

164 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

PennEast Pipeline Company, LLC

Docket No. CP15-558-001

ORDER ON REHEARING

(Issued August 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 reduced to less than significant levels with PennEast's implementation of the required mitigation measures as adopted as conditions of the order.²

¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (Certificate Order).

² Certificate Order, 162 FERC ¶ 61,053 at P 98.

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 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 the

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).

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).

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 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 introduce new evidence for the

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).

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 grounds for (continued ...)")

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 pleadings¹³ do not 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

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 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.

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 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.

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.

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 analysis; (9) (*continued ...*)

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 Procedure¹⁹ 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 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

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.

²¹ *Id.*, at 85.

²² *Id.*, at 86-87.

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 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

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.

²⁵ Certificate Order, 162 FERC ¶ 61,053 at PP 28-36.

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 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 agreements to evaluate project need, regardless of the affiliate status of some of the project shippers.³² As the Certificate Order discussed, the

²⁶ See, e.g., Lower Saucon's Request for Rehearing at 2; Rate Counsel's Request for Rehearing at 2.

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.

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 (continued ...)"))

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 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

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.

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).

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 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 confirm the legitimacy of the financial commitments agreed to in affiliate and non-affiliate precedent agreements, and thereby

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”).

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-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).

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.

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

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 (*continued ...*)

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 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 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.

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.

⁴⁹ Certificate Order, 162 FERC ¶ 61,053 at P 30.

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 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

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).

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 (*continued ...*)

23. Moreover, Rate Counsel makes no showing that turn-back capacity on existing pipelines is sufficient for transporting the required volumes of natural gas 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 NGA⁵⁷ 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

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

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”).

⁵⁶ *Id.* at P 37.

⁵⁷ 15 U.S.C. § 717f (2012).

⁵⁸ Conservation Foundation’s Request for Rehearing at 51-54.

⁵⁹ *Id.*

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.

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 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

⁶² *Id.*

⁶³ *See* Hopewell’s Request for Rehearing 19-20; Conservation Foundation’s Request for Rehearing at 52.

⁶⁴ *National Fuel*, 139 FERC ¶ 61,037 at P 12.

⁶⁵ Certificate Order, 162 FERC ¶ 61,053 at ordering para. (E).

“substantial evidence” of the public benefits of the project.⁶⁶ Petitioners further contend that due to the “questionable benefits” of the project, the Commission 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 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

⁶⁶ See HALT’s Request for Rehearing at 11, 15; Delaware Riverkeeper’s Request for Rehearing at 23.

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.

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).

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

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,

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. 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”).

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.

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. 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.

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).

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).

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 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 certifies 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

⁸⁰ Certificate Order, 162 FERC ¶ 61,053 at P 40.

⁸¹ 15 U.S.C. § 717f(h) (2012).

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*).

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. 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 requirement reduces the overall maximum recourse rate, which acts as a cap on a

⁸⁵ *See id.* at 392.

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. 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).

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

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

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).

⁹⁵ *See* Rate Counsel's Request for Rehearing at 14.

⁹⁶ *Id.* at 16.

⁹⁷ Certificate Order, 162 FERC ¶ 61,053 at P 98.

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 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 the consuming public until just and reasonable rates can be determined

⁹⁸ See *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 39 (2017).

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.

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 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

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.

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.

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 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

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.

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’”).

44. The Certificate Order specifically recognized the existence of incomplete surveys, primarily due to lack 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 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

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.

¹¹³ *Id.* at P 99.

¹¹⁴ Certificate Order, 162 FERC ¶ 61,053 at P 216.

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 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 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

¹¹⁵ Final EIS at 4-76; Certificate Order, 162 FERC ¶ 61,053 at P 129.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 4-17.

¹¹⁹ *Id.*; *see also* Certificate Order, 162 FERC ¶ 61,053 at PP 120-121.

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 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

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.

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.

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.

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).

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 waived”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 the Commission subjected its authorization of the PennEast Project to conditions that must be satisfied before commencing construction or operation of the project.¹³³

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).

