

MEMORANDUM

DATE December 13, 2013

TO Mark Lohbauer, Chair, and the Members of the Pinelands Commission

CC Carleton Montgomery
Pinelands Preservation Alliance

FROM Dechert LLP

RE Proposed South Jersey Gas / B.L. England Pipeline

To the Commission:

On behalf of the Pinelands Preservation Alliance (“PPA”), we appreciate the opportunity to provide comments on the Pinelands Commission’s proposal to enter into an intergovernmental memorandum of agreement (“MOA”) with the New Jersey Board of Public Utilities (“BPU”) to permit the construction of a natural gas pipeline (the “Pipeline”) by South Jersey Gas (“SJG”) to service the B.L. England electrical generation plant at Beesleys Point, Upper Township, Cape May County (“BLE plant”). This memorandum sets forth our concerns regarding the use of an MOA for this type of private development.

In sum, SJG is a private, for-profit entity and the Pipeline project is a private, commercial development project. The MOA process is not intended to provide regulatory approval to a private development project to be carried out by a private, for-profit entity in furtherance of private commercial interests. Indeed, this use of an MOA would directly violate the requirements of the Pinelands Comprehensive Management Plan (“CMP”), which restricts the MOA process to “public development” that is “carried out” by “any agency of the Federal, State or local government.”¹ The fact that the MOA relates to a private, commercial development project by a for-profit entity would alone be sufficient to render it improper under the CMP. The proposed MOA, however, is improper for the separate and independent reason that there has been no demonstration, as required by the CMP, that the MOA affords “an equivalent level of protection of the resources of the Pinelands than would be provided through a strict application of the standards of the plan.”² To the contrary, the Pipeline would have an adverse impact on the natural resources of the Pinelands, and the measures included in the MOA to minimize or offset this impact are insufficient or in some cases even counterproductive to protecting the resources of the Pinelands.

¹ N.J.A.C. 7:50-4.52(c)(2).

² *Id.*

In addition, in 2008, the Commission established procedures to ensure that interested members of the public were given the opportunity to witness in full detail all phases of the deliberation, policy formulation, and decision making of the Commission, as required by the New Jersey Open Public Meetings Act.³ The Commission's process with respect to the proposed MOA violates these procedures, and effectively prevents the type of full and fair public participation in Commission policymaking that the Commission's procedures were intended to guarantee.

For these reasons, and those explained below, the proposed MOA should be rejected by the Commission.⁴

I. Exceptions to the Comprehensive Management Plan Should Be Granted Only in Rare Cases.

The Pinelands Commission has stated that it "expects that a public agency's development plans will conform to all of the land use and development standards" of the CMP, and that situations requiring the Commission to enter into an MOA that authorizes nonconforming development activities will be "very rare."⁵ The Commission has affirmed that it "recognizes its obligation to exercise [its] discretionary authority [to enter into MOAs] very carefully."^{6,7} This cautious approach is consistent with the CMP's requirement that it be "construed liberally to effect the purposes of the [federal National Parks and Recreation Act of 1978] and [New Jersey's] Pinelands Protection Act."⁸

The New Jersey Supreme Court has acknowledged that this approach is necessary to prevent any waiver process, including the MOA process, from undermining the whole of the CMP. By expanding the use of the MOA process – particularly in disregard of the requirements of the CMP – the Commission would devalue the CMP. Indeed, "[i]f exemptions should be granted because development on individual tracts would impair only minutely the entire resources of the

³ N.J.S.A 10:4-7.

⁴ Although the MOA process is not appropriate here, SJG is not without an alternative avenue for seeking approval. The CMP provides a separate procedure, with its own set of requirements, for waiver applications with respect to the type of private development being proposed by SJG.

⁵ New Jersey Pinelands Commission, The Process for Considering an Intergovernmental Agreement (Jun. 23, 2008), *available at* [http://www.state.nj.us/pinelands/images/pdf%20files/Intergovernmental%20Agreement%20Process%20\(June%202023,%202008\).pdf](http://www.state.nj.us/pinelands/images/pdf%20files/Intergovernmental%20Agreement%20Process%20(June%202023,%202008).pdf)

⁶ *Id.*

⁷ As the Commission staff have pointed out, the MOA provision sets forth no standards governing whether or not the Commission may adopt an MOA in any given circumstances, raising questions as to its legality; these questions are only heightened by the Commission's recent practice of seeking to extract money in exchange for this kind of standardless waiver. However, because we understand these are considerations the Commission itself may not choose to consider at this stage of the process, we will not elaborate further on these points going to the underlying legality of the CMP's MOA provisions.

