.[171] And though the Third Circuit relied on "context" to dispute the lack of similar language in the NGA and the FPA—i.e., the fact that the FPA was amended after *Union Gas*[172] permitted Congress to abrogate state sovereign immunity under the Commerce Clause, but before the Supreme Court overruled *Union Gas*[173]—we note that the legislative history of the Energy Policy Act of 1992 makes no reference to the status of Supreme Court precedent on state sovereign immunity. In any event, the "best evidence of Congress's intent is the text of the statute,"[174] and we rely on the text that Congress ultimately chose (or did not choose) for the same right in two analogous statutes administered by the same

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the pre-amendment "current law" under FPA section 21 of the power of eminent domain conferred by a FERC hydropower license included "the power to condemn lands owned by States or local levels of government").

[171] S. Rep. No. 80-429, at 1.

[172] *Union Gas Co.*, 491 U.S. 1, *overruled by Seminole Tribe of Fla.*, 517 U.S. at 66.

[173] *See In re PennEast*, 938 F.3d at 112 n.20.

[174] *United States v. Schneider*, 14 F.3d 876, 879 (3d Cir. 1994).

agency.[175] Therefore, we agree with PennEast[176] that the congressional choice to restrict private licensees' eminent-domain authority under FPA section 21—but not private certificate holders' authority under NGA section 7(h)—shows that Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21.[177]

44. Riverkeeper emphasizes that the Third Circuit rejected arguments suggesting that because Congress amended the FPA, but chose not to amend the NGA, that Congress intended to allow the exercise of eminent domain over state-owned lands pursuant to the NGA.[178] Riverkeeper asserts that if Congress intended to remove a state's sovereign immunity in relation to interstate natural gas pipelines, it could have done so when drafting the language of the NGA,

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[175] *See Hughes*, 136 S. Ct. at 1298 n.10 (recognizing that relevant provisions of the FPA and the NGA are "analogous"); *Lafferty v. St. Riel*, 495 F.3d 72, 81-82 (3d Cir. 2007) (describing "the common canon of statutory construction that similar statutes are to be construed similarly"); *Ky. Utils. Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985) ("It is, of course, well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed *in pari materia*.").

[176] *See* Petition at 22 & n.35 (observing that, where Congress intends to restrict a delegation of its eminent domain authority to exclude state-owned lands, "it has done so expressly").

[177] *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[178] Riverkeeper Protest at 11.

but it did not.[179] Specifically, Riverkeeper takes issue with the "imput[ation] [of] congressional intent and interpretation from one law to another because Congress amended the language of one law and not the other."[180] We disagree and find the eminent domain provisions of FPA section 21 (as it read prior to 1992) and NGA section 7(h) should be read *in pari materia*.[181]

45. The relationship between these two statutes is critical because, while the Supreme Court has not addressed the scope of a pipeline's delegated authority under NGA section 7(h), the Supreme Court's decision in *City of Tacoma v. Taxpayers of Tacoma*[182] directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21.[183] The Supreme Court

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[179] *Id.* at 10.

[180] *Id.* at 11.

[181] The Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10 (citation omitted) (recognizing provisions of the FPA and NGA to be "analogous"); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (following its "established practice of citing interchangeably decisions interpreting the pertinent sections of the [FPA and NGA]" due to the relevant provisions being "substantially identical") (citations omitted).

[182] 357 U.S. 320 (1958) (*City of Tacoma*).

[183] *See id.* at 323 ("The question presented for decision here is whether under the facts of this case the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued to the City under the Federal Power Act and more particularly [§] 21 thereof."); *id.* at 333 ("We come now to the core of the controversy between the parties, namely, whether the

answered that question in the affirmative, finding that "the very issue upon which respondents stand here [in *City of Tacoma*] was raised and litigated in the Court of Appeals [in *Washington Department of Game*[184]] and decided by its judgment."[185] *City of Tacoma* emphasized that Congress intended to commit all questions associated with the issuance of a license—including the legal competence of the licensee to condemn state land—to the Commission alone, with judicial review of the Commission's orders to take place exclusively in the relevant court of appeals or, following such direct review, in the Supreme Court:

> Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, *and to the legal competence of the licensee to execute its terms*, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final,' subject to review by this Court upon certiorari or certification. Such

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license issued by the Commission under the Federal Power Act to the City of Tacoma gave it capacity to act under that federal license in constructing the project and delegated to it federal eminent domain power to take upon the payment of just compensation, the State's fish hatchery—essential to the construction of the project—in the absence of state legislation specifically conferring such authority.").

[184] *State of Wash. Dep't of Game v. Fed. Power Comm'n*, 207 F.2d 391 (9th Cir. 1953) (*Washington Department of Game*).

[185] *City of Tacoma*, 357 U.S. at 339.

> statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts.[186]

46. *City of Tacoma* carefully examined the Ninth Circuit's decision in *Washington Department of Game* that reviewed the Commission's licensing orders and rejected Washington's contentions "that the City does not have 'any right to take or destroy property of the State' and 'cannot act' in accordance with the terms of its federal license."[187] Thus, the Supreme Court found that the Ninth Circuit had already decided "the very issue" raised by Washington in *City of Tacoma*.[188] Rejecting Washington's claim that the Ninth Circuit had not actually decided that an FPA section 21 licensee can condemn state land, the Supreme Court admonished that "it cannot be doubted that [question] could and should have been [raised in the Ninth Circuit], for that was the court to which Congress had given 'exclusive jurisdiction to affirm, modify, or set aside' the Commission's order[,]"[189] adding that "the State may not reserve the point, for another round of piecemeal litigation . . . ."[190]

47. *City of Tacoma* and *Washington Department of Game* relied heavily on the Supreme Court's earlier

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[186] *Id.* at 336-37 (quoting FPA section 313, 16 U.S.C. § 825*l*(b)).

[187] *City of Tacoma*, 357 U.S. at 338 (quoting *Wash. Dep't. of Game*, 207 F.2d at 396).

[188] *Id.* at 339.

[189] *Id.*

[190] *Id.*

decision in *First Iowa Hydro-Electric. Co-op.*,[191] issued a year before NGA section 7(h) was enacted, which held that states may not assert "veto power" over a Commission-licensed hydroelectric project by purporting to require receipt of a state permit "as a condition precedent to securing a federal license for the same project under the Federal Power Act."[192] That was impermissible because "[s]uch a veto power easily could destroy the effectiveness of the federal act" since it "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the [] Commission or other representatives of the Federal Government."[193] It does not appear that the Eleventh

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[191] *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152 (1946) (*First Iowa*).

[192] *Id.* at 164.

[193] *Id.* The Court emphasized that the FPA "was a major undertaking involving a major change of national policy" and "[t]hat it was the intention of Congress to secure a comprehensive development of national resources" such that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 180-81. *City of Tacoma* summarized *First Iowa* as holding that "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam." *City of* Tacoma, 357 U.S. at 339 (quoting *Wash. Dep't. of Game*, 207 F.2d at 396). The Court's emphasis on the effectiveness of federal hydroelectric licenses against state resistance was reiterated in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), which explained:

> To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision. . . . No such duplication of authority is called for by the Act. The Court of Appeals in the

Amendment was raised in *City of Tacoma* or *Washington Department of Game*. However, given the Supreme Court's acceptance of the proposition that licensees must be able to condemn state land in order to make federal licensing jurisdiction fully effective under the original text of FPA section 21, it is difficult to conceive that the Supreme Court would reach a contrary conclusion when evaluating the materially identical eminent domain provision in NGA section 7(h). In all events, *City of Tacoma* does not convey any sense of alarm that FPA section 21, in its original unconstrained form, would "upend a fundamental aspect of our constitutional design."[194]

48. In sum, we think it is evident that NGA section 7(h) was enacted by Congress to enable certificate holders to overcome attempts by states to block the construction of natural gas facilities the Commission

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> instant case agrees. . . . And see *State of Washington Department of Game v. Federal Power Commission*, ... Authorization of this project, therefore, is within the exclusive jurisdiction of the [] Commission, unless that jurisdiction is modified by other federal legislation.

Id. at 445-46 (footnotes and citations omitted); *cf. Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19, 120 (1960) (holding that 25 U.S.C. § 177, which prevents "conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians . . . unless the same be made by treaty or convention entered into pursuant to the Constitution," did not prevent New York from condemning tribal land under a Commission hydroelectric license because "§ 177 is not applicable to the sovereign United States nor, hence, to its licensees *to whom Congress has delegated federal eminent domain powers* under § 21 of the Federal Power Act.") (emphasis added).

[194] *In re PennEast*, 938 F.3d at 112.

determined to be in the public convenience and necessity. In our view, the broad language of NGA section 7(h) was intended to provide certificate holders with expansive eminent domain authority to acquire land owned by private parties or by states.

2. NGA Section 7(h) Delegates its Eminent Domain Authority Only to Certificate Holders, Not the Commission

49. PennEast disputes the Third Circuit's opinion that the NGA provides a "workaround" where, in the absence of authority for a certificate holder to commence eminent domain proceedings for state property in federal court, an "accountable federal official" could "file condemnation actions and then transfer property interests to the private pipeline developer."[195] PennEast seeks the Commission's opinion on whether Congress, through NGA section 7(h), delegated eminent domain authority specifically to certificate holders, or whether NGA section 7(h) authorizes the Commission (or any other federal agency or official) to exercise eminent domain.[196] Riverkeeper argues that, according to the Third Circuit and the plain language of the NGA, Congress did not intend to delegate the federal government's eminent domain power to certificate holders.[197]

50. The Supreme Court has confirmed, in no uncertain terms, that "an agency literally has no power to act . . . unless and until Congress confers

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[195] Petition at 9 (citing *In re PennEast*, 938 F.3d at 113).

[196] *Id.* at 25-26.

[197] Riverkeeper Protest at 11-12.

power upon it."[198] As a federal agency, the Commission "is a creature of statute, and 'if there is no statute conferring authority, FERC has none.'"[199] NGA section 7(h) states, in pertinent part, that "[w]hen any *holder of a certificate of public convenience and necessity* cannot acquire by contract, or is unable to agree with the owner of property . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts."[200] By its plain terms, NGA section 7(h) confers authority to exercise eminent domain to certificate holders alone. And because neither NGA section 7(h) nor any other provision of the NGA authorizes the Commission to exercise eminent domain, the Commission lacks statutory authority to do so. Riverkeeper and Homeowners Against Land Taking –PennEast, Inc. (HALT) concede that the Commission has previously found that it has no role in eminent domain proceedings that result from the issuance of a certificate and that it is not involved in the acquisition of property rights through those proceedings.[201]

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[198] *La. Pub. Serv. Comm'n*, 476 U.S. at 374.

[199] *Tesoro Alaska Co.*, 778 F.3d at 1038 (citing *Atl. City Elec.*, 295 F.3d at 8); *see also Nat. Res. Def. Council v. Nat'l. Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) ("[A]n agency may only act within the authority granted to it by statute.").

[200] 15 U.S.C. § 717f(h) (emphasis added).

[201] *See* Riverkeeper Protest at 3 (citing Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33); HALT Motion to Intervene at 1; s*ee also, e.g.*, Certificate Rehearing Order, 164 FERC ¶ 61,098 at P 33 ("The Commission does not have the authority

51. Nor does the legislative history of NGA section 7(h) suggest that Congress sought to empower the Commission to bring condemnation actions in state or federal court. In first presenting what would become NGA section 7(h) to the House Committee on Interstate and Foreign Commerce in 1947, Representative Schwabe stated in a memorandum to the Committee that as Congress had "invoked its constitutional authority to regulate interstate commerce" via the NGA, Congress should then protect this commerce by conferring "the right of eminent domain upon those natural-gas companies" that have received a certificate from the Commission.[202] Statements in the House committee hearings, both from industry[203] and Congressional representatives,[204] reiterated that certificate

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to limit a pipeline company's use of eminent domain once the company has received its certificate of public convenience and necessity.").

[202] *Amendments to the Natural Gas Act: Hearing on H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce*, 80th Cong. 380 (1947) (memorandum of Rep. Schwabe, Member, H. Comm. on Interstate and Foreign Commerce).

[203] *See*, *e.g.*, *id.* at 609 (statement of John M. Crimmins, representing Koppers Co., Inc.) (referring to the proposed amendment to the NGA as "a change in the act to give natural-gas pipe-line companies the right of eminent domain."); *id*. at 541 (statement of David T. Searls, representing Texas Eastern Transmission Corp.) (noting that this amendment would cure the government's "fail[ure] to provide a similar right of eminent domain" in the NGA as in the FPA).

[204] *See id.* at 613 (statement of Rep. Carson, Member, H. Comm. on Interstate and Foreign Commerce) (stating his belief that "we should do something to give the gas companies [eminent domain].").

holders—not the Commission—would hold the power of eminent domain granted under NGA section 7(h). And, as referenced above, the Senate Report for section 7(h) identified the purpose of the amendment as "confer[ring] the right of eminent domain upon those *natural gas companies* which have qualified under the Natural Gas Act to carry out and perform the terms of any certificate of public convenience and necessity acquired from the [Commission] under the act.[205] Notably, at no point did Congress consider conferring eminent domain under NGA section 7(h), or any other section of the NGA, on the Commission.

52. Beyond the question *whether* the agency has statutory authority to exercise the right of eminent domain, there remains the question, practically speaking, *how* the Commission could wield any such authority. PennEast adds that the NGA "is silent about numerous important considerations that would need to be addressed were the Commission to bring a condemnation action . . . ."[206] Such important considerations include how the Commission would pay just compensation in the absence of an appropriation to do so, and the process of transferring the property from the Commission to the pipeline.[207] We need not address such practical considerations because, as noted above, the NGA does not grant the Commission any authority to bring condemnation actions or transfer land condemned pursuant to a section 7

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[205] S. Rep. No. 80-429, at 3 (emphasis added).

[206] Petition at 25.

[207] *Id.*

certificate of public convenience and necessity to another party.[208]

53. Although NGA section 7(h) requires the Commission's determination as to which land may be condemned for the public convenience and necessity, it delegates eminent domain authority solely to certificate holders and confers no such authority upon the Commission. As a result, contrary to the opinion of the Third Circuit, we conclude that the NGA does not authorize a "work-around" that enables the Commission, rather than private pipeline companies, to acquire state-owned property through the exercise of eminent domain.

