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December 5, 2016

Submitted via <eFiling> at FERC Online: ferconline.ferc.gov

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room IA
Washington, D.C. 20426

Re: PennEast Pipeline Company, Docket No. CP15-558-000:
Comments of Lower Saucon Township (PA) on PennEast Response
to Post-DEIS Environmental Information Request 36

Dear Ms. Bose:

On behalf of Lower Saucon Township (PA), we respond to the November 28, 2016 Response of PennEast¹ to the November 7, 2016 FERC Post-Draft EIS Environmental Information Request (Request No. 36, regarding communications with local governments regarding cultural resources). PennEast's Response is incomplete and inaccurate.

In its Post-Draft EIS Environmental Information Request,² FERC made the following request:

Cultural Resources

36. File documentation that PennEast has provided all information regarding cultural resources within their jurisdiction to local governments interested in being consulting parties, if available.

PennEast's Response to Request 36 claimed that:

- S
ROUTING
- Council
 - Manager orig
 - Asst. Mgr.
 - Zoning
 - Finance
 - Police
 - P. Works
 - P/C
 - P & R
 - EAC
 - Engineer
 - Solicitor
 - Planner
 - Landfill
 - EMC
 - Other web

¹ Accession No. 20161128-5255.

² Accession No. 20161107-3010, p. 7.

ELLIOTT & ELLIOTT

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
December 5, 2016
Page Two

To date, five (5) local governments have asserted their right to consulting party status and have requested information regarding cultural resources: Mercer County; Hopewell Township in Mercer County; and Delaware, Holland, and Kingwood Townships in Hunterdon County.

Pursuant to direction provided by FERC staff, PennEast supplied Mercer County with a non-disclosure agreement and, after Mercer County executed the agreement on August 22, 2016, PennEast sent the requested information via electronic transfer on the same day. Correspondence regarding this transfer is included in Attachment 36-1.

The four (4) other local governments sent letters asserting consulting party status to FERC and requested information regarding cultural resources: Holland Township on September 9, 2016; Delaware Township on June 3, 2016; Kingwood Township on July 13, 2016; and Hopewell Township on September 8, 2016. PennEast sent letters to each of these local governments on November 22, 2016 acknowledging their consulting party status and agreeing to provide privileged and confidential cultural resources information pending execution of a non-disclosure agreement, which was included in each of the mailings. The correspondence is included in Attachment 36-1.

PennEast's representation to FERC that only five local governments "have asserted their right to consulting party status and have requested information regarding cultural resources" is incorrect.

To the contrary, Lower Saucon Township also requested that FERC recognize its status as a consulting party under the applicable regulations of the Advisory Council on Historic

ELLIOTT & ELLIOTT

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
December 5, 2016
Page Three

Preservation (“ACHP”).³ We first requested participation as a consulting party in our NEPA scoping comments. Those comments stated:

Under the regulations of the Advisory Council on Historic Preservation, FERC must:

- (i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);
- (ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors.

36 C.F.R. §800.8(c)(1).

A representative of each municipality through which the pipeline may cut is entitled to participate formally as a consulting party in accordance with 36 C.F.R. part 800:

- (3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.
36 C.F.R. §800.2(c)(3).

Moreover, the regulations governing this process provide that “[c]ertain individuals and organizations with a demonstrated interest in the undertaking

³ See, 36 C.F.R. §800.2(c)(3): “(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party”; see also, 36 C.F.R. §800.2(c)(5) (“[c]ertain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties” either “due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.”)

ELLIOTT & ELLIOTT

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
December 5, 2016
Page Four

may participate as consulting parties” either “due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” 36 C.F.R. §800.2(c)(5). Lower Saucon Township meets that test, as the Township has a specific interest in preserving intact historic properties within the Township for their historic and social value as demonstrated by its history of partnership with the Lower Saucon Historical Society and its expenditure of public funds for preservation and maintenance of National Register-listed properties within the township.

For the record, Lower Saucon Township requests to participate as a “consulting party” in the Section 106 process with respect to all historic properties within its jurisdiction.

