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

Re: Failure to Afford Adequate Public Participation or Democratic Processes in
FERC Docket No. CP15-558

Dear Secretary Bose:

I write on behalf of Homeowners Against Land Taking-PennEast (HALT), which represents over 200 impacted landowners along PennEast's proposed 115-mile pipeline route, including homeowners, residents, farmers, and small businesses. The proposed pipeline will cause irreversible economic and environmental impacts to HALT's members. It will destroy property value, contaminate local water sources and private wells, and result in permanent loss of historic resources which have been carefully preserved for generations. It also will harm endangered species, recreational interests, and preserved farms, parks, and nature preserves. Given the destructive impacts on landowners and communities, HALT and its members have repeatedly demanded that FERC provide robust notice-and-comment opportunities. Those requests largely have been ignored.

The input FERC has allowed is neither meaningful nor consistent in that FERC has gathered too little information, refused to consider contrary evidence or allow the "genuine interchange" required by law,¹ and adopted blindly many of the applicant's self-interested assertions. These notice-and-comment failures infect the entire record, so FERC must withdraw the DEIS until it has corrected these errors.

1) *No Opportunity to Comment on Technical and Scientific Studies and Data or on Mitigation.* The majority of the 54 "conditions" proposed in the DEIS request that PennEast file new data and studies with FERC after the public-comment period has ended. That fails the unambiguous requirement that an agency must make any studies relevant to its licensing decision available for public comment.² The public also must be informed of the mitigation in time for the public-comment period, and

¹ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (internal quotations omitted).

² *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("Congress funded two major studies The public needed the opportunity to comment on them."); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

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mitigation measures must be sufficiently specific to inform the public that it is reasonably likely adverse impacts will be avoided.³ Because the DEIS reveals that approximately 70 percent of the land area in New Jersey has not been analyzed for adverse impacts, any mitigation that has been proposed is insufficiently specific. In any event, many of the wrongly characterized “mitigation” steps (*e.g.*, condition 24 on 5-25) are properly characterized as preliminary analysis of adverse impacts. FERC has not even proposed mitigation for many of the environmental impacts that it has conceded are likely to occur, let alone those it has not yet analyzed.

2) *No Meaningful Response to Public Comments Received.* Although FERC received many substantive comments in response to PennEast’s Application (during the scoping process and otherwise), the DEIS shows that FERC has failed to consider them. One of the most egregious failures is FERC’s failure to analyze the impact of the pipeline on property values. Both the association representing 45,000 New Jersey realtors and dozens of potentially affected landowners have commented on the observed effect on real estate prices from the filing of the proposal alone, and other expert studies highlighted in comments show steep price effects when this type of pipeline must be disclosed to buyers. The DEIS ignores these contrary studies and comments about local conditions and points only to a handful of industry-commissioned studies. FERC cannot disregard the contrary studies, the well-known weaknesses of the industry studies,⁴ or the opinions of local real estate agents with relevant expertise. Instead, it must provide a meaningful response to the “serious and considered comments” of those with expertise on local conditions and analyze the contrary studies.⁵ The same failure is evident for the impacts of arsenic mobilization during pipeline construction and operations and the economic impacts of the project. Studies by PennEast were impermissibly based on past conditions or ignored relevant aspects of the impacts, so were legally invalid. FERC not only ignored these obvious deficiencies, but also ignored the only valid

³ See, *e.g.*, *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 2d 783, 805 (S.D.W. Va. 2009) (“[I]nformation on proposed mitigation is the rationale and pivotal data that must be entered into the administrative record and released for public review and comment . . .”).

⁴ Weaknesses include failure to evaluate sellers’ disclosure obligations, no peer review, and use of bad methodologies producing large variations in price effects, and thus largely meaningless results.

⁵ *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492–93 (9th Cir. 2011).

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expert studies in the record.⁶ The DEIS must be based on the evidence, not FERC's pre-determined conclusion to approve the pipeline.