3. This Commission Lacks Authority to Determine the Constitutionality of Congress's Delegation of the Federal Exemption from State Sovereign Immunity to Certificate Holders under NGA Section 7(h)

54. PennEast states that Congress, in delegating eminent domain authority to certificate holders, necessarily delegated the federal government's exemption from a state's claim of sovereign immunity pursuant to the Eleventh Amendment.[209] PennEast further suggests that, contrary to the doubts raised by the Third Circuit, this delegation of the federal government's exemption from state sovereign

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[208] *See supra* P 50.

[209] Petition at 27-33.

immunity claims raises "no constitutional difficulty."[210]

55. While we find that a certificate holder's ability to condemn state land when necessary to fulfill the certificate is a necessary and essential part of the Commission's administration of the NGA,[211] we deny PennEast's request to address the constitutional sufficiency of that delegation in the context of this discretionary declaratory order. Justice Harlan famously admonished that "[a]djudication of the constitutionality of congressional enactments . . . [is] beyond the jurisdiction of administrative agencies."[212] The federal courts of appeals have confirmed this basic constraint in most circumstances[213] and the Commission typically avoids opining on constitutional matters unless they are necessary to a particular

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[210] *Id.* at 33-34.

[211] *See supra* notes 143 (quoting *Thatcher*), 150 (quoting *Tenneco Atlantic* and describing the discussion of *Carmack* therein), 160 (describing the Commission's rationale in *Islander East*, *East Tennessee*, and *Tenneco Atlantic*), and 193 (discussing the Supreme Court's interpretation of FPA section 21).

[212] *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *see also Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding . . . whether the action of the branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Pub. Utils. Comm'n of State of Cal. v. United States*, 355 U.S. 534, 540 (1958) ("[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.").

[213] *See supra* note 118.

decision.[214] Therefore, it would be inappropriate for the Commission to purport to decide certain constitutional questions implicated by the instant Petition. These questions include: whether a condemnation action under NGA section 7(h) is a suit in law or equity as those terms are used in the Eleventh Amendment; whether Congress's delegation to certificate holders concerning condemnation of all "necessary" land was sufficient to overcome state immunity under the Eleventh Amendment; and whether Congress's delegation to certificate holders of the federal exemption from Eleventh Amendment immunity is a constitutionally permissible exercise of Congressional authority under the Commerce Clause. Accordingly, we decline to provide an opinion on those questions.

C. Implications of the Third Circuit's Decision

56. While we decline to reach the constitutional validity of Congress's delegation of eminent domain to condemn state land under NGA section 7(h), the implications of the Third Circuit's opinion merit discussion here. The Third Circuit acknowledged that its holding "may disrupt how the natural gas industry,

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[214] *See Tenneco Atlantic*, 1 FERC at 65,203-04 & n.53 (citing *Thatcher*, 180 F.2d 644); *East Tennessee*, 102 FERC ¶ 61,225 at P 68; *Islander East*, 102 FERC ¶ 61,054 at PP 128, 131. As a general matter, reasoned decisionmaking under the Administrative Procedure Act requires the Commission to "answer[] objections that on their face seem legitimate." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001))).

which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates."[215] That is correct.[216] If the Third Circuit's opinion stands, we believe it would have profoundly adverse impacts on the development of the nation's interstate natural gas transportation system, and will significantly undermine how the natural gas transportation industry has operated for decades.

57. The NGA provides that, upon a determination by the Commission that a natural gas transportation project is required by the public convenience and necessity, the certificate holder shall have the authority to acquire "the necessary right-of-way to construct, operate, and maintain" the project.[217] This is a "necessary tool[] to make effective the orders and certificates of the Commission."[218]

58. The Third Circuit's decision will substantially impair full application of the NGA, including NGA section 7(h), as well as impair Congress's intent in providing certificate holders with this vital tool because it would allow states to nullify the effect of Commission orders affecting state land—and, apparently, private land in which the state has an interest—through the simple expedient of declining to participate in an eminent domain proceeding brought

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[215] *In re PennEast*, 938 F.3d at 113.

[216] *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (agreeing "that the French Revolution 'modified' the status of the French nobility").

[217] 15 U.S.C. § 717f(h); *see also supra* PP 25-26.

[218] *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947) (statement of Sen. Moore).

to effectuate a Commission certificate. It would likewise impair the NGA's superordinate goal of ensuring the public has access to reliable, affordable supplies of natural gas.[219] As stated above, the Commission has no statutory authority or mechanism by which to condemn property and transfer it to certificate holders.[220] As a result of the Third Circuit's decision, states would be free to block natural gas infrastructure projects that cross state lands by refusing to grant easements for the construction and operation of the projects on land for which the state has a possessory interest, regardless of any Commission finding that a particular project is in the public interest under the NGA.[221] Preventing land

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[219] *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004) ("Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices."); *see NAACP v. Fed. Power Comm'n*, 425 U.S. 669-70 (recognizing that "the principal purpose of . . . [the NGA is] to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices"); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70). *See generally El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133, at PP 32-39 (2019) (McNamee, Comm'r, concurring) (detailing the evolution of "enacted . . . legislation promoting the development and use of natural gas"); *id.* at P 24 ("Each of these textual provisions [in NGA section 7] illuminate the ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.").

[220] *See supra* PP 49-53.

[221] We note that the court's interpretation would permit states to block construction both on land a state owns (e.g., along or across all state roads and the bottoms of navigable water bodies), and on land over which the state asserts some lesser property

owners and states from impeding interstate natural gas transportation projects was an explicit objective of Congress in amending the NGA to include section 7(h).[222] Thus, the Third Circuit's opinion casts serious doubt on the effectiveness of the Commission's certificates of public convenience and necessity and the Commission's ability to satisfy its statutory NGA mandate.

59. Riverkeeper disagrees that *In re PennEast* undermines the Commission's administration of the NGA, stating that the decision provides for consistency with the Constitution and preserves the sovereign rights of states.[223] Relying heavily on the questionable federal work-around discussed above,[224] New Jersey similarly contends that PennEast "overstates the purported consequences of that decision."[225] However, several commenters, including interstate pipeline companies, natural gas utilities, and nongovernmental organizations, as well as the petitioner, raise concerns about the ramifications of

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interests (e.g., conservation easements). If state-owned lands are treated as impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact. If lands over which a state has asserted any property interest also become impassable barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the purpose of NGA section 7(h).

[222] *See supra* PP 28-48.

[223] Riverkeeper Protest at 6.

[224] *See supra* PP 49-53.

[225] New Jersey Protest at 19, 23-24.

the Third Circuit's opinion. PennEast and INGAA[226] comment on the "immediate chilling effect" the Third Circuit's opinion would have on the development of interstate natural gas infrastructure by providing states with a mechanism by which they could nullify a certificate of public convenience and necessity.[227]

60. PennEast notes that New Jersey claims possessory interests in approximately 15 percent of the land in the state.[228] Even if a pipeline route were designed specifically to avoid state lands, PennEast states that property owners could simply grant conservation easements or other non-possessory property interests to states or their agencies with the aim of vetoing or re-routing pipelines.[229] INGAA echoes these concerns, alleging that a certificate holder could "be stuck in a never-ending loop requiring endless reroutes to avoid properties in which the state had no interest when FERC was reviewing the proposal."[230]

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[226] INGAA is a trade association advocating regulatory and legislative positions of the vast majority of the interstate natural gas pipeline companies in the U.S.

[227] Petition at 15; *see* INGAA Comments at 11.

[228] Petition at 12 ("New Jersey currently claims a property interest in more than 1,300 square miles pursuant to its Green Acres and farmland programs. This amount represents more than 15 percent of the 8,729 square miles of land in New Jersey. That figure does not include lands owned in fee by [New Jersey], such as state forests, state parks, and the bottoms of all navigable waterbodies[.]") (citations omitted).

[229] *Id.* at 9.

[230] INGAA Comments at 13.

61. In contrast, Watershed Institute disputes the concern that property owners could grant conservation easements to states in an attempt to block a pipeline, stating that the process of obtaining and undoing a conservation easement in New Jersey is "extremely burdensome and can only occur under limited circumstances."[231] As we discuss below, however,[232] the impacts of the Third Circuit's decision are not limited to New Jersey, which has already proposed new legislation for the purpose of blocking natural gas pipelines.[233] Accordingly, for the Commission to faithfully administer the NGA, it cannot rely on states being measured in granting conservation easements.

62. INGAA further comments that the uncertainty created by the Third Circuit's decision will exacerbate the risk associated with constructing and operating interstate natural gas facilities, thereby raising the

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[231] Watershed Institute Motion to Intervene at 2.

[232] *See infra* P 64.

[233] *See, e.g.*, *Restricts use of eminent domain by private pipeline companies to those demonstrating pipeline is in the public interest and that agree to certain regulation by BPU*, A.B. 2944, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Restricts use of eminent domain by private pipeline companies to those demonstrating pipeline is in the public interest and that agree to certain regulation by BPU*, S.B. 799, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Prevents use of condemnation to acquire residential and other private property under redevelopment laws*, S.B. 302, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Prevents use of condemnation to acquire residential and other private property under redevelopment laws*, A.B. 947, 218th Leg., 1st Ann. Sess. (N.J. 2018); *Proposes constitutional amendment to restrict use of condemnation power against non-blighted property for private economic development purposes*, A.C.R. 27, 218th Leg., 1st Ann. Sess. (N.J. 2018).

cost of financing the projects.[234] INGAA states that the veto power the Third Circuit's opinion would afford states would expand the risk associated with projects "exponentially," as being granted a certificate of public convenience and necessity from the Commission would no longer provide assurance that the approved route is "truly final."[235] As a result of this higher level of risk and uncertainty, "investors will either increase the interest rate at which they are willing to lend capital or will simply choose to invest elsewhere."[236] This would result in either increased costs for natural gas consumers or greater supply constraints as a result of a pipeline's inability to secure capital for construction.[237]

63. Other commenters raise concerns about the impact of the Third Circuit's decision on local distribution companies (LDCs) and, ultimately, consumers. The APGA[238] states that the court's decision will prevent LDCs from securing additional transportation capacity or benefiting from new areas of natural gas supply.[239] The AGA[240] comments that LDCs, as state-regulated utilities, have an "obligation

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[234] INGAA Comments at 11.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] The APGA is an association representing over 730 publicly owned natural gas distribution systems across thirty-seven states.

[239] *See* APGA Comments at 3.

[240] The AGA represents over 200 natural gas utilities, which together deliver natural gas to approximately 95 percent of the nation's natural gas customers.

to provide natural gas service to retail customers" and that the Third Circuit's decision will jeopardize LDCs' ability to meet this obligation.[241] According to the AGA, "utilities develop and implement detailed long-term supply plans" to ensure the needs of consumers are met, and utilities enter into transportation agreements in order to "have natural gas supplies available . . . . to respond to current and future customer demands and to meet operational needs."[242] New Jersey Natural Gas Company, a regulated New Jersey natural gas distribution utility, states that the "interstate natural gas transportation pipelines serving New Jersey are not only running regularly at full capacity—they are fully subscribed."[243] New Jersey Natural Gas states that if interstate pipeline companies such as PennEast are frustrated in their attempts to provide this needed additional capacity "a significant outage event is a realistic threat."[244]

64. Significantly, the impacts of the Third Circuit's opinion may not be limited to New Jersey, or to other states within the Third Circuit. PennEast asserts that the decision will influence courts in other jurisdictions, particularly due to the limited case law and Commission precedent on the matter.[245] Indeed, district courts in Maryland and Texas have issued decisions blocking the condemnation of state land pursuant to a Commission-issued certificate on

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[241] AGA Comments at 9-12.

[242] *Id.* at 9-10.

[243] New Jersey Natural Gas Company Comments at 4.

[244] *Id.* at 5.

[245] Petition at 10-11.

Eleventh Amendment grounds.[246] The decision of the District Court for the District of Maryland is currently pending appeal before the Fourth Circuit. TC Energy states that its subsidiary, Columbia Gas Transmission, LLC (Columbia), the certificate holder in the pending Fourth Circuit proceeding, has been prevented from accessing a "small but necessary portion of land, severely impeding Columbia's ability to construct a project that will serve demonstrated demand and that the Commission has determined to be in the public interest[.]"[247] TC Energy further notes that without the ability to exercise eminent domain over lands in which the state holds a possessory interest "[the] ability to develop needed natural gas infrastructure . . . will be severely hampered to the detriment of consumers[.]"[248]

65. As discussed above, we recognize the potential impact that a state could have in preventing the construction of natural gas pipeline projects authorized by the Commission. For that reason, we believe it is beneficial for the Commission, in its capacity as the agency charged with administering the NGA, to provide here its interpretation of how the NGA's grant of eminent domain authority to certificate holders is intended to operate. We emphasize our "exclusive jurisdiction over the transportation and sale of natural gas in interstate

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[246] *See Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-1444 (D. Md. Aug. 22, 2019) (appeal filed Sept. 20, 2019); *Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131 (E.D. Tex. 2017).

[247] TC Energy's Motion to Intervene and Comments at 19.

[248] *Id.* at 3.

commerce for resale."[249] Therefore, state and local agencies may not, through the application of state or local laws, prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.[250] Indeed, that statement is routinely

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[249] *Schneidewind*, 485 U.S. at 300-01 (citing *N. Nat. Gas Co.*, 372 U.S. at 89); *see also* 15 U.S.C. § 717(b).