⁸ *See* N.J.A.C. 7:40-2.2.

Pinelands, the cumulative effect of such exemptions would defeat the legislative goals of the Pinelands Protection Act.”⁹

II. The Pipeline Project Does Not Meet the Criteria for an Intergovernmental Memorandum of Agreement Set Forth in the Pinelands Comprehensive Management Plan.

As explained in the proposed MOA, Pipeline Project is not “consistent with the permitted use standards for a Forest Area.”¹⁰ As such, the Commission has proposed to enter into an MOA to waive strict compliance with the CMP. The MOA process is inapplicable in this case, and the proposed MOA violates the CMP.

Part IV of Subchapter 4 of the CMP sets forth the MOA process. That Part is designed “to assure that *public development* in the Pinelands Area is in conformance with the goals and provisions of this Plan.”¹¹ The specific provisions relating to the MOA process set forth additional requirements. For example, an MOA may authorize the signing agency to “carry out specified development activities,” even if those activities are outside the scope of the CMP.¹² In addition, an MOA is only permissible when “the Commission finds that variation from the standards of [the CMP] is accompanied by measures that will, at minimum, afford an equivalent level of protection to the resources of the Pinelands than would be provided through a strict application of [the CMP].”¹³

Although SJG could have sought a waiver from the CMP’s requirements under Part V of Subchapter IV of the CMP, which is not restricted to public development and is designed “to provide relief where strict compliance with [the CMP] will create extraordinary hardship or where the waiver is necessary to serve a compelling public need,”¹⁴ it – through the BPU – has attempted to shoehorn the Pipeline project into Part IV’s MOA provision. The proposed MOA fails to meet each of the CMP’s three key requirements for an MOA: it provides for private development, not “public development”; it does not authorize “an agency to carry out specified development activities,” but instead authorizes development by a private, for-profit company; and it does not provide measures that will afford an equivalent level of protection to the resources of the Pinelands.

⁹ *Orleans Builders & Developers v. Byrne*, 453 A.2d 200, 206 (N.J. Super. 1982) (quoted in *Gardner v. New Jersey Pinelands Comm’n*, 125 N.J. 193, 208 (1991)).

¹⁰ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 2, available at [http://www.state.nj.us/pinelands/infor/moa/Under%20Consideration/Draft%20PC-BPU%20MOA%2011-27%20\(Posted\).pdf](http://www.state.nj.us/pinelands/infor/moa/Under%20Consideration/Draft%20PC-BPU%20MOA%2011-27%20(Posted).pdf); cf. N.J.A.C. 7:50-5.23(b)(12).

¹¹ N.J.A.C. 7:50-4.51 (emphasis added).

¹² N.J.A.C. 7:50-4.52(c)(2).

¹³ *Id.*

¹⁴ N.J.A.C. 7:50-4.61.

A. The Pipeline Project Is Not “Public Development.”

The Pipeline project does not constitute “public development” of the sort that can be authorized by an MOA. The CMP defines “Development, public” as “any development by a public agency,”¹⁵ which the Pipeline project is not. Although the BPU is proposed as the contracting party with the Commission and the BPU is a public agency, the Pipeline project would be undertaken, owned and operated by SJG, which is not a public agency. The Pipeline, moreover, has none of the indicia of public development. Under the proposed MOA, the Pipeline will be privately owned, privately financed, and privately managed and operated. Profits and losses from its operation will accrue to a privately-owned, for-profit business that is traded on a stock exchange. Moreover, liability for accidents will lie with a private business, not the BPU or any other public agency. In short, under the CMP, the Pipeline project is not public development, but private development that SJG will carry out in furtherance of its commercial plans.

B. The Proposed MOA Does Not Authorize a Governmental Agency to Carry Out Specified Development Activities

The proposed MOA does not authorize a *governmental agency* to carry out specified development activities as required by the CMP.¹⁶ The BPU, the signing agency, would have no role in carrying out the development activities. The BPU would not design the Pipeline, enter contracts with companies carrying out the construction, finance the construction, own the Pipeline, receive revenue from the Pipeline, or bear any liability for the construction of the Pipeline. SJG, by contrast, will be fully responsible for building the Pipeline and all associated development activities. SJG will even be responsible for hiring inspectors “to ensure that the Pipeline is constructed and installed in accordance with State and Federal requirements.”¹⁷

Moreover, the BPU is a regulatory agency, not an agency that engages in development activities. Although the BPU’s powers extend beyond those set forth in its statutory mandate,¹⁸ the BPU has no power to engage directly in development activities or to order private companies to

¹⁵ N.J.A.C. 7:50-2.11.