Comments of Lower Saucon Township, Northampton County, Pennsylvania on Environmental Issues and the Scope of the Draft Environmental Impact Statement (Accession No. 20150225-5312), pp. 70-71 (emphasis supplied). A copy of the relevant pages is attached as Attachment A for the convenience of the reader.

Indeed, Lower Saucon Township expressed its desire and intention to participate as a consulting party a *second* time to FERC and PennEast. In our comments on the Draft Environmental Impact Statement, we stated:

PennEast’s and FERC’s approach to compliance with the National Historic Preservation Act and the regulations of the ACHP is flawed. Among other things, PennEast and FERC have failed to properly consult with Lower Saucon Township as required by NHPA regulations.

The DEIS (p. 4-183, p. 281 of PDF) states:

We have received three requests for consulting party status. These were from Judith Sullivan, Ramapough Conservancy Inc., Marilyn Cummings, Delaware Township Historic Advisory Committee, and Karen Lutz, Appalachian Trail Conservancy.

ELLIOTT & ELLIOTT

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
December 5, 2016
Page Five

These statements ignored Lower Saucon Township's request, as a local government, to PennEast and to FERC requesting that Lower Saucon Township be recognized as a consulting party for purposes of NHPA reviews. The Township's scoping comments on the draft EIS specifically requested recognition as a consulting party for NHPA purposes. [internal footnote omitted].

* * *

The regulations provide: "the representative of a local government with jurisdiction over the area in which the effects of undertaking may occur is entitled to participate as a consulting party." 36 C.F.R. § 800.2(c)(3) (emphasis added). Despite having a right to formally participate as a consulting party, PennEast and FERC did not identify the Township as a consulting party and did not consult with it. The Township specifically requested that it participate as a consulting party. The DEIS mentions the Lower Saucon Historical Society, but does not even suggest that it was a designee of the Township for purposes of NHPA consultation for this project (it was not) and fails to confirm that the Township has a continuing right to be a consulting party under the NHPA.

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

Comments of Lower Saucon Township, Northampton County, Pennsylvania on the Draft Environmental Impact Statement, FERC\EIS: 0271D (Accession No. 20160912-5515), pp. 6, 10; *see also*, extensive comments on the DEIS' flawed approach to compliance with the National Historic Preservation Act, *id.*, pp. 6- 15 (pages attached as Attachment B).

PennEast cannot claim ignorance of Lower Saucon Township's requests for consulting party status. It responded to the comments in which those requests were made. *See*, "Response to Comments on the Draft Environmental Impact Statement for the PennEast Pipeline Project" (Accession No. 20161013-5008, and "Response to Comments on Select Technical Issues in the Draft Environmental Impact Statement for the PennEast Pipeline Project" (Accession No. 20161020-5171).

ELLIOTT & ELLIOTT

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
December 5, 2016
Page Six

FERC and PennEast have improperly ignored the Township's multiple requests to participate as a consulting party. No "magic words" were required to request such participation and, indeed, under the ACHP regulations, representatives of local governments with jurisdiction over the area in which the effects of an undertaking may occur are *entitled as a matter of law* to participate as a consulting party. Thus, FERC's and PennEast's continuing failure to recognize Lower Saucon Township as a consulting party, and to actually consult with it, violate ACHP regulations.⁴

Moreover, PennEast has failed to provide the Township with any information regarding historic properties or cultural resources in any area of the Township within which the pipeline undertaking may directly or indirectly cause alterations in their character or use. 36 C.F.R. §800.16(d). This is so despite the disclosure in PennEast's Resource Report 4, Appendix D, that newly identified resources are present within the Township. Moreover, we note that DEIS Table 4.9.2-3 ("PennEast Pipeline Segments Pending Surveys in Pennsylvania") identifies those portions of the pipeline route that have not yet been surveyed, including significant portions within Lower Saucon Township. The DEIS (p. 4-198; PDF, p. 296) also admits that: "PennEast has not completed all cultural resources field investigations, provided reports, or completed consultation for the Project...There are approximately 1,032 acres in Pennsylvania that still require archaeological surveys...Additionally, there are 148 parcels in Pennsylvania that still require aboveground resources/historic architecture surveys." Lower Saucon Township requests copies of all relevant documentation of historic properties, including architectural and cultural resources, that currently exist and that may be prepared in the future.