[250] *See* 15 U.S.C. § 717r(d)(2) (state or federal agency's failure to act on a permit is inconsistent with federal law); *Schneidewind*, 485 U.S. at 310 (state regulation that interferes with the Commission's regulatory authority over the transportation of natural gas is preempted) (quoting *N. Nat. Gas Co.*, 372 U.S. at 91-92); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission); *Williams Nat. Gas Co.*, 890 F.2d at 264 ("We hold that the proceedings in the state court that resulted in the order enjoining Williams' exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order in contravention of § 19 of the NGA."); *Nat. Gas Pipeline Co. v. Iowa State Commerce Comm'n*, 369 F. Supp. 156, 160 (S.D. Iowa 1974) (finding state permit requirements inapplicable to federal eminent domain procedures under the NGA); *cf. City of Tacoma*, 357 U.S. at 328, 341 (upholding the finality of a circuit court's determination that "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license" due to the suit being an "impermissible collateral attack" on the circuit court's decision) (internal quotation marks and citation omitted); *First Iowa*, 328 U.S. at 181 ("The detailed provisions of the Federal Power Act providing for the federal plan of regulation leave no room or need for conflicting state controls."); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (finding that the practice of states "shelving" Clean Water Act section 401 water quality certifications through a withdrawal and refiling scheme "usurp[s] FERC's control over whether and when a federal license will issue" and is contrary to the FPA);

included in the orders the Commission issues granting certificates of public convenience and necessity.[251]

IV. Conclusion

66. In enacting the NGA, Congress established a carefully crafted comprehensive scheme in which the Commission was charged with vindicating the public interest inherent in the transportation and sale of natural gas in interstate and foreign commerce, in significant part through the issuance of certificates of public convenience and necessity for interstate gas pipelines. A key aspect of this scheme was the remit to natural gas companies of the ability to exercise, where necessary, the power of eminent domain to acquire lands needed for projects authorized by the Commission. We here confirm our strong belief that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain and that this authority applies to lands in which states hold interest. A contrary finding would be flatly inconsistent with Congressional intent, as expressed

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Wash. Dep't of Game, 207 F.2d at 396 ("[W]e conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license . . .").

[251] *E.g.*, *Transcon. Gas Pipe Line Co., LLC*, 169 FERC ¶ 61,051 at P 85 ("Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.").

in the text of NGA section 7(h), which is also supported by the legislative history.

The Commission orders:

The petition for declaratory order is granted in part, and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(SEAL)

Kimberly D. Bose,
Secretary.

Appendix A

Timely Motions to Intervene

American Gas Association

American Public Gas Association

Angela A. Karas

Calpine Energy Services, L.P.

Consolidated Edison Company of New York, Inc.

Cynthia Niciecki

Daria M. Karas

Delaware Riverkeeper Network

Derrick Kappler

Environmental Defense Fund

Frank R. Karas

HALT—PennEast (Homeowners Against Land Taking—PennEast, Inc.)

Interstate Natural Gas Association of America

Jodi McKinney (Delaware Township Committee)

John T. Leiser

Kelly Kappler

Kinder Morgan, Inc Entities, et al.[252]

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[252] This includes the following entities: Colorado Interstate Gas Company, L.L.C.; Wyoming Interstate Company, L.L.C.; Southern Natural Gas Company, L.L.C.; Tennessee Gas Pipeline Company, L.L.C.; Natural Gas Pipeline Company of America LLC; El Paso Natural Gas Company, L.L.C.; TransColorado Gas Transmission Company LLC; Mojave Pipeline Company, L.L.C.; Bear Creek Storage Company, L.L.C.; Cheyenne Plains Gas Pipeline Company, L.L.C.; Elba Express Company, L.L.C.;

Leslie Sauer

Maya K. van Rossum, the Delaware Riverkeeper

Michael Spille

New Jersey Conservation Foundation

New Jersey Department of Environmental Protection, et al. (collectively, the State of New Jersey)[253]

New Jersey Division of Rate Counsel

New Jersey Natural Gas Company

Niskanen Center

Patricia A. Oceanak

PSEG Energy Resources & Trade, LLC

Richard D. LaFevre and Pamela LaFevre

Samuel H. Thompson

Southern Star Central Gas Pipeline, Inc.

Stony Brook Millstone Watershed Association

TC Energy Corporation

Tellurian Pipeline LLC

Township of Holland, Hunterdon County, New Jersey

Township of Hopewell, Mercer County, New Jersey

Township of Kingwood, Hunterdon County, New Jersey

Kinder Morgan Louisiana Pipeline LLC; and Southern LNG Company, L.L.C.

[253] The State of New Jersey's motion to intervene includes, but is not limited to, the following agencies: the New Jersey Board of Public Utilities; the New Jersey Department of Environmental Protection; and the Delaware and Raritan Canal Commission.

Township of West Amwell, Hunterdon County, New Jersey

Transcontinental Gas Pipe Line Company, LLC

Vincent DiBianca

Washington Crossing Audubon Society

GLICK, Commissioner, *dissenting*:

1. I dissent[1] from today's order on both procedural and substantive grounds. There is no need for the Commission to insert itself into what is primarily a constitutional question that is being litigated where those questions belong: The federal courts. Nor is this an area where the Commission has the particular expertise the majority is so quick to claim. The NGA requires the Commission to determine whether an interstate pipeline is required by the public convenience and necessity.[2] If the Commission finds that a proposed pipeline is so required, section 7(h) of the NGA automatically provides the pipeline developer eminent domain authority without any action or further involvement by the Commission. The congressional intent behind a statutory provision that governs a judicial scheme, which the Commission has no role in administering, is not a subject on which we are especially well-qualified to opine.

2. Turning to the substance of today's order, I disagree with the majority that Congress unambiguously intended section 7(h) to apply state lands. In my view, the evidence simply is not clear one way or the other. The majority's confidence in its conclusion is better evidence of its own ends-oriented

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[1] Although I agree with the conclusion in today's order that section 7(h) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(h) (2018), delegates eminent domain authority to the holder of an NGA section 7 certificate and not to the Commission, I dissent in full because the Commission should not be issuing this order in the first place. *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,064, at PP 49-53 (2020) (Order).

[2] 15 U.S.C. § 717f(c).

decisionmaking than any unambiguous congressional intent.

3. I understand that my colleagues may not like the decision of the U.S. Court of Appeals for the Third Circuit (Third Circuit).[3] But we do not ordinarily rush out a declaratory order whenever a couple of commissioners disagree with a court. Nothing in today's order makes a compelling case for why we should be doing so today.

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4. It is not appropriate for the Commission to issue a declaratory order in an effort to buttress a private party's litigation efforts. Moreover, as the majority notes, the important questions presented by PennEast Pipeline Company, LLC's (PennEast) effort to condemn New Jersey's property interests "involve[] esoteric matters of constitutional law."[4] In other words, the real stakes at issue involve the Eleventh Amendment to the U.S. Constitution; the majority's attempt to divine congressional intent is just nibbling around the edges. Other than signaling the majority's dissatisfaction with the Third Circuit, I see little to be achieved by today's order.

5. The majority contends that today's order is useful because its interpretation of Congress's intent in enacting section 7(h) merits deference from the courts. It supports that statement with a single general citation to *Chevron v. Natural Resources Defense*

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

[4] Order, 170 FERC ¶ 61,064 at P 39.

Council, Inc.[5] But courts do not afford an agency *Chevron* deference when the relevant issue was not delegated to the agency to decide. "Deference in accordance with *Chevron*. . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[6] And *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[7] That said, ambiguity alone will not always suffice: Congress must also have delegated to the agency in question the authority to fill in that ambiguity.[8] Where the relevant issues are

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[5] *Id.* P 15. The Commission also asserts, notably without citation, that it has the authority to apply and interpret section 7(h). *Id.* at P 13. For the reasons discussed below, that is not the case. *See infra* PP 6-7.

[6] *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (explaining that not all agency statutory interpretations qualify for *Chevron* deference; only those interpretations that meet the criteria outlined in *Gonzalez*).

[7] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[8] *See Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ([M]ere ambiguity in a statute is *not* evidence of congressional delegation of authority in the first instance. Rather, *Chevron* deference comes into play of course, only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency." (internal quotation marks and citations omitted) (emphasis in the original)).

not ones that Congress has left for the agency to decide, *Chevron* does not apply.

6. The scope of the eminent domain authority in section 7(h) is not an issue that Congress left for the Commission to decide. Section 7(h) provides a mechanism for a certificate holder to go into court and condemn land that it has been unable to purchase on its own.[9] The Commission has repeatedly made clear that it has no role to play in the proceedings contemplated by section 7(h) or the actual exercise of eminent domain more generally.[10] As the Commission has explained, eminent domain is an "automatic right" that is incident to the Commission's public convenience and necessity determination[11] and

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[9] *See* 15 U.S.C. § 717f(h).

[10] *E.g.*, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 74 (2018) ("In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain . . . . The Commission itself does not grant the pipeline the right to take the property by eminent domain."); *Atl. Coast Pipeline*, 161 FERC ¶ 61,042, at PP 66, 77 (2017) (same).

[11] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 72; *see Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. The Commission does not have the discretion to deny a certificate holder the power of eminent domain." (citations omitted)); *Atl. Coast Pipeline*, 161 FERC ¶ 61,042 at P 78 ("[O]nce a natural gas company obtains a certificate of public convenience and necessity, it may exercise

disputes about the exercise of that eminent domain authority are best addressed by the federal courts.[12]

7. Because the Commission has no role in implementing or administering the eminent domain authority conveyed by section 7(h), the majority cannot reasonably argue that Congress delegated to the Commission the responsibility to address any ambiguity in that provision.[13] Questions about the scope of a private party's right to commence an action in federal or state court are not issues that Congress would have given this Commission to decide. Instead, the obvious venue to address those questions in the first instance is those courts themselves. Accordingly, the prospect of securing judicial deference is also not, in my opinion, a valid reason to put out today's order.

8. Turning to the substance of today's order, the majority's conviction that Congress unambiguously intend section 7(h) to apply to state lands is dead wrong. The "evidence" that the majority relies on to argue that the eminent domain authority in section 7(h) applies to state lands is, at best, inapt or susceptible to multiple interpretations. Even viewed as a whole and in a light most charitable to the

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the right of eminent domain in a U.S. District Court or a state court.").

[12] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at PP 72-73; *see Millennium Pipeline Co., L.L.C.*, 158 FERC ¶ 61,086, at P 6 (2017) ("Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the Natural Gas Act, including issues regarding compensation, are matters for the applicable state or federal court.").

[13] *See, e.g.*, *Atl. City Elec.*, 295 F.3d at 9; *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001).

majority, the evidence discussed in today's order simply does not demonstrate a clear congressional intent one way or another. All today's order proves is that the majority believes that certificate holders should be able to condemn state lands, not that Congress intended that to be the case.

9. The majority begins, as it must, with the text of section 7(h).[14] But there is not much to say. The Commission's two-paragraph discussion consists of one paragraph quoting section 7(h) in full[15] and a second paragraph summarizing how it works.[16] The only substantive point today's order makes about the text of section 7(h) is that Congress did not expressly prohibit condemnation of state lands.[17]

10. On that point, I agree. But the absence of an express limitation on condemning state lands is hardly an unambiguous signal that Congress intended section 7 certificate holders to have that authority. After all, section 7(h) also does not contain an express prohibition on condemning federal land and, to my knowledge, no one believes that section 7(h) therefore conveys such authority. The majority references the "broad and unqualified reference to 'the necessary land or property in section 7(h),'" suggesting that this language extends condemnation authority to any land

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[14] Order, 170 FERC ¶ 61,064 at PP 33-34; *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statutory provision] begins where all such inquiries must begin: with the language of the statute itself.").

[15] Order, 170 FERC ¶ 61,064 at P 33.

[16] *Id.* P 34.

[17] *Id.*

deemed necessary to develop a proposed pipeline.[18] Perhaps, but a more plausible reading is that the word "necessary" acts as a limiting provision, which makes clear that section 7(h) is not a general right of eminent domain and can be deployed only to condemn property that will be used in connection with the pipeline. Under that reading, the term "necessary" does not indicate anything one way or another about section 7(h)'s application to state lands.

11. With that, the majority turns to proffer a discussion of "[j]udicial review of section 7(h)."[19] That discussion cites exactly one section 7(h) case: *Thatcher v. Tennessee Gas Company*,[20] which is entirely irrelevant. *Thatcher* involved a dispute between a natural gas pipeline and a private landowner, who argued that section 7(h) was unconstitutional because, among other things, it did not regulate interstate commerce and eminent domain authority could not be exercised by a private company.[21] Based on principles that were well established even then, the U.S. Court of Appeals for the Fifth Circuit rejected those arguments.[22] The court said nothing about the extent of the eminent domain authority conveyed by section 7(h) or whether that authority extended to state lands.

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[18] *Id.* (quoting 15 U.S.C. § 717f(h)).

[19] *Id.* P 35.

[20] *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 645 (5th Cir. 1950).

[21] *Id.* (summarizing the Thatcher's arguments).

[22] *Id.* at 646-48; *accord* Order, 170 FERC ¶ 61,064 at P 29 (noting that the Third Circuit's opinion does not question these well-established principles).

Simply put, *Thatcher* is irrelevant for our purposes, as the majority itself seems to recognize.[23]

12. As part of its discussion of "judicial review," the majority also points to *Tenneco Atlantic*, a decision issued by an administrative law judge (ALJ) in 1977, thirty years after Congress enacted section 7(h).[24] I agree that, in *Tenneco Atlantic*, the ALJ explained his belief that section 7(h) gave the certificate holder the authority to condemn state land.[25] But I disagree that a single ALJ opinion issued three decades after the relevant amendments tells us much, if anything, about the extent of the eminent domain authority that Congress intended to convey in section 7(h).[26]

13. In addition, the majority points to the Commission's decision in *Islander East*, which rejected an Eleventh Amendment argument on the basis that a condemnation action was not a "suit in law or equity"[27]—exactly the question that today's

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[23] Order, 170 FERC ¶ 61,064 at P 35.

[24] *Id.* P 36.

[25] *Id.*

[26] In that same section of the opinion, the ALJ described as "patently absurd" the notion that Congress would authorize the use of eminent domain to develop a pipeline to serve a liquefied natural gas import/export facility yet deny the use of eminent domain for the actual import/export facility itself. *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, 65,204 (1977). Of course, that is exactly what the law currently does. *Compare* 15 U.S.C. § 717b (no provision for eminent domain) *with* 15 U.S.C. § 717f(h) (providing for eminent domain). Accordingly, it might be worth taking with a grain of salt the ALJ's conclusion that Congress obviously intended the condemnation authority in section 7(h) to apply to state lands.