¹⁶ N.J.A.C. 7:50-4.52(c)(2).

¹⁷ See *In the Matter of the Petition of South Jersey Gas Company for Authorization to Construct a 24-Inch Pipeline*, 2013 WL 3776641 (N.J. Bd. Reg. Com. June 21, 2013), at *3; see also *id.* at *1 (SJG to “construct and operate” the Pipeline), at *2 (SJG responsible for proposal “including the project design, construction plans and specifications”), and at *3 (order approves “request of SJG to construct the Pipeline”).

¹⁸ *A. A. Mastrangelo, Inc. v. Comm’r of Dept. of Envl. Prot.*, 90 N.J. 666, 683-84 (1982); *Twp. Of Deptford v. Woodbury Terrace Sewerage Corp.*, 54 N.J. 418, 424 (1969).

engage in development activities.¹⁹ As such, the BPU's sole role under the proposed MOA would be to agree that *SJG* will construct the Pipeline.²⁰

Tellingly, the proposed MOA ignores the wording of the CMP when it attempts to lay out the legislative authority for granting an MOA, going into great length as to the BPU's *regulatory* authority before describing the project as "specified development that is being carried out consistent with N.J.A.C. 7:50-4.52."²¹ The CMP permits an MOA to "authorize *such agency* to carry out specified development activities,"²² but the MOA, in paraphrasing this section, omits the reference to "such agency" entirely. Indeed, it would be absurd to assert that BPU is "carrying out" this development. Since the proposed MOA does not provide for public development or authorize an agency to conduct development activities, it is impermissible under the CMP.

C. The Proposed MOA Does Not Provide Measures to Afford an Equivalent Level of Protection.

Even if the Pipeline was "public development" (and not a private, commercial development) and it was being pursued by an appropriate agency (and not *SJG*), the project would still be impermissible. The CMP permits the Commission to grant an MOA only if the requesting agency "demonstrates and the Commission finds that variation from the standards of this Plan is accompanied by measures that will, at minimum, afford an equivalent level of protection of the resources of the Pinelands than would be provided through a strict application of the standards of this Plan."²³ In this case, the MOA does not provide measures that afford an equivalent level of protection of resources of the Pinelands. As the BPU has not met its burden, the proposed MOA must be rejected.

1. *The Commission Must Weigh the Environmental Impact of the Pipeline against the Impact of No Development at All.*

The proposed MOA misconstrues the requirement that under an MOA, any variation from the CMP must be accompanied by measures that will afford an equivalent level of protection to the resources of the Pinelands. Although the CMP does not define what is meant by "an equivalent level of protection,"²⁴ the text of the CMP asks the Commission to balance the protections afforded "the resources of the Pinelands" if the MOA is granted against those protections if the MOA is denied and the CMP enforced as written. The proposed MOA misconstrues this test by attributing

¹⁹ See generally N.J.S.A. 48:2-1 *et seq.*

²⁰ See generally *In the Matter of the Petition of South Jersey Gas Company for Authorization to Construct a 24-Inch Pipeline*, 2013 WL 3776641 (N.J. Bd. Reg. Com. June 21, 2013).

²¹ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 13.

²² N.J.A.C. 7:50-4.52(c)(2) (emphasis added).

²³ N.J.A.C. 7:50-4.52 (c)(2).

²⁴ See generally N.J.A.C. 7:50-2.11 (definitions).

environmental benefits to the MOA that will accrue even in its absence, and by assuming environmental degradation in the absence of the MOA that has no relationship to the proposed project.

First, the MOA attributes environmental benefits to the Pipeline and the proposed MOA that are not tied to the project itself and therefore extraneous to the Commission's analysis. For example, the proposed MOA outlines supposed environmental benefits of the Pipeline by placing the Pipeline in the context of the conversion of the BLE plant from a coal- and oil-burning electrical generation plant to one that burns natural gas.²⁵ These environmental benefits are simply those of the BLE plant ceasing to operate as a coal- and oil-burning electrical generation plant, and will accrue whether or not the Commission enters into the MOA, and whether or not the proposed Pipeline is constructed at all. The BLE plant is *already required* to cease operations as a coal- and oil-burning plant, as a result of the administrative consent order to which RC Cape May Holdings, as owner of the BLE plant, is already subject.²⁶ Accordingly, the environmental benefits of deactivating the BLE plant as a coal- and oil-burning plant are irrelevant to the Commission's analysis.