Among these conditions is the requirement that PennEast receive the necessary state approvals under this federal statute prior to construction.¹³⁴

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 there can be no impact on the environment until there has been full compliance with all relevant federal laws.

¹³⁴ Certificate Order, 162 FERC ¶ 61,053, Appendix A, Environmental Condition 10. Environmental Condition 10 applies to *all* federal authorizations, including any necessary 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 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
(continued ...)

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 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

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.

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 Env'tl. 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*).

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

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

¹⁴⁰ Hopewell’s Request for Rehearing at 13; Conservation Foundation’s Request for Rehearing at 57.

¹⁴¹ See *supra* P 56, n. 137.

¹⁴² Hopewell’s Request for Rehearing at 15-16.

¹⁴³ See *e.g.*, *Islander East Pipeline Co., LLC v. Conn. Dep’t of Env’tl. 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 agency’s conditional approval because it was expressly conditioned on the completion of section 106 process).

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 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

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).

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*)).

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 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

¹⁵² HALT’s Request for Rehearing at 7.

¹⁵³ 15 U.S.C. § 717f(e) (2012).

¹⁵⁴ *CATCO*, 360 U.S. at 391.

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. & Env’tl. Control v. FERC*, 558 F.3d 575, 578-579 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from the Commission’s conditional approval of a natural gas terminal construction despite statutes requiring states’ prior approval because (continued ...))

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 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 company-sponsored open house meetings, public scoping meetings, and several comment periods

the Commission conditioned its approval of construction on the states' prior approval); *Pub. Utils. Comm'n. of State of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding the Commission had not violated NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

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.

(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 evaluate compliance during construction.¹⁶⁴ Accordingly, we find that it would be unnecessary and inefficient to

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.

¹⁶⁴ *Id.* P 99.

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 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

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 (continued ...)”

72. Third-party contracting involves the use of an independent contractor to assist Commission staff in its environmental analyses and review of a proposal. 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 the conflict of interest provision. For example, it states that, "[i]n some instances, multidisciplinary firms are being excluded from environmental impact

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)).

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).

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 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

¹⁷¹ 48 Fed. Reg. 34,266 (July 28, 1983).

¹⁷² *Id.*

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).

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 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 responsibility for the work of its third-party contractors or the environmental review of the PennEast Project.

¹⁷⁵ Lower Saucon’s Request for Rehearing at 13-15.

¹⁷⁶ *Id.* at 13.

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.

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 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

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.

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.

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 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

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.

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).

purpose and need of the project to the extent necessary to inform its alternatives analysis. Courts have upheld 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

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 Although this description limits some types of alternatives considered, it does not preordain that the project being

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 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).

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 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

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.

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.

above, when determining “public need,” the Commission balances public 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

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

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.

²⁰⁶ Final EIS at 3-3.

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 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

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.

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.

pipeline adjacent to the Leidy Line would require an additional 54 miles of pipeline; disturb 602 more acres during construction; require 142 more acres of operational right-of-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 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

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 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.

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 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

²¹⁴ Final EIS at 3-9.

²¹⁵ *Id.* at 3-6.

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 be 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 EIS²¹⁹ 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

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.

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 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 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

²²³ NJDEP's Request for Rehearing at 34-37.

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.

²²⁷ Delaware Riverkeeper's Request for Rehearing at 150.

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 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

²²⁸ Final EIS at 3-9 – 3-12.

²²⁹ *Id.*

²³⁰ Delaware Riverkeeper’s Request for Rehearing at 151.

²³¹ Final EIS at 3-12.

²³² Delaware Riverkeeper’s Request for Rehearing at 146-152.

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 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 either the estimated upstream or downstream impact analyses.²³⁷

²³³ *Id.* at 153.

²³⁴ Application, Appendix E at 45.

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.

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 (*continued ...*)

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 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

(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.*

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.

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 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 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”

²⁴⁴ Certificate Order, 162 FERC ¶ 61,053 at P 197.