[27] *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 123 (2003).

order declines to address on the basis that it is outside "the heartland of our quotidian ambit."[28] As the majority recognizes, the Third Circuit dismissed the Commission's conclusion in *Islander East*, calling it "an outlier and one that was reached with little, if any, analysis."[29] "More importantly," the Third Circuit stated, "it is flatly wrong."[30] That sums it up pretty well. I appreciate that the majority likes the outcome in *Islander East*,[31] but, as the Third Circuit noted, there is no reasoning or analysis in that order to support that outcome or explain why it is consistent with congressional intent.[32] Simply put, it sheds no light on the question before us.

14. Next, the majority turns to cherry-picking examples from the NGA's legislative history to bolster its case.[33] It begins with the Senate report associated with the 1947 legislation that added section 7(h) to the NGA. It contends that the Senate report demonstrates that section 7(h) reflected a generalized concern about

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[28] Order, 170 FERC ¶ 61,064 at P 39.

[29] *In re PennEast*, 938 F.3d at 111 n.19.

[30] *Id.*

[31] Order, 170 FERC ¶ 61,064 at P 38 (recognizing that the holding in *Islander East* was "terse," but asserting that being light on analysis "does not . . . obviate the validity of th[e] final holding").

[32] *In re PennEast*, 938 F.3d at 111 n.19.

[33] *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" (quoting Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983))).

states' ability to invade the Commission's jurisdiction or "nullif[y]" its determinations—which, according to the majority, supports the conclusion that Congress plainly intended section 7(h) to apply to state lands.[34]

15. That is quite a leap. In fact, the Senate report indicates that a particular, relatively narrow concern motivated Congress to add section 7(h): Providing a federal right of eminent domain for pipeline developers that were ineligible to utilize state eminent domain laws. The report begins by noting that, because section 7 did not contain an eminent domain provision, certificate holders at the time were required to utilize state eminent domain laws.[35] However, the report explains, an interstate pipeline may not qualify for eminent domain under certain state laws because, for example, the pipeline traverses the state without delivering gas, which can mean that it does not provide the "public use" needed to justify eminent domain under state law[36] or because certain states outright prohibit the exercise of eminent domain authority by "foreign" (*i.e.*, out-of-state) corporations.[37] To address that concern, the report proposes to create a federal right of eminent domain, so that certificate holders are not left at the mercy of

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[34] Order, 170 FERC ¶ 61,064 at P 41.

[35] S. Rep. 80-429, at 2 (1947).

[36] *Id.* (discussing *Shedd v. Northern Indiana Public Service Company*, 188 N.E. 322 (Ind. 1934)); *id.* (collecting other cases to the same effect).

[37] *Id.* (explaining that Arkansas and Wisconsin prohibit the use of eminent domain by companies that are not registered corporations within the state).

a patchwork of state eminent domain laws.[38] But the report says nothing about the scope of that federal right of eminent domain or the entities against which it can be exercised.[39]

16. In addition, a careful reading of the report indicates that the committee was also concerned about another particular and relatively narrow way in which state decisions might interfere with or invade Commission jurisdiction. The report explains that natural gas pipelines frequently transport gas long distances between producing regions and consuming markets, often crossing multiple intervening states without delivering gas for consumption in those states.[40] The report further explains that the Commission certificates the transport of gas "from points of supply to certain defined and limited markets" and that this defined certification of transportation service from point A to point B would be "nullified" if the intervening states could condition eminent domain authority on the pipeline also

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[38] *Id.* at 3.

[39] If anything, aspects of the report could suggest that the committee may not have believed that section 7(h) would apply state-owned lands at all. For example, in enumerating the problems with relying on state eminent domain laws, the report notes that, under Arkansas's Constitution, "a foreign corporation shall not have the power to condemn *private* property." *Id.* at 2 (emphasis added). One could infer that the focus on *private* property indicates that private lands were all the senators had in mind at the time, although, unlike the majority, I am hesitant to find clear congressional intent based on circumstantial inferences alone.

[40] *Id.* at 3.

delivering gas to points C, D, and E along the way.[41] Once again, nothing about that defined problem—states seeking to force interstate natural gas pipelines to deliver gas within their borders—or Congress's solution—a federal right of eminent domain—says anything about the scope of that federal right of eminent domain or the entities against which it can be exercised.[42]

17. The majority then turns to discuss the divergent evolution of the eminent domain provisions under the NGA and the Federal Power Act (FPA).[43] And, to be fair, the majority is on relatively stronger ground here. As today's order explains, the Energy Policy Act of 1992 amended the FPA to limit the exercise of eminent domain against state lands without making a corresponding change to section 7(h).[44] From that, the majority concludes that "Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21."[45] The implication, as I understand it, is that because Congress limited the

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[41] *Id.* at 4 ("If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.").

[42] *Cf. In re PennEast*, 938 F.3d at 113 n.20 ("As for the legislative history, it demonstrates that Congress intended to give gas companies the federal eminent domain power. . . . But it says nothing about Congress's intent to allow suits against the States." (citing S. Rep. No. 80-429, at 2-3)).

[43] Order, 170 FERC ¶ 61,064 at PP 42-43.

[44] *Id.* P 43.

[45] *Id.*

power to condemn state land under section 21 of the FPA, such limits must have been necessary and because Congress did not similarly limit the power to condemn state land under section 7(h) of the NGA, that power must be unlimited.[46]

18. That is one plausible interpretation, but it is hardly the only one. It is equally possible that Congress did not modify NGA section 7(h) because, for whatever reason, it did not believe that section 7(h) presented the same concerns. Although my colleagues may think that Congress would have been wrong in reaching that judgment, that opinion tells us relatively little about Congress's actual motivations. In any case, the fact that Congress subsequently sought to limit the scope of eminent domain under the FPA sheds little light on what Congress intended when it enacted section 7(h) of the NGA roughly 45 years earlier.[47]

19. In addition, the Third Circuit posited another reason why Congress might have added this language when amending the FPA in 1992: "When Congress passed the NGA and [section 7(h)] in 1938 and 1947, respectively, Congress was legislating under the consensus that it could not abrogate states' Eleventh

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[46] *Id*. PP 43-44.

[47] *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) ("'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" (quoting *United States v. Price*, 361 U.S. 304, 313 (1960))); *accord Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously.").

Amendment immunity pursuant to the Commerce Clause."[48] The Energy Policy Act of 1992, by contrast, was enacted during a brief period in which the Supreme Court held that Congress could abrogate state sovereign immunity pursuant to its Commerce Clause powers, giving Congress a reason to explicitly limit eminent domain against state lands.[49] It is possible that, in addressing the FPA in 1992, Congress saw fit to provide newly relevant limits on eminent domain—limits that it did not, for whatever reason, apply to section 7 of the NGA, which the Energy Policy Act of 1992 did not modify.

20. The majority attempts to cast doubt on that possibility by noting that the relevant committee report for the Energy Policy Act of 1992 does not discuss the Supreme Court's sovereign immunity jurisprudence.[50] Although it is true that the report does not mention the Supreme Court's sovereign immunity cases, the absence of any such discussion hardly proves that those cases were irrelevant to Congress's thinking. As the Supreme Court has explained, when using legislative history to "ascertain[] the meaning of a statute, [we] cannot, in the manner of Sherlock Holmes," find clear meaning in "the theory of the dog that did not bark."[51]

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[48] *PennEast*, 938 F.3d at 113 n.20 (internal quotation marks omitted).

[49] *Id.*

[50] Order, 170 FERC ¶ 61,064 at P 43.

[51] *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (citing Arthur Conan Doyle, *The Silver Blaze*, in *The Complete Sherlock Holmes* (1938)).

21. Finally, the majority asserts that this relationship between the eminent domain provisions in the NGA and FPA is of paramount importance because the Supreme Court "directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21" in *City of Tacoma v. Taxpayers of Tacoma.*[52] Except that it didn't. In *City of Tacoma*, the Court held that section 313(b) of the FPA provided the "specific, complete and exclusive mode for judicial review of the Commission's orders,"[53] that the issues then before the Court—which arose on appeal from a decision of the Supreme Court of Washington[54]—could only have been properly raised in an appeal pursuant to section 313(b), and that those issues were, in fact, raised in such an appeal to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit).[55] *City of Tacoma* is a case about the procedures for judicial review of Commission action, not the scope of eminent domain authority under the FPA. Accordingly, the fact that the Supreme Court was not, in the majority's judgment, "alarm[ed]" by the prospect of eminent domain against state lands[56] is of no real help in deciding the issues before us today.

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[52] Order, 170 FERC ¶ 61,064 at P 45.

[53] *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).

[54] *Id.* at 332-333.

[55] *Id.* at 339.

[56] Order, 170 FERC ¶ 61,064 at P 47.

22. The majority also points, albeit briefly, to the Ninth Circuit[57] case referenced in *City of Tacoma* and the Supreme Court's earlier decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*.[58] But, once again, neither case squarely addresses the scope of the relevant eminent domain authority. Instead, both cases stand for a single clear proposition: That "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States."[59] That conclusion, which would appear to be a relatively straightforward application of the Supremacy Clause,[60] says nothing about the scope of the eminent domain authority in FPA section 21. The majority implies that the Ninth Circuit must have approved of the exercise of eminent domain against state property because the licensee in that case, the City of Tacoma, intended to exercise that authority.[61] But whatever the court may have thought about such an exercise of eminent domain is irrelevant, since the question before the court was whether a subdivision of a state could act contrary to state law if it was doing so pursuant to a federal license—a question that the court answered in the

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[57] *State of Wash. Dep't of Game v. FPC*, 207 F.2d 391 (9th Cir. 1953).

[58] 328 U.S. 152 (1946).

[59] 207 F.2d at 396-97 (citing *First Iowa*).

[60] *E.g.*, *id.*

[61] Order, 170 FERC ¶ 61,064 at P 47.

affirmative, without addressing its implications for eminent domain.[62]

23. It bears repeating that I am not certain whether Congress intended section 7(h) of the NGA to apply to state lands or not. The evidence simply is not clear one way or the other. I have gone through the foregoing discussion to highlight the extent to which the Commission has misconstrued the evidence or ignored the limits of the authority on which it relies. I appreciate that my colleagues disagree with the conclusion reached by the Third Circuit and that some badly want to see it overturned. But that disagreement, profound as it may be, does not excuse the ends-oriented reasoning in today's order, which is both deeply troubling and, frankly, a discredit to the agency.

24. Finally, the majority concludes by asserting that the Third Circuit's decision will "have profoundly adverse impacts on the development of the nation's interstate natural gas transportation system."[63] That discussion is, frankly, the most honest part of today's order, as it reflects the majority's belief that the Third Circuit's decision is a bad outcome. But it is not clear just how "profound[]" or "adverse" those effects will actually turn out to be. That question depends on a number of factors that are difficult to predict in a vacuum.

25. For one thing, the primary effect of the Third Circuit's ruling may be to encourage pipeline developers to undertake greater efforts to cooperate

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[62] 207 F.2d at 396.

[63] Order, 170 FERC ¶ 61,064 at P 56.

and coordinate with the relevant states—not necessarily a bad outcome. And, moreover, it is not clear that requiring such coordination would represent an insuperable obstacle to pipeline development. After all, until recently, the Commission interpreted section 401 of the Clean Water Act[64] to create essentially the same type of state-level veto authority that the majority now sees in the Third Circuit's decision.[65] And, notwithstanding that effective veto, the development of interstate pipelines did not exactly grind to a halt.[66]

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[64] 33 U.S.C. § 1341(a)(1) (2018).

[65] *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (explaining that the "withdrawal-and-resubmission scheme" that the Commission had previously interpreted to be consistent with the Clean Water Act and the FPA was invalid because it would allow for the "indefinite[] delay [of] federal licensing proceedings and undermine FERC's jurisdiction").

[66] In 2017 and 2018, roughly 1,500 miles of interstate natural gas pipelines entered service with a combined capacity of 25 billion cubic feet per day (Bcfd). FERC, *2018 State of the Markets Report* 7 (Apr. 2019), *available at* https://www.ferc.gov/market assessments/reports-analyses/st-mkt-ovr/2018-A-3-report.pdf ("Over 13 Bcfd and 689 miles of Commission-jurisdictional pipeline capacity entered service during 2018."); FERC, *2017 State of the Markets Report* 4 (Apr. 2018), *available at* https://www.ferc.gov/market-assessments/reports-analyses/st-mkt-ovr/2017-som-A-3- full.pdf ("Nearly 12 Billion Cubic Feet per day (Bcfd) and 773 miles of Commission-jurisdictional natural gas pipeline capacity went into service in 2017."). The combined total capacity of those pipelines is equivalent to nearly a third of U.S. natural gas consumption. *See* U.S. Energy Info. Admin., *Short-Term Energy Outlook* (Jan. 2020), *available at* https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf **(**"Total domestic U.S. natural gas consumption averaged an estimated 85.3 billion cubic feet per day (Bcf/d) in 2019.").

26. And we must not forget that Congress can have the last say. If Congress disapproves of the Third Circuit's decision, it can step in and remedy the situation.[67] Congress has a long and well-documented history of responding to judicial decisions with which it disagrees, including decisions involving state sovereign immunity and the Eleventh Amendment.[68] If the Third Circuit's decision stands, Congress could, for example, amend section 7(h) of the NGA, attempt to validly abrogate state sovereign immunity under the NGA, or pursue measures, such as the "work-around" contemplated by the Third Circuit,[69] to facilitate pipeline developers' efforts to acquire rights-of-way over state land.

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[67] *See Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."); *Hamilton v. Lanning*, 560 U.S. 505, 537 (2010) (Scalia, J., dissenting) ("But it is in the hard cases, even more than the easy ones, that we should faithfully apply our settled interpretive principles, and trust that Congress will correct the law if what it previously prescribed is wrong."); *Teague v. Lane*, 489 U.S. 288, 317 (1989) (White, J., concurring in part and concurring in the judgment) ("If we are wrong . . . , Congress can of course correct us.").

[68] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 Tex. L. Rev. 1317, 1445 & n.453(2014) (explaining that Congress responded to the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), by explicitly abrogating state sovereign immunity not just in the Rehabilitation Act of 1973, the statute at issue in *Atascadero*, but also in a handful other statutes).

