ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

DELAWARE RIVERKEEPER NETWORK, *et al.,* Petitioners	)	
v.	)	Case No. 18-1128 (lead)18-1225[Consolidated with 18-1144, 18-1220, 18-1226, 18-1233,18-1256]
FEDERAL ENERGY REGULATORY COMMISSION, Respondent	)	
New Jersey Division of Rate Counsel et al., Intervenors	)	

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 162 FERC ¶ 61,053 (January 19, 2018) and 164 FERC ¶ 61,098 (2018)(August 10, 2018)

PETITIONERS' JOINT OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

As per Circuit Rule 28(a)(1), the undersigned, on behalf of New Jersey Conservation Foundation and The Watershed Institute, hereby states that as of the date of filing this brief, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

A. Parties:

This case is a Petition for Review. The parties, amici and entities who intervened and will participate in this proceeding are as follows:

Petitioners: The following parties appear in these consolidated cases as petitioners:

In Case Nos. 18-1128, filed on May 9, 2018, and 18-1220, filed on August 13, 2018, Delaware Riverkeeper Network and Maya van Rossum (collectively "Delaware Riverkeeper").

In Case Nos. 18-1144, filed on May 21, 2018, and 18-1256, filed on September 28, 2018, New Jersey Department of Environmental Protection and the Delaware and Raritan Canal Commission.

In Case No. 18-1225, filed on August 21, 2018, New Jersey Conservation Foundation and the Watershed Institute.

In Case No. 18-1226, filed on August 23, 2018, Homeowners Against Land Takings – PennEast, Inc.

In Case No. 18-1233, filed on August 20, 2018 in the Third Circuit and transferred to this Court on September 12, 2018, New Jersey Division of Rate Counsel is Petitioner in 18-1233. New Jersey Division of Rate Counsel is an Intervenor in Case No. 18-1128, but is filing its briefs solely as a Petitioner in these consolidated matters.

In Case No. 18-1274, filed on September 14, 2018 in the Third Circuit and transferred to this court on or about October 4, 2018, Township of Hopewell, New Jersey.

Respondent: Federal Energy Regulatory Commission (the "Commission")

Intervenors: PennEast Pipeline Company, LLC and Consolidated Edison Company of New York, Inc. have been granted leave to intervene on behalf of the respondents.

Amici: There are presently no amici.

Rule 26.1 Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, New Jersey

Conservation Foundation and The Watershed Institute disclose that they are both nonprofit 501(c)(3) organizations that advocate for the protection of New Jersey lands, waters, and the communities that use New Jersey natural resources. New Jersey Conservation Foundation and The Watershed Institute do not have any parent corporation, nor do they issue stock.

B. Rulings Under Review:

New Jersey Conservation Foundation and The Watershed Institute seek review of the Commission's January 19, 2018 Order Issuing Certificates to PennEast Pipeline Company, LLC pursuant to the Natural Gas Act, Docket No. CP15-558-000, 162 FERC ¶ 61,053, and FERC's August 10, 2018 Order on Rehearing, Docket No. CP-15-558-001, 164 FERC ¶ 61,098.

C. Related Cases

The foregoing Commission orders have not been reviewed in this or any other court to counsel's knowledge.

Respectfully submitted this 20th day of December, 2018.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

As per Circuit Rule 28(a)(1), the undersigned, on behalf of Delaware Riverkeeper, hereby states that as of the date of filing this brief, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

A. Parties:

This case is a Petition for Review. The parties, amici and entities who intervened and will participate in this proceeding are as follows:

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Amici: There are presently no amici.

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Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Delaware Riverkeeper discloses that it is a nonprofit 501(c)(3) organization that advocates

for the protection of Pennsylvania and New Jersey lands, waters, and the communities that use those natural resources. Delaware Riverkeeper does not have any parent corporation, nor does it issue stock.

B. Rulings Under Review:

Delaware Riverkeeper Network seeks review of the Commission's January 19, 2018 Order Issuing Certificates to PennEast Pipeline Company, LLC pursuant to the Natural Gas Act, Docket No. CP15-558-000, 162 FERC ¶ 61,053, and FERC's August 10, 2018 Order on Rehearing, Docket No. CP-15-558-001, 164 FERC ¶ 61,098.

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The foregoing Commission orders have not been reviewed in this or any other court to counsel's knowledge.

Respectfully submitted this 20th day of December, 2018.

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Delaware Riverkeeper Network

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

As per Circuit Rule 28(a)(1), the undersigned, on behalf of Hopewell Township, hereby states that as of the date of filing this brief, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

A. Parties:

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Intervenors: PennEast Pipeline Company, LLC and Consolidated Edison Company of New York, Inc. have been granted leave to intervene on behalf of the respondents.

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Rule 26.1 Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Hopewell discloses that it is a municipal corporation of the State of New Jersey, and therefore has no parent corporation, nor does it issue stock.

B. Rulings Under Review:

Hopewell Township seeks review of the Commission's January 19, 2018 Order Issuing Certificates to PennEast Pipeline Company, LLC pursuant to the Natural Gas Act, Docket No. CP15-558-000, 162 FERC ¶ 61,053, and FERC's August 10, 2018 Order on Rehearing, Docket No. CP-15-558-001, 164 FERC ¶ 61,098.

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Respectfully submitted this 20th day of December, 2018.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

As per Circuit Rule 28(a)(1), the undersigned, on behalf of HALT, hereby states that as of the date of filing this brief, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

A. Parties:

This case is a Petition for Review. The parties, amici and entities who intervened and will participate in this proceeding are as follows:

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Intervenors: PennEast Pipeline Company, LLC and Consolidated Edison Company of New York, Inc. have been granted leave to intervene on behalf of the respondents.

Amici: There are presently no amici.

Rule 26.1 Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, HALT discloses that it is a nonprofit 501(c)(3) organization that was organized to protect

landowners' property rights. HALT does not have any parent corporation, nor does it issue stock.

B. Rulings Under Review:

HALT seeks review of the Commission's January 19, 2018 Order Issuing Certificates to PennEast Pipeline Company, LLC pursuant to the Natural Gas Act, Docket No. CP15-558-000, 162 FERC ¶ 61,053, and FERC's August 10, 2018 Order on Rehearing, Docket No. CP-15-558-001, 164 FERC ¶ 61,098.

C. Related Cases

The foregoing Commission orders have not been reviewed in this or any other court to counsel's knowledge.

Respectfully submitted this 20th day of December, 2018.

