
Docket No. 18-1188

In the United States Court of Appeals
for the District of Columbia Circuit

OTSEGO 2000, INC. and JOHN AND MARY VALENTINE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF ORDERS ISSUED BY
FEDERAL ENERGY REGULATORY COMMISSION

**PETITION FOR PANEL REHEARING
OR, ALTERNATIVELY, REHEARING *EN BANC***

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PRELIMINARY STATEMENT

Otsego 2000, a 501(c)(3) public charity organization located in Cooperstown, New York, is dedicated to the protection of the environmental, agricultural, and historic and cultural resources of the Otsego Lake region. It has been engaged in this work in this region for nearly forty years. As part of its mission, Otsego 2000 works to educate the public about threats to air, water, and soil quality, including, but not limited to, the risks of fossil fuel extraction and consumption, and its effects on climate change, public health, and agricultural lands in the region.

Based on the known adverse impacts on air quality and public health of natural gas compressor stations, Otsego 2000 has worked, and continues to work, to inform the public about proposed projects and their risks to the local environment, oppose new compressor stations and other gas infrastructure expansion in the region, and advocate for mitigation of adverse impacts of fossil fuel use.

As a result of FERC's approval of the Dominion New Market Project (hereafter the "Project") and its refusal to consider the impact of emissions from the Project on climate and health, Otsego 2000 has been forced to spend organizational resources to install air quality monitors for monitoring emissions and health impacts of nearby residents, as well as continue to educate the public

about these risks. This small organization has been forced to incur significant additional costs that divert resources from other critical tasks as a result of FERC's inaction. Further, its costs will only rise since FERC's announced precedent will govern future cases.

PROCEDURAL HISTORY

Otsego 2000 intervened before FERC in opposition to the proposed New Market Project on October 24, 2014. (Schue Decl. Par. 5). Thereafter Otsego 2000 worked to prepare scoping comments and to inform and educate residents and political leaders in adjoining communities of the risks the project posed and to encourage them to adopt resolutions and take action to oppose the Project. (Id. Par. 6). Otsego 2000 also hired consultants to study emissions and dispersion data and to document their findings. (Id. Par.7-8.)

Further, Otsego 2000 dedicated significant resources to educate the community, Town Boards, and Planning Boards of the risks the Project presents. (Id. Par. 10). Informing the public was, and remains, a critical component of Otsego 2000's work, which has been and will be impacted as a result of FERC's refusal to analyze upstream and downstream Greenhouse Gas ("GHG") emissions from the Project.

Early in 2015, Otsego 2000 started collecting air quality and public health data to document current conditions and assess future impacts should the Project

be allowed to proceed. (Id. Par. 13.) This included direct outreach to Amish and Mennonite residents in the region who lived without electricity and access to information yet were uniquely threatened by the proximity to the Project site. (Id.)

On April 28, 2016, FERC issued an order authorizing Dominion's New Market Project to proceed, including (1) the construction and operation of two new compressor stations; (2) upgrading of and modifications to three existing compressor stations and (3) upgrading of and modifications to one meter and regulating station. FERC found the benefits of the Project outweighed any adverse effects on landowners and surrounding communities. It did so without analyzing or even developing data regarding GHG emissions upstream or downstream of the Project. This directly and severely impacted Otsego 2000's educational mission, including Otsego 2000's own right to know and its mission to inform others of the projected harm the Project will cause to help residents and their communities prepare for this risk.

Otsego 2000 sought rehearing of the FERC Order. In its May 31 Petition for Rehearing, Otsego 2000 specifically claimed, as relevant here, that the Commission erred by not evaluating the upstream and downstream impacts of the New Market Project. *Dominion*, 163 FERC ¶61, 128 (2018), P. 2. Consideration of the Petition for Rehearing was stayed and ultimately denied on May 22, 2018, after the Project was already completed, over the vigorous objections of

Commissioners Lafleur and Glick. FERC steadfastly refused to collect data and analyze the anticipated levels of GHG emissions that the Project will cause, damaging Otsego 2000's mission to educate the public about these impacts.

In its appeal to this Court, after fully participating in the agency's administrative process and raising each of the arguments it advocated in this Court, Otsego 2000 argued that FERC violated the Natural Gas Act ("NGA") and the National Environmental Policy Act ("NEPA") when it failed to evaluate or require the applicant to evaluate the impacts of upstream and downstream GHG emissions of the Project.