[69] *In re PennEast*, 938 F.3d at 113.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

Order Denying Rehearing, *PennEast Pipeline Co., LLC*, 171 FERC ¶ 61,135 (May 22, 2020)

1. In this order, we deny rehearing of our January 30, 2020 order granting in part and denying in part a petition for declaratory order filed by PennEast Pipeline Company, LLC (PennEast).[1] In that order, we addressed the nature and scope of the eminent domain authority conferred to pipelines that have been granted a certificate of public convenience and necessity under the Natural Gas Act (NGA).

2. We issued the Declaratory Order in light of the recent Third Circuit decision finding that the NGA did not confer on pipeline certificate holders the right to condemn land in which states hold an interest.[2] In doing so, we determined that it was vitally important to provide our views on this issue of national significance, based on our decades of experience administering the NGA, given the profoundly adverse impacts of the Third Circuit's decision on the development of the nation's interstate natural gas transportation system. In our view, the Third Circuit's decision significantly undermines how the natural gas transportation industry has operated for decades.[3]

3. We found in the Declaratory Order that the text of NGA section 7(h),[4] as confirmed by the relevant legislative history, provides the holders of certificates

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[1] *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064 (2020) (Declaratory Order).

[2] *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019) (*In re PennEast*), *reh'g en banc denied* (Nov. 5, 2019).

[3] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 27, 56-65.

[4] 15 U.S.C. § 717f(h) (2018).

of public convenience and necessity with broad eminent domain authority to condemn land, including land in which a state holds an interest, necessary to construct, operate, and maintain a pipeline and appurtenant facilities.[5] We also explained that NGA section 7(h) does not authorize the Commission to condemn land on a certificate holder's behalf, as the Third Circuit had suggested, as an alternative way for pipelines to be routed through state lands.[6] However we declined to answer constitutional questions raised by the petition as being outside the Commission's jurisdiction.[7]

4. One party—the Delaware Riverkeeper Network (Riverkeeper)—filed a request for rehearing of the Declaratory Order on February 26, 2020. We deny rehearing for the reasons discussed below.

I. Background

5. On January 19, 2018, in Docket No. CP15-558-000, the Commission issued a certificate of public convenience and necessity for the PennEast Project.[8] Due to the inability to reach an agreement with New

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[5] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 25, 32, 48, 66.

[6] *See id.* PP 26, 49-53.

[7] *See id.* PP 27, 54-55.

[8] *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 1 (Certificate Order), *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Certificate Rehearing Order), *petitions for review pending sub nom. Del. Riverkeeper Network v. FERC*, D.C. Cir. Nos. 18-1128, *et al.* (first petition filed May 9, 2018) (argument held in abeyance on October 1, 2019, "pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit's decision").

Jersey to acquire easements for the portions of its certificated pipeline route that would cross land in which New Jersey holds a property interest,[9] PennEast instituted condemnation proceedings in the United States District Court for the District of New Jersey (District Court) in order to obtain these and other necessary easements.[10] New Jersey claimed property interests in forty-two parcels of land that PennEast sought access to via condemnation: two parcels in which New Jersey holds fee simple ownership interests, and forty parcels in which New Jersey claims nonpossessory property interests, including conservation easements and restrictive covenants mandating under state law a particular land use.[11] The District Court granted PennEast's application for orders of condemnation and rejected New Jersey's sovereign immunity argument.[12]

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[9] PennEast October 4, 2019 Petition (Petition) at 5-6. Riverkeeper states that New Jersey asserted in the Third Circuit case that PennEast did not attempt to contract with New Jersey to obtain the necessary rights-of-way. Riverkeeper February 26, 2020 Request for Rehearing at 4 n.10. The Third Circuit noted New Jersey's argument that "PennEast had failed to satisfy the jurisdictional requirements of the NGA by not attempting to contract with the State for its property interests." *In re PennEast*, 938 F.3d at 101. Whether PennEast satisfied the prerequisites for filing an eminent domain action was a matter, if raised, for the court to consider. Riverkeeper's argument is not relevant to the questions addressed in this proceeding.

[10] Petition at 6.

[11] *Id.*

[12] *In re PennEast Pipeline Co., LLC*, No. 18-1585, 2018 WL 6584893, *12, 25 (D.N.J. Dec. 14, 2018).

6. New Jersey appealed to the United States Court of Appeals for the Third Circuit (Third Circuit), which vacated the District Court's order, and held that the NGA does not abrogate New Jersey's sovereign immunity.[13] The Third Circuit found that while the NGA delegates eminent domain authority to certificate holders, it "does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity."[14] In the court's view, "there are powerful reasons to doubt the delegability of the federal government's exemption from Eleventh Amendment immunity,"[15] particularly when that delegation occurs through a statute enacted pursuant to the Commerce Clause.[16] However, the court consciously avoided that constitutional question[17] by holding that the text of

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[13] *In re PennEast*, 938 F.3d at 99. PennEast filed a petition for certiorari with the Supreme Court on February 18, 2020.

[14] *Id.* at 112-13; *accord id.* at 99-100; *see id.* at 111-12.

[15] *Id.* at 105; *accord id.* at 111; *see id.* at 100; *id.* at 107-11 (reviewing precedent).

[16] *Id.* at 105, 108 & nn.13, 15 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996)); *see also id.* at 108 & n.13 (explaining that *Seminole Tribe* abrogated *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

[17] *See id.* at 111 (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008) ("As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.")); *id.* at 111-12 (quoting *Guerrero- Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (describing the "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (citation and alterations omitted)).

the NGA failed to provide an "unmistakably clear" delegation of the federal government's exemption from Eleventh Amendment immunity.[18] Ultimately, the Third Circuit declined to "assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."[19]

7. On October 4, 2019, PennEast petitioned the Commission to issue a declaratory order providing the Commission's interpretation of three questions under NGA section 7(h):

> 1) Whether a certificate holder's right to condemn land pursuant to NGA section 7(h) applies to property in which a state holds an interest;
>
> 2) Whether NGA section 7(h) delegates the federal government's eminent domain authority solely to certificate holders; and
>
> 3) Whether NGA section 7(h) delegates to certificate holders the federal government's exemption from claims of state sovereign immunity.[20]

8. On January 30, 2020, the Commission issued a Declaratory Order granting in part and denying in part PennEast's petition. Specifically, the Commission provided its interpretation, as the agency that administers the NGA, that NGA section 7(h) confers

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[18] *Id.* at 107 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *see id.* at 107-08 & n.12 (discussing *Dellmuth* and *Atascadero*).

[19] *Id.* at 112.

[20] *See* Petition at 2.

to certificate holders the federal government's eminent domain authority to condemn any land necessary to effectuate the certificate, including state land.[21] The order stated that the Commission—like its predecessor, the Federal Power Commission (FPC)—has held this view since its inception.[22]

9. The Declaratory Order also explained why we disagreed with the Third Circuit's suggestion that there is a "workaround" whereby the Commission itself may condemn land needed for a certificated pipeline when a state holds an interest in such land.[23] As we explained, the Commission lacks the statutory authority and the administrative mechanisms needed to condemn state land on behalf of certificate holders.[24] Further, we declined to address the constitutional questions raised in the petition, namely, whether NGA section 7(h) delegates to certificate holders the federal government's exemption from state claims of sovereign immunity pursuant to the Eleventh Amendment.[25]

II. Procedural Matters

10. On March 17, 2020, PennEast filed a motion for leave to answer and answer to the request for rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing "unless otherwise ordered by the

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[21] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 28-48.

[22] *See id.* P 25 & n.108; *id.* P 36 & nn.148-50.

[23] *In re PennEast*, 938 F.3d at 113.

[24] Declaratory Order, 170 FERC ¶ 61,064 at PP 49-53.

[25] *Id.* PP 54-55.

decisional authority."[26] We are not persuaded to accept PennEast's answer and will, therefore, reject it.

III. Discussion

A. Threshold Issues

11. Riverkeeper raised three threshold issues that do not go to the merits of the Declaratory Order, asserting that: (1) the Commission may only issue declaratory orders "to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction;"[27] (2) the Declaratory Order violates the separation of powers doctrine;[28] and (3) agency declaratory orders are owed no deference.[29] These arguments have no merit and are easily resolved.

12. The Third Circuit's opinion created uncertainty about the entire regulatory scheme established under the NGA.[30] As the agency responsible for

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[26] 18 C.F.R. § 385.213(a)(2) (2019).

[27] Request for Rehearing at 11.

[28] *Id.* at 7.

[29] *Id.* at 7-8.

[30] Since its adoption, the NGA has provided the regulatory scheme established by Congress to promote the orderly development of natural gas pipelines in interstate commerce so as to provide access to and the development of natural gas at just and reasonable rates. The amendment to the NGA in 1947 that provided a certificate holder with the sovereign power of eminent domain has been consistently applied against the states since its adoption. The decision of the Third Circuit would change over 70 years of precedent in applying NGA section 7. In addition, the Third Circuit's proposed "work around" of having the Commission condemn land on behalf of the applicant has no statutory basis, would expand the powers of the Commission, and would require Congress to both authorize and appropriate

administering this Act, it is entirely appropriate for this Commission to provide its views on this issue and on the far-reaching effects of the Third Circuit's opinion if allowed to stand. We do this not as an attempt to overrule the Third Circuit, but to provide our views based on our experience in administering the NGA. Furthermore, we believe that we are entitled to deference as to reasonable interpretations of our own regulations.[31] We address each of these issues in detail below.

1. Issuance of the Declaratory Order was Not a Violation of Commission Regulations

13. Riverkeeper asserts that the Commission, by issuing the Declaratory Order, violated its own guidance and regulations regarding declaratory orders,[32] claiming that the Commission may only issue declaratory orders "to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction."[33] Riverkeeper contends the Declaratory Order contravened Commission

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funding to engage in such acquisitions on behalf of certificate holders.

[31] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) ("Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law."); *see also* Declaratory Order, 170 FERC ¶ 61,064 at PP 19, 27, 29, 65, 66; *cf. PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994) (finding that EPA's interpretation of § 401 of the Clean Water Act statutory scheme was entitled to deference despite state agency implementation thereof).

[32] Request for Rehearing at 6.

[33] *Id.* at 11.

regulations because, in its view, no controversy or uncertainty has been presented to the Commission and the Commission lacks jurisdiction over the "eminent domain proceedings or controversies."[34]

14. As the agency charged with administration of the NGA, the Commission may issue declaratory orders to interpret the NGA and any section therein.[35] Furthermore, we are entitled to deference as to reasonable interpretations of our own regulations.[36]

15. Riverkeeper asserts the Commission's authority to issue a declaratory order is narrow and limited.[37] But Rule 207 permits a party to petition for a declaratory order in order to "terminate a controversy or remove uncertainty,"[38] and "does not define what sort of uncertainty may be appropriate to justify a petition for declaratory relief."[39] The Commission has explained that a declaratory order "provides direction to the public and our staff regarding the statutes we administer."[40] Further, we continue to find that the Third Circuit's opinion—particularly the suggestion

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[34] *Id.*

[35] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 19, 27, 29, 65, 66; *cf. PUD*, 511 U.S. at 712 (finding that EPA's interpretation of § 401 of the Clean Water Act statutory scheme was entitled to deference despite state agency implementation thereof).

[36] *See Kisor*, 139 S. Ct. at 2422 ("Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law.").

[37] Request for Rehearing at 11-13.

[38] 18 C.F.R. § 385.207(a)(2) (2019).

[39] Declaratory Order, 170 FERC ¶ 61,064 at P 16.

[40] *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 19 (2008) (emphasis added).

that there is there is a "workaround" through which the Commission itself may condemn property—created uncertainty and required the Commission to explain why such a work-around is neither feasible nor authorized under NGA section 7(h).[41] Accordingly, the Commission properly determined it was both appropriate and necessary to provide guidance on how section 7(h) was intended to operate and has been applied since 1947.[42]

16. Riverkeeper contends that "the 'controversy' was a legal, constitutional matter before the courts and the 'uncertainty' was resolved by the Third Circuit."[43] We disagree. The uncertainty that the Declaratory Order addressed was with respect to the Commission's interpretation of the language of section 7(h) and whether there is an administrative "work-around" to avoid the deleterious effects of the court's holding. Nothing in the Declaratory Order purports to address constitutional matters; indeed, the Declaratory Order expressly declined to address constitutional questions.[44]

17. Riverkeeper asserts that "[t]he Commission cannot issue a binding policy statement that is directly contrary to a holding of the Third Circuit."[45] However, the Declaratory Order is an interpretative action, not a policy statement (nor are policy statements binding). Even if the Third Circuit's decision conflicts with the

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[41] Declaratory Order, 170 FERC ¶ 61,064 at P 49.

[42] *See id.* P 65.

[43] Request for Rehearing at 11.

[44] Declaratory Order, 170 FERC ¶ 61,064 at PP 14, 27, 39, 55.

[45] Request for Rehearing at 13.

Commission's interpretation of section 7(h), the Commission is still permitted to provide its interpretation of the statute it administers.[46] The Commission did not purport to overrule the court's decision, an action it has no authority to take. Rather, due to the potential for nationwide litigation and for confusion in the energy sector, we reached the legitimate conclusion that the interpretation by the Commission may benefit other courts where the issues raised here may arise as matters of first impression.[47] Indeed, another case pending in the United States Court of Appeals for the Fourth Circuit has raised the same issues addressed in the Third Circuit's decision.[48]

2. Issuance of the Declaratory Order Did Not Violate the Separation of Powers Doctrine

18. Riverkeeper asserts that the Declaratory Order violates the separation of powers doctrine,[49] contending that the Third Circuit's opinion "construed the law", and that the Commission, in issuing the Declaratory Order after the issuance of the Third Circuit's opinion "is acting as though it were a court of

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[46] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (finding that an appellate court's prior interpretation of an ambiguous statutory provision did not preclude a federal agency from adopting a contrary reasonable interpretation in subsequent proceedings).

[47] *See id.*

[48] *See Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-1444 (D. Md. Aug. 22, 2019) (appeal filed 4th Cir., No. 19-2040, Sept. 20, 2019).

