Chairman Bobby L. Rush
Ranking Member Upton
Subcommittee on Energy
House of Representatives Committee on Energy and Commerce

Honorable Chairman Rush, Ranking Member Upton and members of the Committee,

I thank you for the opportunity to offer testimony on this important matter of Natural Gas Act reform and the need to reign in the Federal Energy Regulatory Commission and its routine abuses of power and the law. I offer this written testimony to compliment the verbal testimony given at the February 5, 2020 hearing.

With the Department of Energy Organization Act of 1977 (S.826) Congress reorganized the Department of Energy and created FERC, an independent executive agency. During Senate hearings on the bill, a rightfully skeptical Senator William V. Roth of Delaware had this to say about the critical role that an equitable energy policy plays in our society:

> *"If there is a single area where it is necessary for the American people to believe implicitly in the fairness and honesty of Government, where there can be no doubts whatsoever, it is in the field of energy…A sweetheart relationship between those who regulate and those who are regulated will strain the credibility of the most trusting citizens. "*

Unfortunately, after four decades of FERC's unaccountable and irresponsible approach to energy development, the trust of the American people has been strained beyond the breaking point.

At this point, FERC is widely recognized as a rubberstamp for fracked gas infrastructure; we all know that when FERC gets an application from a pipeline or LNG company it is not a question of <u>if</u> approval will be granted, it is simply a matter of <u>when</u> approval will be granted. Even FERC Commissioner Richard Glick has admitted the rubberstamp label is justified.

It is not just the biased decisionmaking that is so devastating when it comes to FERC; it is FERC's repeated misuse of the law to advance pipeline infrastructure and LNG facilities as quickly as possible. FERC is abusing US citizens, residents, farmers, businesses, states and future generations in its misuse of the law and its authority to advance fracked gas pipelines, compressors and LNG facilities regardless

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215)369-1181
drn@delawareriverkeeper.org
www.delawareriverkeeper.org

of the impact and cost on our communities, the environment, energy security, our climate and future generations.

In my role serving as the Delaware Riverkeeper, leader of the 4 state organization the Delaware Riverkeeper Network, founding member of a national coalition of organizations battling FERC regulated pipelines and representing communities in 35 states called the VOICES coalition, and founder of the national organization Green Amendments for The Generations, I have experienced first-hand the many ways the Federal Energy Regulatory Commission ("FERC" or "Commission") routinely abuses its authority and the law in order to advance fracked gas infrastructure (i.e. pipelines, compressor stations and LNG facilities). The Natural Gas Act needs reform to prevent FERC's abuses.

FERC has misused its power and the language of the Natural Gas Act to the detriment of the public and the environment in a myriad of ways. Among FERC's most egregious abuses is:

- Allowing premature use of eminent domain to seize property rights, even before a pipeline project has met all legal obligations, and secured all needed permits and approvals, thereby allowing the taking of private property and state-owned property rights for a pipeline that may never be constructed (which has in fact happened – once taken, the property rights do not return even if approvals for a pipeline are subsequently denied);
- Using a legal loophole called tolling that strips people and states of their legal and due process rights to challenge FERC approval of natural gas pipelines and infrastructure before the power of eminent domain is used to seize their property rights, and construction is allowed to proceed, thereby inflicting irreparable harm on communities and the environment;
- Undermining, and in some cases stripping, the legal authority of states to determine whether natural gas pipelines and infrastructure would violate state water quality standards and should be approved, denied or modified prior to construction;
- Unconstitutionally and illegally piercing the sovereign immunity of states by giving the pipeline companies the power of eminent domain to take property in which a state has a property interest, and unilaterally overruling a federal court decision in order to advance this illegal pro-pipeline stance;
- Approving unneeded and unwanted pipelines that will exacerbate, and even lock in, our growing climate crisis by locking in increased fracking and methane emissions, and that will take from future generations the healthy forests, streams, wetlands and species needed to support a healthy future food supply, to protect them from the floods, droughts and storms caused by climate instability, and that would otherwise enrich their lives;
- Ignoring the viable and economically competitive clean energy alternatives that could negate the need for a pipeline;
- Carrying forth pipeline reviews that ignore the harmful impacts on the health and safety of nearby property owners, the harmful impacts on property values, and the damage inflicted on impacted farms, businesses, public lands, community economy, and quality of life;
- Ignoring and undermining federal court rulings that mandate FERC consider the climate change impacts of projects being approved, consider cumulative impacts of proposed projects, prevent illegal segmentation in the review and approval of projects, and respect the sovereign immunity of states;

- Undermining the authority of other federal agencies such as the Army Corps of Engineers and U.S. Fish & Wildlife Service to determine if the project would comply with federal law under their jurisdiction and therefore should be approved, denied or modified before FERC approval is granted and construction started;
- Advancing pipeline projects based on demonstrably false and misleading facts, claims and "data"; i.e., FERC approval is granted despite demonstrated proof (such as legitimate scientific data, photographs, agency documentation, and factual proof) that information provided by the pipeline company, key to its proposal, is false, misleading and/or intentionally not provided;
- Advancing pipeline projects without genuine demonstration of need, instead allowing companies to claim "need" simply by producing contracts with affiliates of the pipeline company itself, by asserting that projects which will serve foreign nations and customers, by suggesting there is a need for redundant projects that will transport the same gas already flowing to a region, and/or asserting the project is needed in order to enhance a company's private profits or competitive edge;
- Allowing third party contractors with demonstrated conflicts of interest and an obvious vested interest in the outcome to lead review of the proposed project. This includes contractors who are working for the company at issue on other or related projects, and/or those working for the pipeline companies on directly related projects that will be affected by the actions and recommendations of the contractor;
- Allowing FERC employees and Commissioners with demonstrated conflicts of interest, including financial, to work on project review and decision making for proposed pipeline projects;
- Taking jobs and destroying small businesses while peddling unsupported and demonstrably false claims of economic growth.

This is but a shortlist of malfeasance inflicted on our communities and nation by FERC. Evidence and additional demonstrations of FERC's abuses of its authority can be found in the Dossier of FERC's Abuses of Power and Law attached to my testimony (also found online at: http://bit.ly/DossierofFERCAbuse).

Congress needs to act to clarify the law in order to protect peoples' rights, states' rights, property rights and to protect the health, safety, environment and rights of future generations.

FERC's Mission Needs to Be Updated to Reflect Modern Times, Needs, Goals and the Threat of Climate Catastrophe.

Among the most essential fixes to the Natural Gas Act that is needed is an update of FERC's mission. FERC describes its mission as primarily focused on the advancement of natural gas, not protecting the public interest when it comes to energy development. For example, on January 30, 2020, FERC described its principal obligation under the Natural Gas Act to be to *"encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices,"*[1] *and "In enacting the NGA, Congress established a carefully crafted comprehensive scheme in which the Commission was charged with vindicating the public interest inherent in the transportation and sale of natural gas in interstate*

[1] Order on Petition for Declaratory Order, FERC Docket No. RP20-41-000, January 30, 2020.

and foreign commerce, in significant part through the issuance of certificates of public convenience and necessity for interstate gas pipelines."[2]

This misplaced focus encourages FERC to misinterpret and misuse the law to advance fracked gas pipelines and LNG facilities at all cost. That is why we see, literally, only a handful of denials in over 30 years, accompanied by decisions and actions that trample on due process rights, property rights, states' rights, and state sovereign immunity.

To avoid FERC's continuing misuse of the law, Natural Gas Act reforms are needed that update FERC's mission to ensure it is about advancing energy service that serves the public interest, including that of future generations, with a priority on advancing clean and renewable energy alternatives, retiring existing fossil fuel infrastructure, protecting the health and safety of people and our environment, and making clear environmental rights, people's rights, state's rights and the property rights of the public versus private industry, always be given priority in decisionmaking.

I. Summary of Some of the Most Egregious Abuses and Needed Reforms:

Pipelines and LNG export facilities have devastating impacts on those affected. While the pipeline and fracking industries reap the private profits and an increasingly competitive stronghold on energy markets, others suffer grievous harm; families are forced to live with explosive gas pipelines robbing them of the sanctity of their homes, their safety, and the highest property value they might have enjoyed (properties have become unsellable because of pipelines and their values reduced by as much as 5 to 40% with compressor stations reducing property values in the range of 25 to 50%[3] - these are big numbers for the everyday people being harmed); farmers can lose up to 30%[4] productivity in their farm fields; businesses lose their livelihoods; wildlife is devastated, losing the very places they need to live, to reproduce, to feed and raise their young; the public lands that generations have invested their hard earned donations and tax revenues to protect for future generations are devastated in significant ways; and the safety of future generations is compromised because with every fracked gas pipeline and export facility approved by FERC we are increasing the methane and greenhouse gas emissions that are increasing the devastating impacts, storms and costs of climate instability which our children, their children, and all future generations will have to contend with.

<u>Tolling Orders Take Due Process, Property and State's Rights</u>

Using a strategy called tolling orders, FERC puts property owners, impacted community members, and even state government into a legal limbo that prevents them from challenging FERC Certifications in court.

During the period of tolling, which in some cases has lasted nearly 2 years, while people and states are unable to pursue their legitimate legal challenge against FERC approval of a pipeline, the pipeline companies themselves are under no limitation and are allowed to move full steam ahead with their projects. During tolling FERC approves pipeline companies, exercising the power of eminent domain, advancing construction, including clear-cutting forestland, blasting through bedrock, digging and trenching through rivers, devastating wetlands, destroying wildlife habitat, constructing compressors that will spew pollution into the air people breathe, exacerbating climate catastrophe with methane

[2] Order on Petition for Declaratory Order, FERC Docket No. RP20-41-000, January 30, 2020.
[3] Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.
[4] Independent research documented by Fulper Farms of New Jersey, available on the PennEast pipeline FERC Docket, Docket No. CP15-558.

and other emissions, and putting into service pipelines carrying explosive and dangerous gas under the lands where people work and live, and where children play.

Research has shown that in 21 out of 48 cases, projects were put into partial or full service before the tolling order was lifted by FERC issuing a substantive response to the challengers' rehearing request -- that means that before impacted property owners and communities ever got a chance to go to court, the projects they were challenging were already constructed and beginning to operate -- that is a true denial of justice.

It is common for FERC to place people in this legal tolling limbo for close to a year or more, sometimes even two years, all the while allowing the pipeline company to advance its project, take property, and begin construction.

The sad reality is that tolling orders serve no legitimate public purpose other than to buy the pipeline companies time to advance their project to a point where legal victories come too late to have a meaningful impact.

By the time tolling is lifted and challengers are finally able to make it to the court, any legal victory comes too late. Because of tolling, every major legal victory against FERC approval of a project came too late -- property was already taken, construction was done, and all too often the project was already in partial or full operation.

When the courts ruled in the case of the Northeast Upgrade Project and the Sabal Trail project that FERC had violated federal law by allowing illegal segmentation, failing to consider cumulative impacts, and failing to consider the climate changing ramifications of the project, the pipelines were already operating and there was no meaningful way to remedy the violation.

When the court ruled that FERC had improperly allowed contracts with foreign companies in order to service foreign customers to support the need demonstration for the Nexus Pipeline, the pipeline had already cut through the properties of the challengers and it was too late for that review to change anything.

Even the precedential value of the cases was lost because in subsequent pipeline reviews FERC outrightly, blatantly, and I would say illegally, ignored the instructions of the court. Segmentation still happens, cumulative impacts and climate change are still ignored.

In each one of these cases, had the legal challenge been allowed to proceed quickly, the court's finding could have changed the course of history for the project at issue - either resulting in rejection of the project or at least serious modifications to any approvals it received, but the use of the tolling order strategy to take away the rights of the challengers to gain meaningful and timely access to the courts meant that the pipelines got everything they wanted, including their private profit gain, and the impacted people, communities, environments and future generations received only the devastation.

And there are projects right now that are being affected by tolling. Challengers of the Mountaineer Xpress Pipeline project have been the subject of a 2 year tolling order -- FERC has allowed the exercise of eminent domain, construction and for the project to go into operation. And so there can be no justice for the challengers of this project regardless of the outcome of their legal challenge.

In the case of the Atlantic Coast Pipeline (ACP) Project running from West Virginia through eastern portions of Virginia and North Carolina, petitioners were held in legal limbo for 8 months while the pipeline company exercised eminent domain and had advanced extensive tree clearing, ground moving, trenching, and laying pipe. Due to a series of legal decisions vacating 4 critical permits for the project—including an U.S. Fish and Wildlife Service (FWS) Incidental Take Statement; an Army Corp's Nationwide Permit 12; a National Park Service (NPS) permit; and a Special Use Permit from the US Forest Service (USFS) —it is possible that the pipeline will never be built and that the harms inflicted on the public through eminent domain and construction have been completely unnecessary. Additionally, challenges to FERC's certificate brought after the tolling order was lifted are still pending, and also may prevent the project from being built, but much of the damage has already been done.[5]

FERC is Stretching the Misuse and Premature Use of Eminent Domain.

Currently, FERC approves pipelines and bestows upon them the power of eminent domain and grants approval for projects to undertake construction, including cutting forestland, trenching out streams, destroying critical wildlife habitat and more, regardless of whether or not they have received all necessary permits and approvals. As a result, in a number of cases, property rights have been taken and irreparable construction damage inflicted for a project later denied needed approvals that could prevent them from ever being fully built and put into operation. As a result, the taking of property and the devastating construction was all for naught.

It is notable that at this time there persists a real question over what happens to those property rights taken for a pipeline that is not finally approved and therefore not fully built and put into operation - there is not a clear mechanism to have the property rights restored to their original owner.

FERC is increasingly stretching the use of eminent domain authority in ways not intended by Natural Gas Act. For example, FERC granted a Certificate and eminent domain authority to the PennEast pipeline company despite acknowledging that the company had not provided all of the siting information necessary to support the approval; nonetheless FERC granted the certificate and eminent domain authority in order to allow PennEast, to take property by eminent domain so they could gather the surveys and data they need to finalize their application materials for final FERC approval. In other words, FERC gave the company a Certificate and eminent domain authority so the company could complete the materials necessary to support the approval given. Even FERC Commissioner Neil Chatterjee expressed concern over this most recent abuse of FERC eminent domain approval.

