



50 Park Place, Suite 1025
Newark, NJ 07102

ph 973 424 1166
fx 973 710 4653

easternenvironmental.org

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VIA ELECTRONIC FILING

Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, DC 20426
Attention: Kimberly D. Bose, Secretary

Re: Proposed PennEast Pipeline Project
FERC Docket No. CP15-558-000

Dear Secretary Bose:

We are writing on behalf of New Jersey Conservation Foundation and Stony Brook-Millstone Watershed Association to request that the Federal Energy Regulatory Commission (“FERC”) withdraw the Draft Environmental Impact Statement (“DEIS”) for the above-referenced project, dated July 22, 2016. This DEIS violates the National Environmental Policy Act (“NEPA”) by: (1) prejudging PennEast’s application prior to obtaining critical environmental data required for any hard look at environmental impacts; and (2) precluding meaningful public comment and analyses of those missing key environmental data. The substance of this DEIS bears greater resemblance to one of FERC’s many prior unanswered Environmental Information Requests issued to procure those data from PennEast, than to an environmental impact statement fulfilling NEPA’s mandate of reasoned decisionmaking. But NEPA does not allow a federal agency to simply surrender its environmental obligations to a recalcitrant applicant. FERC should withdraw this DEIS.

If FERC does not withdraw this deficient DEIS, it should issue a revised DEIS upon receipt of all outstanding critical environmental data, and extend the public comment period for at least 45 days after the Revised DEIS is released.¹ FERC must provide the public with an opportunity to comment on the environmental data and analyses once it receives them. If FERC neither issues a Revised DEIS with attendant public comment period, nor extends the existing public comment period commensurate with intake of outstanding environmental data, it creates a rolling permit process wherein important data on environmental harms are only available after the comment period closes, and effectuates an end run around NEPA’s goals of ensuring

¹ 40 C.F.R. § 1502.9(a) (“If a draft statement is so inadequate as to preclude meaningful analysis, the agency *shall* prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.”).

decision-making transparency and meaningful public participation. See 40 C.F.R. § 1500.2(d) (NEPA's mandate is to "[e]ncourage and facilitate public involvement").

1. The DEIS Contains FERC's Decision on the Proposed Project's Environmental Impacts Yet Lacks the Very Data That Would Be Essential to Such a Determination

Language throughout FERC's DEIS indicates that it has already prejudged PennEast's application by concluding that the environmental impacts "[will] be reduced to less-than-significant levels with the implementation of...mitigation measures," without ever examining whole categories of environmental data, which FERC acknowledges are missing. Prejudgment of this kind is a blatant violation of NEPA and CEQ regulation mandating that agencies ensure "environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). The myriad data gaps in the PennEast DEIS, each of which provides an independent basis for FERC to withdraw this nascent environmental review, are set out below. This DEIS openly acknowledges that it lacks the following categories of essential environmental data:

- (a) a pipeline design geotechnical report, including site-specific landslide risk evaluations², liquefaction hazards, mitigation measures through geologically hazardous areas;
- (b) mitigation measures, including for waterbody flow increases³ and karst impacts;⁴
- (c) inventory of working and abandoned mines;⁵
- (d) geotechnical investigations at proposed HDD crossings to determine whether those are even feasible;⁶
- (e) HDD design plans;⁷
- (f) site-specific HDD contingency plans;⁸

² FERC initially requested this information in its Environmental Information Request #67, dated November 24, 2015. Accession # 20151124-3028.

³ FERC first requested this information in April 2016. FERC April 29, 2016 Environmental Information Request p. 6, Accession # 20160429-3039.

⁴ FERC first requested a Karst Mitigation Plan in November 2015. November 24, 2015 Environmental Information Request 72. Accession # 20151124-3028. FERC reiterated the need for an updated and accurate Plan in April 2016. FERC April 29, 2016 Environmental Information Request pp. 6-7, Accession # 20160429-3039.

⁵ FERC first requested an inventory of working and abandoned mines in the pipeline's path even before PennEast's September 2015 Resource Report filing. PennEast November 3, 2015 EIR Response p. 13, Accession # 20151103-5236. FERC reiterated its request for PennEast's plans to deal with working mines near the pipeline's path in November 2015. November 24, 2015 Environmental Information Request 72. Accession # 20151124-3028.

⁶ FERC first requested HDD feasibility studies for each HDD crossing in November 2015. November 24, 2015 Environmental Information Request 55(a). Accession # 20151124-3028.

⁷ FERC first requested an HDD Best Practices Plan in November 2015. November 24, 2015 Environmental Information Request 57. Accession # 20151124-3028.