[49] Request for Rehearing at 7.

higher authority and not a part of the executive branch."[50]

19. Several parties raised separation of powers concerns in comments on PennEast's Petition, which we address in the Declaratory Order. Regarding such assertions, we state in the Declaratory Order that "[w]e have no authority to [']overrule['] a precedential opinion of a United States Court of Appeals."[51] As we explained, the purpose of the Declaratory Order was only to "set out the Commission's interpretation of a statute it administers[,]" not to somehow overturn, or otherwise undermine the Third Circuit's opinion;[52] nor was the Declaratory Order an attempt to "improperly influence potential litigation in other circuits[,]" as Riverkeeper contends.[53] Further, the Commission does not purport to decide any constitutional questions implicated by the petition.[54] Thus, we find that it is appropriate for the Commission to provide its interpretation of section 7(h), particularly given the statute's ambiguity and silence with respect to lands in which states hold an interest,[55] and reiterate our determination that

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[50] *Id.* at 16.

[51] Declaratory Order, 170 FERC ¶ 61,064 at P 23.

[52] *Id.* P 23 ("[T]his order neither compels the Third Circuit to reverse its decision, nor compels New Jersey to consent to suit, nor compels any landowner to transfer its property. This order does nothing more than set out the Commission's interpretation of a statute it administers.").

[53] Request for Rehearing at 17.

[54] Declaratory Order, 170 FERC ¶ 61,064 at PP 54-55.

[55] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction

providing this interpretation "does not implicate any separation of powers concerns."[56]

20. Protestors claim that, as a general rule, agency declaratory orders are owed no deference.[57] We disagree. Our interpretation of section 7(h) of the NGA, a statute we administer, merits deference.[58] Deference is appropriate "if the statute is silent or ambiguous with respect to the specific issue[.]"[59] The Third Circuit held that NGA section 7(h) is silent with regard to whether "Congress intended to delegate the federal government's exemption from state sovereign immunity to private gas companies" and, for the purpose of avoiding a constitutional conflict, declined to "assume that Congress intended—by its silence—to upend a fundamental aspect of our constitutional design."[60] The Commission's interpretation of NGA section 7(h) stems from decades of experience in administering the comprehensive NGA regulatory scheme, and it is a reasonable interpretation of the text of NGA section 7(h), confirmed by the legislative history of that provision and the Federal Power Act

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of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.").

[56] Declaratory Order, 170 FERC ¶ 61,064 at P 15.

[57] Request for Rehearing at 7-8.

[58] Declaratory Order, 170 FERC ¶ 61,064 at P 15; *see City of Arlington v. FCC*, 569 U.S. 290, 296, 307 (2013); *Brand X*, 545 U.S. at 982; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*).

[59] *Chevron*, 467 U.S. at 843.

[60] *In re PennEast*, 938 F.3d at 112; Declaratory Order, 170 FERC ¶ 61,064 at P 15 n.61.

(FPA) hydroelectric licensing provision on which NGA section 7(h) was modeled. In any event, whether our order warrants deference is matter for the courts to address: that question does not preclude us from issuing a declaratory order in response to a petition from a regulated entity.

21. Riverkeeper also asserts that the Third Circuit "held that there is no statutory ambiguity in the NGA with regard to federal delegation of eminent domain powers to private parties to condemn a State's property interest."[61] In doing so, Riverkeeper cites to the Third Circuit's discussion of the Supreme Court's *Blatchford* decision,[62] specifically the need for "unmistakably clear language in the statute" in order to abrogate state sovereign immunity. Riverkeeper improperly conflates whether there is ambiguity that permits an agency to interpret the statute it administers with the requirement for "unmistakably clear language" needed to indicate congressional intent to abrogate. As noted above, the Declaratory Order does not address the latter, i.e., whether section 7(h) abrogates a State's sovereign immunity.

22. Riverkeeper contends that the Commission does not "qualify for *Chevron* deference" when construing NGA section 7(h).[63] We disagree. As discussed in the Declaratory Order, the Commission has not disclaimed jurisdiction over every possible issue that may be deemed "related to the acquisition of property

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[61] Request for Rehearing at 18.

[62] *In re PennEast*, 938 F.3d at 102 (citing *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775 (1991)).

[63] Request for Rehearing at 19.

rights by a pipeline."[64] The Commission acknowledges that Congress put the burden of executing condemnation proceedings on state and district courts through NGA section 7(h),[65] and the Commission has appropriately refused to adjudicate issues such as "the timing of acquisition or just compensation."[66] Nevertheless, the Declaratory Order was appropriate under our statutory mandate because it addresses the operation of NGA section 7(h) within the NGA's "comprehensive scheme of federal regulation."[67] While Riverkeeper may disagree with the Commission's interpretation,[68] it is nonetheless our duty to ensure

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[64] Declaratory Order, 170 FERC ¶ 61,064 at P 13.

[65] *See* 15 U.S.C. § 717f(h).

[66] Declaratory Order, 170 FERC ¶ 61,064 at P 13 n.47 (quoting *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018) and *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018)).

[67] *See id.* PP 19, 27 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963))) (internal quotation marks omitted); *see also* 15 U.S.C. § 717(b) (2018).

[68] *See* Request for Rehearing at 17 (quoting Declaratory Order, 170 FERC ¶ 61,064 at P 23 (Glick, Comm'r, dissenting)). The dissent to this rehearing order states that reviewing courts need not defer to the Commission's interpretation of NGA section 7(h), arguing that "*Chevron* 'deference comes into play . . . , only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency." *Infra* P 4 (Comm'r Glick, dissenting). The dissent argues, however, that in construing section 7(h) "a reasonable person could find only ambiguity and questions left unanswered," *id.* P 1, so the dissent's objections necessarily turn on the argument that "the Commission has no role to play whatsoever in administering that provision," *id.* P 5. We disagree. The Commission administers the certification process under NGA

the faithful execution of the NGA,[69] which includes the removal of uncertainty and termination of controversy.[70]

23. Additionally, Riverkeeper asserts that declaratory orders are not entitled to *Chevron* deference and do not have any legal weight. We disagree. Riverkeeper mistakenly bases this contention on the D.C. Circuit's decision in *Industrial Cogenerators v. FERC*,[71] arguing that "courts have held that unlike a declaratory order of a court, a declaratory order of FERC 'is of no legal' moment and

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section 7, which relies on the eminent domain authority granted to certificate holders under NGA section 7(h) to effectuate the federal regulatory scheme and give effect to the Commission's determination that a given pipeline route "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). We have found that nothing in any part of NGA section 7—including NGA section 7(h)—limits the Commission's authority to grant a certificate that crosses state-owned land or land over which a state asserts some lesser property interest. *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 32-34, 66. We think that the text of the statute, as further confirmed by the legislative history, compels only one conclusion. *Id.* P 32. But, to the extent that a reviewing court may find that NGA section 7 is ambiguous because it does not specifically discuss the Eleventh Amendment, the Commission's interpretation should be entitled to judicial deference in order to ensure the successful administration of the federal regulatory scheme when confronted with a contrary interpretation that permits states to nullify the Commission's certificate authority through a collateral attack mounted in eminent domain proceedings.

[69] *See* 15 U.S.C. § 717(a).

[70] 18 C.F.R. § 385.207(a)(2).

[71] 47 F.3d 1231 (D.C. Cir. 1995).

would be legally ineffectual."[72] Riverkeeper, however, has taken language from that decision out of context. The quoted language was directed to the declaratory order at issue in that case, and it addressed whether the declaratory order was binding on specific parties. The D.C. Circuit's opinion continues with the following:

> The Commission nowhere purported to make the Declaratory Order binding upon the [Florida Public Service Commission], nor can we imagine how it could do so. *Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission's position*. It was much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position. *While such knowledge of the FERC's position might affect the conduct of the parties, the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a court that might later have been called upon to interpret the Act and the agency's regulations* in an private enforcement action; and because that could only be a district court, this court cannot have

[72] Request for Rehearing at 21-22 (quoting *Indust. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995)).

> pre-enforcement jurisdiction to review the Declaratory Order.[73]

Nothing in the D.C. Circuit's opinion suggests that the Commission's statutory interpretation, which may be articulated through the issuance of a declaratory order, is not entitled to deference. To the contrary, the D.C. Circuit recognizes that a Declaratory Order has to the "ability to persuade (*or to command the deference of*) a court that might later have been called upon to interpret the Act and the agency's regulations."[74] Further, Riverkeeper's reliance on purportedly contrary precedent concerning "opinion letters . . . policy statements, agency manuals, and enforcement guidelines" is misplaced[75] because, as previously stated, declaratory orders command deference. Indeed, the Supreme Court has applied deference to an agency's declaratory interpretations of a statute the agency administers.[76]

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[73] *Indus. Cogenerators v. FERC*, 47 F.3d at 1235 (emphasis added).

[74] *Id.* (emphasis added).

[75] *See* Request for Rehearing at 21 (quoting *Exelon Wind 1, L.L,C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

[76] *See, e.g.*, *City of Arlington*, 569 U.S. at 307 (applying *Chevron* deference to the FCC's declaratory ruling regarding its own jurisdiction because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority"). The Commission, "*with like effect as in the case of other orders*, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (2018) (emphasis added).

3. Issuance of the Declaratory Order, rather than Participation in the Third Circuit Proceeding, was an Appropriate Means of Addressing the Relevant Issues

24. Riverkeeper attempts to relitigate its claim that administrative agencies are not permitted to issue declaratory orders after court decisions unless they have participated in prior litigation.[77] As explained in the Declaratory Order, we disagree.[78] The Third Circuit's decision does not bind other courts of appeals or preclude the Commission from subsequently adopting a different interpretation of the statute.[79] As the Supreme Court has recognized, allowing a single court of appeals to bind all subsequent agency interpretations of a statute would "lead to the ossification of large portions of our statutory law."[80] Despite Riverkeeper's repeated contentions, neither the Administrative Procedure Act (APA) nor the Commission's regulations indicate that the Commission's authority to issue a declaratory order is contingent on its participation in litigation.[81] As we previously stated, it would be impractical for the Commission to intervene in every condemnation proceeding involving an interstate natural gas

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[77] *See* Request for Rehearing at 8.

[78] Declaratory Order, 170 FERC ¶ 61,064 at P 19.

[79] *Brand X*, 545 U.S. at 982; *cf. United States v. Mendoza*, 464 U.S. 154, 158 (1984) (finding the doctrine of nonmutual offensive collateral estoppel inapplicable against non-private litigants).

[80] *Brand X*, 545 U.S. at 983.

[81] *See* 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2).

pipeline company.[82] Moreover, the issuance of a declaratory order provides the Commission's formal interpretation, as opposed to *ad hoc* litigation pleadings filed by Commission staff.[83] In issuing the Declaratory Order, the Commission complied with past agency practice as well as its statutory mandates under the APA and NGA.[84]

B. Congress Intended NGA Section 7(h) to Empower Certificate Holders to Condemn Lands in which the State Maintains an Interest

25. We now address the merits. Riverkeeper contends that the Declaratory Order's conclusion that Congress intended to grant broad eminent domain authority to certificate holders through NGA section 7(h) is "dead wrong."[85] We disagree.

26. First, Riverkeeper asserts that NGA section 7(h) lacks the unmistakably clear language necessary to abrogate Eleventh Amendment immunity.[86] Riverkeeper further contends that the Commission inappropriately looked to legislative history despite the "clear statement rule" and the Commission's

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[82] Declaratory Order, 170 FERC ¶ 61,064 at P 19.

[83] *Id.*

[84] *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

[85] Request for Rehearing at 25.

[86] *Id.* at 26-31.

recognition that NGA section 7(h) is silent with regard to the states.[87] To support this clam, Riverkeeper cites precedent under the Rehabilitation Act[88] and the Education of the Handicapped Act.[89]

27. Riverkeeper's argument fails for two reasons. First, the Declaratory Order did not need to consider the Eleventh Amendment clear statement rule, which instructs courts not to interpret a statute in a way that abrogates states' rights unless the statute unmistakably intends that result,[90] because the Commission assumes the constitutionality of the statutes it administers. Rather, the Commission's determination was confined to interpreting NGA section 7(h), using typical rules of construction, as further informed by the legislative history of NGA section 7(h) and FPA section 21.[91]

28. Second, employing the federal power of eminent domain is distinguishable from other instances necessitating application of the clear statement rule. Though not addressing the specific 11th Amendment argument, we note for the purposes of statutory interpretation that the precedents cited by Riverkeeper are inapplicable here because they did not involve a grant of the federal eminent domain power, but rather a grant of authority for individuals

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[87] *See* Request for Rehearing at 30.

[88] *See Atascadero*, 473 U.S. 234.

[89] *See Dellmuth*, 491 U.S. 223.

[90] *See id.*, 491 U.S. at 228; *Atascadero*, 473 U.S. at 242.

[91] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 54-55.

to obtain monetary damages.[92] Since only the sovereign may confer the power of eminent domain, and the grant of eminent domain is express, there is no question as to the character of the power conferred.[93] Moreover, states are able to raise any objections they have to the route set in a Commission certification proceeding during that proceeding, on rehearing, and on direct judicial review of the Commission's orders.[94] Accordingly, the Commission appropriately found the absence of limiting language

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[92] *Compare Dellmuth*, 491 U.S. at 232 (holding that "[t]he Eleventh Amendment bars respondent's attempt to collect tuition reimbursement") *and Atascadero*, 473 U.S. at 235, 247 (finding that "litigants seeking retroactive monetary relief under [29 U.S.C. § 794]" were barred by the Eleventh Amendment) *with Blatchford*, 501 U.S. at 785 (recognizing that, "[t]o avoid [the clear statement rule], respondents assert that [28 U.S.C.] § 1362 represents not an abrogation of the States' sovereign immunity, but rather a delegation to tribes of the Federal Government's exemption from state sovereign immunity") *and In re PennEast*, 938 F.3d at 112-13 (vacating because "sovereign immunity has not been abrogated by the NGA, nor has there been . . . a delegation of the federal government's exemption from the State's sovereign immunity").