FERC Approves Projects for Which There Is No Defensible and/or Objective Claim of a Public Need

Demonstrating a public need for a pipeline project is critical to a determination of whether or not a proposed pipeline is for the public benefit and entitled to FERC Certification. And yet FERC routinely allows evidence that is self-serving to the company, and ignores evidence from experts and the public that demonstrates a project is not needed.

To demonstrate project need, FERC routinely accepts contracts for pipeline capacity that are from subsidiaries and affiliates of the very pipeline company proposing to build the project - it is a clear case of self-manufactured need. Companies are proving they need the pipeline by saying they need the pipeline -- and FERC accepts this at face value, even when there is expert evidence on the record that demonstrates there is no need for the gas the pipeline will carry, there is evidence that the pipeline is redundant with other pipelines already in operation, that construction of the pipeline will result in a

[5] See *Atlantic Coast Pipeline- Risk Upon Risk,* Oil Change International, March 2019.

surplus of gas, or there is evidence that the asserted energy goals of the project could be fulfilled by other strategies such as conservation or clean energy options.

- ➔ In the case of the PennEast pipeline, 75% of the claimed capacity was demonstrated by agreements with affiliates of the PennEast pipeline company owners.
- ➔ In the case of the Mountain Valley Pipeline, need was demonstrated based solely on five precedent agreements, all with corporate affiliates of the Projects' developers.
- ➔ In the case of the Ohio Valley Connector Project the supposed need was based on a single contract with one affiliated company which accounted for approximately 76 percent of the project's capacity.

FERC defends this strategy by stating that they do "not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project." This statement is an admission of guilt, not a defense for the action.

All too often, the claimed need is to service foreign customers -- so FERC is allowing public and private properties to be taken, and our precious U.S. natural resources to be devastated, in order to service foreign country customers.

FERC routinely ignores expert evidence that proposed pipelines are not fulfilling a public energy need and will in fact create an energy surplus in the communities they are claiming they will serve. In the case of the PennEast project multiple expert reports that were discounted out of hand by FERC documented that the pipeline would result in an over 50% surplus of gas in the regions the company is claiming need to be served.

Even industry experts admit that we're in overbuild -- including industry expert Rusty Braziel who flatly admitted that the *"....the industry is planning too many pipelines."*

FERC itself has admitted that it is approving projects that are not needed to serve new demand for new gas, but are in fact redundant and simply providing a new pipeline to transport existing gas already flowing to a region -- the Spire pipeline is a perfect example. The FERC-approved Spire pipeline will, according to FERC, carry existing gas that is already flowing to the service area, just in a competitor's pipeline -- in other words, gas flowing to the region through existing pipelines will now be able to flow to the region through the new Spire pipeline.

As a result, pipelines being approved are not needed for the public convenience or necessity, in fact, it is quite the opposite, the pipelines are being approved in order to increase the profits and competitive standing of the pipeline and fracking companies themselves, and to lock us in to an overbuilt, fracked gas future and all the climate change devastation that will cause.

In this country we are at a moment when we need to -- and from an energy and economic perspective we can -- say "no" to new fracked gas fossil fuel projects including pipelines and instead advance the clean energy options that science and technology have proven time and again are available to us. Rather than approving new fossil fuel infrastructure we need to be retiring the ones that exist.

FERC Infringes on State Sovereignty and Rights.

FERC is infringing on state sovereignty and undermining state's rights in its review and approval of pipelines.

FERC has illegally granted pipeline companies the authority to take state property rights by eminent domain and when the federal third circuit determined that this was a violation of state sovereign immunity FERC sought to subvert the course of justice by issuing a Declaratory Order in which it joined with the pipeline companies to reject that court determination and issue its own interpretation of the Natural Gas Act -- rather than allowing the case to proceed through the US Supreme court for adjudication, on January 30, 2020 FERC issued its order deciding that the Natural Gas Act did give the pipeline company eminent domain authority over state property rights and rejected the ruling of the US Court of Appeals for the Third Circuit.

FERC routinely approves the use of eminent domain and construction for projects that have not yet secured state 401 certification. Allowing eminent domain and construction before a project is state-approved undermines the ability of states to give full, fair, and unfettered review and decisionmaking on proposed projects -- it is harder to deny approval or require modifications for a project that is half built.

Failing to wait for all permits and approvals of a project means that property rights can be taken and natural resources decimated for a pipeline that may never be built. The Constitution Pipeline is an infamous example of this outcome – the project took property from hundreds of property owners, devastated forests and natural landscapes, devastated small businesses such as a maple syrup business by cutting 80% of the business's trees, only to have the project be denied state 401 Certification. As a result, lives, businesses and environments have been devastated for a pipeline that may never be built. And whether the property rights taken will ever be legally returned is an outstanding question under the current law.

On multiple occasions when states have rejected 401 Certification FERC has joined with pipeline companies to advance novel and precedent setting legal claims designed to void out the states' determinations-- such as arguing that the 1 year time frame for 401 certification review starts the second the application is submitted to the state by the pipeline company regardless of whether the application is complete according to the state.

FERC is Advancing Climate Instability and In So Doing Putting Our Communities and Future Generations in Unparalleled Jeopardy.

Despite the clear language of the law and federal court ruling, FERC refuses to consider the climate changing impacts of pipelines and LNG facilities, including from downstream use, upstream extraction, and during transmission. By ignoring this element of harm inflicted on the public interest, FERC seeks to make it easier to justify its approval of unneeded and unwanted pipelines and LNG facilities

FERC falsely claims that it has no way to consider the climate change impacts of the pipelines it is approving. This is a ludicrous argument that that has been repeatedly debunked by comments and legal filings that provide FERC the exact information and details it needs to do such a review, even when the agency itself is refusing to amass the information.

FERC is approving unneeded and unwanted pipelines that will exacerbate, and even lock in, our growing climate crisis by locking in increased fracking and methane emissions and will take from future generations the healthy forests, streams, wetlands and species needed to support a healthy

future food supply, to protect them from the floods, droughts and storms caused by climate instability, and that would otherwise enrich their lives.

As FERC Commissioner Glick has said:

> *"Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the* ***existential*** *threat of climate change."*[1]

In addition to ignoring the climate change ramifications of the projects it is reviewing, FERC is ignoring clean and renewable energy alternatives in assessing the need for a pipeline -- this is but another way FERC is using its authority to lock in a fossil fuel future and undermine the needed advancement of clean energy. The Rocky Mountain Institute found that "across a wide range of case studies, regionally specific clean energy portfolios already outcompete proposed gas-fired generators, and/or threaten to erode their revenue within the next 10 years. Thus, the $112 billion of gas-fired power plants currently proposed or under construction, along with $32 billion of proposed gas pipelines to serve these power plants, are already at risk of becoming stranded assets. This has significant implications for investors in gas projects (both utilities and independent power producers) as well as regulators responsible for approving investment in vertically integrated territories."

Why are we, as a country, investing billions of dollars, scarring the land, and robbing families and small businesses of their property rights, all for a massive system of infrastructure that will soon be defunct?

Pipelines Do Explode, Harming Both People and Property.

Forcing someone to become home to a fracked gas pipeline is a serious matter. Pipelines do explode, destroying lives and property. If you don't think so then ask James Baker who was sitting in his home, nursing an injury when the nearby pipeline blew up and literally set James injured and on fire hobbling from his home, trying to get to some semblance of safety.

Accidents, incidents and explosions are not uncommon and inflict serious harm. In a recent 10 year period, PHMSA reports 1,129 natural gas pipeline accidents/incidents/explosions, that caused nearly $1.2 billion in damages ($1,194,966,547) and resulted in injuries or death for 137. According to the Pipeline Safety Trust, the safety record of pipelines is getting worse, not better. According to the Trust, the rate of accidents, incidents and explosions of gas transmission lines installed in the 2010s have annual average incident rates that exceed those pipelines that were installed prior to 1940.

Pipeline compressors are also a source of significant harm -- environmental, property and human health harm. Research has shown that of those living within 2 miles of a compressor station or metering station 71% experience respiratory impacts, 58% experience sinus problems, 55%

experience throat irritation, 52% experience eye irritation, 48% experience nasal irritation, 42% experience breathing difficulties or vision impairment, 39% experience sleep disturbance, and 39% experience severe headaches. In addition, 90% experience odor events including sulfur smell, odorized natural gas odor, ozone odors or the smell of burnt butter. And property values are seriously impacted.

FERC is Ignoring Court Orders by Continuing to Ignore Climate Change, Allowing Illegal Segmentation, Failing to Consider Cumulative Impacts.

The law requires and the courts have ordered FERC to consider the climate changing ramifications of the pipelines, LNG facilities and related infrastructure they are approving. The courts have ordered FERC to consider the cumulative impacts of projects and to stop the illegal process of taking larger projects and breaking them up into smaller pieces (i.e. segmentation) in order to make review and approval easier by masking the true costs and harms of a project. And yet FERC continues to ignore each one of these court ordered mandates.

LNG Loophole Needs Closing

FERC policy provides a loophole for would-be LNG exporters. LNG export proposals where the gas is liquified offsite, transported to the site via rail or truck, and then stored on site in trucks/rail cars waiting to load and subsequently be stored on site for over 2 weeks on shipping vessels while they are slowly loaded with increasing levels of LNG are, by FERC policy, deemed by FERC to evade FERC review. The increasing push for rail and truck approvals to transport LNG liquified near the shale fields, along with this FERC loophole that will help evade full and fair review, means dangerous LNG facilities of this kind, like the one proposed for Gibbstown, New Jersey, will be on the rise.

LNG is a hazardous, flammable cargo that can cause immediate fatal impacts, inextinguishable fire and enormous explosion if it escapes its container. A PHMSA Notice of Proposed Rulemaking findings and expert reports reveal that a release of LNG from its container results in the super-cooled (-260 degrees F) liquid immediately returning to an extremely cold vapor that can asphyxiate people nearby. Some other unique properties of LNG when released include a vapor cloud that can move far distances quickly and ignite into a flash fire or fireball at an ignition source and can explode into a powerful bomb-like explosion even without ignition. The impact zone is at least 1600 meters, about 1 mile, according to PHMSA. How the vapor cloud moves is difficult to predict; in LNG accidents emergency responders have evacuated for 2 miles or more.

LNG carried by rail poses "unique safety hazards" if released. The PHMSA Proposed Rulemaking and expert reports say an LNG release boils furiously into a flammable vapor cloud 620 times larger than the storage container -- if ignited, it is inextinguishable. An unignited ground-hugging vapor cloud can move far distances downwind into communities, burning if then ignited. Or if “confined” in a ditch, by some wall or into a sewer system, can spontaneously explode over a one-mile area as in the 1944 Cleveland LNG disaster which killed 127. The 2016 US Emergency Response Guidebook advises fire chiefs initially to evacuate 1 mile. No federal field research or modeling has shown how far the vapor cloud can move. So in the most recent serious Plymouth WA LNG facility fire, responders evacuated a 2-mile radius.

LNG is dangerous, and truck and rail transport makes it even more dangerous, including for communities along the entire transportation route. It also means that once quiet neighborhoods and those already overburdened with excessive traffic, will be inundated with hundreds of truck trips a day bringing dangerous LNG gas to the export site throughout the entire year. In the case of the

Gibbstown LNG export facility we will be talking about 1,650 truck trips per day barreling through a residential community.

While truck, rail and actual LNG siting may not be subjecting people to eminent domain takings, it is taking from people the safety, sanctity, and value of their properties, which is equally damaging.

PHMSA recently approved a Special Permit for the use of rail cars to transport LNG by the company that wants to export it from Gibbstown and has proposed federal rulemaking to allow LNG on rail lines throughout the nation, much if not most of which is through residential neighborhoods. The tank cars approved for use were designed 50 years ago, and were NOT designed for safe LNG transport. Experts from many quarters have expressed concern. The National Transportation and Safety Board filed a comment with PHMSA on December 5, 2019 stating "In summary, the NTSB believes that it would be detrimental to public safety if PHMSA were to authorize the transportation of LNG by rail with unvalidated tank cars and lacking operational controls that are afforded other hazardous materials such as flammable liquids, as currently proposed in this NPRM."[6]

The tank trucks too will be travelling through residential neighborhoods -- rural, suburban and urban -- across our nation as these alternative LNG facilities proliferate.

This loophole needs to be closed, it is important that FERC be required to review and approve every LNG facility.

When it comes to LNG exports, the Natural Gas Act puts in place a presumption that the project is in the public interest and that there is a public value to the project. This presumption is unsupported in this modern era.

II. Reforms are Needed to Check FERC's Abuses of Power and Law.

Congress needs to act to reform the law in order to stop the abuses by FERC that are advancing climate catastrophe, stripping people of their property rights, stripping state sovereignty and authority, damaging family farms and businesses, and are the cause of accidents, incidents and explosions that are very literally killing and injuring people and devastating property and lives.

In addition, through executive order and agency action, Donald Trump is seeking to fast track fracked gas infrastructure, drilling, and exports, including most recently by proposing regulations that would severely misinterpret and strip protections provided by proper implementation and interpretation of the Clean Water Act and the National Environmental Policy Act. It is imperative that Congress reform the Natural Gas Act to specifically and firmly protect people's rights, states' rights, property rights, and the right of future generations to a safe and secure environment, a stable climate, and the clean energy future that will provide them with both national security, economic security, and environmental vitality.

- Congress needs to reform FERC's mission - to ensure it is about advancing energy service that serves the public interest, including that of future generations, with a priority on advancing

[6] National Transportation Safety Board, letter to U.S.D.O.T., RE. Docket No. PHMSA -2018-0025 (HM-264), December 5, 2019.

clean and renewable energy alternatives, retiring existing fossil fuel infrastructure, protecting the health and safety of people and our environment, and making clear environmental rights, people's rights, state's rights and the property rights of the public versus private industry, but always be given priority in decisionmaking.