Either PennEast's process for identifying and communicating with local governments as consulting parties is fundamentally and structurally flawed, or PennEast is deliberately ignoring local government consulting party requests. We are not sure which is worse.

⁴ As we noted in our DEIS comments, "Lower Saucon Township is by no means the only entity that is reporting to FERC that the DEIS claims of NHPA consultation are incorrect or false. See, e.g., Letter dated September 1, 2016 from the Mayor of Kingwood Township to FERC Secretary Kimberly Bose, Accession No. 20160902-5239: "FERC's assertions in the DEIS that PennEast consulted with the local committees is false. PennEast never offered the local committees, including the Kingwood Township Historical Society, consulting party status nor did PennEast ever provide the committees with any survey reports...PennEast and FERC did not consult the local committees or townships at all, let alone at an early enough time for the consultation to serve its intended purposes." (p. 4 of PDF)." Lower Saucon DEIS Comments, p. 9, fn. 11.

ELLIOTT & ELLIOTT

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
December 5, 2016
Page Seven

To be clear: Lower Saucon Township *once again* requests consulting party status and all information regarding historic properties (including, but not limited to, architectural and cultural resources) within its jurisdiction that may be directly or indirectly affected by the PennEast Pipeline project. To the extent necessary, Lower Saucon Township invites the proffer of a non-disclosure agreement in the standard form sent to other municipalities for purposes of consulting party access to privileged cultural resources information.

Thank you for the opportunity to submit these additional comments.

Very truly yours,

/s/ Charles W. Elliott
Charles W. Elliott

CWE/wp

Attachments: excerpts from Lower Saucon Township comments to FERC
c: Lower Saucon Township

building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f; see also *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (discussing the requirements of the NHPA). “[T]he preservation of this irreplaceable heritage is in the public interest,” 16 U.S.C. § 470(b)(4).

FERC’s January 13, 2015 “Notice Of Intent To Prepare An Environmental Impact Statement For The Planned PennEast Pipeline Project, Request For Comments On Environmental Issues, and Notice Of Public Scoping Meetings” states:

In accordance with the Advisory Council on Historic Preservation’s implementing regulations for Section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Offices (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the Project’s potential effects on historic properties. We will define the Project-specific Area of Potential Effects (APE) in consultation with the SHPOs as the Project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EIS for this project will document our findings on the impacts on historic properties and summarize the status of consultations under Section 106. [internal footnote omitted]

Under the regulations of the Advisory Council on Historic Preservation, FERC must:

- (i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);
- (ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors.

36 C.F.R. §800.8(c)(1).

A representative of each municipality through which the pipeline may cut is entitled to participate formally as a consulting party in accordance with 36 C.F.R. part 800:

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.

36 C.F.R. §800.2(c)(3).

Moreover, the regulations governing this process provide that “[c]ertain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties” either “due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” 36 C.F.R. §800.2(c)(5). Lower Saucon Township meets that test, as the Township has a specific interest in preserving intact historic properties within the Township for their historic and social value as demonstrated by its history of partnership with the Lower Saucon Historical Society and its expenditure of public funds for preservation and maintenance of National Register-listed properties within the township.

For the record, Lower Saucon Township requests to participate as a “consulting party” in the Section 106 process with respect to all historic properties within its jurisdiction.

The Notice of Intent’s reference to the Area of Potential Effects that it “at a minimum encompasses all areas subject to ground disturbance,” signals that FERC may adopt an unlawfully narrow APE scope. FERC’s consultation duty is in order to “identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.” 36 C.F.R. §800.1(a). NHPA regulations make clear that the scope of proper analysis is defined by the project’s area of potential effects, see 36 C.F.R. § 800.4, which in turn is defined as “the geographic area . . . within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties,” 36 C.F.R. § 800.16(d). This area is “influenced by the scale and nature of an undertaking.” *Id.* The area of potential effects should sweep quite broadly here because, as in the ESA and NEPA contexts, the reach of the pipeline project extends to the entire area in which it will increase gas production.

Q. The EIS must fully and comprehensively consider the “no action” alternative and must not use an impermissibly narrow definition of the Project purpose and need.