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GLOSSARY

Add.	Addendum to this brief
Certificate	Certificate of public convenience and necessity
Certificate Order	*PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018)
CNA Report	The Potential Environmental Impacts of Fracking in the Delaware River Basin, 2015 (Exhibit to Delaware Riverkeeper Rehearing Request under CP15-558)
Commission	Federal Energy Regulatory Commission
Conservation Foundation	New Jersey Conservation Foundation
Conservation Foundation Rehearing Request	Request for Rehearing of New Jersey Conservation Foundation under CP15-558
Constitution Pipeline	Constitution Pipeline Company, LLC
Delaware Riverkeeper	Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum
Delaware Riverkeeper Comment	Comment of Delaware Riverkeeper Network on Draft Environmental Impact Statement under CP15-558
Delaware Riverkeeper Rehearing Request	Request for Rehearing of Delaware Riverkeeper Network under CP15-558
Department	New Jersey Department of Environmental Protection
DRBC	Delaware River Basin Commission
Final Environmental Impact Statement	Final Environmental Impact Statement for PennEast Pipeline Company, LLC's PennEast Pipeline Project under CP15-558

Gas Act	Natural Gas Act
HALT	Homeowners Against Land Taking – PennEast, Inc.
HALT Rehearing Request	Request for Rehearing of Homeowners Against Land Taking under CP15-558
Hopewell	Township of Hopewell
Hopewell Rehearing Request	Request for Rehearing of Township of Hopewell under CP15-558
JA	Joint Appendix
Key-Log Report	Letter dated September 9, 2016 written by Key-Log Economics to Secretary Kimberly Bose & Deputy Secretary Nathaniel J. Davis (Exhibit to Delaware Riverkeeper Rehearing Request under CP15-558)
PennEast	PennEast Pipeline Company, LLC
PennEast Certificate	Certificate of Public Convenience and Necessity under Section 717f(e) issued to PennEast by *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018)
Petitioners	Conservation Foundation, The Watershed Institute, Delaware Riverkeeper, HALT and Hopewell
Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999), clarified, 90 FERC ¶ 61,128 (Feb. 9, 2000), further clarified, 92 FERC ¶ 61,094, 61,373 (July 28, 2000)
Project	PennEast Pipeline Company's proposed 120 mile greenfields gas transmission pipeline
Rehearing Order	*PennEast Pipeline Co.*, *LLC*, 164 FERC ¶ 61,098 (2018)

State Petitioners	New Jersey Rate Counsel, New Jersey Department of Environmental Protection, and Delaware and Raritan Canal Commission
State Petitioners' Brief	Brief submitted on behalf of New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Rate Counsel, and fully incorporated herein
Transco	Transcontinental Gas Pipe Line Company, LLC

JURISDICTIONAL STATEMENT

Petitioners incorporate State Petitioners' Jurisdictional Statement herein.

STATEMENT OF ISSUES

Whether the Commission violated the National Environmental Policy Act by failing to assess adequately environmental impacts of and alternatives to the Project.

Whether the Commission violated the Fifth Amendment's Public Use Clause by authorizing the use of eminent domain without federal environmental authorizations required to construct the Project.

Whether the Commission violated the Due Process Clause by authorizing the use of eminent domain without federal environmental authorizations required to construct the Project.

Whether the Commission violated the Gas Act by authorizing the use of eminent domain absent federal environmental authorizations, and by refusing to attach reasonable conditions to the Certificate.

Petitioners join State Petitioners' Statement of Issues, incorporating all portions of State Petitioners' Brief.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in this brief's Addendum.

STATEMENT OF THE CASE

Petitioners incorporate State Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

As the Commission mechanically churns out Certificates relying exclusively on private contracts with boilerplate citations to its own Policy Statement (which it fails to apply), it strays unacceptably far afield of its Congressional mandate to protect the public interest. This case provides compelling reasons for the Court to realign the Commission's practices with its statutory obligations and constitutional responsibilities. In Section II, Petitioners review how the Commission fails to protect the public interest by violating the National Environmental Policy Act's requirements to analyze, quantify, and disclose PennEast's social costs and environmental harms.[1] Sections III and V.B review the constitutional harms emanating from the Commission's failure to await critical federal environmental authorizations prior to issuing PennEast's Certificate. Sections IV and V.A

[1]Petitioners adopt State Petitioners' claims for additional violations of the Commission's statutory duties.

demonstrate why this Court must find the Certificate Order cannot legitimize condemnation under the Gas Act.[2] Section VI sets out an additional Gas Act failure to protect the public interest by excluding reasonable environmental conditions. Each of these Commission failings provides independent grounds for the Court to vacate PennEast's Certificate and correct the Commission's collision course with the public interest.

STANDING

Conservation Foundation, The Watershed Institute, and Delaware Riverkeeper are nonprofit organizations with members who own property, reside, work, and recreate in the specific geographic areas that will be harmed by the Project, and/or are themselves landowners whose preserved property has been or will be taken by eminent domain or otherwise adversely affected by the Project. *See* Declarations at Add. 40-185; *see also Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977).

The construction, maintenance and operation of the Project has caused and will continue to cause Petitioners concrete, particularized, and imminent harm, which this Court can redress by setting aside the Commission's findings under the

[2] Petitioners adopt State Petitioners' claims for additional violations of the Commission's statutory duties.

Fifth Amendment, Gas Act, and the underlying National Environmental Policy Act analysis, vacating the PennEast Certificate based thereon, and remanding to the agency. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Wildearth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013); *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) ("In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary . . . .").

HALT is a nonprofit corporation formed to protect the rights of property owners. After the Commission issued the Certificate Order, PennEast filed 180 complaints in condemnation and acquired easements on land owned by HALT's members. *See* Add. 152-175. These injuries can be redressed by voiding the Certificate and condemnation orders granted as a result of its issuance. Thus HALT has standing. *See Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 271-73 (D.C. Cir. 2015).

Hopewell is a municipal corporation of the State of New Jersey owning property that has or will be taken through condemnation or will otherwise be adversely affected by the Project. The Project's construction and operation will cause Hopewell particularized and actual harm, which this Court can redress by vacating the Certificate. *See City of Boston Delegation v. FERC*, 897 F.3d 241, 250 (D.C. Cir. 2018).

ARGUMENT

I. Standard of Review

The Court must review Petitioners' constitutional claims *de novo*. *See Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1179 (D.C. Cir. 2014) ("Petitioners' constitutional challenge is subject to *de novo* review"). The Commission must base its determinations under the Gas Act on "substantial evidence." 15 U.S.C. § 717r(b). The Court must review Petitioners' National Environmental Policy Act claims under an arbitrary and capricious standard. *See Nat'l Committee for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

II. The Commission Failed To Adequately Assess Project Impacts Pursuant To The National Environmental Policy Act

A. The Commission Failed To Discuss Cumulative Impacts Of Upstream New Well-Pad Development And Associated Impacts

In *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017), this Court stated with regard to the scope of the Commission's analysis, "It's not just the journey . . . it's also the destination." Likewise, it's not just the journey, *it's also the origin*. The National Environmental Policy Act's hard look requires "discussion of the 'significance' of [an] indirect effect, *see* 40 C.F.R. § 1502.16(b) (2018), and 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.'" *Id*. at 1374 (internal citation

omitted); *see also* 40 C.F.R. § 1508.8(b) (2018) ("Indirect effects" are those that "are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable."). However, here, the Commission failed to account for the context and intensity of the impacts resulting from the sources of gas for the Project. 40 C.F.R. § 1508.27 (2018); *see also* Certificate Order at ¶ 200 [JA__] ("[F]uture natural gas production" does not "necessitate further analysis").