- The practice of tolling orders can be ended, and if not ended then the inequities addressed by making clear that if a tolling order is in place there can be no exercise of eminent domain or construction approval until the order has been lifted.
- States' rights, peoples' rights and property rights can be restored and protected by making clear that FERC either cannot issue a certification of public convenience and necessity until all government approvals required have been secured; or, less protective but another option, by making clear that there can be no eminent domain or construction approval until all permits and approvals have been secured.
- To further protect state authority, it must be made clear that the 1 year timeline for 401 certification review only starts when a state has determined that the application materials submitted by the pipeline company are complete.
- Congress must make clear that FERC must consider the climate changing ramifications of pipeline and LNG infrastructure it is approving, including the downstream uses of the gas to be transported, the upstream fracking that must be induced in order to supply the gas for the pipe, and all of the emissions released as the gas is transported from the frack field to the end uses. If expert analysis demonstrates there is a clean energy alternative to the pipeline, a less damaging path environmentally, and/or there will be demonstrable climate catastrophe impacts, then FERC must be obliged to deny the project as failing to be in the public interest.
- Congress must prohibit the use of precedent agreements with pipeline company affiliates for demonstrating need in whole or in part (or with some meaningful limitation, e.g. that no more than 3% of the demonstrated capacity supporting a claim of need can be from affiliates), make clear that exported gas to foreign users cannot be used to demonstrate need, that FERC must consider the evidence provided by third parties about a lack of need, and that FERC must mandate consideration of renewable energy alternatives (including increased efficiency and energy conservation) for supplying the energy needs the companies are claiming they will serve.
- **Congress** should make clear that neither the pipeline companies nor FERC are entitled to use the power of eminent domain to take property in which the state has a property interest. If property in which a state has a property interest are to be taken by eminent domain for pipeline construction, it should require an act of congress in order to ensure the taking is genuinely for the public benefit, including present and future generations.
- The law needs to make clear that if a pipeline does not secure all needed approvals to support construction and/operation, or for any other reason is not built, that the property rights taken, whether by eminent domain or contract under threat of eminent domain, will be returned, in their entirety, to public and private property owners.
- The law needs to make clear that every LNG facility must require FERC review and approval, no exceptions.
- The presumption that LNG exports are in the public interest should be removed from the law.

It is time for reform of the Natural Gas Act so we can put an end to FERC's abuses of its power and the rights of the people and states of our nation.

III. Property Rights Under Attack From FERC

a) The grant of eminent domain authority to a private industry in order to support purely private profits is unacceptable, particularly given the harms inflicted.

Fracked shale gas is a serious source of climate changing emissions and inflicts irreparable harms on our environment, including the forests, waterways, wetlands and habitats that are decimated in order to accommodate the construction, operation and maintenance of each one of these dirty fossil fuel projects.

Every fracked gas pipeline approved results in increased fracking and an increase in the release of climate changing emissions. As human-induced climate change advances, so too does the destruction of private property due to flood and storm damage, and the environment. It is irresponsible to allow FERC to give private companies that are undertaking activities that are exacerbating the destructive forces of climate change, the power of eminent domain in order to force the construction of the infrastructure that is devastating the lands it is crossing while also devastating the climate for future generations. This misuse of authority is particularly concerning given that the majority of energy needs claimed by the pipeline companies either don't exist or could be fulfilled by clean and renewable energy strategies. Given these facts, FERC has no business allowing a private company to use eminent domain for a self-serving project at the expense of American property rights and/or our environment. If a project is not good enough to curry the favor of landowners to willingly grant access, then it should not be powerful enough to take their property rights.

The NGA was originally conceived under the assumption that the increased access and use of natural gas was in the public interest. In the 80 years that have passed since that time, many things have changed, including our understanding of the devastating climate changing effects of methane, our clean and renewable alternative energy options, and the vast proliferation of natural gas pipelines cutting across the country and taking enormous numbers and acres of individuals', families', and small business's private property--a proliferation which has also created a more than sufficiently saturated and accessible natural gas market. As such, the underlying mission and definition of public interest under the NGA must be reformed to reflect our current reality.

The Federal Energy Regulatory Commission should be an agency tasked with regulating energy projects and markets for the people and in their public interest. As it is currently framed, the NGA instead encourages a system of regulatory capture, in which the Commission interprets its principal obligation under the Natural Gas Act to be to *"**encourage** the orderly development of plentiful supplies of . . . natural gas at reasonable prices,"*[7] *and "vindicating the public interest **inherent in the transportation and sale of natural gas** in interstate and foreign commerce, in significant part through the issuance of certificates of public convenience and necessity for interstate gas pipelines."*[8] Under this framework, FERC is given an inherent bias for the approval of pipeline projects, and is beholden to the

[7] Order on Petition for Declaratory Order, FERC Docket No. RP20-41-000, January 30, 2020.
[8] Order on Petition for Declaratory Order, FERC Docket No. RP20-41-000, January 30, 2020.

pipeline companies rather than the people. This has resulted in a massive overbuild of natural gas infrastructure that, as demonstrated below, is not needed, is approved in violation of the rights of people and the states, that has trampled the private property and due process rights of the people in favor of private industry, and that exacerbates the existential threat of climate change facing humanity.

b) FERC is giving eminent domain authority to pipeline companies while preventing legitimate legal challenges by property owners facing eminent domain.

Challengers to FERC Certification are unable to challenge FERC's approval in court until such time as they file a rehearing request with FERC that is either approved or denied. Rather than do either, FERC uses a self-manufactured legal loophole, called a tolling order, to put challengers into a legal limbo that prevents them from bringing a legal challenge in court until FERC lifts the order by substantively granting or denying the rehearing request.

Inflicting a great injustice, while challengers to a project are placed in legal limbo, no limitations are placed on the forward progress of the pipeline projects -- to the contrary, they are allowed to advance without limitation. While a tolling order is in effect FERC grants pipeline companies the power of eminent domain, allowing them to take property through forced condemnation or coerce property owners to give up their property rights under the threat of condemnation. In addition, during the period of tolling, FERC routinely approves project construction including cutting forestland, cutting through waterways, devastating wildlife habitat, irreparably harming wetlands, building compressors, and installing their pipeline.

As Commissioner Glick explains:

> "Until the Commission issues its ultimate order on rehearing, the NGA precludes parties from challenging the Commission's decision in federal court. However, the pipeline developer has the right to pursue eminent domain and, in many cases, to begin construction on the new pipeline facility while the Commission addresses the rehearing requests. As a result, **landowners, communities, and the environment may suffer needless and avoidable harm while the parties await their opportunity to challenge the Commission's certificate decision in court**."[9]

In the case of the Spire STL pipeline, 4 rehearing requests and a request for a stay pending the Commission's decision on rehearing were tolled for nearly 15 months, and for more than a year after the Commission granted Spire's request to begin construction of the pipeline. As Commissioner Glick lamented in his dissent of the Commission's Order on Rehearing:

> While rehearing was pending—and before any party had an opportunity to challenge the Commission's decision in court—Spire disturbed what [...] the Certificate Order estimated to be over 1,000 acres of land and brought eminent domain proceedings against over 100 distinct entities. Indeed, as noted, Spire successfully prosecuted eminent domain proceedings involving well over [...] 200 acres of privately owned land—a number equivalent to more than half of total number of acres needed to permanently operate the pipeline. Those eminent domain proceedings all took place when the Commission's order was "final enough for [the pipeline] to

[9] Statement of Commissioner Richard Glick on PennEast Pipeline Co., LLC. May 30, 2018. FERC Docket No. CP15-558-002.

prevail in an eminent domain action," but "non-final" for the purposes of judicial review. (citations omitted)[10]

Commissioner Glick went on to critique FERC's handling of the case as "fundamentally unfair", explaining that:

> In this proceeding, several parties were stuck in limbo, unable to even seek judicial relief, while Spire STL seized land and proceeded to build the pipeline. A regulatory construct that allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court ensures that irreparable harm will occur before any party has access to judicial relief. That ought to keep every member of this Commission up at night. Under those circumstances, dismissing as moot [the] year-old request for a stay pending rehearing because the Commission finally issued an order on rehearing is a level of bureaucratic indifference that I find hard to stomach.
>
> The Commission can and should do better. … Instead, by relying on what Judge Millett correctly described as "twisted . . . precedent" and a "Kafkaesque regime," the Commission has guaranteed substantial irreparable harm occurs before any party can even set foot in court. (citations omitted)[11]

c) FERC is giving Eminent Domain authority to pipelines to help them finalize their application materials -- not because they have demonstrated the requirements for Certification -- this is a clear violation of the language and intent of the NGA.

Pursuant to Section 717f(h) of the Natural Gas Act, private fracked natural gas companies are entitled to use the power of eminent domain to take property in order to advance construction of their FERC regulated, fracked gas pipelines (including appurtenances such as compressor stations) if they have received from FERC a Certificate of Public Convenience and Necessity (FERC Certification), have been unable to secure the property rights through agreement of the property owner, and the value of the property exceeds $3,000. The power of eminent domain is routinely used by pipeline companies against both private property owners as well as states.

To secure FERC Certification the pipeline company must demonstrate it can conform to the requirements of the Natural Gas Act including implementing rules and regulations, and if the company cannot demonstrate that the proposed project "is or will be required by the present or future public convenience and necessity … [the] application shall be denied." Demonstrating that a pipeline can fulfill the elements required for Certification must come before FERC Certification can be granted and eminent domain authority bestowed. But FERC is now clearly stretching its authority beyond these legal mandates and bounds and granting Certification in order to bestow eminent domain authority so pipelines can take property rights in order to fulfill all of the information requirements necessary to support FERC Certification.

With the PennEast Pipeline project FERC has started granting Certification and bestowing the power of eminent domain to private companies for projects that have not demonstrated their ability to meet the

[10] Dissent Regarding Spire STL Pipeline LLC, Commissioner Richard Glick Statement. November 21, 2019. FERC Docket No. CP17-040-002.
[11] Dissent Regarding Spire STL Pipeline LLC, Commissioner Richard Glick. November 21, 2019. FERC Docket No. CP17-040-002.

mandates necessary to be entitled to FERC Certification approval. In the case of the PennEast Pipeline Company ("PennEast"), FERC issued a Certificate of Public Convenience and Necessity despite the fact that the pipeline company was unable to complete all of the needed surveys, information and application materials required to demonstrate its ability to comply with the mandates of the law. In fact, as recognized by, and of concern to, Commissioners Neil Chatterjee and Richard Glick, the FERC Certificate was issued and the company given the power of eminent domain to help PennEast secure the property access needed to complete the surveys and secure the information necessary to support FERC approval and to complete applications required for other agencies. In other words, FERC gave the company a FERC Certificate and eminent domain authority so the company could take property in order to force its way onto people's private lands so PennEast could collect the information needed to complete the materials necessary to support the FERC approval that had already been given. This is a shocking abuse of power and disfigurement of the intent and language of the law.

As stated by Commissioner Glick in response to this FERC action "Congress did not intend for the Commission to issue certificates so that certificate holders may use eminent domain to acquire the information needed to determine whether the pipeline is in the public interest."

This is a clear and obvious abuse of the law and the private property rights of those affected.

d) FERC Allows Pipeline Companies to Use the Power of Eminent Domain and to Undertake Destructive and Irreparable Construction Activity for Pipelines That May Never be approved and never be built.

Currently, FERC approves pipelines and bestows upon them the power of eminent domain and grants approval for projects to undertake construction, including cutting forestland, trenching out streams, destroying critical wildlife habitat and more, regardless of whether or not they have received all necessary reviews and approvals from impacted states who have a legal decision-making role and other federal agencies. Consequently, pipelines have taken property and inflicted devastating harm on private property, preserved public landscapes, and the environment, thereby inflicting irreparable harm on property, economic, business and environmental interests only to have a project denied key permits and approvals that could prevent them from ever being built. As a result, the taking of property and the devastating construction was all for naught.

It is notable that at this time there persists a real question over what happens to those property rights taken for a pipeline that is not finally approved and therefore not fully built and put into operation - there is not a clear mechanism to have the property rights rescinded from the pipeline companies and returned to their original and rightful owner and as such the pipeline companies may retain a property interest taken by eminent domain for a project that never received all necessary government approvals and therefore may never be built.

e) The presumption of Public Interest for LNG Exports should be removed

When it comes to LNG exports, the Natural Gas Act puts in place a presumption that the project is in the public interest and that there is a public value to the project. This presumption is unsupported in this modern era. LNG exports are intended to serve the private profit goals of the companies involved -- i.e. the companies building the export terminal, those building the connecting pipelines, and those undertaking the fracking to provide the gas transported and exported. Given the devastating private property, environmental harmful economic, and climate changing ramifications of fracking, pipelines

and LNG facilities, there is no basis on which to presume a public benefit. In fact, it is the people and the land of the US that will bear the brunt of the negative impacts for the energy interests of another country.

f) FERC public hearings are no hearing at all.

FERC is supposed to hold a public hearing before issuing a Certificate of Public Convenience and Necessity, and while FERC does provide notice of when the Commissioners will meet to make such a determination, the public, including those about to lose their property rights or suffer direct and egregious harm, are given no opportunity to speak at this hearing. The advance public comment process on the docket that is dominated by false and misleading information accepted by FERC from the pipeline companies, and is complicated by ever changing plans including route changes, does not provide a fair opportunity for the public to be heard on the final proposal before the Commissioners give their rubber stamp approval.

FERC Commissioners should be required to provide an opportunity for public comment, to the Commissioners not just FERC staffers, prior to the Commissioners voting on project Certification.

g) Reforms Required to Protect Property Rights

FERC's mission must be reformed to ensure the primary goal of the agency is advancing energy service that serves the public interest, including that of future generations, with a priority on advancing clean and renewable energy alternatives, retiring existing fossil fuel infrastructure, protecting the health and safety of people and our environment, and making clear environmental rights, people's rights, state's rights and the property rights of the public versus private industry, but always be given priority in decisionmaking.

Reform: The power of eminent domain must not be automatic with FERC Certification of natural gas or LNG infrastructure. The power of eminent domain is a legal tool of government, not a source of power to be handed to private industry. Given the many ways FERC has abused its ability to hand over eminent domain authority to pipeline companies, the most prudent course of action is for Congress to remove their ability to do so all together. The ability of FERC to give the power of eminent domain to private pipeline companies must be removed. If it is not then significant boundaries must be put into place, such as:

- preventing its use before a pipeline project has secured all state and federal approvals;
- preventing its use before a pipeline company has provided all of the details necessary to support FERC certification without forced access to properties;
- preventing its use against state owned property rights;
- preventing its use when there is a FERC issued tolling order in affect.

If FERC is to retain the authority to grant the power of eminent domain to private pipeline companies upon issuance of a FERC Certificate, the NGA must be reformed so as to prohibit FERC from approving a pipeline infrastructure project and/or allowing it to proceed with eminent domain or any element of construction (including tree felling) until all state, federal, interstate commission and other government reviews/permit/docket/approval processes have been finalized and approvals/permits/dockets granted.

