TOWNSHIP OF KINGWOOD

Committee Meeting:
First Thursday of Each Month – 7pm
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September 1, 2016

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE

Washington, D.C. 20426

RE: Objections to the DEIS's Implementation of NHPA Section 106
FERC Docket No. CP-15-558

Dear Ms. Bose:

The Kingwood Township (the "Township") has reviewed the Draft Environmental Impact Statement (DEIS) for PennEast Pipeline Company, LLC's proposed natural gas pipeline and has determined the National Historic Preservation Act (NHPA) Section 106 process, as incorporated in the DEIS, is significantly flawed. Based on these flaws, the Township has numerous objections to the DEIS. The Township, as a "local government with jurisdiction over the area in which the effects of undertaking may occur,"[1] is a consulting party, and therefore, pursuant to 36 C.F.R. § 800.8(c)(2)(ii), FERC must refer the Township's objections to the Advisory Council on Historic Preservation (ACHP) for resolution.

FERC incorporated the NHPA Section 106 process for the PennEast project into its National Environmental Policy Act (NEPA) process and its DEIS, and therefore preparation of the DEIS must meet the requirements of 36 C.F.R. § 800.8(c)(1). Under § 800.8(c)(2)(ii), if a consulting party objects to the DEIS for not meeting the standards in § 800.8(c)(1) or because the DEIS's substantive resolution of the effects on historic properties is inadequate, the federal agency "*shall* refer the matter to the Council." 36 C.F.R. § 800.8(c)(2)(ii) (emphasis added). As discussed below, the Township objects to the DEIS for not meeting the standards in § 800.8(c)(1) and for providing inadequate resolution of adverse effects. The Township demands FERC immediately refer the matter to the ACHP as required and revoke the DEIS until after ACHP has reviewed and responded to the objections.

Objections

There are five requirements in 36 C.F.R. § 800.8(c)(1) that a federal agency must meet in preparing a DEIS that complies with NHPA: 1) identify consulting parties pursuant to § 800.3(f); 2) identify historic properties and assess the effects on those properties pursuant to §§ 800.4

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[1] 36 C.F.R. § 800.2(c)(3).

through 800.5; 3) consult the consulting parties regarding the effects during "NEPA scoping, environmental analysis, and the preparation of NEPA documents;" 4) involve the public; and 5) develop alternatives and proposed mitigation measures in consultation with the consulting parties and describe those alternatives and mitigation measures in the DEIS. 36 C.F.R. § 800.8(c)(1). The regulations specifically require that "*During preparation* of the EA or draft EIS (DEIS) the agency official *shall*" complete the five requirements outlined above, so meeting the requirements after the DEIS is inadequate. 36 C.F.R. § 800.8(c)(1) (emphasis added). The Township objects to the DEIS for its failure to meet all five requirements.

1. *Failure to identify consulting parties.*

The Township is a local government, as defined by the regulations, and the Kingwood Township Historical Society (KTHS) in the Township is the Township's representative for NHPA purposes. The regulations state, "the *representative* of a local government with jurisdiction over the area in which the effects of undertaking may occur is *entitled* to participate as a *consulting party*." 36 C.F.R. § 800.2(c)(3) (emphasis added). Despite having a right to participate as a consulting party, neither the KTHS, nor any other local historic committee in other New Jersey townships, have been identified as consulting parties by FERC or PennEast. Instead, PennEast asked the local committees to participate as "interested parties" which does not grant them any of the rights provided to consulting parties under the regulations.[2]

The local committees repeatedly requested both FERC and PennEast recognize their status as consulting parties.[3] However, that status was never granted. The DEIS mentions the committees and acknowledges the request by at least one committee (Delaware Township Historic Advisory Committee) to become a consulting party, but never actually confirms that these local organizations had and continue to have a right to be consulting parties under the law.[4]

Because FERC never identified the local committees as consulting parties, the Township objects to the DEIS for failure to meet the requirements in 36 C.F.R. § 800.8(c)(1)(i).

2. *Failure to identify historic properties and assess the potential effects.*

PennEast and FERC did not sufficiently identify the historic properties in the area of potential effects (APE), which resulted in insufficient assessment of potential effects from the pipeline. In addition, FERC and PennEast's assessment of the pipeline's effects for those properties that were identified was flawed, resulting in underestimation of the effects.