The Commission failed to account for foreseeable gas well development and associated impacts in the Final Environmental Impact Statement. *See* Delaware Riverkeeper Rehearing Request at 25-60 [JA__-__]; *see also* Delaware Riverkeeper Comment at 22-41 [JA__-__]. Specifically, the Commission failed to consider land development impacts and greenhouse gas emissions from the Project's induced well-pad development.

1. The Environmental Impact Statement Ignores Thousands of Well-Pads Required For The Project

The wells that would initially supply the Project will not be the same wells that supply it several years from now. *See* Delaware Riverkeeper Rehearing Request at 58-59 [JA__]. New wells are far more prolific than mature wells; as such, it is self-evident that the Project will spur the development of new wells. In fact, at least *three thousand* new well-pads would be required to support the Project's contracted-for volume of gas. *Id*. at 59 [JA__]. The development of these wells is not only reasonably foreseeable, it is the Project's primary purpose.

But the Final Environmental Impact Statement is devoid of any discussion of these foreseeable wells and their associated impacts. The Commission simply concludes "[t]he Project does not depend on additional shale gas production," Final Environmental Impact Statement at 1-21 [JA__], and the Project will not cause "development of gas reserves." Certificate Order at ¶ 197 [JA__]. These statements are not only demonstrably false, but are contradicted by the Commission's later findings.

For example, a supplementary "Commission staff" statement in the Certificate Order confirms Petitioners' conclusions of the Project's induced development, finding it "required" between "2,400 and 4,600" new wells. Certificate Order at ¶ 204 [JA__]. This statement irreconcilably conflicts with the Commission's earlier conclusion: "we cannot estimate how much of the Project volumes would come from current/existing shale gas production and how much, if any, would be new production." Final Environmental Impact Statement at 1-21 [JA__]. The Commission's new Certificate Order finding – with no evidentiary support on how the Commission generated the estimates – cannot cure the defective and contradictory conclusions in the Final Environmental Impact Statement, as the statement fails to analyze the newly adopted data's significance. *See Sierra Club*, 867 F.3d at 1368 ("The agency action [an EIS] undergirds is arbitrary and capricious[] if the EIS does not contain 'sufficient discussion of the

relevant issues.'") (internal citation omitted); *see also WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017).

2. The Impacts Of Land Development For Thousands Of Well-Pads Were Not Considered In the Final Environmental Impact Statement

The Commission's Certificate Order concedes that this newly induced well development would yield between 3,600 to 6,900 acres of additional land "impacted by well drilling" over the Project's thirty-year lifespan. Certificate Order at ¶ 204 [JA__]. This represents a massive increase in the Project's total footprint, as the Final Environmental Impact Statement only evaluated 1,500 acres of the Project's land impacts. *See* Final Environmental Impact Statement at 2-3 [JA__]. The Commission therefore conceded that the foreseeable well-pad development to support the Project exponentially increased land development impacts; yet, the Commission did not identify this impact in its Final Environmental Impact Statement and failed to analyze the context and intensity of this vast increase in land development. *See Blue Ridge Environmental Defense League v. Nuclear Regulatory Com'n*, 716 F.3d 183, 196 (D.C. Cir. 2013) (holding supplemental environmental analyses required where there is "new and significant . . . information relevant to environmental concerns and bearing on the proposed action or its impacts after the EIS is assembled"); *see also* 40 C.F.R. § 1502.9(c) (2018) (environmental supplement standard). The previously unaccounted increase

in land development impacts necessitates further discussion of its significance to comply with the National Environmental Policy Act. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (Environmental Impact Statement must describe the "*actual* environmental effects" of an action; not just how much land will be affected (emphasis in original)).

Additionally, the Commission's assertion that the average well-pad and associated facilities impact only "1.48 acres" of land, Certificate Order at ¶ 204 [JA__], appears to be conjured from thin-air, as it contains no citation to any authority. *See WildWest Inst. v. Bull*, 547 F.3d 1162, 1174 n.6 (9th Cir. 2008) ("NEPA requires that the [agency] disclose the hard data supporting its expert opinions to facilitate the public's ability to challenge agency action"). Not only is there no support for this conclusion anywhere in the record, the conclusion is flat out wrong. It is well-accepted that a single well-pad averages 3.5 acres of disturbance, *see* Delaware Riverkeeper Rehearing Request at CNA Report, 20 [JA__]; furthermore, modeling of land disturbance for each well-pad and associated facilities shows the expected total land disturbance per well-pad would be between 17-23 acres. *Id.* at CNA Report, 73-74 [JA__-__]. As such, the Commission's unsupported estimate on the Project's additional land impacts is a gross underestimation by at least a factor of ten.

Delaware Riverkeeper not only provided modeling for the number of upstream well-pads and their anticipated land cover disturbance, but also provided modeling for exactly where the well-pad development would take place. Delaware Riverkeeper Rehearing Request at 54-56 [JA__-__]. The Commission complains that it "does not have sufficient information to determine the origin of the gas that will be transported on a pipeline." Certificate Order at ¶ 198 [JA__]. This is not true. Historical drilling and permitting activity is an accurate, strong indicator for new well-pad development, and is information the Commission inexplicably ignored. *See* Delaware Riverkeeper Rehearing Request at 54-56 [JA__-__]. Prime candidates for new drilling activity are those well-pads that are already permitted by the state, but have not yet been developed. *Id*. at 55 [JA__]. Pennsylvania meticulously tracks such sites, and in the counties surrounding the Project's starting point, there are roughly 3,500 undeveloped but permitted well-pads. *Id*. Furthermore, these permitted well-pads are located in precisely those counties that have been prolific producers of gas, including: Bradford, Lycoming, Susquehanna, and Tioga Counties. *Id*. at 55-56 [JA__-__]. Therefore, not only did the Commission have information regarding the general region where well-pads would likely be located, the Commission had access to localized data on the specific locations of the well-pads.

3. The Climate Change Impacts For Thousands Of Well-Pads Were Not Considered In the Final Environmental Impact Statement

The Commission also failed to account for climate change impacts in the Final Environmental Impact Statement associated with the upstream development of well-pads. *See* Delaware Riverkeeper Rehearing Request at 71-78 [JA__-__]. The Commission admits it did not consider such impacts in the Final Environmental Impact Statement. Certificate Order at ¶ 203 [JA__] ("The final EIS does not include upstream emissions").

However, in the Certificate Order the Commission concedes that upstream emissions are inevitable and could be estimated, admitting that the expected upstream greenhouse gas emissions would be over three million metric tons per year. Certificate Order at ¶ 203 [JA__]. Those additional emissions represent a twelve percent increase in the Commission's tally of total emissions provided in the Final Environmental Impact Statement. *See* Final Environmental Impact Statement at 4-254 [JA__]. As with well-pad development, the Commission again failed to discuss or evaluate the context and intensity of the impacts related to this increase in expected emissions in the Final Environmental Impact Statement, Certificate Order, or Order Denying Rehearing. This failure is an abrogation of the Commission's statutory responsibilities. *See* Rehearing Order (Lafleur, Comm'r, dissenting) at 3-4 [JA__] ("[T]he majority's stated approach for determining the

significance of those [greenhouse gas emissions] impacts does not comply with NEPA" because the Commission "must consider both context and intensity"); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) ("An agency must fulfill its duties to 'the fullest extent possible.'" (internal citation omitted)); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("Reasonable forecasting and speculation is . . . implicit in NEPA").