If Congress is unwilling to put in place this common sense reform then other approaches for addressing the concern could include:

- **Clarify the law to make clear that State Section 401 Clean Water Act approvals have primacy in the FERC review and approval process.** Section 401 of the Clean Water Act specifically reads: "no [federal] license or permit shall be granted until the certification required by this section has been granted or waived." 33 U.S.C. § 1341(a)(1). Requiring Section 401 certification from the states prior to federal action ensures that states' rights are honored, that state standards are met, and that public and private resources are not unnecessarily lost. It also ensures that the federal government is held accountable to the same standards as private entities, an important point of equity. FERC routinely issues Certificates of Public Convenience and Necessity prior to state decision-making on 401 Certifications for FERC pipeline and infrastructure projects. The result is to undermine state authority, and in some instances, has resulted in the taking of property rights, and damage to business, jobs and the environment for construction of a pipeline that a state ultimately rejected. 401 primacy prevents such an irreversibly harmful outcome. If the mandate that 401 Certification must be received prior to FERC providing NGA Certification is not enacted/clarified within the language of the NGA, then it must be clear that FERC cannot approve any element of eminent domain or construction until all state reviews/permit processes have been finalized and approvals/permits granted, including but not limited to 401 Certification.

- **Ensure Full Applicability of all Federal and Interstate Commission Laws.** Currently, FERC approves pipelines and allows them to proceed through phases of construction and eminent domain regardless of whether or not they have received all necessary reviews and approvals from other agencies, such as wetland permits from the US Army Corps, completed endangered species review from the U.S. Fish & Wildlife Service, or permits/approvals/dockets for interstate Commissions such as the Delaware River Basin Commission. The law needs to make clear that FERC cannot approve a project and allow it to proceed with any element of eminent domain or construction until all applicable government reviews/permit processes have been finalized and approvals/permits/dockets granted.

Certification and eminent domain must be prohibited until such time as the pipeline company can demonstrate it fulfills all of the mandates of the law and implementing regulations and is entitled to FERC Certification. The NGA must specifically prohibit FERC Certification if a project cannot, prior to FERC approval and Certification, demonstrate that it has provided full and accurate information and proof that objectively supports all the findings necessary to support FERC approval.

There must be a mechanism for restoring property rights. The law needs to make clear that if a pipeline does not secure all needed approvals to support construction and/or operation, or for any other reason is not built, that the property rights taken, whether by eminent domain or contract under threat of eminent domain, will be returned, in their entirety, to public and private property owners.

The presumption that gas exports are in the public interest should be removed. Companies must be forced to demonstrate, and FERC must be required to determine, that there is a genuine public benefit, beyond the profit and business interests of the applicant. It must also be clear that the public benefit determination must include consideration of the climate change impacts of the proposal, as well as all other environmental, property and economic harms that will result.

FERC Commissioners should be required to provide an opportunity for public comment, to the Commissioners not just FERC staffers, prior to the Commissioners voting on project Certification which results in the taking of property rights and community harm.

IV. People's Rights Under Attack FROM FERC

FERC intentionally undermines the ability of impacted communities, property owners and states to timely challenge FERC Certificates of Public Convenience and Necessity through the use of tolling orders, and at the same time undermines the right and the ability of courts to review and judge projects in a full, fair, and timely manner.

a. The use of Tolling Orders by FERC to undermine individual's, communities' and states' rights should be prohibited.

While FERC works proactively with pipeline companies to advance their projects with the power of eminent domain and quickly issued notices to proceed with construction, FERC at the same time uses a legal loophole that prevents property owners, impacted community members or even states from challenging the FERC approval in a timely manner, before eminent domain solidifies and significant and irreversible construction is underway.

Under the Natural Gas Act, a party (impacted property owner or community member, state, or even interested industry) cannot legally challenge FERC approval of a pipeline project in court until they have first submitted a rehearing request to FERC, and FERC has affirmatively granted or denied that request. According to the plain language of the law (15 U.S.C. § 717r(a))[12] FERC should respond to this request within 30 days. But in an obvious effort to subvert the course of justice and help the pipeline companies advance their projects unimpeded, FERC issues something called a tolling order -- a tolling order is neither a true grant or denial of the rehearing request, it is an order that grants rehearing "for the limited purpose of further consideration." Without a grant or denial of the substance of the rehearing request, challengers have not legally passed the threshold necessary to file their legal challenge in court.

[12] "Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter." 15 U.S.C. § 717r(a)

The result of a tolling order is that would-be challengers are placed in a legal limbo, where they are unable to challenge the project. While the public is unable to take any action in its own defense, the pipeline companies are allowed to move full steam ahead with their projects, exercising the power of eminent domain, clear-cutting forestland, blasting through bedrock, digging and trenching through rivers, devastating wetlands, destroying wildlife habitat, constructing compressors that will spew pollution into the air people breath, taking the safety and sanctity of people's homes, ruining public lands that generations have invested to protect for future generations, bringing us ever closer to the climate change tipping point, and putting into service pipelines carrying explosive and dangerous gas under the lands where people work and live, and where children play.

According to a detailed EarthJustice review[13], in 21 out of 48 cases, FERC projects were placed into partial or full service before FERC responded to the rehearing request and lifted the tolling order - thereby making it impossible for the challengers to receive justice even if they win their case because the victory comes too late to impact the actual outcome of the project.

It is common for FERC to place people in this legal limbo for close to a year or more, sometimes even two, all the while allowing the pipeline company to advance its project, take property, and begin construction.

The sad reality is that there is no value to a tolling order other than to allow pipeline companies time to advance the taking of property (through either the threat or reality of eminent domain actions) and construction unimpeded by legitimate legal challenges. We know this because FERC does not grant rehearing requests, they are always denied. And so it is not a matter of if the rehearing will be denied, thereby allowing a legal challenge in the courts, it is only a matter of when the rehearing request will be denied. In no tolling order reviewed by the Delaware Riverkeeper Network have we ever seen any meaningful explanation for the need for the additional time to review. It is clear from the evidence on the public record that tolling orders serve no legitimate public purpose other than to buy the pipeline companies time to advance their project to a point where legal victories come too late to have a meaningful impact.

Delaware Riverkeeper Network is unaware of any non-industry aggrieved party who has actually been granted a request for rehearing -- as such, the denial of the rehearing request is a foregone conclusion and the use of tolling orders is an obvious ploy to allow pipeline projects to advance unfettered by any legal challenge. The harms inflicted by the delay in responding to the rehearing requests cannot be undone or fully remedied later – forests cut cannot be instantly regrown; property rights, once taken, are not returned.

It is also important to note that tolling orders are FERC's typical response to rehearing requests. According to EarthJustice review of rehearing requests questioning FERC certificates of public convenience and necessity that were filed by parties that were not project proponents, from 2009 to 2019 FERC responded with a tolling order 61 out of 63 times and as a result it unilaterally and indefinitely extended its timeline for review, and the legal limbo of the challengers.

FERC Commissioner Glick is among those with serious concerns about the illegitimate way FERC uses tolling orders. Reacting to FERC decisionmaking with regards to the Spire STL project, Commissioner

[13] Amicus Brief filed on behalf of the Delaware Riverkeeper Network and Others in the case Allegheny Defense Project v. FERC, 1/17/2020, see: https://www.delawareriverkeeper.org/sites/default/files/Earthjustice_NGO_Amicus%20%282020-01-17%29.pdf

Glick critiqued FERC's handling of the case as "fundamentally unfair", highlighting the harmful and inequitable use of tolling orders:

> "In this proceeding, several parties were stuck in limbo, unable to even seek judicial relief, while Spire STL seized land and proceeded to build the pipeline. A regulatory construct that allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court ensures that irreparable harm will occur before any party has access to judicial relief. That ought to keep every member of this Commission up at night. Under those circumstances, dismissing as moot [the] year-old request for a stay pending rehearing because the Commission finally issued an order on rehearing is a level of bureaucratic indifference that I find hard to stomach."

FERC's regular practice of tolling the time to respond to rehearing requests and then failing to issue timely final orders denies the public their due process rights to a timely decision by FERC and denies them a fair opportunity to challenge a pipeline before their property is taken or their community or environment are irreparably harmed. Such a failure to act causes irreparable injury to communities striving to protect their property, their families, their health, safety, and environmental interests, and striving to protect their descendants from the devastating harms that climate change and environmental destruction will undeniably cause.

The harms inflicted by the delay in responding to the rehearing requests with a grant or denial cannot be undone or fully remedied later – e.g. the mature trees and forests cut cannot be regrown or replanted to their pre-construction condition, the loss of a maple tree forest necessary to support a maple syrup business cannot be replaced in time to deliver syrup for the company to survive -- it is simply too late.

The use of tolling orders strips people of their due process rights, strips them of their property rights, and frustrates the clear intent of the Natural Gas Act. Every single one of the most controversial pipelines that are setting important precedent regarding the authority of FERC, the states, and other federal agencies has been subjected to tolling orders that prevented full or fair legal proceedings or successful challengers receiving the benefit of the precedent their legal action has set.

In the case of *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), FERC issued a 7 month tolling order that prevented us from challenging, in court, FERC approval of the Tennessee Gas Pipeline Company's Northeast Upgrade Project. While our legal rights to challenge the project were put in shackles by the tolling order, FERC granted the pipeline company the right to take property, to cut through streams, to decimate over 810 acres of land, including along 7 miles of prime farmland, to cut down forests including in Pennsylvania's Delaware State Forest and New Jersey's Highpoint State Park, and to inflict harm as it crossed the Wild & Scenic Delaware River and trenched through dozens of waterways. By the time the tolling order was lifted and the United States Court of Appeals for the DC Circuit ruled in our favor determining that FERC had violated federal law in its review and approval of the project, the pipeline was built and already in operation. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309 (D.C. Cir. 2014).

A 6 month tolling order complicated by a slow judicial process, meant that by the time the Sierra Club secured its precedent setting decision out of the DC Circuit Court of Appeals ruling that FERC had violated the National Environmental Policy Act when it failed to analyze greenhouse gas (GHG) emissions resulting from the Sabal Trail Pipeline Project, much of the pipeline was already built and in

service. And so while, on paper, the court vacated FERC's approval of the Project and mandated that FERC either quantify and consider the Project's downstream carbon emissions, or explain in more detail why it failed to do so, the climate changing damage of concern to the courts and the challengers was already taking place leaving no meaningful way to address the ruling or the problem.

The 10 month tolling order challengers of the Nexus pipeline were subjected to, meant that the project was built by the time the US Court of Appeals for the DC Circuit agreed with challengers that FERC had inappropriately credited contracts with foreign companies to serve foreign customers in its determination of whether the pipeline company was able to demonstrate that its project was providing the kind and level of public benefit necessary to support a FERC Certificate of public convenience and necessity. As with so many other cases, the extended tolling order meant that this project came too late to be of benefit to the challengers of the project who had already had their property taken and, in their eyes, devastated. With the project built and in operation there was no resolution but to remand to the FERC for further explanation and consideration, but no real opportunity to change the outcome for those harmed. All they had succeeded in doing was set precedent for a future project.

In the case of the TGP NEUP, the Sabal Trail and the Nexus Pipeline projects, the court rulings secured could have materially and significantly changed the outcome of the FERC process, perhaps even resulting in a denial of the project. But tolling ensured that the decisions came too late to have an impact on that final outcome.

One cannot even argue that at last the precedent set will be of broader community benefit and value because FERC routinely ignores legal precedent set in successful legal challenges to its authority. Despite the successful rulings secured in the TGP NEUP case and the Sabal Trail case secured by the Delaware Riverkeeper Network and the Sierra Club, FERC has intentionally ignored the guidance of the court in subsequent pipeline reviews; i.e. it has failed to end the practice of segmentation, it has failed to consider cumulative impacts, and it has failed to consider the climate changing ramifications of the projects it is reviewing and approving.

FERC tolled the New Market project a stunning 24 months. Once the tolling order was lifted Otsego 2000's challenge to the FERC Certificate in the U.S. Court of Appeals for the District of Columbia was supported with amicus brief filings from the Attorneys General of New York, Maryland, New Jersey, Oregon, Washington, Massachusetts, and the District of Columbia, demonstrating the importance of this case. While the project had been constructed and in-service for over a year, the case was still pending in federal court. FERC's tolling order clearly prevented timely legal challenge – and a favorable decision from the court would have had no effect on construction or operation of this pipeline.

While petitioners challenging the Mountain Valley Pipeline (MVP) Project were held in legal limbo for 6 months, FERC authorized construction and tree felling along the length of the 300 mile project and condemnation actions were pursued against nearly 300 property owners. Shortly after rehearing requests were finally denied and much of the construction was complete, a series of court decisions called into question the legitimacy of several of the Project's state and federal approvals.

- ➔ On July 27, 2018, the United States Court of Appeals for the Fourth Circuit issued an order vacating decisions by the Department of Interior's Bureau of Land Management and the Department of Agriculture's Forest Service authorizing the construction of the MVP Project across federal lands.

- ➔ In December 2018, the Virginia DEQ and Attorney General filed a lawsuit against MVP, documenting more than 300 violations between June 2018 and November 2018. The case is still pending.[14]
- ➔ On October 2, 2018 federal court vacated the Army Corps of Engineer's Nationwide 12 permit, finding that the Corps did not have the authority to approve stream crossing methods that were in violation of West Virginia Law.[15]

Had FERC not strategically used tolling to allow eminent domain and construction to prematurely advance, the environmental harms and violations of law could have been avoided.

In the case of the Atlantic Coast Pipeline (ACP) Project (FERC Docket No. CP15-554), a new system consisting of approximately 600 miles of pipeline and other facilities running from West Virginia through eastern portions of Virginia and North Carolina, petitioners were held in legal limbo for 8 months due to a tolling order. During this period of tolling the pipeline company exercised eminent domain and had advanced extensive work tree clearing, ground moving, trenching, and laying pipe in North Carolina and West Virginia. Due to a series of legal decisions vacating critical permits for the project—including U.S. Fish and Wildlife Service (FWS) Incidental Take Statement, which authorized the ACP project to take certain species protected by the Endangered Species Act; an Army Corp's Nationwide Permit 12; a National Park Service (NPS) right-of-way permit; and a Special Use Permit for national forest land from the US Forest Service (USFS) required to allow ACP to cross the Appalachian Trail and national forests—it is possible that the pipeline will never be built and that the harms inflicted on the public through eminent domain and construction during tolling have been completely unnecessary. To date, 8 of the permits required for the project have been vacated, yet FERC refuses to put in place a Stop Work Order. Additionally, challenges to FERC's certificate brought after the tolling order was lifted are still pending, and also may prevent the project from being built.[16]

Challengers of the Mountaineer Xpress Pipeline project cutting through West Virginia and Ohio have been the subject of a nearly 2 year tolling order. During this time FERC has allowed the pipeline company to construct the entire project crossing nearly 500 waterbodies, building 3 compressor stations spewing pollution into the air, and even causing landslides. The pipeline company was fully constructed and placed into operation before the tolling order was lifted. And so, there can be no justice for the challengers of this project - because justice too late is justice denied.