⁸ FERC first requested an HDD Contingency Plan in November 2015. November 24, 2015 Environmental Information Request 8. Accession # 20151124-3028. FERC provided a general, preliminary plan, which did not

- (g) inventory of water wells and springs⁹ within 150 feet of construction workspace, extending to a 500 foot swath in Karst terrain;
- (h) identification of hydrostatic test water withdrawal locations, for the 18 million gallons of water required for hydrostatic testing;¹⁰
- (i) accurate assessment of any wetlands impacts, including, but not limited to wetlands with extremely saturated soils;¹¹
- (j) inventory of Vernal Pools, noted to be special concern communities, or assessment of impacts to such valuable resources;¹²

Incredibly, despite these data gaps, with respect to geological resources, the DEIS proclaims, “[w]e conclude that the Project would not have significant impacts on geologic resources.” DEIS at ES-4. Similarly, with respect to water resources, the FERC states, “[b]ased on our analysis, we conclude that the Project is not expected to significantly impact groundwater, surface water, or wetland quality or quantity during construction or operation with implementation of PennEast’s proposed mitigation measures as well as our recommendations.” Id. at ES-6. These conclusions follow directly on the heels of FERC’s recitation of the above-listed data gaps clearly indicating that these adverse impacts are not accurately identified, inventoried, or even purportedly addressed by a current mitigation plan.

FERC’s discussion of impacts to threatened and endangered species is equally, if not more, perplexing. The DEIS determines that, with respect to “Indiana bat, northern long-eared bat, bog turtle, dwarf wedgemussel, and northeastern bulrush . . . the Project ‘*may affect and is likely to adversely affect*’ these species.” DEIS at ES-9 (emphasis in original). It is entirely unclear how this finding squares with FERC’s stated conclusion that “impacts would be reduced to less-than-significant levels,” when simultaneously acknowledging that it has not “complete[d] the process of complying with Section 7 of the Endangered Species Act.” DEIS at ES-16. Absent these missing data, surveys, and analyses regarding endangered and threatened species, FERC’s conclusion regarding ultimate impact reduction is arbitrary and stands upon no actual findings.

FERC’s treatment of recreation, visual and cultural resources is no more enlightening -- and similarly reveals this document to be an Environmental Information Request cloaked in

include any site-specific information. PennEast December 14, 2015 EIR Response, Attachment 3. Accession # 20151215-5032.

⁹ FERC first requested an inventory of potentially impacted seeps and springs even before PennEast’s September 2015 Resource Report filing. PennEast November 3, 2015 EIR Response p. 3, Accession # 20151103-5236.

¹⁰ FERC first requested the locations of hydrostatic test water withdrawal and discharge points even before PennEast’s September 2015 Resource Report filing. PennEast November 3, 2015 EIR Response p. 5, Accession # 20151103-5236.

¹¹ NJDEP first requested a site-specific wetlands mitigation plan on October 28, 2015. NJDEP letter, Accession # 20151104-0045. FERC reiterated the request in November 2015. November 24, 2015 Environmental Information Request 18. Accession # 20151124-3028.

¹² FERC first requested an inventory of potentially impacted vernal pools even before PennEast’s September 2015 Resource Report filing. PennEast November 3, 2015 EIR Response p. 7, Accession # 20151103-5236.

DEIS clothing. As to these impacts, FERC recommends that PennEast submit the critical data “prior to construction,” but simultaneously reports that, “[a] sizeable portion of the Project has not been investigated for cultural resources,” then concludes that “overall impacts on land use and visual resources would be adequately minimized.” DEIS at ES-11-12; 4-199-200. Despite PennEast’s failure to complete cultural resource investigations on 3,473 acres of affected land, the DEIS appears to reflect FERC’s intent to allow the pipeline company to delay submitting those data until just prior to construction, which will occur well after the public comment period has closed. DEIS at 4-198, 4-200. If FERC were to allow these data to be shielded from public review until just prior to construction, the public’s right to be involved in the NEPA process would be rendered meaningless.^{13, 14} Moreover, the glaring absence of these data leave FERC’s conclusion with respect to cultural resource impacts resting on only promises of future analysis and compliance.

According to FERC’s own Guidance Manual for Environmental Report Preparation¹⁵ -- the pre-filing guide to applicants -- PennEast was required to submit the categories of data still absent from this DEIS at the time of filing, or at the latest, in response to FERC’s Environmental Information Requests. The DEIS admits that PennEast’s wetland surveys are “incomplete” and requires that PennEast file “a complete wetland delineation report” prior to construction. DEIS at 4-66. However, according to FERC’s own guidelines, this information should have been filed *prior to application*.¹⁶ Without complete wetland surveys, it equally impossible for PennEast to have submitted its plan for crossing these wetlands, yet another requirement of PennEast’s *application* to FERC.¹⁷ PennEast does not even make a good faith effort to fulfill these requirements, submitting to FERC only “draft conceptual” plans of HDD water crossings that will only become final once topographical surveys and geotechnical data are collected. DEIS C app. at 533. This type of data is essential to evaluating the available crossing methodologies, and without it, the public does not have the ability to meaningfully comment on the impacts of this pipeline.