B. The Commission's Refusal To Use Several Available Tools To Assess Project Impacts Is Arbitrary And Capricious

For purposes of the National Environmental Policy Act, meaningfully disclosing the impact of greenhouse gas emissions requires the use or implementation of a tool beyond merely identifying physical changes in the environment attributable to an individual project's emissions. Here, Petitioners identified two tools for making such a determination. The first is a protocol developed by the interagency working group on the Social Cost of Greenhouse Gases. *See* Delaware Riverkeeper Rehearing Request at 34-35 [JA__-__]; *see also* Delaware Riverkeeper Comment at 33-34 [JA__-__]. Second is the modeling and evaluation of "ecosystem services." Delaware Riverkeeper Rehearing Request at 65, 67 [JA__,__]; *see also* Delaware Riverkeeper Comment at 5, 35 [JA__,__]. The Commission inexplicably ignored widely accepted tools in its environmental review and its requisite public benefits analysis.

1. Social Cost of Carbon

The Social Cost of Carbon is a "scientifically-derived metric" to translate tonnage of carbon dioxide or other greenhouse gases to the cost of long-term climate harm, Rehearing Order (Lafleur, Comm'r, dissenting) at 4-5 [JA__-__], and remains generally accepted in the scientific community. 40 C.F.R. § 1502.22(b)(4) (2018). Cost monetization, as provided by this tool, is appropriate and required when "alternative mode[s] of [NEPA] evaluation [are] insufficiently detailed to aid the decision-makers in deciding whether to proceed, or to provide the information the public needs to evaluate the project effectively." *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981). Additionally, several courts and two of the five Commissioners have provided full-throated support for using the Social Cost of Carbon. *See, e.g., Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097-98 (D. Mont. 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-91 (D. Colo. 2014); *NEXUS Gas Transmission, LLC; Texas E. Transmission, LP; DTE Gas Company; Vector Pipeline L.P.*, 164 F.E.R.C. ¶ 61,054 at P 61,340 (2018) (Glick, Comm'r, dissenting) ("[T]he Social Cost of Carbon provides a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change."); Rehearing Order (LaFleur, Comm'r, dissenting) at 6 [JA__] ("[T]he Social Cost of Carbon can

meaningfully inform the Commission's decision-making to reflect the climate change impacts of an individual project").

Here, the Project would contribute an equivalent of over twenty million metric tons of greenhouse gases per year. Final Environmental Impact Statement at 4-254 [JA__]. A conservative cost estimate using the Social Cost of Carbon protocol yields a true cost of the Project of over $250 million *annually*. Delaware Riverkeeper Rehearing Request at 65 [JA__]. This calculation provides indispensable data with regard to the Commission's environmental and public interest determinations analysis. Indeed, the Commission's Section 7 duty to consider the public interest is "broader than promoting a plentiful supply of cheap gas." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 650 (D.C. Cir. 2010); *see also* 15 U.S.C. § 717f(e) (2012). Specifically, this economic test must "balance 'the public benefits against the adverse effects of the project.'" *Sierra Club*, 867 F.3d at 1373; *see also infra* Sections III, IV. Here, the record shows the Commission failed to utilize the Social Cost of Carbon metric for this balancing test.

2. Ecosystem Services Analysis

"Ecosystem services" is a term describing a phenomenon of "benefits that flow from nature to people." Delaware Riverkeeper Rehearing Request at 65 [JA__] (quoting Key-Log Report). These benefits include tangible physical

quantities, such as food, timber, clean drinking water; life support functions like assimilating waste that ends up in air and water or on the land; as well as aesthetics, recreational opportunities, and other benefits of a more cultural, social, or spiritual nature. *Id*. By applying per-acre ecosystem service productivity estimates (denominated in dollars per acre per year) to various ecosystem service types, the Commission could estimate ecosystem service value produced per year in the periods before, during, and after construction. *Id*. at 9-10 [JA__-__].

The Commission failed to use any of the existing resources, such as the methodologies outlined in *Federal Resource Management and Ecosystem Services* or *Best Practices for Integrating Ecosystem Services into Federal Decision Making*, to estimate the loss of ecosystem services related to the Project's construction and operation. *Id*. at 10 [JA__]. Nor did the Commission explain why it failed to use these readily available tools. *See Sierra Club*, 867 F.3d at 1375.

When applied to this Project, an expert report deploying these methodologies determined the Project would cause a loss of $7.3 million in ecosystem services during construction, and an additional loss of $2.6 million each year thereafter. Delaware Riverkeeper Rehearing Request at 67 [JA__]. Failing to consider ecosystem service losses means many of the economic consequences of environmental impacts have not been accounted for. The Commission's willful ignorance of readily available analytical tools to inform a qualitative assessment of

the Project's impacts violates its responsibilities under the National Environmental Policy Act and the Gas Act.

C. The Commission Erred by Failing to Fully Consider Alternatives

The National Environmental Policy Act requires the Commission's Final Environmental Impact Statement to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a) (2018). The Commission's failure to examine project purpose and need generated an independent failure to rigorously explore the no action alternative. *See* 40 C.F.R. 1508.25(b)(1) (2018); Conservation Foundation Rehearing Request at 64-69. The Court should find the Commission's summary dismissal of the no action alternative and Petitioners' evidence demonstrating its viability to be arbitrary and capricious. *See id*. at 69-73 [JA__-__].

The Commission was also unable to objectively evaluate or rigorously explore the Hopewell Alternative because it did not require PennEast to submit evidence upon which it could do so *prior* to issuing the Certificate. Certificate Order at ¶ 215 [JA__]. From the Project's inception, Hopewell presented the Commission with a viable, less impactful, alternative delivery point and "tie-in" interconnection with Transco. Rehearing Order at ¶ 97 [JA__]. Adopting this alternative would eliminate approximately 2.5 miles of pipeline through Hopewell, reaching a similar delivery point as PennEast proposed. Final Environmental

Impact Statement at 3-37 to -39 [JA__-__]. The Transco line is open access, so PennEast can, by right, connect to the Transco line at an alternate point. Hopewell Rehearing Request at 35 [JA__].

The Project's record demonstrates this alternative would significantly reduce impacts to Hopewell by: eliminating impacts to residential and farmland areas; shortening the Project's length; reducing costs ultimately borne by ratepayers; avoiding New Jersey State Highway 31 crossing and related traffic disruption; eliminating stream crossings; avoiding the need for a second Transco connection; and reducing the use of condemnation. Hopewell Rehearing Request at 36 [JA__]. The Final Environmental Impact Statement acknowledges this alternative's significance, noting additional benefits: it would not traverse lands earmarked for contribution towards Hopewell's affordable housing obligations or planned for Hopewell's emergency services facility. Final Environmental Impact Statement at 3-37 [JA__].