In the case of the Spire STL pipeline, 4 rehearing requests and a request for a stay pending the Commission's decision on rehearing were tolled for nearly 15 months, and for more than a year after the Commission granted Spire's request to begin construction of the pipeline. As Commissioner Glick lamented in his dissent of the Commission's Order on Rehearing:

> While rehearing was pending—and before any party had an opportunity to challenge the Commission's decision in court—Spire disturbed what [...] the Certificate Order estimated to be over 1,000 acres of land and brought eminent domain proceedings against over 100 distinct entities … involving well over [...] 200 acres of privately owned land—a number equivalent to more than half of total number of acres needed to permanently operate the pipeline. Those eminent domain proceedings all took place when the Commission's order was "final enough for

[14] See Press Release, *Attorney General Herring and DEQ File Lawsuit over Repeated Environmental Violations During Construction of Mountain Valley Pipeline,* Commonwealth of Virginia Office of the Attorney General, December 7, 2018.
[15] See Juan Carlos Rodriguez, *4th Circ. Nixes Army Corps Permit for $3.5B Pipeline*, Law360, October 2, 2018.
[16] See *Atlantic Coast Pipeline- Risk Upon Risk,* Oil Change International, March 2019.

[the pipeline] to prevail in an eminent domain action," but "non-final" for the purposes of judicial review. (citations omitted)[17]

It's not just people's rights that are being taken through this tolling order practice. FERC is also undermining the rights of states to reject, approve or require mitigation for, fracked gas pipelines by allowing pipelines to exercise eminent domain and go into construction with their proposed pipelines before impacted states even get the chance to finish their review of proposed pipelines. This means that if a state rejects the project, that denial comes after the taking of property rights and the devastation of construction; it also means that if a state wanted to approve a project but seek modifications to reduce the community or environmental harms, those modifications become irrelevant as they will come after construction has already mooted the opportunity to change the project and avoid the harm.

As stated by the New York Attorney General "FERC's use of tolling orders undermines congressional intent, infringes upon property rights of landowners, and renders judicial review meaningless."[18]

FERC Commissioner Glick joined the impacted public in urging Congress to enact reforms to end the harmful practice if tolling orders when he stated in response to the Atlantic Coast Pipeline Docket: "This situation highlights the need for Congress to enact legislation amending the judicial review provisions of the Natural Gas Act and the Federal Power Act to account for the ability of an aggrieved party to seek redress in the courts of appeal. It is fundamentally unfair to deprive parties of an opportunity to pursue their claims in court, especially while pipeline construction is ongoing.[19]

b. Reforms required to address FERC's abuse of People's Rights.

Tolling must no longer be allowed to frustrate the rights of people and states and should be prohibited. Quite simply the NGA should be reformed to mandate that FERC must respond to rehearing requests within 30 days and if they fail to do so the rehearing request is deemed denied.

If tolling orders are not prohibited then the other most legally equitable mechanism for addressing the problem is to prohibit projects from advancing in any way, shape or form, including eminent domain and/or construction, if there is an outstanding rehearing request/tolling order.

V. FERC allows the taking of property rights for projects where the claimed need is proved by self-dealing contractual agreements, to support pipeline company profit or an advantage over competitors, to serve foreign customers; or where the claimed need has been debunked by experts or the pipeline is proved redundant with existing infrastructure.

To support FERC certification, a pipeline company must show that its project's benefits (such as serving some unmet energy needs) will outweigh its adverse harms (such as environmental and property rights impacts). This should be FERC's "first step in reviewing an application for an NGA

[17] Dissent Regarding Spire STL Pipeline LLC, Commissioner Richard Glick Statement. November 21, 2019. FERC Docket No. CP17-040-002.

[18] Comments of the New York Attorney General, FERC Docket No. PL18-1, July 2018.

[19] Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC, FERC Docket Nos. CP15-554-002; CP15-555-001; and CP15-556-001, August 10, 2018.

section 7 certificate" to build a new pipeline, "to determine whether there is a need for that project." According to Commissioner Glick, "a finding that a proposed pipeline is not needed would presumably mean that the project is not consistent with the public convenience and necessity since the project's benefits would, almost by definition, not outweigh its adverse impacts."[20] Therefore, the need for a project cannot be considered in a vacuum and must include a genuine demonstration of public energy need that cannot be fulfilled by another, less harmful alternative.

Despite that demonstration of need is one of the most fundamentally important underpinnings of FERC decisionmaking, FERC routinely accepts self-serving, false or inappropriate claims/demonstrations of need for pipeline infrastructure proposals.

a. FERC routinely accepts self-dealing contracts with the pipeline company's own affiliates as proof of public need for a project.

Pipeline companies routinely assert need for their projects by presenting contracts for pipeline capacity with affiliate corporate entities. As such, they use their own connected operations and/or subsidiaries to put forth an unverified claim of need that FERC routinely accepts without question. As acknowledged by FERC Commissioner Glick and the New Jersey Division of Rate Counsel, the only way PennEast has been able to demonstrate need is by bringing forth precedent agreements, 75% of which are by/with/from PennEast's own affiliate companies. In other words, PennEast has demonstrated a need for the PennEast pipeline, which FERC has accepted as a basis for Certificate approval, by bringing forth contracts it has made with its own company affiliates. Need should be based upon public need and require a demonstration of third party users and verified market demand. Allowing self-dealing to serve as a sole or primary demonstration of need cannot and should not be used to justify the taking of private property rights.

Commissioner Glick dissented from FERC's decision to approve PennEast's certificate in part for this reason:

> "the Commission relies exclusively on the existence of precedent agreements with shippers to conclude that the PennEast Project is needed. Pursuant to these agreements, PennEast's affiliates hold more than 75 percent of the pipeline's subscribed capacity. While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline, contracts among affiliates may be less probative of that need because they are not necessarily the result of an arms-length negotiation. By itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer's burden to show that the pipeline is needed."[21] (citations omitted)

In a statement on the Empire Pipeline, former Commissioner Bay implored FERC to explore how it "establishes need in doing its certificate reviews under section 7(c) of the Natural Gas Act," and to consider "whether precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize" among other considerations. He warned that:

> "It is inefficient to build pipelines that may not be needed over the long term and that become

[20] Dissent of Commissioner Richard Glick on Spire STL Pipeline, FERC Docket No. CP17-040-002, November 21, 2019.
[21] Statement of Commissioner Richard Glick on PennEast Pipeline Project, FERC Docket No. CP15-558, January 19, 2018.

> stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems. If a new pipeline takes customers from a legacy system, the remaining captive customers on the system may pay higher rates. Under such circumstances, a cost-benefit analysis may not support building the pipeline."

Despite these facts, FERC makes no investigation into the legitimacy of the claims resulting from self-dealing, and gives deference to the pipeline company profits rather than the overarching public interest.[22]

In its issuance of a certificate for the Mountain Valley Pipeline (MVP) Project, FERC relied its need determination solely on five precedent agreements—all with corporate affiliates of the Projects' developers. The Commission defended this decision in an order denying rehearing of the pipeline's certificate, stating that they do "not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project."[23] Commissioner Glick dissented from the order, stating that it "fails to comply with our obligations under section 7 of the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA)" (citations omitted):

> "Two issues are particularly egregious. First, the Commission concludes that precedent agreements among affiliates of the same corporation are sufficient to demonstrate that the Projects are needed. I disagree. The mere existence of affiliate precedent agreements—which, by their very nature, are not necessarily the product of arms-length negotiations—is insufficient to demonstrate that the Projects are needed. … [**This consideration,] the need for the Projects … [is] critical to determining whether the Projects are in the public interest**." (citations omitted[24]

FERC attempts to justify the practice simply by asserting that it has done it in the past, stating in its defense that "the Commission has approved numerous projects in which there was a **single**, affiliated shipper, including those with less than 100 percent project capacity under contract." (emphasis added)[25] This is certainly true. FERC's 2005 approval of the Entrega Gas Pipeline, a 328-mile interstate pipeline in Colorado and Wyoming, was justified by one affiliated shipper receiving service pursuant to discounted rates.[26] Its 2009 approval of the Sundance Trail Expansion Project in Wyoming and Utah was justified again by a single affiliated shipper.[27] The Commission's 2015 certificate approval for the Ohio Valley Connector Project in West Virginia and Ohio supported by one precedent agreement with only one affiliated shipper for approximately 76 percent of the project's capacity.[28] In the case of the Eastern Shore Natural Gas Company's Mainline Extension Interconnect Project, a project that "would not increase capacity or deliverability to meet any additional natural gas demand",[29] FERC determined it was in the public interest based solely on its precedent agreements

---

[22] Commissioner Bay Separate Statement, p.3, FERC Docket No. CP15-115.

[23] FERC Order on Rehearing, Mountain Valley Pipeline, FERC Docket No. CP16-13, June 15, 2018.

[24] Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC and Equitrans, L.P., FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

[25] See FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, On August 3, 2018.

[26] See FERC Order Issuing Certificates, Entrega Gas Pipeline, FERC Docket No. CP04-413, August 9, 2005.

[27] See FERC Order Issuing Certificate and Granting Abandonment, Sundance Trail Expansion Project, FERC Docket No. CP09-415, November 19, 2009.

[28] See FERC Order Issuing Certificate, Ohio Valley Connector Project, FERC Docket No. CP15-41, December 30, 2015.

[29] Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. CP17-40, August 3, 2018. Referencing Eastern Shore Natural Gas Company's Mainline Extension Interconnect Project, FERC Docket No. CP10-76.

with two affiliated LDCs for 80 percent of the total proposed project capacity.[30] As Commissioner LaFleur remarked in a dissenting opinion, FERC justifies each emboldened new and baseless approval by pointing to its own previous illegal approvals for projects such as these, "stating there is a similar fact pattern including no additional natural gas demand [and] precedent agreements solely with affiliates".[31]

As a result, pipeline companies have been increasingly brazen in their self-dealing and FERC continues to let them get away with it. In the case of the Spire STL Pipeline, FERC issued a certificate despite its recognition that "All parties, including Spire, agree that the new capacity is not meant to serve new demand, as load forecasts for the region are flat for the foreseeable future"[32]and, in fact, "record evidence suggests that natural gas demand in the region may actually be declining."[33] Spire had a single precedent agreement for its project with Spire Missouri, an affiliated shipper, for 87.5% of the total design capacity of the project. FERC accepted this as a demonstration of project need while also acknowledging in its certificate order "that without new demand, existing pipelines in the area will likely see a drop in utilization once supplies begin to flow on the project."[34]

As opponents of the Spire STL pipeline project aptly pointed out, "although the Commission may have approved projects in various cases where there was only a single shipper, or the shipper was an affiliate of the pipeline or an affiliated LDC, or where less than 100 percent of the project capacity had been subscribed, or where no market study had been provided or state agency need findings made", there does not appear to be "any single prior case in which the Commission approved a pipeline project with all of these [deficiencies]." [35]

Despite the facts on the record, FERC "made no effort to weigh the harm caused by the then-likely, and now actual, use of extensive eminent domain or explain why the benefits of the Spire Pipeline outweighed those potential adverse impacts."[36] After receiving its FERC certificate, "Spire STL prosecuted eminent domain actions against over 100 distinct entities and involving well over 200 acres of privately owned land."[37] Commissioner Glick responded to the Commissions denial of rehearing requests, saying the decision "justifies criticism that the agency acts as a 'rubber stamp' for gas projects."[38]

b. FERC routinely ignores expert demonstrations that there is no public need for the gas a pipeline will carry and that in fact there may be public harm.

Pipeline company claims that end-of-pipeline communities "need" their gas are often debunked by experts in the field who are quickly ignored by FERC in their reviews. In the case of the Atlantic Sunrise Pipeline, FERC took Transco's word over the word of a Pennsylvania electric utility. According to the record, FERC's approval of Transco's Atlantic Sunrise Pipeline would directly negatively affect the

[30]See FERC Order Issuing Certificate, Mainline Extension Interconnect Project, FERC Docket No. CP10-76, On September 3, 2010.
[31] Dissent of Commissioner Cheryl LaFleur on Spire STL Pipeline Project, FERC Docket Nos. CP17-40-000, CP17-40-001, August 3, 2018.
[32] FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, August 3, 2018.
[33] Dissent of Commissioner Richard Glick on Spire STL Pipeline, FERC Docket No. CP17-040-002, November 21, 2019.
[34] FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, August 3, 2018.
[35] FERC Order Issuing Certificate, Spire STL Pipeline Project, FERC Docket No. CP17-40, August 3, 2018.
[36] Dissent of Commissioner Richard Glick on Spire STL Pipeline, FERC Docket No. CP17-040-002, November 21, 2019.
[37] Dissent of Commissioner Richard Glick on Spire STL Pipeline, FERC Docket No. CP17-040-002, November 21, 2019.
[38] *FERC's Glick Says Pipeline OK Has Whiff of A 'Rubber Stamp'*, Law360, November 21, 2019.

public and the electric grid; and Transco's use of a public utility's right-of-way would condemn the right-of-way, rendering it unusable for the utility's transmission infrastructure. FERC issued a Certificate to Atlantic Sunrise despite the fact that its interference with the utility's right-of-way would negatively affect the electric grid's reliability and resiliency, forcing the utility to intervene before FERC in an effort to preserve its own rights. Approval of the Atlantic Sunrise pipeline demonstrates FERC's skewed definition of public need, which favors natural gas infrastructure over even the security of the electric grid.[39]

Expert reports challenging company claims of need should be given primacy in the review process, rather than being disregarded if in conflict with pipeline claims.