The Commission must give full and comprehensive consideration to the benefits associated with the “no action” alternative, including appropriate quantification of the natural resource and ecological benefits of avoiding the adverse impacts that are identified. In weighing the various alternatives, it must not accept an impermissibly narrow statement of the project’s purpose and need that in essence forecloses FERC from accepting any alternative except the routes and capacity proposed by the applicant for the project. PennEast’s statement of need in its Resource Report 10 is a classic example of a

interests. Moreover, the DEIS appears to uncritically accept the applicant's statements at face value, and lacks the analysis of need that NEPA requires. See further discussion of purpose and need, *infra*.

p. 1-5 (p. 41 of PDF): The Draft EIS states that: "As an element of its review, the USACE must consider whether a proposed project avoids, minimizes, and compensates for impacts on existing aquatic resources, including wetlands, to strive to achieve the national regulatory goal of net loss of values and functions." Aside from the DEIS's incorrect and extremely ironic reference to the "national regulatory goal of net loss of values and functions", we are at a loss to understand how the Army Corps of Engineers can make such determinations in the face of such inadequate surveys and incomplete information, and without final wetlands identifications, delineations, and mitigation plans.

As we said, these are just examples from the first few pages of the DEIS. We note throughout these comments other examples of the incomplete and inadequate character of this DEIS.

PennEast's and FERC's approach to compliance with the National Historic Preservation Act is flawed.

PennEast's and FERC's approach to compliance with the National Historic Preservation Act and the regulations of the ACHP is flawed.⁹ Among other things, PennEast and FERC have failed to properly consult with Lower Saucon Township as required by NHPA regulations.

The DEIS (p. 4-183, p. 281 of PDF) states:

We have received three requests for consulting party status. These were from Judith Sullivan, Ramapough Conservancy Inc., Marilyn Cummings, Delaware Township Historic Advisory Committee, and Karen Lutz, Appalachian Trail Conservancy.

These statements ignored Lower Saucon Township's request, as a local government, to PennEast and to FERC requesting that Lower Saucon Township be recognized as a consulting party for purposes of NHPA reviews. The Township's scoping comments on the draft EIS specifically requested recognition as a consulting party for NHPA purposes. Our scoping comments stated:

Under the regulations of the Advisory Council on Historic Preservation, FERC must:

⁹ Other commenters have similarly objected to the DEIS's flawed approach to compliance with the NHPA and ACHP regulations. We echo and concur with those objections. See, for example, comments of Kingwood Township (Accession No. 20160902-5239) and of the New Jersey Conservation Foundation (Accession No. 20150715-5137).

(i) Identify consulting parties either pursuant to §800.3(f) or through the NEPA scoping process with results consistent with §800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors.

36 C.F.R. §800.8(c)(1).

A representative of each municipality through which the pipeline may cut is to participate formally as a consulting party in accordance with 36 C.F.R. part 800:

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.

36 C.F.R. §800.2(c)(3).

Moreover, the regulations governing this process provide that “[c]ertain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties” either “due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” 36 C.F.R. §800.2(c)(5). Lower Saucon Township meets that test, as the Township has a specific interest in preserving intact historic properties within the Township for their historic and social value as demonstrated by its history of partnership with the Lower Saucon Historical Society and its expenditure of public funds for preservation and maintenance of National Register-listed properties within the township.

For the record, Lower Saucon Township requests to participate as a “consulting party” in the Section 106 process with respect to all historic properties within its jurisdiction.

Comments of Lower Saucon Township, Northampton County, Pennsylvania on Environmental Issues and the Scope of the Draft Environmental Impact Statement, pp.70-71 (Accession No. 20150225-5312) (emphasis supplied).¹⁰

¹⁰ See also, Township Motion to Intervene, p. 2 (“Lower Saucon Township also requested participation as a “consulting party” in the National Historic Preservation Act Section 106

Despite these requests, PennEast and FERC have failed to consult with the Township.