Finally, FERC’s discussion of cumulative impacts appears to be no more than a summary of the empty conclusions discussed above, rolled into one larger, yet still unsubstantiated proclamation about cumulative impacts. DEIS at ES-14. Individually, each gap in the environmental data and analyses remains unchanged from the dearth of data that prompted FERC’s numerous pre-filing and Environmental Information Requests delineated in footnotes 2-12 above. Yet NEPA does not allow FERC to simply decide that it is time to issue a DEIS based

¹³42 U.S.C. § 4331(b)(4) (NEPA’s purpose is to “preserve important historic, cultural, and natural aspects of our national heritage”); 40 C.F.R. 1500.2(d) (ensuring that public participation is a part of the NEPA process).

¹⁴While FERC reserves the Advisory Council on Historic Preservation’s right to comment before the commencement of construction, NEPA’s mandate involves “mak[ing] diligent efforts to involve the public in preparing and implementing the NEPA procedures,” and allowing only the small subsection of the public appointed to the Advisory Council to comment violates NEPA’s very foundation. DEIS at 4-200; 40 C.F.R. § 1506.6(a).

¹⁵FERC Office of Energy Projects, *Guidance Manual for Environmental Report Preparation*, FERC (August 2002), <http://www.ferc.gov/industries/gas/enviro/erpman.pdf>

¹⁶18 C.F.R. 380.12(d)(requiring wetlands to be identified in *all* applications to FERC)(emphasis added); FERC Office of Energy Projects, *Guidance Manual for Environmental Report Preparation*, FERC (August 2002), <http://www.ferc.gov/industries/gas/enviro/erpman.pdf> at 3-25 (PennEast is required to “provide a table.....identifying *all* wetlands”) (emphasis added).

¹⁷ *Id.*

on an applicant-driven construction schedule. It requires the acting federal agency to take a hard look at the adverse environmental impacts of any project prior to finding that construction yields no harm. A DEIS, such as this one, containing nothing more than the promise to comply with all applicable environmental laws, is not the hard look that NEPA intended.¹⁸

FERC's determination in this DEIS that the proposed project will have no significant adverse impacts prior to the applicant's collection and publication of key environmental information violates NEPA. NEPA is intended to minimize "the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (*with prior public comment*) of the likely effects of their decision upon the environment."¹⁹ For that reason, NEPA requires "governmental decision-makers" to consider all "relevant environmental data *before* they commit themselves to a course of action."²⁰ Accordingly, FERC should withdraw this DEIS.

2. Absent FERC's Extension of the Public Review and Comment Period, the NEPA Cornerstone of Meaningful Public Participation Would be Upended.

Despite FERC's acknowledgment in the DEIS that it does not contain anything close to "full disclosure" of the environmental consequences of this project, FERC has stated its intention to only consider public comments until September 12, 2016. This is barely more than the 45-day legally required minimum,²¹ though this is a complex, large-scale project that has generated unprecedented public concern. One of the key purposes of FERC's Environmental Information Statement is to provide a "springboard for public comment"²² in the agency decisionmaking process. Here, PennEast still needs to submit dozens of critical items, including site-specific surveys on nearly forty percent of the pipeline's right-of-way and temporary workspace. These items may well include new significant impacts, and FERC will rely on these future submissions to prepare the Final EIS. Yet many, if not most, of these items will be submitted after the close of the current public comment period for this DEIS. The public meetings FERC has scheduled

¹⁸ 42 U.S.C. § 4332(2)(C) (FERC is responsible for submitting a "detailed statement") (emphasis added); Dubois v. U.S. Dept. of Agric., 120 F.3d 1273, 1285 (1st Cir. 1996) ("[T]he EIS helps satisfy NEPA's 'twin aims': to ensure that the agency takes a 'hard look' at the environmental consequences of its proposed action, and to make information on the environmental consequences available to the public."); Silva v. Lynn, 482 F.2d 1282, 1284-1285 (1st Cir. 1973) at 1283, Fn. 2 ("The 'detailed statement' required by § 4332(2)(C) serves at least three purposes. First it permits the court to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard. To that end, it must 'explicate fully its course of inquiry, its analysis and its reasoning.' Second, it serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project...It cannot be composed of statements 'too vague, too general and too conclusory.' Finally...a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues, but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.'").

¹⁹ Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989)(emphasis added).

²⁰ Id. (emphasis in original).