Second, the MOA argues that "impacts [from the Pipeline] to the resources of this Forest Area are no greater than would occur if the proposed development were comparable to uses that are permitted in the Forest Area pursuant to N.J.A.C. 7:50-5.23."²⁷ In doing so, the MOA improperly compares the Pipeline to the maximum possible environmental degradation that could be caused by *any* permitted development in the absence of an MOA, rather than the probable result of "strict application of the standards of the Plan" to the Pipeline project itself. The CMP provides that any project undertaken under an MOA must include measures that would afford an equivalent level of protection to Pinelands Resources as would be provided by strictly applying the standards of the CMP to the project under review. The proposed MOA would effectively rewrite this standard to one that weighs an optimistic assessment of the impact of the proposed development against the worst-possible outcome of any and all permitted development absent an MOA.

Here, a strict application of the CMP would preclude the installation of the Pipeline in the Forest Area altogether. The coal-fired generator at the BLE plant will be deactivated regardless of whether or not the MOA is granted. As a result, the Commission may only grant the MOA if it determines that construction of the Pipeline (together with any measures specifically set forth in the MOA), without any consideration of the (unrelated) deactivation of the BLE plant or any (unrelated) hypothetical permitted development, would have *no adverse impact* on the natural resources of the Pinelands.

²⁵ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 14.

²⁶ RC Cape Holdings, LLC (N.J. Dep't of Environ. Prot. May 18, 2012) (admin. consent order amend.), available at <http://www.nj.gov/dep/docs/20120613104728.pdf>.

²⁷ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 13.

2. *Construction of the Pipeline Will Have an Adverse Impact on the Natural Resources of the Pinelands.*

As the New Jersey Supreme Court has noted, the purposes of the CMP are defeated if even minor degradations of the landscape are routinely permitted, as “[t]he cumulative detrimental impact of many small projects can be devastating.”²⁸ The proposed MOA states that “there are *no* direct environmental impacts associated with the natural gas pipeline” and only allows for (and provides offsets for) possible “secondary impacts.”²⁹ Even the documents submitted to the Commission on behalf of SJG, however, do not support this position. In fact, the analysis submitted on behalf SJG concedes that the Pipeline would cause some level of direct environmental impact.

The two reports submitted on behalf of SJG by Woodard & Curran suggest that the proposed Pipeline route is the best of several alternatives, with “fewer disturbances to environmental resources” largely because it stays “almost entirely beneath existing State and County road, power, or rail line” rights-of-way (“ROWs”).³⁰ However, the reports do not claim that the Pipeline will have *no* environmental impacts, only “*less* impact to the Pinelands ecosystem” than the proposed alternatives, with little further explanation as to what the impacts might be.³¹ The reports even acknowledge that “[i]mpacts to wetland areas adjacent to and within these ROWs could affect multiple species foraging and breeding habitat,”³² that “[a]ll routes would cross or are adjacent to regulated wetlands, streams, and open waters,”³³ and that “[t]hreatened and endangered species habitat is along all alternatives.”³⁴ In addition, the environmental report prepared by Trident Environmental Consultants lists a number of threatened or endangered species along the Pipeline route, including red-headed woodpecker, Cope’s gray tree frog, and Pine barren thoroughwort, and noted habitats suitable for a number of others.³⁵

²⁸ *Gardner v. New Jersey Pinelands Comm’n*, 125 N.J. 193, 208 (1991).

²⁹ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 14 (emphasis added).

³⁰ See generally Woodard & Curran, South Jersey Gas-BL England Route Analysis Report 1 (2012), available at http://www.pinelandsalliance.org/downloads/pinelandsalliance_855.pdf.

³¹ *Id.* at 1 (emphasis added). The two reports contain little quantifiable information, but repeatedly claim “minimal” or “minor” environmental impact. See, e.g., *id.* at 1 (route “would have minimal environmental and community impacts”); at 7 (while effects on nearby wetlands “could affect multiple species, . . . wetland impacts should be minimal”); Woodard & Curran, Alternatives Analysis Addendum to the June 18, 2012 South Jersey Gas-BL England Gas Route Analysis Report 4 (2013) (“minimal clearing of existing forested edges”); at 8 (“only minor ROW clearing would be required”).