PennEast’s Resource Report 4 and the draft EIS identified a number of historic properties within Lower Saucon Township in close proximity to the Project. They include the following references:

Resource Report 4, Table 4.7-2, Previously Recorded Historic Architectural Resources within 1/4 Mile of the Project Corridor in Pennsylvania

MP 71.7, HL 0.1	086688	Site No. 3: Farmhouse, Barn and Outbuildings	Eligible: 9/17/1996
MP 71.6 HL 0.0	086674	Limekiln	Undetermined: 1972
HL 1.1	101330	Severn Homestead	Not Eligible: 3/8/1993
71.7	096307	Anthony Oberly Farm	Eligible: 11/14/1989
72.0	143013	Christman Farm; Pichel Farm	Eligible: 8/21/2006

The draft EIS (p. 4-191) identifies the following listed/eligible resources within the Township:

DEIS TABLE 4.9.2-4, Aboveground Resources Listed/Eligible to the NRHP or Requiring Additional Documentation Located within the Indirect APE in Pennsylvania

086688	Site No. 3: Farmhouse, Barn and Outbuildings	Eligible	Consult the Pennsylvania SHPO regarding effects
096307	Anthony Oberly Farm	Eligible	Consult the Pennsylvania SHPO regarding effects
143013	Christman Farm; Pichel Farm	Eligible	Consult the Pennsylvania SHPO regarding effects

The PennEast Resource Report 4, Appendix 4D also identifies the following resources within the Township:

Table 4D-1, Newly Identified Historic Architectural Resources in Pennsylvania

1.8 (HL) NO-0177	Lower Saucon	Northampton	Needs Additional Research
2.0 (HL) NO-0176	Lower Saucon	Northampton	Needs Additional Research

The DEIS (p. 4-182; p. 280 of PDF) states:

Representatives of local governments within the Project area are participants in the Section 106 review of the Project and would be provided cultural resources information within their jurisdiction for review and comment. When cultural resources survey and/or evaluation reports are available within a local government’s jurisdiction, PennEast would

process with respect to all historic properties located within the Area of Potential Effects within its geographical boundaries.”

provide the information to the representative of a local government for review and comment.

Despite this assertion in the draft EIS, no such information has been provided to Lower Saucon Township “for review and comment.” Nor have cultural resource survey or evaluation reports been provided to the Township “for review and comment.”

The DEIS (p. 4-182, p. 280 of PDF) claims:

Additionally, in December 2015, PennEast consulted with local organizations in Pennsylvania to request their input regarding known cultural resources located within the Project boundaries. The local organizations contacted were the following: Society for Pennsylvania Archaeology...Lower Saucon Township Historical Society...Northampton County Historical and Genealogical Society, Pennsylvania Canal Society, Preservation Pennsylvania[.]”

We have inquired of the Lower Saucon Township Historical Society whether PennEast has consulted with it regarding historic properties in the Township. The Lower Saucon Township Historical Society reports that PennEast has *not* consulted with it. To the contrary, the Historical Society confirmed that it did not receive consultation communications from PennEast in December 2015 as the draft EIS claims.¹¹

Moreover, any consultation with Lower Saucon Township would necessarily have been inadequate because the draft EIS and PennEast’s Resource Report 4 show that substantial areas of the proposed pipeline route within Lower Saucon Township (both mainline and Hellertown Lateral) have not even been surveyed for cultural resources.

The Township respectfully submits that the NHPA Section 106 process, as incorporated in the DEIS, is flawed and therefore objects to the DEIS on this basis. Inasmuch as FERC has incorporated the NHPA Section 106 process into its NEPA process (36 C.F.R. §800.8) and the DEIS for the PennEast Pipeline project, the preparation of the DEIS must meet the requirements of 36 C.P.R. § 800.8(c)(1). Under §800.8(c)(2)(ii), if a consulting party objects to the DEIS for not meeting the standards in § 800.8(c)(1) or because the DEIS’s substantive resolution of the effects on historic properties is inadequate, the federal agency “*shall* refer the matter to the Council.” 36 C.P.R. §800.8(c)(2)(ii) (emphasis added). As the Township must be deemed a

¹¹ Lower Saucon Township is by no means the only entity that is reporting to FERC that the DEIS claims of NHPA consultation are incorrect or false. See, e.g., Letter dated September 1, 2016 from the Mayor of Kingwood Township to FERC Secretary Kimberly Bose, Accession No. 20160902-5239: “FERC’s assertions in the DEIS that PennEast consulted with the local committees is false. PennEast never offered the local committees, including the Kingwood Township Historical Society, consulting party status nor did PennEast ever provide the committees with any survey reports...PennEast and FERC did not consult the local committees or townships at all, let alone at an early enough time for the consultation to serve its intended purposes.” (p. 4 of PDF).