Time after time, expert and public utility analyses have directly contradicted company assertions of "need." And yet, in each instance, the information was largely ignored by FERC as it continued, instead, to rely on the assertions of the pipeline companies. In the case of the NorthEast Direct Pipeline, a 2015 study conducted by Analysis Group at the request of the Massachusetts Attorney General found that new interstate natural gas pipeline capacity is **not** needed in New England through the year 2030.[40] The report was placed on the docket but had no effect on FERC decisionmaking.

According to a 2016 study conducted by Synapse Energy considering the need for the Mountain Valley and Atlantic Coast pipelines that are purported to deliver natural gas from West Virginia to Virginia and the Carolinas: "The region's anticipated natural gas supply on existing and upgraded infrastructure is sufficient to meet maximum natural gas demand from 2017 through 2030. Additional interstate natural gas pipelines, like the Atlantic Coast Pipeline and the Mountain Valley Pipeline, are not needed to keep the lights on, homes and businesses heated, and industrial facilities in production."[41] In a separate analysis, Synapse found that Dominion overestimated the Atlantic Coast Pipeline's economic benefits in reports to FERC and failed to account for any of the environmental and societal costs that the pipeline would impose on local communities.[42] In a filing to the Public Service Commission of South Carolina (which was later filed on the FERC docket), Transcontinental Gas Pipe Line Company (Transco) claims Dominion Energy planned infrastructure (Atlantic Coast Pipeline) would be "duplicative." Transco claims their own established and operational pipeline infrastructure is enough to meet the natural gas needs of the Southeast for many years. According to the filing, the costs for the Atlantic Coast Pipeline would be passed off to captive ratepayers, and "could ultimately lead to stranded infrastructure assets that Transco has installed."[43]

The asserted public "need" advanced by the PennEast Pipeline Company for the PennEast Pipeline Project and accepted by FERC included assertions that the proposed pipeline is necessary to serve New Jersey and eastern Pennsylvania communities and some unstated number of "surrounding states." However, multiple expert reports on the PennEast docket demonstrate there is in fact no such "need" for the gas that PennEast would transport, and that if the pipeline were to be built there would be an increased gas surplus in both NJ and PA:

---

[39] Motion to Intervene out-of-time of the PPL Electric Utilities
Corporation re the Transcontinental Gas Pipeline Company, FERC Docket No. CP15-138, March 6, 2017.
[40] Power System Reliability in New England, Analysis Group, Inc., November 2015 and Press Release, Mass Attorney General's office, AG Study: Increased Gas Capacity Not Needed to Meet State's Electric Reliability Needs, November 18, 2015.
[41] Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? Synapse Energy, September 12, 2016.
[42] Atlantic Coast Pipeline Benefits Review, Synapse Energy, June 12, 2015.
[43] See Petition for Rehearing and/or Reconsideration, *In Re Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy*, No. 2017-370-E (Public Service Commission of South Carolina July 16, 2018).

- "The proposed PennEast Pipeline would deliver an additional 1 Bcf/d of natural gas to New Jersey potentially creating a 53% supply surplus above the current level of consumption." "…Pennsylvania has no unfulfilled demand…"[44]

- "Local gas distribution companies in the Eastern Pennsylvania and New Jersey market have more than enough firm capacity to meet the needs of customers during peak winter periods. Our analysis shows there is currently *49.9% more capacity than needed to meet even the harsh winter experienced in 2013."*[45]

These expert analyses were disregarded by FERC in favor of PennEast's claim of need.

FERC refused to revisit the alleged "need" for the Sabal Trail pipeline through Alabama, Georgia, and Florida, despite admissions by Florida Power and Light (FPL) that the region's needs had dramatically changed. In 2016, FPL's Ten Year Plan stated firmly that "FPL does not project a significant long-term additional resource need until the years 2024 and 2025" and, at the same time, acknowledged that growing investments in efficiency and solar power will stave off and reduce Florida's need for increased natural gas deliveries. FERC's refusal to reconsider the question of need for the Sabal Trail pipeline is yet another example of irresponsible consideration of "need."[46]

In the case of the Spire STL Pipeline, the Missouri Public Service Commission, a regulator of the affiliated company that was the sole subscriber to the project, asserted that "there is no clear need for the Spire Project given no new demand for gas capacity, a mature St. Louis market, and a track record of failed projects proposing to bring gas [through the same path]."[47]

In each of these cases, FERC ignored the expert evidence on the question of need and accepted the pipeline companies' assertion of need in its approval of the projects.

c. FERC's self-imposed ignorance is causing an unneeded overbuild of pipeline capacity.

Industry experts themselves have recognized that there is no need for additional pipeline capacity and that we are on the path to overbuild. For example, industry expert Rusty Braziel, speaking to attendees at the 21st Annual LDC Gas Forums Northeast conference regarding capacity in the Northeast, said:

> *"an evaluation of price and production scenarios through 2021 suggests the industry is planning too many pipelines to relieve the region's current capacity constraints…What we're really seeing is the tail end of a bubble, and what's actually happened is that bubble attracted billions of dollars' worth of infrastructure investment that now has to be worked off."*[48]

A 2017 study from the Analysis Group found that FERC approved capacity already exceeds national peak demand:

---

[44] Arthur Berman, Labyrinth Consulting Services, Inc., Professional Opinion on the PennEast Pipeline, February 2015 and Arthur Berman, Labyrinth Consulting Services, Inc., PennEast Updated Opinion, September 11, 2016.
[45] Analysis of Public Benefit Regarding PennEast, Skipping Stone, March 9, 2016
[46] Florida Power and Light, Ten Year Power Plant Site Plan, 2016-2025, April 2016, p.56-62.
[47] Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.
[48] Jeremiah Shelor, *Marcellus/Utica on Pace for Pipeline Overbuild, Says Braziel*, Natural Gas Intelligence, June 8, 2016.

> *"Since 1999 FERC has approved approximately 400 pipeline applications for an additional 180 billion cubic feet per day (Bcf/d) of pipeline capacity. This amount of additional capacity on the interstate pipeline system is significant, considering that the average consumption of natural gas in the U.S. during January 2017 was 93.1 Bcf/d, and the all-time peak-day consumption was 137 Bcf/d during the 2014 Polar Vortex*."[49]

In the case of the Spire STL Pipeline, FERC itself acknowledged that it was approving an unneeded pipeline that would result in excess pipeline capacity to the region. The Spire pipeline was going to be redundant with other existing pipelines already carrying the same gas to the region. According to the FERC docket:

> "Project would bring up to 400,000 Dth per day of new pipeline capacity into the St. Louis area. All parties, including Spire, agree that **the new capacity is not meant to serve new demand,** as load forecasts for the region are flat for the foreseeable future. We acknowledge that without new demand, **existing pipelines in the area will likely see a drop in utilization once supplies begin to flow on the project**."

As Commissioner Fleur explains in her dissent of the project approval:

> The Spire Project is the unusual case of a pipeline application that squarely fails the threshold economic test. The record does not demonstrate a sufficient need for the project. [The project] … will force **duplicative gas transportation capacity** into a regional market of flat demand, shifting gas supply away from an existing pipeline and adversely impacting rates for the existing pipeline captive customers.[50]

Rather than a "need," Commissioner LaFleur points out, "the precedent agreement reflects a desire to shift Spire Missouri's firm transportation capacity from an existing pipeline with Mississippi River Transmission (MRT) to the Spire Project… Ultimately, because need has not been demonstrated, there is a significant risk of overbuilding into a region that cannot support additional pipeline infrastructure." [51]

As reported by the Institute for Energy Economics and Financial Analysis, pipeline companies have an incentive to overbuild, and no reason to self-moderate or limit their construction. The failure of FERC to provide any independent review or oversight over self-serving claims of "need" undermines the requirements of the law and the actual needs of the public. As recognized by IEEFA:

- "…current low natural gas prices in the Marcellus and Utica region are driving a race among natural gas pipeline companies …. An individual pipeline company acquires a competitive advantage if it can build a well-connected pipeline network…; thus, pipeline companies

[49] See Susan Tierney, Ph.D., Analysis Group, *Natural Gas Pipeline Certification: Policy Considerations for a Changing Industry*, November 6, 2017, available at: https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_ferc_natural_gas_pipeline_certification.pdf , citations removed.

[50] Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.

[51] Dissent of Commissioner Cheryl A. LaFleur on Spire STL Pipeline LLC, FERC Docket No. Docket No. CP17-40, August 3, 2018.

competing to see who can build out the best networks the quickest. This is likely to result in more pipelines being proposed than are actually needed to meet demand in those higher-priced markets."

- "…[T]he regulatory environment created by FERC encourages pipeline overbuild. The high returns on equity that pipelines are authorized to earn by FERC and the fact that, in practice, pipelines tend to earn even higher returns, mean that the pipeline business is an attractive place to invest capital. And because … there is no planning process for natural gas pipeline infrastructure, there is a high likelihood that more capital will be attracted into pipeline construction than is actually needed."

- "The pipeline capacity being proposed exceeds the amount of natural gas likely to be produced from the Marcellus and Utica formations over the lifetime of the pipelines. An October 2014 analysis by Moody's Investors Service stated that pipelines in various stages of development will transport an additional 27 billion cubic feet per day from the Marcellus and Utica region. This number dwarfs current production from the Marcellus and Utica (approximately 18 billion cubic feet per day). … pipeline capacity out of the Marcellus and Utica will exceed expected production by early 2017."

- "The loss borne by the public, businesses, and critical irreparable natural resources when a natural gas pipeline is approved by FERC requires that the Agency sufficiently consider whether an infrastructure project is actually necessary and for the public good. Instead, FERC uses an inappropriate and counterintuitive definition of "need" which is contrary to the historic underpinnings and intent of the Natural Gas Act, and results in the overbuild of unnecessary pipelines to pad companies' quarterly balance sheets."[52]

d. FERC routinely accepts the private business and profits goals of the pipeline companies as proof of public need.

Pipeline companies routinely assert "need" for a project because it will lower costs, improve profits or enhance the ability to compete with others in the gas and/or pipeline industry. These assertions demonstrate corporate goals and desires. None of these scenarios demonstrate public needs that warrant the economic, environmental or property rights harms inflicted by a project and so should be explicitly prohibited.

This misplaced support of business interests over public interests when determining project need is well understood by FERC Commissioners -- unfortunately there is only one Commissioner who is willing to identify and highlight the wrongheadedness of this approach to determining public need. In the case of the FERC approved Spire STL pipeline, Commission Glick flatly stated in his dissent that:

> The record suggests that this project—the Spire STL Pipeline Project (Spire Pipeline)—is more likely an effort to enrich the shared corporate parent of the developer, Spire STL Pipeline LLC

[52] IEEFA, Risks Associated with Natural Gas Pipeline Expansion in Appalachia, April 2016.

(Spire STL), and its only customer, Spire Missouri, Inc. (Spire Missouri), than a response to a genuine need for new energy infrastructure.[53]

[The project] may make good business sense for the Spire corporate family, but that does not necessarily mean that the project is in the public interest or consistent with the public convenience and necessity. The Spire companies' obvious financial motive coupled with the abundant record evidence casting doubt on the need for the project ought to have caused the Commission to carefully scrutinize the record to determine whether the Spire Pipeline is actually needed or just financially advantageous to the Spire companies. Instead, the Commission asserts that the existence of the precedent agreement between Spire STL and Spire Missouri is sufficient, in and of itself, to find that the Spire Pipeline is needed, no matter the contrary evidence.[54]

e. FERC fails to consider clean and renewable energy alternatives.

"Need" considerations uniformly focus on the end goal of securing gas, rather than focusing on the end goal of securing energy. This means that clean and renewable energy or other viable alternatives (such as increased energy efficiency) are ignored in the FERC review and approval process. Growing renewable energy markets are already, or projected to soon, outcompete natural gas, and as such are essential factors to FERC's consideration of need and the public interest in its review of pipelines. However, FERC instead continues to ignore renewable energy alternatives in assessing the need for a pipeline, considering each pipeline project in isolation of one another and of the larger market trends and realities. As a result, FERC encourages the building of natural gas infrastructure, and the environmental, economic, and social costs that come with it, that may be obsolete within years of construction. New market analyses indicate that continued natural gas infrastructure buildout is a shortsighted investment in an industry that is becoming obsolete, wasting economic resources while great external costs are borne on the public.

In a May 2018 report on *The Economics of Clean Energy Portfolios*, the Rocky Mountain Institute found that:

→ "across a wide range of case studies, regionally specific clean energy portfolios already outcompete proposed gas-fired generators, and/or threaten to erode their revenue within the next 10 years. Thus, the $112 billion of gas-fired power plants currently proposed or under construction, along with $32 billion of proposed gas pipelines to serve these power plants, are already at risk of becoming stranded assets. This has significant implications for investors in gas projects (both utilities and independent power producers) as well as regulators responsible for approving investment in vertically integrated territories."[55]

→ Due to the 'expected cost declines in renewable energy and battery storage technology...the costs of optimized clean energy portfolios [could] fall by [about] 40% within the next 20 years. Depending on the price of natural gas, the calling costs of clean energy portfolios will begin to

[53] Dissent of Commissioner Richard Glick on Spire STL Pipeline, FERC Docket No. CP17-040-002, November 21, 2019.
[54] Dissent of Commissioner Richard Glick on Spire STL Pipeline, FERC Docket No. CP17-040-002, November 21, 2019.
[55] See Mark Dyson, et al., Rocky Mountain Institute, The Economics of Clean Energy Portfolios, May 2018.

outcompete just the operating costs of a highly efficient gas plant by 2026"[56]

f. Reforms are required to ensure a genuine need is demonstrated for pipeline and LNG infrastructure project before it is considered for a Certificate of Convenience and Necessity.

The NGA needs to be reformed to ensure legitimate, and independently verified demonstrations of need are provided for FERC review and consideration. Consideration of need must focus on genuine end-use "energy" needs of the end users and require full and fair consideration of whether renewable energy alternatives could fulfill the need for energy asserted.

Demonstration of need must be based on more than assertion that a pipeline or export facility has customers. There must be a demonstration of a need for increased energy that cannot be fulfilled by clean and renewable energy options.

The NGA must make clear that precedent agreements with pipeline company affiliates cannot be used to support a demonstration of "need" for a pipeline. Pipeline companies should be prohibited entirely from engaging in self-dealing in need demonstration – no contractual in-dealing should be allowed for asserting need.