Despite this evidence, the Commission issued the Certificate, abdicating its statutory responsibility to *fully* evaluate Project alternatives, leaving PennEast to simply apprise the Commission later. Rehearing Order at ¶ 97 [JA__]. The Commission provided no further analysis before Certificate issuance -- violating its duties to give "thorough consideration" of alternatives, rely only on high-quality data, and avoid acting on incomplete information. *Sierra Club v. Morton*, 510 F.2d

813, 825 (5th Cir. 1975); 40 C.F.R. 1502.14 (2018). The Commission cannot presume that someday it will acquire "substantial evidence" to support its ruling -- it should have required PennEast to fully explore and provide the requisite "further analysis" before issuing the Order. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (finding that failure by FERC to consider strong evidence suggesting a contrary conclusion violated the substantial evidence standard).

Commission evaluation of the no action and Hopewell Alternative were not stymied by survey access. As such, the Commission's decision to issue the Certificate Order absent rigorous exploration and objective evaluation of these reasonable alternatives was arbitrary and capricious.

III. Certificates lacking Federal Authorizations but Granting Condemnation Authority Violate the Fifth Amendment's Public Use Requirement

The Fifth Amendment protects private and public landowners' rights, ensuring property cannot be seized absent a constitutionally sufficient showing that condemnation serves a public use. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). This requires more than mere recitation of the phrase, "public use," and must rest upon evidence[3]

[3]The Gas Act requires Commission findings to rest upon *substantial* evidence; its theory that private contracts = public need = significant public benefit cannot

supporting a public use determination. *See Kelo v. City of New London*, 545 U.S. 469, 472-73, 478 (2005) (reviewing the record of evidence showing condemnation was intended to "revitalize an economically distressed city" and remedy "[d]ecades of economic decline," and finding that "[t]he takings before us, however, would be executed pursuant to a 'carefully considered' development plan."); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-42 (1984) (finding a law intended to remedy the "social and economic evils of a land oligopoly" and serving both economic needs of land lessors and lessees did not violate the public use clause); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (finding a comprehensive redevelopment plan issued pursuant to a Congressional Act passed to remedy "[m]iserable and disreputable housing conditions [that] do more than spread disease and crime and immorality. . . [and] also suffocate the spirit by reducing the people who live there to the status of cattle" satisfies a legitimate public use). *Kelo* and its predecessors undeniably require a predicate determination of *public* purpose that cannot be waived by the government nor supplanted by general proclamations of public use.

Importantly, *Kelo*, *Midkiff* and *Berman* are all premised on comprehensive government plans documenting existing harm, and findings based on substantial evidence that condemnations in accordance with that plan would redress that harm,

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withstand this Court's *de novo* constitutional scrutiny. Conservation Foundation Rehearing Request at 8-9 [JA__-__].

thus serving a public purpose, and thereby satisfying the public use clause.[4] In the 1938 Gas Act, Congress identified existing harms as wartime steel shortages, constrained gas transportation capacity for heating homes, and monopolistic practices harming consumers. *Bills to Amend the Natural Gas Act: Hearings Before the Subcomm. on S. 784 and S. 1028 of the S. Comm. on Interstate and Foreign Commerce*, 80th Cong. 51, 58 (1947) (statement of Hon. Nelson L. Smith, Chairman, Federal Power Commission); *Fed. Power Comm'n v. La. Light & Power Co.*, 406 U.S. 621, 631 (1972). In 1947, it amended the Gas Act to include condemnation because those harms continued. Act of July 25, 1947, ch. 333, 61 Stat. 459. Even then, there was no presumption that a pipeline served the public interest; the Commission was required to assess individually each project. *See* 15 U.S.C. 717f(e). While there was background economic harm against which those determinations were made, that context has changed, but the requirement for individualized assessment has not.

Today, background economic harms are: (1) a deregulated market; (2) a built-out national gas transmission network; (3) a *glut* of capacity; (4) production,

[4]Unlike the comprehensive government plans in *Kelo*, *Midkiff* and *Berman*, the Commission does not profess to perform gas market planning. *Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 at P 27, n.38 (2017) ("Unlike under the Federal Power Act with respect to the regulation of electric transmission lines and electric markets, Congress has not authorized the Commission to plan either a regional or national natural gas pipeline system.")

shipment, and consumption integrated into one entity passing higher rates onto consumers; and (5) widely understood environmental harms. Conservation Foundation Rehearing Request at 4-6, 10-11 [JA__-__,__-__]. Thus industry reality has shifted, and the public's interest in protecting water quality is now memorialized in federal environmental laws, but the Commission's obligation to protect consumers and make individualized public assessments has not changed.

While the Commission has no comprehensive plan documenting existing social or economic harm, it now also disclaims responsibility for making individualized assessments, instead using private precedent agreements rather than providing particularized determinations that projects are required to redress a particular harm. This must fail under Fifth Amendment jurisprudence. Here, the Commission's failure to engage in a constitutionally sufficient public benefit analysis is laid bare by a record replete with independent energy market assessments of capacity gaps, providing substantial evidence of the opposite -- there is a transmission capacity *glut* in the market the Project proposes to serve; thus building it would cause public harm.

The Commission articulated its statutory obligations in its Policy Statement, issued after a lengthy administrative process. *See* Policy Statement at ¶¶ 61745–46 [JA__]. Specifically, when reviewing new transmission proposals, the Policy Statement directs the Commission to (1) consider "the evidence of public benefits

to be achieved" by the proposed project; (2) balance that evidence against adverse economic effects on "existing pipelines in the market and their captive customers" and on "landowners and communities affected by the route of the new pipeline"; and, if that balance still produces economic benefit, (3) weigh that benefit against adverse environmental impacts as a final step in public interest balancing. *Id*. The Commission must undertake those predicate steps to finding public benefit *prior* to certificating any project. It cannot now simply insist that the existence of private contracts satisfies the required searching, multi-step inquiry to ultimately determine public purpose. *See FCC v*. *Fox Television Stations*, *Inc*., 556 U.S. 502, 515 (2009) ("An agency may . . . not depart from a prior policy *sub silentio*. . . ."); Conservation Foundation Rehearing Request at 9 [JA__]. Yielding condemnations, the Commission's inquiry is of a constitutional nature and requires this Court's *de novo* review. *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin*., 769 F.3d 1173, 1179 (D.C. Cir. 2014).

Where, as here, the Commission fails to engage in a meaningful assessment of the economic benefit or harms of new pipeline construction, instead relying exclusively on private contracts,[5] its proclamation that a project is required by

[5]Petitioners' request for "documents containing, reflecting, or providing analysis representing the FERC staff review of economic data related to project need, prepared in relation to the PennEast pipeline project" produced only precedent agreements in response. Conservation Foundation Rehearing Request at 9, 49 [JA__,__].