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.

²⁴⁸ *Id.*

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

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

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 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 [P]roject. [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 (continued ...)

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 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 case, and resource to resource, depending on the facts presented.

[¶ 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).

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)).

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 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

²⁵⁷ Conservation Foundation's Request for Rehearing at 81.

²⁵⁸ Final EIS at 4-320 - 4-321.

²⁵⁹ Conservation Foundation's Request for Rehearing at 81.

²⁶⁰ Final EIS at 4-231.

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 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 project’s GHG emissions.²⁶⁵ As the Commission has explained, it cannot find a suitable method to attribute discrete

²⁶¹ *Id.* at 4-322.

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.

²⁶⁵ *See* Delaware Riverkeeper’s Request for Rehearing at 68 – 99, Sierra Club – New Jersey’s Request for Rehearing at 2.

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 “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

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.

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.

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

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. FERC*,²⁷⁵ that the Social Cost of Carbon tool is not useful for the Commission’s NEPA reviews because

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.*

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 CO₂ emissions in a given year.

²⁷⁵ 828 F.3d 949, 956 (D.C. Cir. 2016).

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 be appropriate for, analysis of project-level decision-making.”²⁷⁸ We adopt that reasoning here.²⁷⁹

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.

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 (continued . . .)

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

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).

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).

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 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 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

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 projects; and commercial and large-scale residential developments.

²⁸⁹ *Id.* at 4-329.

²⁹⁰ *Id.* at 4-332.

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 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

²⁹¹ *Id.* at 4-246 - 4-248.

²⁹² *Id.* at 4-254 - 4-255.

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))).

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 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 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

²⁹⁵ Delaware Riverkeeper’s Request for Rehearing at 38 – 41.

²⁹⁶ *Supra* n.279.

²⁹⁷ *Id.* at 102-108.

²⁹⁸ Hopewell’s Request for Rehearing at 40-42

²⁹⁹ 40 C.F.R. § 1508.25(a)(1)-(3) (2017).

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 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

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”).

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.”

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 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

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 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.

137. We further found that neither the PennEast Project nor the Garden State Expansion Project are 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

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

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.

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).

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, 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

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).

³¹⁶ NJDEP's Request for Rehearing at 49-51.

³¹⁷ N.J. Stat. Ann. § 13:1L-14.2, *et seq.* (West 2017).

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 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

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

³¹⁸ See NJDEP's Request for Rehearing at 51-52.

³¹⁹ Final EIS at 4-173.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ Certificate Order, 162 FERC ¶ 61,053 at P 163.

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 these comments when NJDEP raised them in response to the Draft EIS, and explained in the Certificate Order that in addition to reseedling 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 reseedling.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.

³²⁴ *Id.* P 141.

³²⁵ *Id.*

³²⁶ Final EIS at 4-175.

³²⁷ NJDEP’s Request for Rehearing at 52.

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.

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 streams,³³¹ which could have adverse impacts on wood turtle and long-tailed 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 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

³³⁰ NJDEP's Request for Rehearing at 47-49.

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.

³³⁶ *Id.* at P 147.

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 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

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Final EIS at 4-124 – 4-139.

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.

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 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 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 high-

³⁴³ Lower Saucon’s Request for Rehearing at 37-39.

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.

³⁵⁰ Lower Saucon’s Request for Rehearing at 38, Delaware Riverkeeper’s Request for Rehearing at 155-156.

consequence areas³⁵¹ 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 program³⁵² 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 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.

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.

³⁵⁵ *See* Final EIS at 4-304; *see also* 49 C.F.R. § 192.615 (2017).

³⁵⁶ Final EIS at 4-311.

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 potentially significant environmental impacts that the Final EIS ignores.³⁵⁷ Delaware Riverkeeper points to instances of non-compliance 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 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 on-site daily during construction and restoration.³⁶⁰ Environmental Condition 3 requires the

³⁵⁷ Delaware Riverkeeper’s Request for Rehearing at 108.