Independent expert analysis of energy and market need, and the viability of renewable energy alternatives, must be given equal or greater consideration as the need claims asserted by pipeline companies.

The NGA needs to be clear that demonstration of need to support FERC Certification is based on a genuine domestic need that is supported by a third party verified demonstration of energy need that cannot be fulfilled by clean and renewable energy alternatives.

VI. States' Rights Under Attack From FERC.

A fundamental underpinning of our nation is respect for the rights of states to govern within their boundaries and to ensure the protection of the health, safety and welfare of their people. States' rights are carefully honored throughout our nation's laws and history. In contrast, the Natural Gas Act steps in to undermine state's rights by preempting state laws that would otherwise apply to fracked gas pipelines. And while the Natural Gas Act itself drastically undermines state authority, it does make effort to protect the authority of states when they are acting pursuant to recognized federal laws, the most notable among them being the Clean Water Act. Despite the balancing the Natural Gas Act attempts to strike -- both limiting states authority but specifically preserving it in the context of protecting its water and air -- in FERC's implementation of its regulatory authority over fracked gas pipelines, FERC repeatedly overreaches to further erode state authority including their property rights and their preserved authority when implementing the federal Clean Water Act.

FERC has been misusing the authority granted it by the Natural Gas Act to undermine the right of states in fundamentally important ways, e.g.:

[56] See Mark Dyson, et al., Rocky Mountain Institute, The Economics of Clean Energy Portfolios, May 2018.

- FERC routinely issues approvals for pipelines to begin construction of their projects before all states have rendered their own legal determinations on a project, thereby interfering with the ability of a state to reject a project under the terms proposed -- e.g. interfering with the ability to say no to a project because court's are loath to support determinations that stop a project which has already begun, and making it difficult for a state to reject a pipeline based on the route chosen even if there is a less damaging option because construction has already started on pipeline company's desired route.
- FERC has supported the take of state property interests by private pipeline companies in violation of state sovereign immunity and the constitution.

a. FERC Strips States of Their Legal Right and Authority to Review and Approve, Deny, Approve with Conditions, or Approve with Modifications Natural Gas Pipeline Projects.

The Clean Water Act expressly prohibits FERC from issuing a Certificate of Public Convenience and Necessity or an Order to proceed with construction activity prior to the project applicant receiving a Clean Water Act Section 401 Water Quality Certification from the impacted state – this mandate can be found in the plain language of the Clean Water Act ("CWA").[57] FERC (at this point with court acquiescence) skirts the clear intent of this obligation to the detriment of the states and the people. FERC routinely issues Certificates of Public Convenience and Necessity pursuant to the Natural Gas Act that are conditional on securing all needed government permits and approvals but as a result, gives FERC the ability to advance projects in irreversible ways even in situations where not all states have yet weighed in with full and final state 401 Water Quality Certification.

Using this conditional certification as the basis, FERC grants eminent domain authority to the pipeline companies, and approves construction despite a project not having all state 401 Certifications or government approvals. The result is that a pipeline company can and does exercise the power of eminent domain to take peoples' property and inflict irreparable construction damage to natural resources for a pipeline that may never get all of the approvals necessary to be built.

The Constitution Pipeline is an infamous example of this outcome. Despite that the constitution pipeline did not have a Clean Water Act section 404 permit from the US Army Corps or a Section 401 Certification from the state of New York, FERC issued Certificate approval for the project. Because the project now had FERC Certification, hundreds of properties were taken either through the threat of eminent domain or through forced condemnation actions by the private Constitution pipeline company. One month later, still without NY state 401 Certification or Army Corps permitting, FERC approved the start of project construction. Among the first actions taken by Constitution Pipeline was to cut down a maple tree forest in New Milford Township, Susquehanna County, Pennsylvania, including over 300 maple trees, that had belonged to the Holleran family since the 1950s, was a natural treasure that enriched their lives and was also the basis of their family owned maple syrup business. The Holleran's property, lives, and business had been irreparably harmed. New York

[57] Section 401 of the CWA plainly requires "no [federal] license or permit shall be granted until the certification required by this section has been granted or waived." 33 U.S.C. § 1341(a)(1); City of Tacoma v. FERC, 460 F.3d 53, 68 (D.C. Cir. 2006) ("without [Section 401] certification, FERC lacks authority to issue a license."). The Supreme Court has stated that, consistent with the State's primary enforcement responsibility under the CWA, Section 401 "requires States to provide a water quality certification before a federal license or permit can be issued…" PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology, 511 U.S. 700, 707 (1994) (emphasis added).

ultimately rejected 401 certification for the project. FERC and the Constitution Pipeline Company continue to try to force reconsideration of NY's 401 denial. But what is clear, is that all of this devastation was inflicted for a pipeline that may never be built. And even if it is ultimately constructed, the Hollerans have needlessly lost at least 4 years of syrup production and the enjoyment of the natural beauty of their family lands.

Even after the Second Circuit upheld the NY state denial of 401 certification for the Constitution Pipeline and the US Supreme Court rejected the opportunity to weigh in, FERC continues to battle for the pipeline company to get them another bite at the 401 certification apple. After the *Hoopa Valley v. FERC* decision issued on January 25, 2019, in which the US Court of Appeals for the DC circuit ruled that, in the context of a hydroelectric project, a many year agreement between the company-applicant and the state whereby the company would annually withdraw their 401 Certification application and re-submit it would not stop tolling of the state's Clean Water Act 401 certification 1 year window, FERC took it upon itself to try to use this ruling, which had a significantly different set of facts, to seek to revisit the Constitution pipeline 401 certification denial. FERC requested that the U.S. Court of Appeals for the D.C. Circuit to remand the constitution pipeline case to FERC in order to allow it to reconsider whether NY waived its right to approve or deny the CWA 401 certification because the determination came within a year after an application resubmission rather than the original, flawed and deficient submission which was twice withdrawn and resubmitted by the applicant in order to avoid 401 Certification denial based on the many deficiencies in the application and demonstrations that the project would violate state water quality standards and therefore was not entitled to state 401 certification. It seems clear that FERC is seeking a new opportunity to consider stripping NY of its legal authority to deny CWA 401 Certification to the Constitution Pipeline. FERC is clearly taking this step in service to the pipeline company, not the state and not the people FERC should serve.

To this day the Constitution pipeline is being held in abeyance by the NY rejection of 401 Water Quality Certification. To this day the pipeline company promises it will build the project. To this day FERC continues to work to help the pipeline company advance this damaging project.

In the case of the Northern Access 2016 Project, when it became clear to the pipeline company that NY state was about to deny 401 certification given its multiple failures to demonstrate it would meet state water quality standards as required by the Clean Water Act, the pipeline company entered into a written signed agreement whereby both parties agreed to modify the date of submission of the application materials in order to allow the pipeline company more time to supplement the record and the state more time to consider their application without reaching the 1 year time clock written in the law. Both parties contractually and voluntarily entered into the agreement, and both parties got a benefit from the extension. When the state ultimately denied 401 Certification, the pipeline company did an about face and went to court claiming that the state denial of 401 Certification came too late to be valid. While that case was in court, FERC used its regulatory authority to unilaterally overturn the state 401 denial, asserting that it came too late and as a result the state had waived its authority.

Ultimately the Second Circuit remanded the decision to the NYSDEC ruling it needed "to more clearly articulate its basis for the denial."[58] Instead of providing the state with the opportunity to respond to the Court's request FERC continued to allow the pipeline to advance based on its own regulatory usurpation of the state 401 certification authority.

[58] See *National Fuel Gas Supply Corporation v. N.Y. State Department of Environmental Conservation*, No. 17-1164-cv (2d Cir. 2019).

FERC continues to stretch its interpretations of the law to undermine states' rights at every turn.

In another aggressive stripping of states' rights, FERC rejected New York's denial of a CWA 401 Certification for Millennium's Valley Lateral Pipeline project, once again asserting that the state had waived its authority and therefore the denial was null and void. FERC stripped the state of its legal rights by asserting that the applicable one year time period provided for CWA 401 decisionmaking began when Millennium first submitted its application to the state, rejecting the state's reasonable legal position that the clock only began ticking when the state issued a determination that the application was complete and complied with state application requirements. [59] FERC then quickly granted the pipeline company authorization to begin construction before the state had the opportunity to make its case in court—thereby ensuring that even if the state was victorious in its legal position before the court, the decision would come too late to stop the pipeline's construction. In the end, with FERC leading the charge, the Second Circuit supported FERC's interpretation of the law and the State of New York lost its legal ability to protect the natural resources, water quality standards, and residents of its state.

These cases help to demonstrate why Congressional reforms that restore, honor and protect states' rights pursuant to Section 401 of the CWA are so essential. FERC is constantly finding ways to make it harder for the state to fulfill its Clean Water Act obligation to protect the water resources of the state, and using its regulatory authority to argue these positions in court, where judges are eager to support the regulatory interpretations of agencies.

b. FERC routinely grants eminent domain authority and grants construction approval to pipelines that have not yet received 401 Certification -- thereby putting undue pressure on states to bias their decisionmaking, subverting the ability of a state to approve with modification, or to outright deny a project.

In addition to overtly overturning 401 Certification denials, FERC also routinely undermines, inhibits and/or subverts the state 401 certification process by granting eminent domain and construction authority for projects that have not yet secured their 4or Certification. This premature granting of eminent domain and construction authority subverts the ability of a state to approve a project but with modifications that might mitigate or avoid harms; and undermines the state's ability to outright deny 401 certification because the project is already so far underway it becomes difficult to support denial politically or judicially (i.e. through a claim of mootness), and/or in those circumstances when the state has denied a project the property rights and environmental harms have already been inflicted.

In the case of the Constitution Pipeline, as noted above, when the state of New York denied 401 Certification, irreparable harm had already been inflicted -- property rights of hundreds of property owners, including small businesses, had already been taken, and significant construction had also advanced -- forests were cut, streams were cut, businesses devastated, irreplaceable habitats lost, and more.

After FERC issued certification for the PennEast Pipeline Project (FERC Docket No. CP15-558), and before the state of NJ had rendered its 401 determination, FERC authorized the pipeline company to exercise eminent domain to take property rights, including against the state of NJ. A year and a half later the state denied 401 Certification, but by that time PennEast had filed nearly 200 eminent domain

[59] Denial of Section 401 Permit, New York State Department of Environmental Conservation, August 30, 2017.

cases in PA and NJ, and has been granted access to survey in both states. In addition to denying 401 Certification for the project, the state of New Jersey appealed all eminent domain decisions that impact preserved state lands, the U.S. Court of Appeals for the Third Circuit has ruled that PennEast does not have eminent domain authority over the over 40 properties in which the state has a property interest. The result is that the project has been stopped in its tracks, and yet landowners across the length of the pipeline have lost their property for a project that does not have, and may never get, the state 401 Certification necessary to proceed. It is important to note that not only was NJ 401 Certification outstanding, but Pennsylvania's permitting associated with its 401 certification also remains outstanding, as do approvals from the US Army Corps of Engineers and a needed docket from the Delaware River Basin Commission.

Above, when talking about the taking of property rights and premature approval for construction, we have provided multiple other examples of this same problem with multiple other pipeline projects. It short, it is commonplace and routine for FERC to approve eminent domain and construction before states are rendered their 401 Certification decisions.

This undermining of state legal authority frustrates both the language and intent of the Clean Water Act and the Natural Gas Act.

c. State Property Rights Need to Be Respected and Protected

Even a casual review of pipeline projects reveals an intentional targeting by the pipeline companies for their proposed pipeline routes, public lands, including parks, forests, preserves, and highly prized open space and agricultural lands in which the state has a property interest. The reason is partly political as it is easier to take state owned land as compared to the property of families, farmers and businesses; and state owned properties tend to provide large expanses that are unencumbered by structures and therefore are easier for a pipeline to cut through using whatever route they see fit.

While FERC's approval of pipelines that cross state owned lands, and the granting of eminent domain authority over state owned lands, has gone unchallenged for decades, the State of New Jersey recently took a stand in defense of their sovereign immunity and won in the Third Circuit Court of Appeals. The court determined that the Natural Gas Act had not transferred to the private pipeline companies the power of eminent domain that could be exercised in order to force the condemnation of lands in which a state had a property interest, and that to do so would be a violation of state sovereign immunity under the Constitution.

Displeased by the ruling and its "implications" for the "natural gas industry",[60] FERC sought to subvert the course of justice by issuing its Order in which it joined with the pipeline companies to reject that court determination and issue its own interpretation of the Natural Gas Act. Rather than allowing the case to proceed through the US Supreme court for adjudication, on January 30, 2020 FERC issued a Declaratory Order deciding that the Natural Gas Act did give the pipeline company eminent domain authority over state property rights and rejected the Third Circuit ruling. In the Order, FERC expresses concern that the Third Circuit's decision "would have profoundly adverse impacts on the development of the nation's interstate natural gas transportation system" by allowing states "to block natural gas infrastructure projects that cross state lands by refusing to grant easements for the construction and operation of the projects on land for which the state has a possessory interest."

[60] Order on Petition for Declaratory Order, FERC Docket No. RP20-41-000, January 30, 2020.

In his dissent of the Order, Commissioner Glick admonished the Commission for its biased overreach of power:

> "I appreciate that my colleagues disagree with the conclusion reached by the Third Circuit and that some badly want to see it overturned. But that disagreement, profound as it may be, does not excuse the ends-oriented reasoning in today's order, which is both deeply troubling and, frankly, a discredit to the agency."

It is time for Congress to solidify protection of state property rights from forced condemnation by either the pipeline companies or the federal government. The third circuit did leave open the opportunity that the federal government could in fact use its eminent domain authority to take state owned lands.

When states use the public purse to protect important natural and agricultural lands for the benefit and protection of future generations, that investment should not ultimately inure to the benefit of the pipeline companies. It is important that when public dollars are invested to protect natural lands, landscapes, important historic preservation areas and agricultural lands, that those areas are in fact preserved, as intended, for the public and future generations. It is neither moral nor right that a pipeline company, seeking to enhance their own private profits, should be allowed to irreparably damage the environments, wildlife, waterways, agriculture, history, and public open spaces that the public, through their state government, has worked and invested to preserve.

d. Reforms Required to Protect the Rights of States.