PennEast only surveyed 32% of the APE in New Jersey.[5] Thus, PennEast did not even begin the identification process for more than two-thirds of the impacted area in New Jersey. PennEast cannot claim to have met the requirement to identify historic properties when surveys are so severely lacking.

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[2] *See* Attach. A, letter from PennEast to Delaware Twp. Historic Advisory Comm. (Mar. 11, 2016) (An example of PennEast asking the local committee to be an interested party).

[3] *See* Attach. B (copies of the letters sent to FERC and PennEast requesting consulting party status).

[4] *PennEast Pipeline Project Draft Envtl. Impact Statement*, No. CP15-558, at 4-182, 4-183 (July 2016) ("DEIS").

[5] *Id.* at 4-193.

In addition, the surveys PennEast did conduct failed to identify many historic sites that should have been uncovered. The New Jersey Historic Preservation Office (NJHPO) determined from PennEast's Phase I archaeological survey report ("survey report") that PennEast's surveys did not identify all of the sites that should have been found in the surveyed area.[6] The NJHPO stated that PennEast should have found more sites than it did, which suggested that the survey techniques were flawed. Thus, even for the small amount of the APE PennEast surveyed for historic sites, PennEast failed to identify several properties.

FERC acknowledged in the DEIS that surveys were missing from PennEast's analysis and that PennEast would need to complete surveys and finish identifying properties in order to complete the Section 106 process.[7] FERC also acknowledged that NJHPO found serious flaws in PennEast's survey report.[8] However, despite knowing that PennEast had not even completed the initial step of identifying historic properties, FERC released the DEIS. The regulations explicitly state the identification of properties must be done during preparation of the DEIS,[9] so FERC's plan to complete identification at a later date clearly violates the regulations.

The Township objects to the DEIS because it does not identify historic properties for two-thirds of the APE in New Jersey, and thus does not meet the requirements in 36 C.F.R. § 800.8(c)(1)(ii).

The NHPA regulations also require the agency, during preparation of the DEIS, assess potential effects on the potentially impacted historic sites. FERC could not fully meet this requirement in preparing the DEIS because PennEast had only surveyed in 32% of the APE in New Jersey and because identification was flawed for that 32% of the APE. It is impossible to assess the effects on historic sites when the agency does not know what those sites are for most of New Jersey.

Furthermore, the NJHPO found serious flaws in PennEast's assessment of the effects on the historic properties PennEast has identified in its limited surveys.[10] The NJHPO indicated that PennEast completely failed to take into account the effects on historic sites that were reasonably foreseeable during maintenance, and instead improperly limited the assessment to just impacts during construction. The NJHPO also noted "a disconnect" between the assessment of above-ground and archaeological historic properties, which caused additional improper evaluation of impacts.[11] For many of the sites PennEast analyzed, the NJHPO disagreed with PennEast's conclusions regarding the amount of impacts. Overall, for the few sites for which PennEast did assess the effects, it incorrectly concluded the effects were minimal and consistently less than what is likely to occur.

FERC released the DEIS before PennEast provided complete information regarding effects. The DEIS contains almost no analysis by FERC of the potential effects on historic properties, and instead FERC states it will look at the effects whenever PennEast finally provides that

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[6] *See* Attach. C, Comments of New Jersey Historic Preservation Office, No. CP15-558, at 9 (Mar.18, 2016) (NJHPO response to the Phase I archaeological report).

[7] DEIS at 4-187, 4-194, 4-200.

[8] *Id.* at 4-193.

[9] 36 C.F.R. § 800.8(c)(1)

[10] Attach. C at 7

[11] *Id.*

information.[12] The Township objects to the DEIS because FERC failed to include an assessment of the effects on historic properties, in violation of 36 C.F.R. § 800.8(c)(1)(ii).