³² Woodard & Curran, South Jersey Gas-BL England Route Analysis Report 4 (2012).

³³ Woodard & Curran, Alternatives Analysis Addendum 8 (2013)

³⁴ *Id.*

³⁵ See Trident Environmental Consultants, Threatened & Endangered Species Habitat Suitability Assessment & Survey Report, South Jersey Gas B.L. England Power Plant Supply & Reinforcement Line, Cumberland, Atlantic & Cape May Counties, New Jersey (February 4, 2013)

The proposed Pipeline supposedly involves “minimal clearing of existing forested edges” and “only minor ROW clearing,” but increasing the width of road and ROW corridors by only a few meters can have a significant impact on species diversity and ecosystem health. Road and utility corridors commonly lead to “habitat loss, intrusion of edge effects in natural areas, isolation of population, barrier effects, road mortality and increased human access.”³⁶ Forest fragmentation is one of “the primary contributors to recent declines seen among many forest bird species,” and “creates conditions that increase the exposure of forest-nesting birds to nest predation and brood parasitism.”³⁷ Notably, even minor widening of roads and clearing of ROWs can have significant adverse environmental impacts. A study of forest birds in the Pinelands region found that narrow roads and rights-of-way had little impact in species diversity, but corridors as narrow as 16 meters “affect the distribution and abundance of birds in ways that are associated typically with the effects of forest fragmentation.”³⁸

Moreover, while the Woodard & Curran analysis focuses primarily on the impact of the Pipeline once it is running, the greater impact to the Pinelands may be during construction and ongoing maintenance. Construction would “mostly be open cut construction,”³⁹ meaning work crews will dig a 10-mile-long trench along the side of a road bisecting a forest management area. Woodard & Curran claims that “HDD laydown and staging areas would not require wetland impacts for construction,”⁴⁰ but they would still require staging areas, with attendant heavy machinery and work crews, to be established elsewhere along the route.

The Woodard & Curran analysis also fails to address future maintenance needs, which, with a pipeline buried four feet underground, will inevitably require excavation along the route, again involving heavy machinery working in and traversing the Pinelands. Finally, while the Woodard & Curran reports do not discuss it, the Commission cannot ignore the possibility of leaks or other problems that can arise over the long life cycle of a subterranean gas pipeline.⁴¹

³⁶ Ana Benitez-Lopez et al, *The impacts of roads and other infrastructure on mammal and bird populations: a meta-analysis*, 143 *Biological Conservation* 1307, 1307 (2010).

³⁷ Adam C. Rich & David S. Dobkin, *Defining Forest Fragmentation by Corridor Width: The Influence of Narrow Forest-Dividing Corridors on Forest-Nesting Birds in Southern New Jersey*, 8 *Conservation Biology* 1109, 1110 (2002).

³⁸ *Id.* at 1116.

³⁹ Woodard & Curran, *South Jersey Gas-BL England Route Analysis Report 4*.

⁴⁰ Woodard & Curran, *Alternatives Analysis Addendum to the June 18, 2012 South Jersey Gas-BL England Gas Route Analysis Report 4*.

⁴¹ To pick two recent, if extreme, examples, in September 2010, eight people were killed when an underground natural gas pipeline operated by Pacific Gas & Electric Company ruptured and ignited in San Bruno, CA, causing a fire that destroyed 38 homes and damaged 70, *see* National Transportation Safety Board, *Pipeline Accident Report: Pacific Gas and Electric Company Natural Gas Transmission Pipeline Rupture and Fire x* (2010), *available at* <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>; and in November 2007, two people were killed when an underground liquid propane pipeline operated by Dixie Pipeline Company ruptured in Carmichael, MS, releasing a cloud of propane gas that expanded over nearby

3. *The Environmental Measures Contained in the Proposed MOA Do Not Adequately Protect the Natural Resources of the Pinelands.*

The “Environmental Conditions” set forth as Attachment B to the proposed MOA are inadequate and, in some cases, counterproductive. These Environmental Conditions include numerous measures to prevent construction crews from introducing non-native species into the Pinelands.⁴² However, the risk posed by open-cut construction is not simply that non-native species will be planted by construction crews: rather, the disturbance caused by digging up and re-seeding the grass embankment along NJ-49 *inherently* leaves the Pinelands more open to invasive species. Soil disturbance itself “creates openings for establishment [of invasive species,] frequently of weedy or ruderal species.”⁴³ In addition, the MOA calls for the use of orange plastic construction fencing along the perimeter of the proposed area of disturbance,⁴⁴ which will serve as a barrier to native species that would ordinarily traverse the construction area for feeding, breeding or migration.