FERC's continual attempts to recklessly ignore and actively misinterpret the law and directed court orders in order to serve its "end-oriented" decisionmaking underscores the need for NGA reforms that clearly and explicitly define FERC's role and powers, relative to the states, other agencies, and the public; and those transferred to private pipeline companies. FERC has made clear that it is not an agency that can be trusted with any regulatory ambiguity or deference.

The Natural Gas Act should be reformed and remove the preemption over state and municipal regulation that pipelines and LNG facilities enjoy. The Natural Gas Act preempts state and local authority when it comes to fracked gas pipelines, except for the authorities specifically preserved by and through the Clean Water Act, Clean Air Act and Coastal Zone Management Act. Stripping states and municipalities of their legal authority, particularly given the tremendous health, safety and economic harms pipelines inflict on communities is not justified. In addition, there is no reason that natural gas pipeline projects should not be subject to the same laws that all other industries are subject to, and that other arms of the energy industry must comply with. To exempt natural gas infrastructure from the state and local laws that apply to every other industry gives them an inappropriate competitive advantage.

Clarify the law to make clear that State Section 401 Clean Water Act approvals have primacy in the FERC review and approval process. The NGA must make clear that FERC cannot issue Certification -- conditional or otherwise -- until all state, federal and government approvals have been secured, including Clean Water Act Section 401 Certification. This will prevent the premature construction of a pipeline until the public, FERC and the states are assured that the project will secure all permits needed for construction. If the mandate that 401 Certification must be received prior to

FERC providing NGA Certification is not enacted/clarified within the language of the NGA, then it must be clear that FERC cannot approve any element of eminent domain or construction until all state reviews/permit processes have been finalized and approvals/permits granted, including but not limited to 401 Certification.

Clarify the Natural Gas act (and/or the Clean Water Act) to make clear that the 1 year time frame for Clean Water Act 401 certification review does not start to toll until such time as the state determines the pipeline application materials submitted are complete and meet all state requirements. To do otherwise creates the absurd result that a company can submit deficient, false and even misleading materials -- which they do now, and the state is still held to the one year time frame for decisionmaking. This leaves a state no option but to reject 401 Certification, although in the current climate it seems clear that FERC will continue to try to find ways to work with the pipeline companies to undermine and subvert this authority.

The Natural Gas Act should make clear that neither the pipeline companies nor the FERC are entitled to use the power of eminent domain to take lands in which the state has a property interest. If state lands are to be taken by eminent domain for pipeline construction, it should require an act of congress in order to ensure the taking is genuinely for the public benefit, including present and future generations.

VII. Rights of Present and Future Generations

Presidents on both sides of the political aisle, Republican and Democrat,[61] characterized climate change as a threat to US security because of its impacts on infrastructure, floods, droughts, the economy. Even the Department of Defense is on board with recognizing the priority status that must be given to climate change in government reviews and decisionmaking. October of 2014 the U.S. Secretary of Defense called climate change a "threat multiplier"[62] because of its potential to magnify the many challenges already faced by the U.S. and the world –from infectious disease to armed insurgencies".

The catastrophic harms of climate change will increase with every fracked gas pipeline approved by FERC. Fracked shale gas is a primary source of methane, one of the most harmful climate changing greenhouse gases known to man. Fracked gas is known to be worse for climate change than even coal.[63] Every pipeline approved by FERC is making the problem worse. And yet, FERC is turning a blind eye.

Then How? Why? Does FERC continue to approve, without fail, every fracked gas pipeline brought before its Commissioners for review?

---

[61] See *George Bush Sr Cabinet Was Worried About Climate Change 27 Years Ago*, Farron Cousins. December 18, 2015. Desmog Blog. Available at: https://www.desmogblog.com/2015/12/18/bush-sr-cabinet-was-worried-about-climate-change-27-years-ago

[62] Secretary of Defense Speech, As Prepared for Delivery by Secretary of Defense Secretary of Defense Chuck Hagel. Conference of Defense Ministers of the Americas, October 13, 2014. Arequipa, Peru. Available at: https://dod.defense.gov/News/Speeches/Speech-View/Article/605617/

[63] "Methane emissions and climatic warming risk from hydraulic fracturing and shale gas development: implications for policy," Robert W Howarth. October 8, 2015. Dovepress Journal: Energy and Emissions Control Technologies.

a. FERC ignores its legal responsibility to consider the implications of its actions on the existential threat of climate change.

As the federal agency with primary responsibility for reviewing interstate natural gas transmission lines which are themselves a significant source of climate changing emissions, as well as a key piece of infrastructure that advancing drilling and fracking for gas from shale, another serious source of climate changing emissions, FERC should heavily weigh climate change in its public interest decisions regarding fracked gas pipelines. And yet, it refuses to do so - despite clear language in the law and court mandates.

Every pipeline approved by FERC is bringing us closer to climate catastrophe. And yet, FERC is turning a blind eye.

The science is clear, each fracked gas pipeline is a known, direct source of methane releases to the atmosphere.[64] At the same time the approval of fracked gas pipelines is a direct cause of increased drilling and fracking for gas from shale, advancing the fracking of thousands of shale gas wells – all releasing tremendous volumes of methane and climate changing emissions, even NASA says so.[65] The catastrophic harms of climate change will increase with every fracked gas pipeline approved by FERC. In fact, just 1 pipeline project recently approved by FERC, the proposed PennEast Pipeline, would result in the drilling of 3000 shale gas wells in just four Pennsylvania counties. All of this fracking is contributing to climate change, even NASA is saying so.

As FERC Commissioner Richard Glick has so eloquently explained many times and in many ways:

> "Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the **existential** threat of climate change."[66]

Despite the widespread evidence of the growing harms of climate change and its importance in the minds of US leaders (other than the current President and a few extreme members of Congress), despite the obligation to consider climate change in decisionmaking both as the result of the National

---

[64] Methane Emissions from Natural Gas Systems, Background Paper Prepared for the National Climate Assessment. Howarth, R; Shindell, D; Santoro, R; Ingraffea, A; Phillips, N; and Townsend-Small, A. February 25, 2012. Available at: http://lnginnorthernbc.ca/images/uploads/documents/Howarth_MethanEmissions_2012.pdf

[65] *NASA just made a stunning discovery about how fracking fuels global warming,* Joe Romm. Think Progress. January 9, 2018. Available at: https://thinkprogress.org/nasa-study-fracking-global-warming-0fa0c5b5f5c7/

[66] Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.

Environmental Policy Act and federal court decisions,[67] the Federal Energy Regulatory Commission, denies its obligation to consider the climate changing impacts of the pipelines and LNG facilities it approves.

One of FERC's baseless rationales for completely ignoring the devasting climate changing impacts of the pipelines and LNG facilities it approves is that it doesn't have the tools to measure and consider these impacts. In fact, FERC has many tools that would allow it to consider the climate changing ramifications of its pipeline decisions. Among the most readily available is the social cost of carbon. Despite court mandate, FERC has refused to avail itself of information and tools provided on relevant dockets to aid in its project reviews.

The social cost of carbon (SCC)— "a measure, in dollars, of the long-term damage done by a ton of carbon dioxide (CO2) emissions in a given year"[68]—is a tool that would allow FERC to measure economic impacts of climate change that would result from proposed pipelines as required by its NEPA and NGA mandates. Despite the fact that a federal court recently upheld the legitimacy of using the social cost of carbon as a viable statistic in climate change regulations,[69] and that the CEQ had recommended its use in its final guidance for federal agencies to consider climate change when evaluating proposed Federal actions,[70] the Commission continues to contend that it "'has not identified a suitable method' for determining the impact from the Projects' contribution to climate change and, absent such a method, it simply 'cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment and how that impact would contribute to climate change.'"[71]

However, as Commissioners Glick and LaFleur have pointed out in response to multiple recent certificate order decisions, FERC is incorrect in its claims that there is "no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions"[72] and that "it cannot 'determine how a project's contribution to GHG emissions would translate into physical effects on the environment.'"[73]As Commissioner Glick explains[74]:

> "That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and

[67] Sierra Club v. FERC 867, F.3d 1357, 1373 (D.C. Cir. 2017)
[68] See EPA Fact Sheet, Social Cost of Carbon, December 2016, available at: https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf
[69] See Susanne Brooks, Environmental Defense Fund, *In Win for Environment, Court Recognizes Social Cost of Carbon,* August 29, 2016, available at: http://blogs.edf.org/markets/2016/08/29/in-win-for-environment-court-recognizes-social-cost-of-carbon/
[70] Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, Christina Goldfuss, Council on Environmental Quality, August 1, 2016.
[71] Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.
[72] *Id.* P 27. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at 2, 5–8 (2018) (Glick, Comm'r, dissenting).
[73] Statement of Commissioner Cheryl LaFleur on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018.
[74] Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC Docket Nos. CP17-441-000, CP17-441-001, July 19, 2018. See also Statement of Commissioner Richard Glick on Texas Eastern Transmission, LP, FERC Docket No. CP18-10, July 19, 2018; Statement of Commissioner Richard Glick on Columbia Gas Transmission, L.L.C., July 19, 2018, Docket No.: CP17-80-000; Statement of Commissioner Richard Glick on Northwest Pipeline, LLC, FERC Docket Nos. CP17-441-000, CP17-441-001, July 19, 2018.

informative approach for satisfying an agency's obligation to consider how its actions contribute to the harm caused by climate change."[75]

"the Commission has the tools needed to evaluate the Projects' impacts on climate change. It simply refuses to use them."[76]

b. Reforms required to ensure to people and their public interest are protected from FERC's decisions and their impacts on climate change.

The Natural Gas Act must be reformed be reformed to make clear that FERC's "public interest" duty pursuant to the Natural Gas Act does in fact mandate consideration of the climate change impacts of pipeline infrastructure. In order to fully and properly implement this reform, legislative reforms must mandate, and include, all of the following, that:

- FERC conduct a full accounting of the climate changing impacts of any proposed pipeline infrastructure and LNG facility it is considering for Certification, and
- that this analysis must include a full and robust Social Cost of Carbon analysis, and
- that this analysis must include both the downstream end uses of the gas to be carried through the pipeline as well as the climate change contributions of the upstream production operations necessary to secure the gas that would flow through the proposed pipeline and/or infrastructure under review (including associated drilling and fracking operations, tree removal, associated trucking and industrial operations), and
- that if it is demonstrated that there is a significant climate change impact that will result, FERC "must"/"shall" deny FERC Certification for the project.

The Natural Gas Act must be reformed to mandate that FERC include alternatives for a proposed project that could have a letter climate change footprint, including consideration of clean and renewable energy options and increased efficiency.

VIII. Conclusion

I am grateful to Honorable Chairman Rush, Ranking Member Upton and members of the Committee for this opportunity to provide detailed testimony for the consideration of the Energy & Commerce Committee. I am also grateful that the 116th Congress has recognized that is finally time to reexamine and reform the outdated provisions of the Natural Gas Act in light of the egregious abuses of the Federal Energy Regulatory Commission on our communities, environment, states and future generations.

Magnifying the urgent need for swift action on these reforms is the signing of Donald Trump's April 10, 2019 Executive Order, in which he seeks to protect and advance the profit goals of the fossil fuel industry over the legal authority and rights of states, and his efforts to undermine government efforts to help defend present and future generations from actions and decisions that are bringing us closer to

[75] *Id.* at 5 (Glick, Comm'r, dissenting) (citing cases that discuss the Social Cost of Carbon when evaluating whether an agency complied with its obligation under NEPA to evaluate the climate change impacts of its decisions).
[76] Statement of Commissioner Richard Glick on Mountain Valley Pipeline, LLC , FERC Docket Nos. CP16-10-000 and CP16-13-000, June 15, 2018.

the tipping point of climate catastrophe. Trump's order, and the regulatory reforms and rollbacks that are currently unfolding in response, magnifies the importance of Congressional action to implement reforms that will check FERC's misuse of its authority and the law, will protect states' rights, will protect people's rights and property rights, and will ensure that FERC proactively advances clean energy alternatives over the continuing and unchecked expansion of the dirty fossil fuel that is fracked shale gas.

I have attached a copy of our Dossier of FERC's Abuses of Power and Law to this written testimony for greater detail and further examples of FERC's abuses on the people, states, land, climate and waters of this country.

In addition to the reforms identified above, provisions need to be placed in the law that ensure an appropriate level of accountability and oversight of the agency to both Congress and the people of the United States in order to address the following *(more information on these topics can be found in our Dossier of FERC's Abuses of law And Power)**:***

- Prohibit FERC's use of third party consultants with actual or potential bias.
- Change structure of FERC commissioners – add a public representative Commissioner position.
- Mandate removal of Commissioners that are demonstrated to engage in any degree of conflict in their decision-making.
- Prohibit Commissioners or other agency staff from working for the pipeline, oil or gas industry, or any of their legal, messaging, lobbying or other related representatives, for a period of 5 years prior to, and a period of 5 years post, their employment with the agency.
- Require a public advocate be appointed for each pipeline that is representative of environmental resources, property owners, public land interests that will be impacted by the project.
- Put in place stronger requirements for information disclosure and timelines by which info has to be released.
- Mandate Commissioners provide public hearing opportunities before them, as a body, before final decision-making;
- Mandate FERC use latest science in analysis and decision-making;
- Prohibit waivers, variations and/or changes to a project after its application has been submitted for review by FERC; if changes are proposed mandate the new proposal be subject to the full agency and public review and approval process.
- Add an environmental justice standard, including community involvement, for pipeline projects that are within a 10 mile proximity of an environmental justice community.
- Prohibit self interest in FERC staff and Commissioners:
    - Prohibit investments in companies regulating,
    - Prohibit Commissioners or staff from being involved in decisions that benefit directly or indirectly the staff, Commissioner, their families or professional colleagues.

- Mandate public hearings during NEPA process that are within 20 miles of any community that will be impacted by a proposed project;
- Mandate minimum 120 days to comment on any FERC NEPA documents or proposed project approvals.

The swamp at FERC is murky and deep, and is getting worse, it is time for Congress to act to reform the Natural Gas Act.

Respectfully Submitted,

Maya K. van Rossum
the Delaware Riverkeeper
Leader of the Delaware Riverkeeper Network
& Founder of the national Green Amendment for the Generations movement

List of Supporting Documents (submitted separately)

1. People's Dossier of FERC's Abuses of Power and Law, Delaware Riverkeeper Network, updated May 2019.
2. Collection of letters from nationwide VOICES Coalition members expressing concerns regarding FERC Abuses and the need for reforms to the Natural Gas Act.