“consulting party” as a matter of law pursuant to 36 C.F.R. § 800.8(c)(2)(ii), FERC must refer the objections to the ACHP for resolution.

As set forth in more detail below, the Township objects to the DEIS for not meeting the standards in § 800.8(c)(1) and for providing inadequate evaluation and resolution of adverse effects.

ACHP regulations establish five requirements for preparation of a DEIS that complies with the NHPA: (1) identify consulting parties pursuant to § 800.3(f); (2) identify historic properties and assess the effects on those properties pursuant to §§ 800.4 through 800.5; (3) consult the consulting parties regarding the effects during “NEPA scoping, environmental analysis, and the preparation of NEPA documents;” (4) involve the public; and (5) develop alternatives and proposed mitigation measures in consultation with the consulting parties and describe those alternatives and mitigation measures in the DEIS. 36 C.F.R. § 800.8(c)(1).

The regulations specifically require that “During preparation of the EA or draft EIS (DEIS) the agency official shall” complete these five requirements. Thus, meeting the requirements *after* the issuance of the DEIS is inadequate. 36 C.F.R. § 800.8(c)(1) (emphasis added). The Township objects to the DEIS for its failure to meet all five requirements.

1. Failure to identify consulting parties.

The regulations provide: “the representative of a local government with jurisdiction over the area in which the effects of undertaking may occur is entitled to participate as a consulting party.” 36 C.F.R. § 800.2(c)(3) (emphasis added). Despite having a right to formally participate as a consulting party, PennEast and FERC did not identify the Township as a consulting party and did not consult with it. The Township specifically requested that it participate as a consulting party. The DEIS mentions the Lower Saucon Historical Society, but does not even suggest that it was a designee of the Township for purposes of NHPA consultation for this project (it was not) and fails to confirm that the Township has a continuing right to be a consulting party under the NHPA.

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

2. Failure to identify historic properties and assess their potential effects.

Because PennEast and FERC did not complete cultural resource surveys for a substantial portion of the route,¹² they could not have sufficiently identified the historic

¹² The DEIS states that, within Pennsylvania: “Between August 2014 and July 2015, PennEast performed cultural resource surveys for 56.3 miles (approximately 2730 acres) along the proposed pipeline route and where survey permission was granted (Wyatt et al. 2015). An additional 380 acres were surveyed within the study corridor and the limit of disturbance between

properties within the area of the undertaking. Despite its knowledge and admission that PennEast had not even completed the initial step of identifying historic properties, FERC released the DEIS. Rather than complying with the clear and explicit requirements of the ACHP regulations, FERC plans instead to require PennEast to complete the process after issuance of the Final EIS, and after agency action to issue a certificate of public convenience and necessity. This turns the required process on its head, purporting to allow agency action first, and thereafter identify historic properties and evaluate the effects of the undertaking on those properties.

The DEIS states (p. 4-200; PDF p. 298) that:

Compliance with section 106 of the NHPA has not been completed for the Project. PennEast still needs to complete surveys and evaluation for archaeological sites and historic architecture for the Project. To ensure the FERC's responsibilities under the NHPA and its implementing regulations are met, we recommend that:

- PennEast should not begin construction of facilities and/or use of all staging, storage, or temporary work areas, and new or to-be-improved access roads until:
- PennEast files with the Secretary:
 - remaining cultural resources survey report(s);
 - site or resource evaluation report(s) and avoidance/treatment plan(s), as required;
 - the Project's recommended effects to historic properties in Pennsylvania and New Jersey; and
 - comments on the cultural resources reports and plans from the Pennsylvania and New Jersey SHPOs, as appropriate.
- the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and
- the FERC staff reviews and the Director of the OEP approves the cultural resources reports and plans, and notifies PennEast in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