"public necessity and convenience" cannot provide a constitutionally sufficient basis for condemnation. Moreover, here, it compounds that failure by neglecting to weigh any documented economic benefit against public harms from pipeline construction impacts on federally protected resources, leaving a woefully insufficient record upon which it could establish the Project's public benefit.[6] The Court should protect Petitioners' constitutional rights to secure their property from a government-sanctioned land grab for private gain.

A. The Commission's Failure to Assess the Economic Benefits of the Project Violates the Fifth Amendment

The Commission's exclusive reliance on precedent agreements fails entirely to explore whether or not a project will serve a *public* need. Compounding the statutory error State Petitioners describe, the Commission's ongoing practice of issuing deficient Certificates violates the Fifth Amendment's unwavering requirement that the government may not seize (nor authorize seizure of) property without first determining that the seizure serves a public purpose.[7]

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[6]The Commission's failure extends to its broad practice of issuing Certificates lacking additional federal environmental authorizations necessary to make a final public use determination.

[7]It is axiomatic that the Fifth Amendment precludes condemnation for the sole purpose of conferring benefit to another private party – even if justly compensated. *See Kelo*, 545 U.S. at 477.

Interpreting the Gas Act together with these minimum constitutional safeguards, as the Commission and this Court must do, requires the Court to vacate PennEast's Certificate for constitutional insufficiency. Here, the Commission failed to assess properly whether the pipeline would yield an economic public benefit. In fact, based on the voluminous record before it, it could only have rationally determined that the proposed Project would cause public harm. The Commission's blind reliance on precedent agreements cannot satisfy its constitutional obligation to determine that the Project would serve a public purpose *prior* to issuing a Certificate conferring condemnation authority on a private company. *See* Conservation Foundation Rehearing Request at 26-27 [JA__-__]. Substantial evidence demonstrates the Project's harmful economic effects on consumers, underscoring the Commission's unwillingness to assess meaningfully the public need for pipeline construction before granting certificates conferring condemnation authority to private companies.

B. Certificates Lacking Required Federal Environmental Authorizations But Carrying Condemnation Authority Violate the Fifth Amendment

The Commission acknowledges it is required to consider the Project's environmental impacts when evaluating whether it serves a public purpose, *See* Policy Statement at ¶¶ 62745-46, 61749 [JA__,__], but it cannot factor environmental impacts into its public use analysis if it does not possess the actual

impacts findings from the regulatory agencies charged with making them. The Policy Statement -- the Commission's only cognizable roadmap to its public use analysis -- explicitly requires any documented economic benefit to be weighed against adverse impacts, yielding a final determination of public benefit. *See* Policy Statement at ¶ 61748 [JA__].

Yet the Commission routinely issues Certificates like PennEast's without such required determinations, for projects lacking substantive environmental authorizations preserved within the structure of the Gas Act. These preliminary determinations of public interest violate the Takings Clause by permitting condemnation without demonstrated public use. *See* Certificate Order at 4 (Glick, Commissioner, dissenting) [JA__] ("As a result, there will not necessarily be any restriction on a pipeline developer's ability to exercise eminent domain while the Commission waits to confirm that the pipeline is in the public interest"). The Certificate cannot constitutionally convey eminent domain authority before the Project has received all necessary state and federal approvals, because those approvals may never be issued. Neither *Kelo* nor its predecessors addressed nor anticipated that *preliminary* findings of public benefit, delivered before critical information about potential harm was reviewed, could form sufficient predicates for private property condemnation. *See Kelo*, 545 U.S. at 489 ("*Once the question of the public purpose has been decided*, the amount and character of land to be

taken . . . rests in the discretion of the legislative branch." (emphasis added) (quoting *Berman*, 348 U.S. at 35-36)). There is no context in which a conditional public use determination has been upheld as a valid basis for eminent domain. *See Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008) ("[T]he means of executing the project [resulting in a taking] are for [the legislature] alone to determine, *once the public purpose has been established*." (emphasis added) (quoting *Berman*, 348 U.S. at 33)). *Kelo*, *Berman*, and *Midkiff* all recognize that the public use analysis must be final before any other action is taken in an eminent domain proceeding.

Thus the Certificate is constitutionally flawed for two independent reasons: (1) the Commission failed to engage in a public need inquiry, demonstrating that it has not done even the first step of a constitutionally sufficient public use analysis; and (2) it is indisputable that the Project lacks required federal environmental authorizations, confirming that the Commission could *not* have done the second step of a constitutionally sufficient public use analysis -- weighing any economic benefits against any environmental harms to determine that the project will serve a public purpose. *See* Policy Statement at ¶¶ 62745-46, 61749 [JA__,__]. These constitutional infirmities infect its practice nationwide, and the Court should vacate and remand PennEast's Certificate to the Commission to conduct a constitutionally

sufficient analysis, providing guidance to cure the Commission's pattern and practice of violating the Fifth Amendment.

IV. Certificates Authorizing Eminent Domain, But Lacking Federal Authorizations, Violate The Gas Act

This case presents the question unanswered by *Gunpowder Riverkeeper*: "[m]ust the 'holder of a certificate of public convenience and necessity' described in the eminent domain provision, *see id*. § 717f(h), be a holder of the type of certificate described in § 717f(c)—that is, one who is authorized to begin construction, extension, or operation of facilities?" *Gunpowder Riverkeeper*, 807 F.3d at 281 (Rogers, J., dissenting). The court in *Gunpowder Riverkeeper* held that "resolution of this question is for another day," because no violation of the Gas Act was raised. *Id*. That day is today; Petitioners have squarely framed this question.

PennEast's Certificate does not authorize construction. *See* Certificate Order at Appendix A, ¶ 10 [JA__]. But it authorizes and has forced condemnations without Clean Water Act authorizations. *See In re PennEast Pipeline Co*., 2018 WL 6584893 [JA__]. Accordingly, the Commission could not weigh Project impacts against any economic benefit. *See* Policy Statement at ¶¶ 61745-46, 61749 [JA__,__]. The Commission's explicitly conditional finding that the Project meets the Gas Act standard ignores factors essential for determining whether the Project

is in the public interest.[8] Certificate Order at p. 82 [JA__]. This preliminary finding cannot be constitutionally interpreted to trigger Section 717f(h).

To help ensure appropriate constitutional limits on its delegation of eminent domain authority via the Gas Act, Congress explicitly limited it to (1) holders of a certificate of public convenience and necessity; (2) only lands "*necessary* . . . to *construct*, operate, and maintain a pipe line [sic]" 15 U.S.C. § 717f(h) (emphasis added). The PennEast Certificate does not authorize construction; the Project cannot proceed without several outstanding authorizations. *See* Certificate Order at Appendix A, ¶ 51 [JA__]. There are important reasons for this: the Commission cannot yet know *where* or *whether* the Project could be built without harming water quality. If PennEast fails to meet Clean Water Act standards, or permits are significantly conditioned, it could substantially change the Project's route or preclude its construction altogether.