3. *Failure to consult the consulting parties.*

Not only did FERC fail to identify consulting parties, it also failed to consult with the consulting parties as required by law and regulation. Under the regulations, a consulting party must be involved "at the early stages of the project planning" so the party can fully consult on all stages from identifying historic sites, conducting surveys of those sites, and mitigating impacts. 36 C.F.R. § 800.1 *et seq*. In addition, the agency must consult the consulting parties during "NEPA scoping, environmental analysis, and the preparation of NEPA documents." 36 C.F.R. § 800.8 (c)(1)(iii). As already discussed, FERC and PennEast never acknowledged the local committees' status as consulting parties, and as a result, did not consult them "at the early stages" or during any of the NEPA analysis, including preparation of the DEIS. In addition, FERC and PennEast did not consult with the Kingwood Township or the other New Jersey townships, who are also consulting parties.

The DEIS recognizes how the consultation process is supposed to work: "When cultural resources survey and/or evaluation reports are available within a local government's jurisdiction, PennEast would provide the information to the representative of a local government for review and comment."[13] However, even though the DEIS says PennEast "would provide" the information, PennEast never did so. Without this information, the local committees and townships could not participate in the consultation process.

FERC's assertions in the DEIS that PennEast consulted with the local committees is false.[14] PennEast never offered the local committees, including the Kingwood Township Historical Society, consulting party status nor did PennEast ever provide the committees with any survey reports. In addition, one committee, the Delaware Township Historic Advisory Committee (DTHAC) did not receive any communications from PennEast until March 11, 2016, six months after PennEast filed its application, three months after the Phase I archaeological survey report was finished, and a year-and-a-half after PennEast began the pre-filing process. The letter received from PennEast only asked the DTHAC to participate as an "interested party."[15] Even if this request qualified as consulting the DTHAC, which it does not because interested parties do not have the same rights as consulting parties, it was still made far too late to allow DTHAC to participate in NEPA scoping, environmental analysis, or preparation of the DEIS.

PennEast and FERC did not consult the local committees or townships at all, let alone at an early enough time for the consultation to serve its intended purposes. Thus, the Township objects to the DEIS for failure to meet the requirements in 36 C.F.R. § 800.8(c)(1)(iii).

4. *Failure to involve the public.*

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[12] DEIS at 4-199, 4-200.
[13] *Id.* at 4-182.
[14] *Id.*
[15] Attach. A.

FERC and PennEast have not adequately involved the public in the Section 106 process. Additionally, by only requiring completion of the process before construction, and not before the DEIS comment period ends,[16] FERC dramatically limits public involvement in the process moving forward. Failure to involve the public as required is yet another shortcoming in the DEIS.

One of NJHPO's criticisms of PennEast's survey report was the low "level of public consultation that has taken place."[17] This lack of public involvement, along with failure to consult local historic groups, deprives PennEast of local expertise regarding the presence of historic sites and the likely impacts on those sites from the pipeline. Many of the flaws in PennEast's analysis could have been mitigated had PennEast adequately involved the public. However, as the NJHPO indicated, "no evidence that further public consultation has taken place" exists from PennEast.[18]

In addition, FERC is limiting public involvement even further by allowing PennEast to wait until after the DEIS public comment period ends before finishing the Section 106 process. Because the process is nowhere near completion, the DEIS contains very limited information on the impacts to historic resources, which severely limits the public's ability to comment on FERC's analysis of the impacts. By the time this information is made available by PennEast and FERC, the public will no longer have the venue through which to make comments.

The Township objects to the DEIS because FERC did not sufficiently involve the public before releasing the DEIS, which violates 36 C.F.R. § 800.8(c)(1)(iv).

5. *Failure to develop alternatives and develop mitigation measures*

Because FERC and PennEast have not yet identified historic properties or assessed the effects of the pipeline on those properties, they also cannot and have not developed alternatives or mitigation measures based on the analysis of the site specific effects. FERC cannot develop or consider avoidance alternatives without knowing first what the impacts are from the proposed action. Similarly, FERC cannot develop proper mitigation measures for effects without knowing what and where the site specific effects will be. FERC recognizes in the DEIS that mitigation measures will need to be developed by PennEast and approved by FERC at some point before construction.[19] However, like with all of the other requirements above, the development of alternatives and mitigation measures should have occurred before the DEIS was completed.