In their responsive briefs, neither FERC nor any of the industry intervenors challenged Otsego 2000's standing to perfect this appeal. About ten days before oral argument, the assigned panel issued an order noting that it would consider the standing issue at oral argument. The panel did not invite additional or supplemental briefing on the standing issue. After oral argument, on May 9, 2019, without any opportunity for further briefing, the panel dismissed Otsego 2000's appeal for lack of organizational standing. This petition for rehearing follows.

STATEMENT OF FACTS

Otsego 2000 is a small non-profit organization located in Cooperstown, New York. Its mission is to protect the historic, agricultural and environmental assets of the region. Otsego 2000 is not a membership organization, though it has a Board

of Directors, officers and staff actively engaged in education and advocacy on environmental and historic preservation issues, including opposition to projects that will adversely affect the health and economy of the Otsego Lake region.

Factual support to establish organizational standing was provided in four Declarations submitted on behalf of Otsego 2000 by its Executive Director, President of its Board of Directors, one of its Board members, and a technical advisor. These Declarations establish the substantial commitment of time and resources which Otsego 2000 dedicated to this matter, including at least 44 written comments prepared for submission to FERC and related parties over the course of six years of work in opposition to the Project. FERC's refusal to properly consider the impacts of the New Market Project and its decision to grant a Certificate for the Project to proceed has directly damaged Otsego 2000's interests in protecting the community and required Otsego 2000 to expend substantial resources assessing these impacts and educating the public about the risks the Project poses. This work, particularly air and health monitoring, must now continue indefinitely as a result of FERC's failure to consider upstream or downstream GHG emissions.

Ellen Pope's Affidavit explains that Otsego 2000 was required to undertake research to develop "mitigation measures to reduce adverse environmental and health impacts, including proposed mitigation of harmful air emissions" JA-268. As part of these efforts, Otsego 2000 expended thousands of dollars to install

air monitors to document air quality at homes near the facility. JA-269. These activities were, and will continue to be, necessary because FERC refused to analyze the upstream and downstream GHG emissions of the New Market Project. JA- 270.

Nicole Dillingham, Esq., the long-time President of Otsego 2000's Board of Directors, further attested that the failure to study upstream and downstream air quality impacts caused by the Project impeded fulfillment of other critical organizational purposes as it created a risk of harm to vulnerable populations, including children attending schools in the immediate area. JA-273.

Faced with FERC's refusal to consider downstream and upstream GHG emissions, Otsego 2000 was required "to document baseline conditions at the site for air quality . . . purchased equipment to conduct air monitoring, installed air monitors and undertook to develop health histories of the families in the study program." JA-274. In short, Otsego 2000 sought to develop baseline conditions and changes therefrom. Id. Ms. Dillingham explained that a favorable ruling on this appeal would cause FERC to undertake an evaluation of the full scope of upstream and downstream climate and public health impacts, essentially superseding and making redundant the effort Otsego 2000 has engaged in absent FERC's analysis. JA. 276.

On behalf of the organization, Keith Schue, an electrical engineer and technical advisor to Otsego 2000, explained how he was required to study impacts associated with the New Market Project. JA-280. His work not only involved scientific analysis – which FERC and the applicant were *not* doing – but also public education regarding the potential impacts of the proposed project. JA-282. Mr. Schue explained that FERC’s failure to conduct the necessary studies of emissions, including GHG impacts, required Otsego 2000 to expend substantial resources to study the adverse environmental effects of the Project. JA-288.

Dr. Julie Huntsman, a local veterinarian and member of the Otsego 2000 Board, also has worked with Otsego 2000 conducting studies of local air quality in and around eight local sites. JA-294-95. Her work was part of the organization’s effort to “try to reduce the impacts of the compressor station.” JA-296-297.

All of these efforts negatively impacted the organization’s ability to pursue other work and caused it to expend its limited economic and human resources to educate both FERC and the community about its risks.

ARGUMENT

Point I

Otsego 2000 has organizational standing.

As an organization with direct and long-standing ties to the community directly affected by FERC’s alleged violation of NEPA, Otsego 2000 can and has

established standing on its own on behalf, known as organizational standing. *PETA v. U.S. Dep.t of Agriculture*, 797 F. 3d 1087, 1093 (D.C. Cir. 2015). Pursuant to Article III of the Constitution, organizational standing requires an entity, like an individual, to show actual or threatened injury in fact that is traceable to the alleged illegal action, and likely to be redressed by a favorable court decision. *Id.* (citing, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (in an organizational standing case, courts “conduct the same inquiry as in the case of an individual: Has the plaintiff alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction?”)).