Such changes would significantly impact what land (if any) is necessary for the Project. Under Section 717f(h) of the Gas Act, demonstrating that land condemned is "necessary" for construction must come before that property is taken. PennEast's Certificate provides for the opposite: permanent condemnation prior to determining whether *any* land is required for construction. *See* Certificate

[8]The Commission's flawed environmental review process cannot rescue its insufficient public interest analysis; it excluded Clean Water Act review, which may determine the Project is inconsistent with the public's interest in clean water.

Order at 3 (Glick, Commissioner, dissenting) [JA__] (eminent domain should not be used to determine if projects serve the public interest).

V. The Commission Violated the Gas Act and Due Process Clause by Failing to Wait for Decisions by Agencies with the Authority to Block Construction of the Project

A. The Gas Act

Even if the Project is in the public interest, the Commission still violated the Gas Act by conferring eminent domain before agencies that have the authority to block construction of the project have made their decision. HALT Rehearing Request [JA__]. The Commission is not entitled to deference because Congress explicitly stated the "right of eminent domain [is] for construction of pipelines[.]" 15 U.S.C. § 717f(h). "[When] the intent of Congress is clear, that is the end of the matter[.]" *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Unambiguous statutory interpretation is reviewed *de novo*. *See id*. at 843, n.9.

1. This is a Case of First Impression

Gunpowder Riverkeeper challenged the Commission's certificate under the Clean Water Act for failing to wait for a water quality certification. *Gunpowder Riverkeeper*, 807 F.3d at 270-71. Concurring in the judgment, Judge Rogers asked "[w]hether the Commission's conditional certificate allowed for the immediate exercise of eminent domain[.]" *Id*. at 281. While the question could not be answered then, it is now properly before the Court.

2. Eminent Domain Is for the Construction of the Project

When Congress amended the Gas Act in 1947,[9] it specified "eminent domain [is] for construction of pipelines," and construction cannot take place unless the certificate is "in force." 15 U.S.C. §§ 717f(h), 717f(c)(1)(A). Here, the Certificate Order is not "in force" because required federal authorizations have not been obtained. Certificate Order at p. 82, Appendix A, ¶ 10. [JA__,__]. One missing authorization is a water quality certification from New Jersey, which "is a prerequisite to the FERC granting final approval to commence construction of the proposed pipeline." *Islander E. Pipeline Co. v. McCarthy,* 525 F.3d 141, 144 (2d Cir. 2008). Since it has not been granted, the Certificate Order is contrary to Congressional intent because eminent domain was intended for companies who

[9]Act of July 25, 1947, ch. 333, 61 Stat. 459.

have "qualified under the Natural Gas Act to carry out and perform the terms of any certificate." S. Rep. No. 80-429, at 3 (1947).

The lack of this required federal authorization did not stop PennEast, which used the conditional Certificate Order to file over 180 complaints in condemnation, Add. 152-163, claiming it had a final order conferring the right of eminent domain. *See, e.g.*, Complaint at ¶¶ 8, 18, 36(a), 37, 38, *PennEast Pipeline Co. v. A Permanent Easement of 0.60 Acre*, 3:18-cv-00281-MEM (M.D.Pa. Feb. 6, 2018), ECF No. 1. A HALT member objected, but PennEast was granted an easement and immediate access to her land. Add. 164-175. District courts routinely find that only circuit courts can determine if the Commission's certificate is valid. *See, e.g.*, Memorandum-Decision and Order at 5, *Constitution Pipeline Co. v. A Permanent Easement for 1.80 Acres*, 3:14-cv-02049-NAM-DJS (N.D.N.Y. Feb. 23, 2015), ECF No. 20.

The Commission claims that eminent domain is automatically conferred with its Certificate, and that it "lacks the authority to limit [PennEast's] exercise of eminent domain." Rehearing Order at ¶ 30 [JA__]. However, 717f(h) only authorizes eminent domain for the construction of pipelines, which means the Commission must wait for federal authorizations that determine whether the Project will be constructed. Otherwise, the Commission could authorize eminent domain for projects that are never built, which is exactly what happened with the

Constitution Pipeline. *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 101, 103 (2d Cir. 2017), *reh'g denied, cert. denied,* 138 S.Ct. 1697 (2018) (upholding the denial of the water quality certification). The court-ordered easements remain in force even though the pipeline was not constructed. *1.80 Acres*, 3:14-cv-02049-NAM-RFT, ECF Nos. 21, 25.

3. It Is Not Reasonable to Condition the Certificate on Decisions by Agencies That Can Block the Project

"As 'a creature of statute','' the Commission has only those powers endowed upon it by statute." *Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (internal citation omitted). While the Commission may attach terms and conditions to its orders, under 717f(e), that right is limited. For example, the conditions must be "reasonable," and cannot expand the Commission's powers or conflict with other sections of the Gas Act. In *Panhandle*, this Court found that the Commission exceeded its conditioning authority because its order would "emasculate" and/or "dilute" the provisions of Sections 4 and 5. *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1133 (D.C. Cir. 1979). A similar restraint on the Commission's power is needed now because it is "emasculating" 717f(h) and 717n by authorizing the right of eminent domain even when pipelines may not be constructed. (*See infra* Section V.B.2 for a discussion of 717n.)

It is not only unreasonable to authorize the use of eminent domain when other agencies can block the construction of the pipeline, it is contrary to law.

National Fuel Gas Supply Corp. *v*. *FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (holding that the condition was not reasonable because if the Commission lacks authority to do something directly, it cannot do it indirectly). Here, the Commission cannot directly authorize construction because the Department has denied the water quality certification (without prejudice), and the Clean Water Act instructs the Commission to wait for a final decision. "No license or permit shall be granted if certification has been denied by the State. . . ." 33 U.S.C. § 1341(a)(1). The Gas Act preserves this preemptive power of states. 15 U.S.C. § 717b(d)(3). Thus, the Commission must wait for states to decide whether to grant or deny a water quality certification before issuing a certificate authorizing eminent domain. Otherwise, land may be taken for a project that cannot be constructed, which is unreasonable, contrary to law, and unconstitutional.

B. Due Process

"No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Due process claims require a two-step inquiry: (1) whether there has been a deprivation of a protected interest; and, if so (2) determining what process is due. *Logan v*. *Zimmerman Brush Co*., 455 U.S. 422, 428 (1982). Whether there was a deprivation of property without due process is reviewed *de novo*. *Kincaid v. Gov't of D.C*., 854 F.3d 721, 726 (D.C. Cir. 2017). However, this Court must interpret the Gas Act so as to *not* violate the

Constitution. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001).

1. There Have Been Deprivations of Property

PennEast filed over 180 cases in condemnation, relying on the Certificate Order to justify eminent domain. *See supra* Section V.A.2. As a result, property and property rights have been taken from HALT's members. Add. 164-175.

2. The Commission Violated Landowners' Due Process Rights

"A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal citation omitted). Applied here, landowners should have been heard by agencies with the authority to block construction of the project before their land was taken. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (Notice and hearing "must be granted at a time when the deprivation can still be prevented").