²¹ 40 C.F.R. 1506.10(c)

²² N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp., 677 F.3d 596, 603 (4th Cir. 2012), quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004) (Finding an EIS to be deficient for failing to provide "a clear basis for choice among options by the public" due to the omission of a key assumption), quoting 40 C.F.R. § 1502.14.

for August 15th, 16th and 17th, 2016 will not provide any real opportunity to comment; neither FERC personnel nor the members of the public that attend these meetings will be able to speak to the impacts information still missing from the DEIS. As set out above, FERC should withdraw this deficient DEIS. If it fails to do so, it should issue a revised DEIS upon receipt of all outstanding critical environmental data, and extend the public comment period for 45 days after the Revised DEIS is released. See 40 C.F.R. § 1502.0(a) To do otherwise unacceptably shifts the burden of performing NEPA's requisite environmental analyses from FERC to the public. 42 U.S.C. § 4331(b).

Failure to at least issue a revised DEIS, or, at the barest minimum, to extend the public comment period until after missing impacts data are made public, would violate FERC's legal mandate to "make diligent efforts to involve the public in preparing" the EIS. 40 C.F.R. 1506.6(a). FERC would preclude meaningful public participation by resting final decisions on environmental data and analyses never subject to public review. Even when agency action requires only an Environmental Assessment ("EA"), courts recognize the primary importance of providing the public critical environmental data prior to the final EA. See Sierra Nevada Forest Prot. Campaign v. Weingardt, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005) (NEPA regulations "require that the public be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA."). Here, PennEast's significant environmental impacts require the more stringent NEPA review, an EIS rather than an EA, and accordingly, FERC's public disclosure requirements should be even higher than those detailed in Weingardt.

FERC cannot defer such public disclosure until its Final EIS. See New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 708 (10th Cir. 2009) In BLM, after the 190-day public comment period closed, the agency issued a Final EIS, which announced that it had chosen an alternative that had been modified from the one included in the DEIS. The court labeled this "Alternative A-modified," holding that, "a public comment period is beneficial only to the extent the public has meaningful information on which to comment, and the public did not have meaningful information on the fragmentation impacts of Alternative A-modified. Informed public input can hardly be said to occur when major impacts [of Alternative A-modified] were never disclosed." Id. Here, as in BLM, anticipated disclosure of crucial impacts and information after the close of the public comment period constitute a violation of NEPA's public involvement requirement. See id. In order to comply with NEPA's public disclosure requirements, FERC should incorporate and analyze the missing impacts data into a revised DEIS, with attendant public comment period. NEPA demands that this minimal public comment deadline be extended until after PennEast has obtained and disclosed data, studies, and analyses on potential environmental impacts from its proposed project.²³ At that point, additional public meetings should be scheduled as well.

²³ Equally troubling is the fact that at least one of the public meetings currently scheduled to ostensibly acquire input on this insufficient DEIS appears to be near impossible for citizens to confirm actually exists, much less make arrangements to attend. When a citizen contacted the venue according to the information in FERC's Notice dated July 22, 2016, FERC Docket CP15-558, Accession # 20160722-4010, they were told that no such event was scheduled at that location, regardless of what was "posted online." See attached letter from Fairfax Hutter to FERC, dated July 29, 2016, Accession # 20160801-5000. If FERC were to hold the hearing at this venue, which it does not appear to be the case despite the Notice, the venue itself is nowhere near the affected areas and contains inadequate space and safe parking.

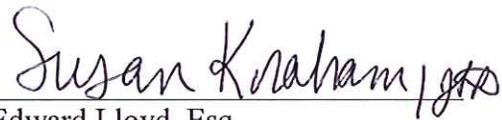
Conclusion

In its current form, this DEIS is legally insufficient, and cannot form the basis for rational agency decision making. FERC should withdraw this DEIS, and reissue a revised one that adheres to NEPA's mandate that it set forth data, studies, and analyses of adverse environmental impacts from the proposed PennEast project. Importantly, NEPA regulations require this information to be considered in any DEIS so that FERC can analyze it before making decisions. 40 C.F.R. § 1500.1(b). If FERC did not withdraw the DEIS at this juncture, NEPA requires FERC to defer its own determination of the adverse environmental impacts stemming from the proposed project until after it receives outstanding environmental data and until after it provides the opportunity for meaningful public comment on those pending data, so that it may form a rational basis for reasoned decision-making.

Respectfully submitted,



Aaron Kleinbaum, Esq.
Jennifer Danis, Esq.
Raghu Murthy, Esq.
Amanda Drennen, Legal Intern
Eastern Environmental Law Center



Edward Lloyd, Esq.
Susan Kraham, Esq.
Columbia University School of Law

*Co-counsel for Intervenors New Jersey
Conservation Foundation and Stony
Brook-Millstone Watershed Association*