[93] *Compare Blatchford*, 501 U.S. at 785-86, 788 (refusing to find delegation in a general "arising under" statute) *with Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890) (upholding a private railroad corporation's condemnation of tribal land because "it is necessary that the United State government should have an eminent domain still higher than that of the state in order that it may fully carry out the objects and purposes of the constitution").

[94] *See* Declaratory Order, 170 FERC ¶ 61,064 at P 45 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)); *see also infra* P 23.

in NGA section 7(h) supported its decision to consider the legislative history.

29. Riverkeeper additionally argues that the legislative history of the NGA and the FPA is irrelevant and inconclusive. The Declaratory Order explains why we disagree. As a threshold matter, Riverkeeper's assertion that the clear statement rule precludes interpretation of the legislative history is inapplicable to the instant case because this case involves a certificate holder's exercise of the federal power of eminent domain, not the abrogation of state sovereign immunity from suits for monetary damages. Riverkeeper asserts that the Commission took "a large, unsupported leap of logic" in finding that the Declaratory Order was supported by legislative history of NGA section 7(h).[95] The legislative history is replete with concern over state interference with the build-out of energy infrastructure, explaining Congress' decision to grant the federal eminent domain power to certificate holders, free from potential state interference.[96]

30. Riverkeeper further challenges our reference in the Declaratory Order to Congress' amendment of FPA section 21 to impose restrictions on holders of hydroelectric licenses ability to condemn state lands pursuant to the parallel grant of eminent domain

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[95] Request for Rehearing at 35.

[96] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 40-41; S. Rep. No. 80-429, at 4 (1947) ("If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.").

authority under the FPA. As we explained, "the congressional choice to restrict private licensees' eminent-domain authority under FPA section 21—but not private certificate holders' authority under NGA section 7(h)—shows that Congress did not intend for condemnations under NGA section 7(h) to be subject to the restrictions Congress later imposed in amendments to FPA section 21."[97]

31. Riverkeeper asserts that the Commission cannot "extrapolate congressional intent" regarding NGA section 7(h) from the legislative history of FPA section 21.[98] However, we consider the legislative history and judicial interpretations of statutory text that Congress "follow[ed] substantially" in the creation of NGA section 7(h) to be informative and persuasive.[99] Additionally, we do not find the fact that "[t]he FPA . . . was amended during the period between *Union Gas* and the overruling of *Union Gas* by *Seminole Tribe*" to be significant.[100]

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[97] Declaratory Order, 170 FERC ¶ 61,064 at PP 42-44.

[98] Request for Rehearing at 37.

[99] S. Rep. No. 80-429, at 1. The Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016) (citation omitted) (recognizing provisions of the FPA and NGA to be "analogous"); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (following its "established practice of citing interchangeably decisions interpreting the pertinent sections of the [FPA and NGA]" due to the relevant provisions being "substantially identical") (citations omitted).

[100] Request for Rehearing at 37. Riverkeeper submits that the forty-five years between the passage of NGA section 7(h) and the 1992 amendment of FPA section 21 detract from the Commission's position that the amendment elucidates Congress's

32. We are likewise unpersuaded by Riverkeeper's challenge to the Commission's reliance on the Supreme Court's ruling in *City of Tacoma*, which involved a hydroelectric licensee's condemnation of state land. Riverkeeper asserts that the Supreme Court's decision was based on procedural grounds and did not address the merits of whether the licensee could condemn state land.[101]

33. We recognize that *City of Tacoma* was dismissed on procedural grounds due to it being an "impermissible collateral attack[] upon . . . the final judgment of the Court of Appeals,"[102] which had declined to interfere with the Commission's license order.[103] Nonetheless, the question presented to the Court was: "whether . . . the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued . . . under the Federal Power Act and more particularly [section] 21 thereof."[104] As stated in the Declaratory Order,

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intent as to the scope of the eminent domain authority provided for in NGA section 7(h) and FPA section 21 prior to its amendment. *Id.* (quoting Declaratory Order, 170 FERC ¶ 61,064 at P 18 (Glick, Comm'r, dissenting)). We disagree and note that the Energy Policy Act of 1992 also amended portions of the NGA while leaving unchanged the language of NGA section 7(h).

[101] *Id.* at 39.

[102] *City of Tacoma*, 357 U.S. at 341.

[103] *State of Wash. Dep't of Game v. Fed. Power Comm'n*, 207 F.2d 391, 398 (9th Cir. 1953).

[104] *City of Tacoma*, 357 U.S. at 323. Despite the dissent's assertion that *City of Tacoma* "says nothing about the issue now before us[,]" *infra* P 8 (Glick, Comm'r, dissenting), we are not so

eager to dismiss instruction from the Supreme Court. Moreover, we fail to see why raising a collateral attack to the Commission's certificate orders in an eminent domain proceeding is any more acceptable than other types of collateral attack on certificate orders that the federal courts routinely dismiss on the basis of the Supreme Court's decision in *City of Tacoma*. For example, the Third Circuit itself recently affirmed the dismissal of a complaint alleging that a pipeline certificate order violated the Religious Freedom Restoration Act, explaining that:

> Indeed, the Supreme Court has long held that the Federal Power Act's ("FPA"), statutory review scheme, 16 U.S.C. § 825*l*, which is materially identical to the NGA's, "necessarily preclude[s] de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review," and that challenges brought in the district court outside that scheme are therefore "impermissible collateral attacks." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 341 (1958); *see also Me. Council of the Atl. Salmon Fed. v. Nat'l Me. Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) ("The Supreme Court has made clear that the jurisdiction provided by [the Federal Power Act's jurisdictional provision] is 'exclusive,' not only to review the terms of the specific FERC order, but over any issue 'inhering in the controversy.'" (quoting *City of Tacoma*, 357 U.S. at 336).

Adorers of the Blood of Christ v. FERC, 897 F.3d 187, 197 (3d Cir. 2018) (footnotes and parallel citations omitted), *cert. denied*, 139 S. Ct. 1169 (2019); *see also, e.g.*, *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) ("Thus, a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding, *McCulloch* [*Interstate Gas Corp. v. Fed. Power Comm'n*], 536 F.2d [255,] at 913 [(10th Cir. 1976)] . . . . Moreover, the prohibition on collateral attacks applies whether the collateral action is brought in state court, *e.g.*, *City of Tacoma*, or federal court, *e.g.*, *McCulloch*."); *Woodrow v. FERC*, No. 20-6 (JEB), slip op. at 9-10 (D.D.C. May 6, 2020) (dismissing several constitutional challenges to the

"*City of Tacoma* emphasized that Congress intended to commit all questions associated with the issuance of a license—including the 'legal competence of the licensee' to condemn state land—to the Commission alone, with judicial review of the Commission's orders to take place exclusively in the relevant court of appeals or, following such direct review, in the Supreme Court[.]"[105]

34. In the Declaratory Order, the Commission cited to the Fifth Circuit's *Thatcher* decision, decided shortly after the enactment of NGA section 7(h). As the Commission explained, *Thatcher*[106] "resolved several other constitutional objections, including claims that NGA section 7(h) invaded authority reserved to the States under the Tenth Amendment."[107] Riverkeeper argues that *Thatcher* is inapplicable because it did not explicitly address the Eleventh Amendment. We never asserted otherwise and explicitly acknowledged this point in the Declaratory Order.,[108] However, the novel claim that section 7(h) did not confer the right to condemn state land required the Commission, like any adjudicator, to draw analogies, inferences, and comparisons to come to a determination. Drawing

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Commission's pipeline authority, and citing, among numerous other collected cases, *City of Tacoma*, *Adorers of the Blood of Christ*, and *Williams*).

[105] Declaratory Order, 170 FERC ¶ 61,064 at P 45 (citing *City of Tacoma*, 357 U.S. at 336-37).

[106] *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950).

[107] Declaratory Order, 170 FERC ¶ 61,064 at P 35.

[108] *Id.* ("*Thatcher* did not address the Eleventh Amendment, but resolved several other constitutional objections . . . .").

such inferences in these circumstances is neither improper nor unusual. In that regard, *Thatcher* appropriately informed the Commission regarding implementation of NGA section 7(h), as the Fifth Circuit upheld the constitutionality of Congress's grant of federal eminent domain authority to certificate holders against a Tenth Amendment challenge.[109]

35. After challenging the Commission's reliance on *Thatcher*, Riverkeeper asserts that the Commission's interpretation, as articulated in the Declaratory Order, is not supported by any judicial precedent. However, neither Riverkeeper nor the dissent note any precedent prior to the Third Circuit's decision, other than a 2017 federal district court decision,[110] supporting a contrary interpretation of the Commission's otherwise unchallenged interpretation of NGA section 7(h). That the issue had not been raised in the courts in 70 years despite extensive pipeline construction reinforces the Commission's conclusion that section 7(h) confers the right to condemn state lands. Prior to 2017, it does not appear that courts doubted that proposition.

36. Riverkeeper further alleges that the Commission's interpretation, as articulated in the Declaratory Order, is not supported by Commission precedent,[111] mischaracterizing supportive

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[109] *Thatcher*, 180 F.2d at 647; *see* Declaratory Order, 170 FERC ¶ 61,064 at P 35.

[110] *See Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131 (E.D. Tex. 2017).

[111] Request for Rehearing at 31-34.

Commission precedent as "a single [Administrative Law Judge (ALJ)] opinion[.]"[112] The dissent similarly errs,[113] contending that "the Commission had, what was to my knowledge, an unblemished record of ducking any and all questions related to section 7(h)[.]"[114] That is incorrect.[115] First the decision of the ALJ in *Tenneco Atlantic* referenced in the Declaratory Order repeated verbatim the reasoning of a statutorily-mandated Presidential recommendation from the Federal Power Commission, issued in that same year, which likewise found that "[t]he eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands."[116]

37. Second, the FPC decision cited in *Tenneco Atlantic* constitutes yet another precedent. That decision addressed numerous issues arising from the legislation[117] directing the FPC to make recommendations regarding the construction of the so-called Alaska Natural Gas Transportation Systems

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[112] *Id.* at 32-33 & n.39 (citing Declaratory Order, 170 FERC ¶ 61,064 at P 12 (Glick, Comm'r, dissenting)).

[113] Declaratory Order, 170 FERC ¶ 61,064 at P 12 (Glick, Comm'r, dissenting).

[114] *Infra* P 6 (Glick, Comm'r, dissenting).

[115] Declaratory Order, 170 FERC ¶ 61,064 at PP 12-13 (Glick, Comm'r, dissenting) (discussing cases in which the Commission dealt with Eleventh Amendment issues implicated by NGA section 7(h)).

[116] *Id.* at P 25 n.108 (quoting *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025 (1977); *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. 810, 1454 (1977)).

[117] Alaska Natural Gas Transportation Act, 15 U.S.C. § 719 (2018).

(ANGTS) intended to transport natural gas from fields on Alaska's North Slope. One such issue was the ability of a certificate holder to use its section 7(h) eminent domain authority to condemn the extensive Alaska state land ANGTS necessarily would have to traverse. The FPC conducted the same analysis we conducted in the Declaratory Order of the statutory language, the legislative history, and the parallel provisions of FPA section 21.[118] Based on that analysis, the FPC concluded, as we do here, that "the eminent domain grant to persons holding Section 7 certificates applies equally to private and state lands."[119]

38. Third, the Commission cited to *Islander East*, which rejected an Eleventh Amendment argument.[120] Riverkeeper questions such reliance, due to the Third Circuit "dismiss[ing] the relevance of *Islander East*."[121] The court's conclusion notwithstanding, the Commission cited *Islander East* to illustrate its consistent implementation of NGA section 7(h) over the past seven decades.

39. Finally, Riverkeeper claims that the Commission has exaggerated the potential impact of the Third Circuit's decision.[122] We disagree. As explained in the Declaratory Order, if state-owned lands are treated as

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[118] *Recommendation to the President Alaska Nat. Gas Transp. Sys.*, 58 F.P.C. at 1453-55.

[119] *Id.* at 1454.

[120] Declaratory Order at P 38 (citing *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at PP 128, 131 (2003) (*Islander East*)).

[121] Request for Rehearing at 34.

[122] *Id.* at 40-42.

impassable barriers for purposes of condemnation, the circumvention of those barriers, if possible at all, would require the condemnation of more private land at significantly greater cost and with correspondingly greater environmental impact.[123] If lands over which a state has asserted any property interest become impassable barriers for purposes of condemnation, a state could unilaterally prevent interstate transportation of an essential energy commodity through its borders, thus eviscerating the Commission's Congressionally-conferred authority over interstate natural gas pipeline construction.

40. For instance, Columbia Gas Transmission, LLC (Columbia), the certificate holder in the pending Fourth Circuit proceeding, has been prevented from accessing a "small but necessary portion of land, severely impeding Columbia's ability to construct a project that will serve demonstrated demand and that the Commission has determined to be in the public interest[.]"[124] Furthermore, the Commission's analysis of potential impacts was buttressed by the concerns of commenters.[125]

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[123] Declaratory Order, 170 FERC ¶ 61,064 at P 58 n.221.

[124] TC Energy's October 18, 2019 Motion to Intervene and Comments at 19. We note that the condemnation proceeding for the Eastern Panhandle Expansion Project involves approximately .12 acres of land in which the State of Maryland holds an interest. *See Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv- 1444 (D. Md. Aug. 22, 2019) (appeal filed Sept. 20, 2019).

[125] *See* Declaratory Order, 170 FERC ¶ 61,064 at PP 59-60, 62-64.

IV. Conclusion

41. We confirm our conclusions in the Declaratory Order that, in enacting the NGA, Congress established a carefully-crafted, comprehensive scheme in which the Commission was charged with the exclusive authority to issue certificates of public convenience and necessity for interstate gas pipelines; that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain to acquire lands needed for authorized projects; and that this authority applies to lands in which states hold interest. Riverkeeper provides no convincing argument or authority to the contrary.

The Commission orders:

The request for rehearing is denied.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(SEAL)

Kimberly D. Bose,
Secretary.

GLICK, Commissioner, *dissenting*:

1. I dissented from the underlying order because the Commission went out of its way to bolster a private party's litigation efforts regarding the meaning of the U.S. Constitution.[1] I also disagreed with several aspects of the Commission's slipshod analysis of the questions it chose to address. As I explained, the Commission magically saw clear congressional intent where a reasonable person could find only ambiguity and questions left unanswered. The bottom line was that "[t]he majority's confidence in its conclusion [wa]s better evidence of its own ends-oriented decisionmaking than any unambiguous congressional intent."[2]

2. Today's order is more of the same, and I do not need to repeat all of my underlying dissent. A few points, however, are worth a brief mention.

3. The first is the Commission's attempt to bolster its claim to *Chevron* deference.[3] In the underlying order, the Commission asserted, *ipse dixit*, that its interpretation would receive deference by the courts.[4]

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[1] *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,064, at P 15 (2020) (Order) (Glick, Comm'r, dissenting at P 1 & n.1).

[2] *Id.* (Glick, Comm'r, dissenting at P 2).

[3] *PennEast Pipeline Company, LLC*, 171 FERC ¶ 61,135, PP 20-22 (2020) (Rehearing Order); *see generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (discussing deference).

[4] Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at P 5) ("The majority contends that today's order is useful because its interpretation of Congress's intent in enacting section 7(h) merits deference from the courts. It supports that statement with a single general citation to *Chevron*.").

The Commission tries a little harder in today's order, contending that *Chevron* deference is appropriate because the Commission is the agency charged with administering other provisions of the Natural Gas Act (NGA).[5] But the end result is the same, as today's order once again misapprehends the purpose and role of Chevron.

4. As the Supreme Court has repeatedly held, "[d]eference in accordance with Chevron . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[6] In particular, *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[7] An implicit delegation can be found where an "agency's generally conferred authority and other statutory circumstances [indicate] that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[8] But that must

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[5] Rehearing Order, 171 FERC ¶ 61,135 at PP 20-22.

[6] *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (explaining that not all agency statutory interpretations qualify for *Chevron* deference; only those interpretations that meet the criteria outlined in *Gonzalez*).

[7] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[8] *Mead*, 533 U.S. at 229.

mean that ambiguity by itself is not sufficient to implicate Chevron; otherwise there would be no need to consider what Congress would "expect" from the agency.[9] "Rather, *Chevron* 'deference comes into play . . . , only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency.'"[10]

5. As I explained in my earlier dissent, nothing in the NGA indicates that Congress would have expected the Commission to fill in ambiguity regarding the scope of section 7(h).[11] That is because the Commission has no role to play whatsoever in administering that provision.[12] Rather, section 7(h) provides what the Commission describes as an "'automatic right'"[13] that affords certificate holders the ability to begin eminent domain proceedings in federal court, with no Commission supervision. The Commission's oft-stated position is that all it does is evaluate whether a proposed pipeline is required by

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[9] *Id.*; *see Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir. 2002) ("'Mere ambiguity in a statute is *not* evidence of congressional delegation of authority.'" (quoting *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001)).

[10] *Atl. City*, 295 F.3d. at 9 (emphasis in the original) (quoting *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)).

[11] Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at P 6).

[12] This is a point the Commission makes frequently—almost every time eminent domain comes up in the certification process. *See id.* (collecting recent Commission orders disclaiming responsibility over the scope of certificate holders' eminent domain authority or how they exercise that authority).

[13] *Id.* **(**Glick, Comm'r, dissenting at P 6) (quoting *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 72 (2018)).

the public convenience and necessity and that the "Commission itself does not grant the pipeline the right to take the property by eminent domain."[14]

6. Indeed, the Commission has an impressive record of ducking questions related to section 7(h), insisting that the courts are the proper forum for those questions.[15] That makes sense given that section 7(h) provides no role for the Commission to play and there is nothing in the NGA's "generally conferred authority and other statutory circumstances" that indicates that "Congress would expect the [Commission] to be able to speak with the force of law" when interpreting section 7(h).[16] Against that backdrop, the Commission's role

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[14] *E.g.*, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 74 ("In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain . . . . The Commission itself does not grant the pipeline the right to take the property by eminent domain.").

[15] *See, e.g.*, Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at P 6). The Commission notes that it has not formally "disclaimed jurisdiction over every possible issue that may be deemed related to the acquisition of property rights by a pipeline." Rehearing Order, 171 FERC ¶ 61,135 at P 22 (internal quotation marks omitted). That statement, which is supported only by a citation to an unsupported section of the underlying order, tells us nothing. An agency's statement that it has not formally disclaimed jurisdiction hardly proves that it had it in the first place.

[16] *Mead*, 533 U.S. at 229. The Commission also suggests that its experience administering the NGA more generally entitles it to deference, even with regard to the provisions of the NGA that it

in administering other aspects of the NGA's certification process is irrelevant.[17]

7. Second, the Commission attempts to rehabilitate its reliance on a series of cases that are —to put it charitably—inapt. As I previously explained, no reasonable person could read those cases to support the assertion that section 7(h) clearly vests certificate

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does not administer. Rehearing Order, 171 FERC ¶ 61,135 at P 20. But that is not the theoretical foundation on which *Chevron* is based. *See supra* notes 6-10 and accompanying text; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) (explaining that "the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes" is "hardly a valid theoretical justification" for judicial deference). Instead, the theory of *Chevron* is that when Congress has not spoken to a specific issue and delegated to an agency the lawmaking authority to fill that gap, it is not for the courts' to second guess the agency's reasonable interpretation. The fact that the agency may have experience with other areas of the statute is beside the point where there is no indication from the "generally conferred authority and other statutory circumstances" that Congress would have expected the agency to fill in the ambiguity. *Mead*, 533 U.S. at 229.

[17] The Commission's principal response is a run-on footnote that rehashes its above-the-line arguments. In particular the Commission reiterates that it "administers the certification process under NGA section 7," that it believes that the statute's silence on the issue of certificate holders' ability condemn state lands is unambiguous evidence that they can do so, and that, in any case, it deserves deference in resolving any ambiguity. Rehearing Order, 171 FERC ¶ 61,135 at n.68. Those unsupported assertions are nothing that the Commission has not already said and repeating them does not make the points any more convincing.

holders with the authority to condemn state lands.[18] Indeed, the Commission's reliance on those cases only highlights the absence of persuasive authority supporting its position.

8. Today's order begins with the Supreme Court's decision in *City of Tacoma v. Taxpayers of Tacoma*.[19] Unlike the underlying order, the Commission this time admits that the case was decided on procedural grounds that are irrelevant to the question before us.[20] That should be the end of the analysis, since it means that all today's order has to contribute is the observation that the substantive question presented in a case dismissed on jurisdictional grounds[21] was whether a subdivision of a state could condemn state land under section 21 of the Federal Power Act (the most analogous provision to section 7(h) under the NGA).[22] The Court, of course, could not address that

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[18] *See* Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at PP 11, 21).

[19] Rehearing Order, 171 FERC ¶ 61,135 at P 33 (discussing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 338 (1958))

[20] *Compare id.* ("recogniz[ing] that *City of Tacoma* was dismissed on procedural grounds") *with* Order, 170 FERC ¶ 61,064 at PP 45-47 (claiming that "the Supreme Court's decision in *City of Tacoma* . . . directly addressed the question whether a hydroelectric licensee may condemn state land pursuant to a license granted under FPA section 21").

[21] *City of Tacoma*, 357 U.S. at 334-37 (explaining that the Court lacked jurisdiction to review the claims because they could only have been—and, in fact, were—brought through an appeal pursuant FPA section 313(b)).

[22] *Id.* at 323. In any case, as I explained in my earlier dissent, the City of Tacoma's substantive arguments appear to have addressed the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. 6, cl. 2, not the scope of section 7(h). Order, 170 FERC

question,[23] and so that case says nothing about the issues now before us.[24]

9. In a pseudo-response, the Commission slips into a footnote a new theory of *City of Tacoma*'s relevance, asserting that it is an example of the Court's willingness to dismiss collateral attacks on the

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¶ 61,064 **(**Glick, Comm'r, dissenting at P 22); *see State of Wash. Dep't of Game v. FPC*, 207 F.2d 391, 396 (9th Cir. 1953) (explaining that the authority conferred by a federal license trumped state law limitations on a city's capacity to exercise that authority); *see also City of Tacoma*, 357 U.S. at 339 (explaining that the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) resolved the case based on its "[c]onclu[sion] that . . . state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license"); *City of Tacoma*, 357 U.S. at 341 (Harlan, J., concurring) (explaining that the question decided by the Ninth Circuit was "whether state or federal law governed" the particular dispute between the parties).

[23] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (explaining that addressing the merits of any proceeding before establishing subject-matter jurisdiction violates Article III of the U.S. Constitution and "offends fundamental principles of separation of powers" (citing *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *see also Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56 (D.C. Cir. 2015) (dismissing an appeal for lack of subject-matter jurisdiction because the petitioner did not comply with FPA section 313(b)). That means that any substantive discussion therein was not just *dicta*, but *dicta* about an issue on which the Court lacked subject-matter jurisdiction to opine.

[24] The Commission criticizes this "assertion," Rehearing Order, 171 FERC ¶ 61,135 at n.104, but then fails to respond to the arguments on which it is based. That tells you all you need to know. The Commission's evident frustration with the holes in its argument does not rob the counterarguments of their force.

Commission's certificate orders.[25] Although that theory correctly characterizes *City of Tacoma* (for the first time), its implication badly mischaracterizes New Jersey's claim of sovereign immunity.[26] Whether right or wrong, a state's assertion of its "dignity" interest in not being haled into court without its consent, is hardly just a collateral challenge to a Commission certificate.[27] Immunity from suit in federal court is an altogether different theory than a substantive challenge to a section 7 certificate, and a condemnation proceeding is exactly the forum in which one would expect a state to raise that putative right.[28] So brusquely dismissing a state's attempt to assert its Constitutional immunity from suit in federal court as nothing more than a collateral challenge to a certificate order is quite the contrast to my colleagues'

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[25] Rehearing Order, 171 FERC ¶ 61,135 at n.104.

[26] It also has nothing in common with the interpretation the Commission spent four pages advancing in the underlying order. *See* Order, 170 FERC ¶ 61,064 at PP 43- 48.

[27] *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." (citing *In re Ayers,* 123 U.S. 443, 505 (1887)); *see also Alden v. Maine*, 527 U.S. 706, 748 (1999) ("The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" (citing *In re Ayers*, 123 U.S. at 505)).

[28] *Cf., e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent.").

oft-repeated commitments to federalism and states' rights.

10. Next, the Commission turns to briefly defend its reliance on *Thatcher v. Tennessee Gas Transmission Company*,[29] a case from the U.S. Court of Appeals for the Fifth Circuit, which upheld section 7(h) against a challenge under the Tenth Amendment to the U.S. Constitution.[30] But, as I explained in my earlier dissent, the fact that section 7(h) did not violate the Tenth Amendment is irrelevant when considering whether Congress intended section 7(h) to apply to state lands or what that means for the Eleventh Amendment.[31] Nevertheless, the Commission insists that considering *Thatcher* was appropriate because, lacking any cases directly on point, it was forced to resort to "analogies, inferences, and comparisons."[32] It may well be that *Thatcher* is all the Commission can point to as it works with what little authority it has.[33] But, if so, that only proves my point that we do not

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[29] 180 F.2d 644 (5th Cir. 1950).

[30] Rehearing Order, 171 FERC ¶ 61,135 at P 34.

[31] Order, 170 FERC ¶ 61,064 **(**Glick, Comm'r, dissenting at P 11).

[32] Rehearing Order, 171 FERC ¶ 61,135 at P 34. The Commission suggests that *Thatcher* is somehow relevant because I do not cite old cases that involve the Eleventh Amendment or that present the Third Circuit's interpretation of section 7(h). *Id.* Now we're really grasping for straws. As I have maintained throughout this proceeding, the question before us simply cannot be answered clearly one way or the other. Why that ambiguity justifies the Commission in building an over-confident interpretation of section 7(h) on a foundation of irrelevant cases is beyond me.

[33] *Cf.* Bob Dylan, *Like A Rolling Stone* (1965) ("When you ain't got nothing, you got nothing to lose.").

have a clear answer regarding Congress' intentions behind section 7(h).

11. Finally, I am glad to see today's order this time explicitly acknowledge that the text of section 7(h) is ambiguous.[34] Although I think that is the only reasonable conclusion, it means that this proceeding is not one that can be decided on the basis of the text alone, as the Commission suggested in the underlying order.[35] Instead, the outcome must turn on the other indicia of congressional intent that the Commission spent—and, in today's order, spends—so much time discussing.[36] I have reviewed those materials again

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[34] Rehearing Order, 171 FERC ¶ 61,135 at P 19 (asserting that it is appropriate for the Commission to weigh in "given the statute's ambiguity and silence with respect to lands in which states hold an interest"); *see also id.* P 20 (claiming *Chevron* deference and noting that "[d]eference is appropriate 'if the statute is silent or ambiguous with respect to the specific issue'" (quoting *Chevron*, 467 U.S. at 843)).

[35] Order, 170 FERC ¶ 61,064 at P 32.

[36] It is also noteworthy that the Commission addresses for the first time the consequences of that ambiguity. Despite the Commission's claim in the underlying order to be addressing only the "straightforward questions of law" regarding Congress' intent in enacting section 7(h), Order, 170 FERC ¶ 61,064 at P 21, today's order wanders so far afield as to theorize about whether the Supreme Court's clear statement rule for abrogating states' Eleventh Amendment immunity applies in the context of an eminent domain proceeding, Rehearing Order, 171 FERC ¶ 61,135 at P 28 ("[E]mploying the federal power of eminent domain is distinguishable from other instances necessitating application of the clear statement rule); Rehearing Order, 171 FERC ¶ 61,135 at n.92 (speculating about distinctions in the nature of authority conferred by Congress)—hardly a matter within "the heartland of our quotidian ambit," Order, 170 FERC ¶ 61,064 at P 39.

and, for the reasons discussed in my earlier dissent, can only reach the same conclusion as before: "The evidence simply is not clear one way or the other . . . whether Congress intended section 7(h) of the NGA to apply to state lands or not."[37] As a result, the Commission had no business issuing the Declaratory Order that it did.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

[37] Order, 170 FERC ¶ 61,064 (Glick, Comm'r, dissenting at PP 2, 23).