The Commission controls due process because it is responsible for coordinating federal authorizations. 15 U.S.C. §§ 717n(a)-(d). In its 2005 amendments, Congress instructed the Commission to set a schedule for federal authorizations that ensures compliance with the schedules established by other federal laws.[10] *Id.* at § 717n(c)(1)(B). Congress also ordered the Commission to

[10]Energy Policy Act of 2005, Pub.L. 109-58, Title III, §313(a), Aug. 8, 2005.

maintain an integrated record for judicial review, and gave this Court jurisdiction over agency delay. *Id*. at §§ 717n(d), 717r(d)(2).

These mandates to integrate all federal authorizations in one process, with one record for judicial review, were not followed here. First, the Commission's ninety-day schedule for federal authorizations ignored the one-year timeframe Congress granted to States to grant or deny water quality certifications. 33 U.S.C. § 1341(a)(1) [JA__]. By issuing a ninety-day schedule before PennEast had even applied to the Department, the Commission violated 717n(c)(1)(B) [JA__]. Second, the Commission issued the Certificate Order without waiting for federal authorizations that can block construction, thereby authorizing eminent domain for a project that may never be built, which violates 717f(h). As a result, landowners were denied notice and comment in at least two proceedings: PennEast's application for a water quality certification from the Department and for a permit from the Delaware River Basin Commission. Add. 176-185. Both are listed as required permits and have federal components, so denial would block construction of the Project [JA__-__]. Additionally, both require public notice and comment. 33 U.S.C. § 1251(e); 40 C.F.R. § 25.5; 18 C.F.R. § 401.5. The lack of opportunity to be heard by these agencies violates both the Gas Act and due process because the Commission failed to "establish a schedule for all Federal authorizations . . . [that] compl[ied] with applicable schedules established by Federal law." 15 U.S.C. §

717n(c)(1)(B). Instead, the Commission prematurely issued a certificate that is not "in force," under 717f(c)(1)(A), yet enabled PennEast to take property, under 717f(h). Thus, landowners were denied the process that is due to them before their land was taken.

The Commission claims this does not matter because landowners will be compensated even if the Project is not constructed. HALT Rehearing Request at 31 [JA__]. This view ignores the process mandated by Congress, under 717f(h) and 717n, and subverts the sanctity of property rights because damage awards cannot undo the wrong of an unjust taking. *Fuentes*, 407 U.S. at 82.

3. Due Process Requires the Commission to Wait

Three factors are considered in determining what process is due. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The first is the significance of the deprivation of the private interest. *Id*. Here, HALT's members were deprived of real property and property rights. "[T]he right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Thus, the significance of the deprivation weighs in HALT's favor. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 206

(D.C. Cir. 2001). Unlike the temporary disability benefits in *Mathews*, these easements are permanent (unless vacated by this Court). While landowners will be paid fair market value, they will never be compensated for their loss of their right to decide whether to sell. Since full relief will never be obtained, a pre-deprivation hearing on all required permits is required. *Mathews*, 424 U.S. at 331 ("A claim to a pre-deprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing."). "In sum, the private interests at stake in the seizure of real property weigh heavily in the *Mathews* balance." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54-55 (1993).

The second factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. By not waiting for federal authorizations that can block construction, the Commission increases the risk of an erroneous deprivation. *Fuentes*, 407 U.S. at 80-81 (holding that the purpose of due process is "to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party"). What the Court warned of in *Fuentes* happened with the Constitution Pipeline and could be repeated here. Thus, additional safeguards are needed. *Mathews*, 424 U.S. at

344-46. Erroneous deprivations of property can be prevented by requiring the Commission to wait.

The third factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 335. Here, the Government has three distinct interests: (1) regulating the interstate transmission of gas, under 15 U.S.C. § 717(a); (2) "restor[ing] and maintain[ing]" the Nation's water, under 33 U.S.C. § 1251(a); and (3) ensuring the right to due process prior to the taking of property, under the Fifth Amendment. Congress has indicated that the preservation of water is more important than the transportation of gas, because the denial of a water quality certification trumps the certificate. 33 U.S.C. § 1341(a); 15 U.S.C. § 717b(d). Under 717n, Congress envisioned an integrated administrative review and instructed the Commission to coordinate that process. Thus, due process can be provided without imposing any new fiscal or administrative burdens because all the Commission has to do is delay its decision.

In sum, all three of the *Matthews* factors weigh in HALT's favor. To ensure due process, the Commission must wait for decisions by agencies that will determine whether the Project will be constructed before issuing a certificate that authorizes eminent domain.

VI. The Commission's Failure to Attach Reasonable Conditions Protecting the Township of Hopewell Violates the Gas Act

The Commission also violated the Gas Act's requirement to ensure projects are in the public interest when it declined to condition the Certificate Order to protect Hopewell residents and resources from harm. The Commission has authority to include "such reasonable terms and conditions as the public convenience and necessity may require."[11] The Certificate Order contemplates PennEast may have to apply for and obtain permits from local regulating authorities. Certificate Order at ¶ 218 [JA__]. Hopewell submitted myriad comments to the Commission responding to its deficient Final Environmental Impact Statement, describing Hopewell's ordinances regulating tree clearing, impacts to steep slopes, and stormwater management. Hopewell Rehearing Request at 43. [JA__].

Without having complete and accurate information regarding steep slopes, the Commission lacked substantial evidence upon which it could determine that steep slope impacts would be appropriately mitigated and public interest be protected. Rehearing Order at ¶ 158 [JA__]. *See also* Certificate Order at ¶ 27 [JA__] (requiring PennEast to revise its Erosion and Sediment Control Plan to

[11]Ironically, despite the Commission's willingness to use this power to condition Certificates on obtaining federal environmental authorizations, it disclaims any power to condition its grant of condemnation authority to protect public interest. *See* Rehearing Order at 33.

account for waterbody crossings with steep slopes and address methods for crossing steep embankments). The Certificate Order failed to protect the public interest by neglecting to include conditions protecting Hopewell's resources.

VII. Conclusion And Relief Requested

For the reasons set forth above, the Commission's National Environmental Policy Act analysis, Gas Act findings, and issuance of the PennEast Certificate lacked substantial evidence, were arbitrary and capricious, and must be vacated and remanded pursuant to the Natural Gas Act, 15 U.S.C. § 717r(b), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). HALT also requests associated easements to be nullified. The Commission's practice of issuing Certificates that do not evaluate public need and lack federal environmental authorizations, but which convey condemnation authority, violates both the Gas Act and the Fifth Amendment, and the Court must make clear that its ruling setting aside the PennEast Certificate Order precludes the Commission from engaging in this practice nationwide.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of December 14, 2018 because this brief contains 8600 words, and the State Petitioners' brief contains less than 9400 words, adding up to 18,000 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2013 computed the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Microsoft Word 2013 Times New Roman) in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I electronically filed the foregoing Petitioners' Joint Opening Brief with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

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