Although it misleadingly denies any direct impacts from the Pipeline project, the proposed MOA contains arbitrary and insufficient provisions to offset the supposed secondary effects of the Pipeline. Like Atlantic Electric, which was required to pay \$13,000,000.00 to the Pinelands Commission in 2004 to embark on an electric line project,⁴⁵ SJG would be required to “contribute eight million dollars (\$8,000,000.00) towards Pinelands Area land acquisition and education” to commence the project.⁴⁶ The land preservation, education, research and monitoring actions proposed to be funded by this \$8,000,000 cannot achieve “equivalent protection.”

homes and ignited, destroying four homes and damaging several others (National Transportation Safety Board, Rupture of Hazardous Liquid Pipeline with Release and Ignition of Propane vii (2010), *available at* http://www.nts.gov/news/events/2009/Carmichael_ms/index.html).

⁴² See Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 23 (“1. Any areas disturbed as a result of construction activities shall be graded to natural conditions and seeded with native Pinelands grass species. 2. Only native Pinelands species . . . shall be used for re-vegetation purposes.”).

⁴³ Richard J. Hobbs & Laura F. Huenneke, Disturbance, Diversity, and Invasion: Implications for Conservation, 6 *Conservation Biology* 324, 329 (1992); *see also* Michelle C. Mack & Carla M. D’Antonio, Impacts of biological invasions on disturbance regimes, 13 *TREE* 195, 195 (1998) (finding that “[i]t is well known that invasions can be promoted by disturbance,” and further that individual invasive species “can cause profound and often irreversible alteration to [terrestrial ecosystems]”).

⁴⁴ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 23.

⁴⁵ Pinelands Commission, Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Sept. 2004), at 8, *available at* <http://www.state.nj.us/pinelands/infor/moa/>.

⁴⁶ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 14.

In the MOA, the Commission concedes that infrastructure such as the Pipeline may have the effect of increasing pressure for development along its route.⁴⁷ Without any stated basis or explanation (reference is made to an Attachment C not made available to the public), the MOA allocates \$7,250,000 to land acquisition, to purchase parcels along the Pipeline route to offset this hypothetical pressure. Notably, the MOA merely provides funds but does not actually require any specific purchases, ultimately allowing for the land to be used anywhere south of the Atlantic City Expressway – a vast area in which \$7.25 million could make no measureable impact in addressing the development which the Pipeline could foster in the future.⁴⁸

The MOA allocates the remaining \$750,000 to fund unrelated initiatives desirable to the Commission, including education, research and monitoring activities with no direct, or even indirect, connection to the impacts the pipeline and MOA will have on the Pinelands environment. The proposed MOA does not even attempt to draw any specific or quantifiable links between these activities and the environmental impacts of the pipeline and MOA. This monetary requirement does not prevent or compensate for the most immediate environmental impacts of the pipeline and its construction on Pinelands resources, but rather gives the misguided impression that money cures environmental harms.

III. Granting an MOA Would Further Weaken the Pinelands CMP.

The Commission has acknowledged the concern that granting an MOA in this instance “could evolve into using the Pinelands as a matter of convenience.”⁴⁹ The proposed MOA proves that this fear is justified.

A. Granting the MOA Would Make Future Development More Likely

If the Commission enters into the MOA under consideration, it will establish the proposition that regulatory agencies can help the private entities they regulate evade the express protections of the CMP through the MOA process, bolstering a dangerous and legally improper precedent begun in 2004. That year, the Commission entered into an unusual MOA with the BPU authorizing Atlantic Electric, a private company, to construct an electric line through approximately 17.5 miles of the Preservation Area District or Forest Area even though the electric line did not strictly comply with the requirements of the CMP (the “Transmission Line MOA”).⁵⁰

⁴⁷ *Id.*

⁴⁸ The inadequacy of this funding provision is detailed in a separate report which the Pinelands Preservation Alliance will submit in the public hearing process.

⁴⁹ Memorandum from Stacey P. Roth, B.L. England: Proposed Gas Main Project to Repower the Facility (July 1, 2013), at 2 (on file with the Pinelands Preservation Alliance).

⁵⁰ See Pinelands Commission, Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Sept. 2004), *available at* <http://www.state.nj.us/pinelands/infor/moa/>.

As interested parties argued at the time, this use of the MOA process was inconsistent with the regulatory scheme set forth in the CMP, but the Commission approved it anyway.

When the Transmission Line MOA was before the Commission, PPA submitted to the Commission written comments expressing concerns both about the use of the MOA and its potential precedential impact. In particular, PPA explained that N.J.A.C. 7.50-4.52(c)(2) requires that the governmental entity which is the party to the MOA to carry out the specified development activities and also expressed concern that “the Commission’s approval of [the] MOA would invite additional parties to seek exceptions to the rules and procedures of the Commission.”⁵¹ The proposed MOA confirms PPA’s concerns about the precedential impact of the Transmission Line MOA. In fact, Stacey Roth, a Senior Counselor for the Pinelands Commission, has stated that “precedent [for the proposed MOA] has been set with the MOA with BPU for the Conectiv power lines.”⁵² One or more decisions contrary to the CMP do not automatically amend the CMP, and entering into the proposed MOA would only strengthen this legally erroneous precedent.

In addition, this precedent may have a “snowball” effect. If approved, the Pipeline project will increase the pressure to develop within the Pinelands Forest Area. As a result, more developers will be seeking to take advantage of MOA process, pointing to the Pipeline MOA itself as precedent. Thus, the MOA may lead to additional development, and also create the precedent for (improperly) facilitating that development. This concern is not fanciful. To the contrary, the proposed MOA itself acknowledges this possibility and would even require SJG to pay \$8,000,000 to embark on the project to ensure, in part, that the Commission can remedy the potential of “additional pipelines cutting through the protected Forest Areas” by permanently preserving more land.⁵³

B. The Transmission Line MOA Does Not Provide a Precedent for the Proposed MOA.

In addition to being inconsistent with the terms of the CMP itself, the Transmission Line MOA and the circumstances from which it arose differ from the currently-proposed Pipeline MOA in a number of key ways. In fact, the Commission explicitly stated in its report on the Transmission Line MOA that each of the factors associated with the project made it unique, and that “all of these factors taken together make the proposed project *sui generis* (one of a kind).”⁵⁴

One glaring difference between the Transmission Line MOA and the proposed Pipeline MOA is the nature of the land affected. The Transmission Line MOA, involving minor widening

⁵¹ Pinelands Commission, Report on a Proposed Memorandum of Agreement (Aug. 6, 2004), at 2, *available at* <http://www.state.nj.us/pinelands/infor/moa/>.

⁵² Pinelands Commission, CMP Policy & Implementation Committee Meeting, Meeting Minutes (June 28, 2013), at 3, *available at* http://www.state.nj.us/pinelands/about/mtng/0628p&i_minutes.pdf.

⁵³ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 14.

⁵⁴ Pinelands Commission, Report on a Proposed Memorandum of Agreement, at 3.

of the highly-altered Garden State Parkway right-of-way along the outer edges of the Pinelands, did not risk forest fragmentation and did not disturb the Pinelands ecosystem.⁵⁵ The Commission recognized that development along the Garden State Parkway, at the perimeter of the Pinelands, did not pose the same threat to the forest ecosystem of the Pinelands as other development would. The Commission ultimately repaired the legal infirmity of using an MOA for the Transmission Line and future utility development in the Garden State Parkway right-of-way when, through the proper procedure for amending the CMP, it amended the CMP in 2005 allowing for further development of public infrastructure along the Garden State Parkway corridor.⁵⁶

By contrast, the proposed Pipeline project, involving excavation and construction along NJ Route 49, a small, two-lane road with minimal cleared land on either side traversing otherwise contiguous forest in the heart of the Pinelands, would significantly increase traffic and activity in close proximity to wilderness, and increase forest fragmentation. The ecological consequences of development within the heartland of the Pinelands would be far greater than development along the already-developed periphery, and the Commission's actions in creating the Garden State Parkway overlay district action preclude the Commission from using the Transmission Line MOA as precedent for the SJG Pipeline.

Another major difference is that the Pipeline need not traverse the Pinelands Forest Area. The Transmission Line MOA proposal noted that the BPU "recognized [the] project as a necessary and integral element of the transmission system upgrade required for continued electric transmission capacity throughout the region,"⁵⁷ and found that "continued reliable power delivery to the New Jersey Shore region could not be guaranteed" unless the project went forward.⁵⁸ In this case, while the MOA establishes the need to improve the reliability of natural gas service in the areas of New Jersey that would benefit from the Pipeline,⁵⁹ it does not establish the necessity of building the Pipeline *in protected areas of the Pinelands*.

⁵⁵ See *id.* at 2 ("although a portion of the proposed line will traverse approximately 17.5 miles of the Pinelands Preservation Area District and Forest Area, the project minimizes significant land use and ecological impacts, to the maximum extent possible, by utilizing existing electric transmission line rights-of-way and the right-of-way of the Garden State Parkway.")

⁵⁶ See New Jersey Pinelands Commission, Annual Report (2005), at 4, available at <http://www.state.nj.us/pinelands/images/pdf%20files/2005%20annual%20report.pdf>; see N.J.A.C. 7:50-5.12(b), 5.13(i) & 5.35.

⁵⁷ Pinelands Commission, Report on a Proposed Memorandum of Agreement (Aug. 6, 2004), at 2, available at <http://www.state.nj.us/pinelands/infor/moa/>.

⁵⁸ *Id.*

⁵⁹ Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 10.

Notably, reports submitted on behalf of SJG have acknowledged that other routes exist for the proposed Pipeline which do not traverse the Pinelands,⁶⁰ and even the MOA concedes that the overwhelming majority of customers to be served by the Pipeline reside outside of the Pinelands.⁶¹ Particularly given the acknowledged possibility of constructing a pipeline that does not traverse the Pinelands, or transmitting electricity from another power plant, the stated need for a Pipeline running through protected areas of the Pinelands is simply less urgent than the need for a transmission line along the outskirts in 2004.

III. The Commission Has Not Followed Its Own Procedures in Considering the MOA.

In assessing the proposed MOA, the Commission has not followed the procedures for considering whether to enter into an MOA it published in 2008.⁶² The outline included twelve specific steps, at least three of which have not been followed here: (1) the Executive Director of the Commission has not provided “a preliminary opinion as to whether [the Pipeline project] appears to be consistent with the types of other activities authorized by the Commission through intergovernmental agreements”⁶³; (2) the Public and Government Programs Committee has not “determine[d] whether the Commission should considering entering into an intergovernmental agreement for the project”⁶⁴; and (3) the Executive Director of the Commission has not “consult[ed] with the Public and Government Programs Committee as the agreement is being prepared and . . . fully brief[ed] the Committee as to the specific contents of the draft agreement before scheduling a public hearing on the proposal.”⁶⁵ Far from mere formalities, these are key steps in ensuring that the interested public is afforded the opportunity “to witness in full detail all phases of the deliberation, policy formulation, and decision making” of the Commission, as required by the New Jersey Open Public Meetings Act,⁶⁶ to which all meetings of the Commission are subject.⁶⁷

⁶⁰ See generally Woodard & Curran, South Jersey Gas-BL England Route Analysis Report (2012); Woodard & Curran, Alternatives Analysis Addendum to the June 18, 2012 South Jersey Gas-BL England Gas Route Analysis Report (2013)

⁶¹ See Pinelands Commission, Proposed Memorandum of Agreement between the New Jersey Pinelands Commission and the New Jersey Board of Public Utilities (Nov. 2013), at 10-11. (noting that only 3,300 of SJG’s “61,000 natural gas customers (meters) in Cape May County . . . are located in the Pinelands,” and that only 28,700 of the “142,000 customers located east and south of Union Road Station . . . are located in the Pinelands Area”).

⁶² See New Jersey Pinelands Commission, The Process for Considering an Intergovernmental Agreement (Jun. 23, 2008), at 1, available at [http://www.state.nj.us/pinelands/images/pdf%20files/Intergovernmental%20Agreement%20Process%20\(June%2023,%202008\).pdf](http://www.state.nj.us/pinelands/images/pdf%20files/Intergovernmental%20Agreement%20Process%20(June%2023,%202008).pdf).

⁶³ *Id.* at 1.

⁶⁴ *Id.* at 2.

⁶⁵ *Id.* at 3.

⁶⁶ N.J.S.A. 10:4-7.

⁶⁷ N.J.A.C. 7:50-1.12(a).

IV. Conclusion.

For the reasons set forth above, the proposed MOA would be inconsistent with the text and purposes of the Pinelands Comprehensive Management Plan, and must be rejected by the Commission.