The cornerstone of NEPA is the development and consideration of alternatives. In recognition of the importance of the development of alternatives, the NHPA regulations require that FERC consult with consulting parties to develop alternatives that might limit or avoid the impacts on historic and cultural resources, and include these in the DEIS.[20] Alternatives must be developed

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[16] DEIS at 4-200.
[17] Attach. C at 8.
[18] *Id.*
[19] DEIS at 4-199, 4-200.
[20] 36 C.F.R. § 800.8(c)(1)(v).

before the DEIS so that they can be fully taken into account before a final decision[21] on the Certificate application. While FERC did consider some alternatives to the proposed action in the DEIS, it did not develop alternatives based on an analysis of impacts to historic and cultural resources, because there was no information available from PennEast regarding those impacts. Even if FERC eventually works with consulting parties to develop alternatives as required under NHPA, it will occur after FERC has already analyzed alternatives in the DEIS and made a determination that the proposed action is the preferred option. Thus, developing the alternatives will not serve the intended purpose.

The DEIS does not describe any actual mitigation measures developed by PennEast or analyzed by FERC with respect to impacts on historic and cultural resources. Instead, FERC states, "[i]f it is determined that adverse effects to historic properties would result from the Project, PennEast would be required to develop avoidance plans and treatment plans along with Memoranda of Agreements."[22] FERC makes reference to some avoidance plans that PennEast proposes, such as installing fencing and monitoring the area, but these measures are not analyzed or approved by FERC, nor are they fully developed by PennEast.[23] In addition, these proposed measures are the same ones that NJHPO found inadequate.[24] It is unsurprising that the DEIS lacks a full discussion of mitigation measures considering PennEast and FERC do not yet know the extent of the impacts or even what sites are in the APE. However, failure to include mitigation measures in the DEIS violates the NHPA regulations and jeopardizes the historic resources.

The avoidance and mitigation measures PennEast proposed in its survey report were flawed, according to the NJHPO.[25] This shows how important it is for the mitigation measures to receive sufficient scrutiny, or else they may not fully protect the resources. Not including the mitigation measures in the DEIS does not allow for this scrutiny. FERC only requires PennEast to develop the measures before construction, and waiting until after the DEIS deprives the public of the opportunity to comment on the viability and effectiveness of the proposed mitigation measures. This increases the likelihood the mitigation measures will continue to be flawed, which puts resources at risk during construction and maintenance of the pipeline.

The Township objects to the DEIS because it fails to discuss alternatives and mitigation measures as required under 36 C.F.R. § 800.8(c)(1)(v).

6. *The DEIS's substantive resolution of the effects on historic properties is inadequate.*

The Township also objects to the DEIS because its substantive resolution of the effects on historic properties is inadequate. As discussed above, the DEIS does not analyze the effects on historic properties and provides no resolution regarding the effects. Instead, FERC says it will

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[21] "NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (internal quotation marks and citations omitted), *Union Neighbors United, Inc. v. Jewell*, No. 15-5147, 2016 WL 4151237, at *1 (D.C. Cir. Aug. 5, 2016)

[22] DEIS at 4-199.

[23] *Id.*

[24] Attach. C at 7.

[25] *Id.*

provide resolution some time before construction begins.[26] This delay in providing a resolution renders the DEIS inadequate.

Conclusion

As outlined above, the Township objects to the DEIS because it completely fails to meet any of the requirements found in 36 C.F.R. § 800.8(c)(1) and fails to provide substantive resolution of the adverse effects. Because the Township is a mandatory consulting party, under 36 C.F.R. § 800.8 (c)(2) FERC is required to refer the Township's objections to the Council for resolution. The Township demands that FERC immediately meet this obligation. The Township also urges FERC to withdraw the DEIS until the Council has addressed these objections. Finally, the Township requests that FERC revise and supplement the DEIS to fix the current flaws. If FERC does not withdraw the DEIS, it runs the risk of continuing to violate NHPA regulations, which in turn threatens the valuable historic and cultural resources in the proposed pipeline's pathway.

Thank you for your attention to this matter.

Diana Haywood, Mayor
Kingwood Township

cc: John Eddins, ACHP

[26] DEIS at 4-200.