3) Arbitrary Hearing Procedures. FERC inexplicably did not provide an opportunity to submit oral comments in a public setting. Although FERC has consistently provided public fora for oral comments and dialogue with FERC officials on the DEIS in past controversial pipeline proceedings (e.g., Atlantic Sunrise, Constitution Pipeline), FERC departed from its standard practice. FERC's so called "public meetings" or "public hearings" were neither "meetings" or "hearings" as reasonable people and the law would interpret those terms. Meetings and hearings are gatherings at which those attending can exchange ideas with each other and with the governmental officials paid to protect the public's interests. At FERC's "meetings," there was no presentation by either FERC, PennEast, or TetraTech, no opportunity for members of the public to speak to each other or to FERC representatives, and no opportunity to hear and dialogue about the concerns of other affected residents. There certainly was no dialogue allowed between the public and either FERC or PennEast. Those who showed up at the "meetings" waited for multiple hours, were shunted to an empty room, and were limited to commenting in front of a private consultant for PennEast and a court reporter. FERC cannot deny the opportunity for oral comments, and it cannot depart from its past practice arbitrarily and with no explanation.⁷ These gatherings did not constitute the "meetings" or "hearings" required by 40 CFR 1506.6(c) and other applicable laws, and President Obama would be horrified that one of his agencies is conducting its business in a manner more likely to intimidate and suppress public comment than to solicit it. FERC should reschedule real public hearings at which it and the public can engage in meaningful dialogue and the public commenters can educate each other and FERC on the issues.

4) Conditioning Public Comment on Forfeiture of Other Rights. The danger of dispensing with public comment is especially apparent in this case: FERC's proposed approach places a coercive burden on landowners to choose whether to

⁶ See FERC Docket No. CP-15-558, Accession Nos. 20160722-4001, 20160802-5034, 20160906-5247, 20160907-5050 (arsenic studies conducted by Dr. Tullis Onstott, which also point out the invalidity of PennEast's study); FERC Docket No. CP-15-558, Accession No. 20160311-5209 (economic impacts).

⁷ See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

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forfeit constitutional or public-comment rights.⁸ By proposing to grant a Certificate in the DEIS before gathering required data, FERC creates a process where landowners who relinquish their constitutional rights and allow PennEast to enter their property have their property's resources considered in FERC's analysis of the route alignment and receive the benefit of public comment on FERC's analysis of site-specific impacts, while those who exercise their rights do not receive this benefit. Acting within this flawed process, PennEast told landowners along the pipeline that if they refused access to PennEast for surveys—or if they refused to agree to PennEast's easement offers—they would be denied the benefit of being able to influence the route's placement and to protect resources on their properties. PennEast's threat is effective only because FERC's proposed action does in fact deny the benefit of public comment, influencing the route, and protecting resources to those landowners who exercise their constitutional rights. FERC and PennEast unconstitutionally conditioned public comment on landowners' forfeiture of their constitutional right to exclude the government until appropriate condemnation procedures and a "public use" finding.

5) *Violation of Notice Requirements.* Despite an applicant's obligation to make a "good faith effort" to notify all affected landowners of "the effect the construction activity will have on the landowner's property,"⁹ PennEast continues to give landowners inconsistent messages about whether the pipeline route will affect their property. Some landowners have been told they were on the proposed route, then that they were not, and then moved on again; for others, PennEast has submitted maps and route modifications showing they are affected but has not provided actual notice that they will be affected. PennEast continues to submit route modifications to FERC with no explanation to landowners about the effects. Many landowners previously submitted comments about the problems with PennEast's undefined route and mixed messages. The DEIS addressed none of these comments. The DEIS provides no information about which landowners' land, farms, and businesses will be affected. Nor does it even include the total number of private property owners who will be affected. Potentially affected landowners have not been afforded an opportunity for meaningful comment on the impacts to their land because they are uncertain whether they are on the current iteration of the proposed route. If FERC knows the landowners that will be affected, it must provide that data for comment. Information about whether PennEast purports to have notified

⁸ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (prohibiting government from "coercively withholding benefits from those who exercise" their constitutional rights).

⁹ 18 C.F.R. § 157.203(d)(2).

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the affected landowners, the maps and studies, “the methodology used in creating [them], and the meaning to be inferred from them” must all be open to public comment.¹⁰ If FERC does not have this data, it lacks the record necessary for a decision. Either way, the process cannot go forward until this error is corrected.

6) *Insufficient Public Comment Period.* FERC’s website has suffered outages and errors multiple times during the comment period. These outages prevent filing of comments, review of new information filed by other commenters, and the public’s ability to provide FERC with complete information. Moreover, the applicant has continued to file modifications to its application after the posting of the DEIS—such as a supplemental filing on August 5, 2016¹¹—which has not been available for the full public comment period. These issues infringe on the public’s right to participate under NEPA.

Based on FERC’s failures to give proper notice and provide a meaningful opportunity for public comment, it must withdraw the DEIS until it can do so.

Best regards,

s/ R. Steven Richardson

¹⁰ *Am. Radio Relay League*, 524 F.3d 227, 236 (D.C. Cir. 2008).

¹¹ FERC Docket No. CP15-558, Accession No. 20160805-5221 and Accession No. 20160805-5228.