³⁵⁸ *Id.* at 110.

³⁵⁹ *Id.*

³⁶⁰ Final EIS at 2-16 – 2-17.

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-by-case 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

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 that in order to ensure drinking water safety, additional post-construction

³⁶¹ See 15 U.S.C. § 717t-1(c) (2012).

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.

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 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

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.

³⁷² Final EIS at 4-81.

³⁷³ *Id.* Appendix A, Environmental Condition 32.

³⁷⁴ *Id.* P 136.

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 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 resources³⁸⁰ 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

³⁷⁵ *Id.* Appendix A, Environmental Condition 28.

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.

restoration of steep 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 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 state-owned 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 time-

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.

³⁸⁶ Certificate Order, 162 FERC ¶ 61,053 at P 162.

³⁸⁷ NJDEP’s Request for Rehearing at 10.

frame 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 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

³⁸⁸ *Supra* P 144.

³⁸⁹ Delaware Riverkeeper’s Request for Rehearing at 51.

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.

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

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 pages³⁹⁴ 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.

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.

³⁹² *Id.*

³⁹³ *Id.* at 1-12, 4-62.

³⁹⁴ *See id.* at 164-188.

(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.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC

Docket No. CP15-558-001

(Issued August 10, 2018)

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

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*).

particularly difficult in 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 included such analysis in the Certificate Order.⁷ While that approach has its

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, 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.

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 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

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*).

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).

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 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 context¹³ and intensity.¹⁴ By evaluating how the emissions from the PennEast Project would impact the regional¹⁵ 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 is precisely the use for which the Social Cost

¹¹ Rehearing Order at P 118.

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 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 (*continued ...*)

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 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-

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*).

¹⁸ Rehearing Order at P 122.

¹⁹ *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm’r, *dissenting in part*).

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 [benefit-cost 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 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.

Cheryl A. LaFleur
Commissioner

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).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PennEast Pipeline Company, LLC

Docket No. CP15-558-001

(Issued August 10, 2018)

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 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

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).

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 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

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).

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).

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 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 parties¹¹ 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

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).

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”).

simultaneously claim to have given the record evidence the review it deserves and that the Administrative Procedures Act¹⁵ 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 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

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 Env'tl. 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.

¹⁹ Rate Counsel's Request for Rehearing at 5.

²⁰ *Id.* at 6.

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 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

²¹ Rehearing Order, 164 FERC ¶ 61,098 at P 20.

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).

review of the project's potential harms to ensure that the project is in the public interest.²³ In this case, the 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 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

²³ Certificate Policy Statement, 88 FERC at 61,748 ("The amount of evidence necessary to establish the need for a proposed project 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.

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)).

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 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 post-decision 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

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.

³² *LaFlamme*, 852 F.2d at 399; see also *Jones v. Gordon*, 792 F.2d at 829.

³³ 42 U.S.C. § 4332 (2012).

interest in the first place. This is not only circular logic, but an outright abuse of the eminent domain authority that a section 7 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

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

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.

³⁶ Certificate Order, 162 FERC ¶ 61,053 at PP 203, 208.

³⁷ Rehearing Order, 164 FERC ¶ 61,098 at P 109.

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 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

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”).

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.

generation.⁴² Under NEPA's obligation to engage in reasonable forecasting⁴³ 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

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 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 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 (continued ...)”)

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 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

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).

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.

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

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 test by simultaneously refusing to use the Social Cost of Carbon to monetize the impact of GHG emissions while monetizing the Project’s long-term socioeconomic benefits related to construction and operations from employment, tourism, and local taxes construction, operation and consumption,⁵² as well as the

⁵⁰ Although the Rehearing Order cites revised comments submitted by the EPA, in the original comments submitted in the 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 Env’tl Info. Ctr.*, 274 F. Supp. 3d at 1095-96.

⁵² Final EIS at 4-181 □ 4-186.

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 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

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.

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.”).

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.

Richard Glick
Commissioner

Document Content(s)

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