This recommendation sets up a process that violates ACHP regulations and the NHPA. ACHP regulations explicitly state that identification of historic properties must be

July 2015 and February 2016.” (DEIS, pp. 4-184 to 4-185; PDF, pp. 282-283). Table 4.9.2-3 (“PennEast Pipeline Segments Pending Surveys in Pennsylvania”) identifies those portions of the pipeline route that have not yet been surveyed, including significant portions within Lower Saucon Township. The DEIS (p. 4-198; PDF, p. 296) also admits that: “PennEast has not completed all cultural resources field investigations, provided reports, or completed consultation for the Project...There are approximately 1,032 acres in Pennsylvania that still require archaeological surveys...Additionally, there are 148 parcels in Pennsylvania that still require aboveground resources/historic architecture surveys.”

done during preparation of the DEIS. Thus, FERC's plan to complete identification at a later date—indeed, after the completion of the NEPA process and an agency final action whether to issue a certificate of public convenience and necessity—clearly violates the regulations.

The ACHP regulations also require the agency to assess potential effects on the potentially impacted historic sites during the preparation of the DEIS. FERC could not fully meet this requirement in preparing the DEIS because it did not even complete the necessary surveys for historic properties. FERC released the DEIS for public comment before PennEast provided complete information regarding effects and without the required consultation with consulting parties. The DEIS contains almost no analysis by FERC of the potential effects on historic properties. For example, the DEIS is utterly void of any landscape studies or even any recognition that impacts to viewsheds should be analyzed, and alternatives reviewed to mitigate impacts to viewsheds of historic districts and sites.¹³ Instead, FERC's DEIS states it will examine the effects whenever PennEast finally provides the necessary identification information, sometime prior to construction. This violates the ACHP regulations and the NHPA. The Township objects to the DEIS because FERC failed to include an assessment of the effects on historic properties, in violation of 36 C.F.R. § 800.8(c)(1)(ii).

3. Failure to consult the consulting parties.

Not only did FERC fail to identify the consulting parties in the DEIS, it also failed to actually consult with the consulting parties as required by law and regulation.¹⁴ Under the regulations, a consulting party must be involved “at the early stages of the project planning” so the party can fully consult on all stages from identifying historic sites, conducting surveys of those sites, and mitigating effects. 36 C.F.R. § 800.1 et seq. In addition, the agency must consult the consulting parties during “NEPA scoping, environmental analysis, and the preparation of NEPA documents.” 36 C.F.R. § 800.8(c)(1)(iii). FERC and PennEast did not consult with the Township.

The DEIS describes the required consultation process as follows: “When cultural resources survey and/or evaluation reports are available within a local government's jurisdiction, PennEast would provide the information to the representative of local government for review and comment.” But PennEast never did so. Without this

¹³ The utter vacuity of landscape studies and effects analysis reflected in the DEIS violates even FERC's own “Guidelines for Reporting On Cultural Resources Investigations for Pipeline Projects,” which requires recognition of cultural landscapes, historic viewsheds, and project effects on such features. The DEIS simply offers generic, boilerplate statements that impacts on unspecified “visual resources” would be “minimal.”

¹⁴ While the Township reports that it received no communications from PennEast regarding historic resources and the NHPA Section 106 process, “Consultation” is more than sending out a letter. It “means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.” 36 CFR §800.16.

information, the Township as a consulting party could not meaningfully participate in any consultation process.

4. Failure to involve the public.

FERC and PennEast have failed to adequately involve the public in the Section 106 process. For example, contrary to its false claims, it did not involve the Lower Saucon Township Historical Society, which would have been able to offer comments and information. Even worse, by planning to complete the section 106 process after the expiration of the DEIS public comment period, and only prior to construction, FERC plans to effectively *exclude* the public from meaningful involvement.

The lack of public consultation was a significant criticism of the PennEast/FERC process by the New Jersey Historic Preservation Officer. See, Letter dated September 1, 2016 from the Mayor of Kingwood Township to FERC Secretary Kimberly Bose, Accession No. 20160902-523, p. 5.¹⁵ As was noted by Kingwood Township, this lack of public involvement, along with the failure to consult with local governments and historic groups, deprived PennEast and FERC of local expertise regarding the presence of historic sites and the likely impacts to those sites by the Project.¹⁶

The Township objects to the DEIS because FERC failed to sufficiently involve the public before its release, thus violating 36 C.F.R. § 800.8(c)(1)(iv).

5. Failure to develop alternatives and develop mitigation measures

Because FERC and PennEast have failed to fully identify historic properties or assess the effects of the project on those properties, they also cannot and have not developed alternatives or mitigation measures based on the analysis of site-specific effects. FERC cannot develop or consider avoidance alternatives without knowing first what properties may be affected and what the impacts are from the proposed action. Similarly, FERC cannot develop proper mitigation measures for effects without knowing what and where the site-specific effects will be. FERC recognizes in the DEIS that mitigation measures will need to be developed by PennEast and approved by FERC at some point before construction. See, DEIS at pp. 4-199, 4-200. This approach is flawed. As with the other ACHP regulatory requirements set forth above, the development of alternatives and mitigation measures should have occurred prior to the issuance of the DEIS and should have been disclosed in it.

¹⁵ These criticisms were acknowledged, but downplayed, in the DEIS. See, DEIS, p.4-179.

¹⁶ This failure to consult with or involve local “consulting parties” or other knowledgeable entities or persons seems to be an endemic, structural problem in the DEIS. For example, the DEIS states that: “NPS [National Park Service] also noted the Project crossings through the Delaware and Lehigh National Heritage Corridor and the Crossroads of the American Revolution National Heritage Area. NPS requested PennEast to contact State and local land managers associated with these areas. To date no communications has [sic] been filed.” DEIS, p. 4-181, p. 279 of PDF.

In recognition of the importance of the development of alternatives to the proposed action, ACHP regulations require that FERC consult with consulting parties to develop alternatives that might limit or avoid the effects on historic and cultural resources and include them in the DEIS. 36 C.F.R. § 800.8(c)(1)(v). These alternatives must reflect site-specific conditions, and must be analyzed prior to issuance of the DEIS.

FERC's limited analysis of alternatives failed to include or develop alternatives based on the project's effects on historic and cultural resources. Even if FERC eventually works with consulting parties to develop alternatives as required under NHPA, that development will almost certainly not occur until after FERC has already made its determinations under NEPA and the Natural Gas Act. Those determinations will preclude full consideration of alternatives and mitigation actions. Thus, developing the alternatives at that stage will not serve the intended purpose.

The DEIS fails to describe any actual mitigation measures developed by PennEast or analyzed by FERC with respect to effects to historic and cultural resources except a few generic boilerplate references to "fencing" and "monitoring" proposed by PennEast.¹⁷ Rather than developing alternatives and mitigation measures for consultation, and for disclosure in the DEIS as part of its environmental review and decisionmaking, FERC improperly kicks the can down the road: "[i]f it is determined that adverse effects to historic properties would result from the Project, PennEast would be required to develop avoidance plans and treatment plans along with Memoranda of Agreements." DEIS, p. 4-199.

In light of the fact that PennEast and FERC do not yet know the extent of the impacts nor even to have fully identified all of the sites in the APE, the DEIS inevitably—if not necessarily—lacks a full discussion of mitigation measures. This failure violates ACHP regulations and jeopardizes the historic resources.

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

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

The Township also objects to the DEIS because its substantive resolution of the effects on historic properties is inadequate. As we note above, the DEIS does not analyze the effects on historic properties and provides no resolution regarding the effects. Instead, FERC says it will provide any resolution "prior to construction." The failure to address and describe effects, resolution, avoidance, mitigation, and treatment plans, with respect to all historic properties prior to issuance of the DEIS is improper and violates regulatory requirements.

¹⁷ These PennEast-proposed measures are not articulated or developed in the DEIS and FERC does not meaningfully comment on them. It is noteworthy that the NJSHPO does not concur with the adequacy of many of these measures for properties in New Jersey and that any Pennsylvania SHPO concurrence lacked involvement by appropriate consulting parties.

Document Content(s)

Lower Saucon Comments re NHPA Consulting Party.PDF.....1-18