“The ‘irreducible constitutional minimum of standing contains three elements: (1) the plaintiff must have suffered injury in fact, an actual or imminent invasion of a legally protected, concrete and particularized interest; (2) there must be a causal connection between the alleged injury and defendant’s conduct at issue; and (3) it must be ‘likely’ not ‘speculative’ that the Court can redress the injury.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Humane Soc’y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C.Cir. 1990), *cert. denied*, 498 U.S. 980 (1990).

Otsego 2000 has met these standards, establishing organizational standing. Through its Declarations it has shown that the challenged order impedes its organizational purpose and has caused the organization “to suffer cognizable

injuries that will continue without the court's intervention." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015); *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006). And, it has shown that its injury can and should be redressed through judicial intervention.

Indisputably, Otsego 2000 was founded to protect the environment in and around Cooperstown, New York. Air quality, as well as the downstream and upstream impacts of the New Market Project, implicates serious GHG emissions and environmental concerns. In the absence of FERC requiring a comprehensive study of the direct/indirect impacts of the New Market Project, including GHG emissions, Otsego 2000 was forced to expend substantial organizational resources to estimate the projected amount of such emissions to educate the public about risks to health, agriculture and the climate. Put another way, Otsego 2000 was damaged by being forced to make projections without adequate data because FERC refused to comply with applicable law and analyze these impacts. By and through its appeal, Otsego 2000 claims this failure by FERC was a violation of NEPA and the Administrative Procedure Act ("APA") and must be corrected by judicial review.

The re-direction of organizational resources to conduct the kinds of review and study FERC has failed to conduct has clearly damaged Otsego 2000 and the region in which it works. It impeded the organization's purpose and should

support standing, much like the fight against discriminatory housing practices predicated standing in *Havens, supra* (upholding standing of organization dedicated to promoting equal access to housing to challenge defendants' practice of steering prospective homeowners because defendants' practice perceptibly impaired the organization's ability to counsel and provide referral services for low and moderate income home seekers). Indeed, actual expenditure for operational costs beyond those expended normally for the organization's advocacy mission properly predicates standing. *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995); *Cf. Food & Water Watch, supra* (Affidavit from Assistant Director of organization projected potential expenditures to resist poultry regulations, but did not show injury in fact had already occurred).

As in *Havens*, here Otsego 2000's active mission of protecting the local environment was directly impeded by FERC's failure to require comprehensive environmental review of the New Market project, including GHG emissions. As a result, Otsego 2000 was required to expend and re-direct its resources to engage in air monitoring and related activities intended to create a baseline to measure impacts of the New Market Project, seek appropriate mitigation and educate the community about the risks they were facing.

These activities were not “pure issue” advocacy expenditures which are concededly not a predicate for organizational standing. *See Sierra Club v. Morton*, 405 U.S. 727 (1972). Nor were these expenditures “self-inflicted” or the consequence of the organization’s own budgetary choices. *Fair Emp’t Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994).¹

Rather, the expenditures incurred by Otsego 2000 were necessary to protect the environment and health of the community due to FERC’s failure to conduct the comprehensive review NEPA requires. These resources were not directed to litigation or legal counseling, but intended to directly monitor air quality and develop a baseline measure of local public health conditions. *Cf. National Taxpayers Union*, 68 F.3d at 1434.

This Court has upheld standing in precisely such instances: where organizations divert resources in response to defendants’ alleged discrimination, standing is appropriate. *See Equal Rights Center v. Post Props.*, 633 F.3d 1136, 1141 (D.C. Cir. 2011) (“In both *BMC* and *Spann*, the plaintiff organizations chose to redirect their resources to counteract the effects of the defendants’ allegedly

¹ Expenditure of funds on a lawsuit also does not constitute injury in fact sufficient to confer standing. *Spann*, 899 F.2d at 27. Likewise, “a mere setback” to the organization’s social interests is insufficient to confer standing. *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987). Finally, frustration of an organization’s objective is insufficient to premise standing. *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

unlawful acts; they could have chosen instead not to respond. In neither case did our standing analysis depend on the voluntariness or involuntariness of the plaintiff's expenditures. Instead, we focused on whether they undertook the expenditures in response to, and to counteract the effects of the defendants' alleged discrimination, rather than in anticipation or litigation.”).

Precisely the same conclusion obtains here. The evidence shows that Otsego 2000 was required to engage in air monitoring, public health data collection, and additional educational activities based on unsupported data because FERC refused to do its job. Otsego 2000 was damaged by being forced to divert its own resources to conduct the sort of study FERC refused to undertake. Such expenditure of money and resources constitutes an injury-in-fact sufficient to predicate standing. *See PETA*, 797 F.3d at 1097 (“PETA redirected its resources in response to USDA’s allegedly unlawful failure to provide the means by which PETA would otherwise advance its mission . . .”).

Respectfully, the panel’s conclusion “Otsego’s affidavits do not identify any injury other than the organization’s expenditure of time and money related to this litigation” is erroneous and overlooks the factual assertions set forth in Otsego 2000’s Affidavits, which, as discussed above, demonstrate that its expenditures of money and resources were not related solely to this litigation, but rather in

conducting the research and analyses that FERC should have required to be conducted during the approval process.

Further, the panel's reliance on *Food & Water Watch* to support its conclusion is misplaced because that case did not arise under NEPA and concerned only the risk of *future* injury to the organization. By contrast, here, as demonstrated above, Otsego 2000 submitted extensive evidence demonstrating actual injury already sustained resulting from FERC's refusal to conduct required review under NEPA.

CONCLUSION

Otsego 2000 has shown that it suffered a legally cognizable injury to its organizational interests due to the alleged illegal conduct of FERC in violation of the NGA, NEPA and the APA. Otsego 2000 must be allowed to seek redress for the agency's failure to ensure proper review of the effects of the New Market Project, specifically the upstream and downstream impacts and effects on air quality, as required by these statutes and applicable case law. *See, e.g., Sierra Club v. Fed. Energy Regulatory Comm'n.*, 867 F.3d 1357, 1372 (D.C. Cir. 2017).

On re-hearing, the panel or this Court *en banc* should vacate the May 9, 2019 decision, find that Otsego 2000 has organizational standing, and reach the merits of the important issues presented by Otsego 2000's appeal.

Dated: Goshen, New York
June 21, 2019

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1188

September Term, 2018

FILED ON: MAY 9, 2019

OTSEGO 2000, ET AL.,

PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

DOMINION ENERGY TRANSMISSION, INC.,
INTERVENOR

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: GARLAND, *Chief Judge*, and TATEL and WILKINS, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the Federal Energy Regulatory Commission (“FERC”) and on the briefs of the parties and oral arguments of counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be **DISMISSED** for lack of jurisdiction.

Petitioner Otsego 2000, Inc. (“Otsego”)¹ asks this Court to set aside a FERC order granting a certificate to Intervenor Dominion Transmission Inc. (“Dominion”) to construct and operate compression facilities for its New Market Project (“Project”), which will provide 112,000 dekatherms per day of additional firm transportation service on Dominion’s existing natural gas pipeline network. Otsego contends that, under NEPA, the Commission was required to include an

¹ In addition to Otsego, the Petition for Review included John and Mary Valentine as petitioners. However, as FERC correctly noted, John and Mary Valentine are jurisdictionally-barred from seeking review of the underlying orders because the only timely request for rehearing of the Certificate Order was filed by Otsego. *See* 15 U.S.C. § 717r(a) (“No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.”). Indeed, at oral argument, Otsego conceded that the Valentines are not properly before this Court as petitioners. *See* Oral Arg. Recording at 10:50-10:54.

evaluation of upstream and downstream greenhouse gas emissions in its environmental review of the Project. Petitioners further claim that FERC improperly announced a new policy without notice and an opportunity for public comment when, in its Order Denying Rehearing, the Commission announced it would no longer go beyond the requirements of NEPA and provide information regarding the environmental effects of upstream natural gas production and downstream combustion where it determines such impacts do not qualify as direct or indirect effects of a given project.

We do not reach the merits of Petitioner's challenge because it failed to demonstrate Article III standing to petition this Court. Otsego acknowledged at oral argument that it is not a membership organization, *see* Oral Arg. Recording at 1:12, and it does not suggest that it has associational standing. Its standing in this matter therefore turns on whether it has organizational standing. We find that it does not. Otsego's affidavits do not identify any injury other than the organization's expenditure of time and money related to this litigation. "Our precedent makes clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015).

Although Otsego suggested at oral argument that it has suffered an "information[a] injury," *see* Oral. Arg. Recording at 8:26-9:32, Otsego does not allege informational injury in its standing affidavits or briefs, and therefore that theory of injury is not properly before this court, *see Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002) ("Requiring the petitioner to establish its standing at the outset of its case is the most fair and orderly process by which to determine whether the petitioner has standing to invoke the jurisdiction of the court.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk