

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The  
**United States Court of Appeals**  
For The District of Columbia Circuit

**THE TOWN OF WEYMOUTH, MASSACHUSETTS; FORE RIVER  
RESIDENTS AGAINST THE COMPRESSOR STATION; FOOD &  
WATER WATCH; CITY OF QUINCY, MASSACHUSETTS;  
REBECCA HAUGH; SANDRA PETERS; EASTERN CONNECTICUT  
GREEN ACTION; KEEP YORKTOWN SAFE; WEST ROXBURY  
SAVES ENERGY; BERKSHIRE ENVIRONMENTAL ACTION  
TEAM; DRAGONFLY CLIMATE COLLECTIVE; GRASSROOTS  
ENVIRONMENTAL EDUCATION; SAFE ENERGY RIGHTS  
GROUP; 350MASS SOUTH SHORE NODE; TOXIC ACTION  
CENTER; STOP THE ALGONQUIN PIPELINE EXPANSION,**

*Petitioners,*

v.

**FEDERAL ENERGY REGULATORY COMMISSION,**

*Respondent.*

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**LORI HAYDEN; MICHAEL H. HAYDEN, ESQUIRE;  
ALGONQUIN GAS TRANSMISSION, LLC;  
MARITIMES & NORTHEAST PIPELINE, L.L.C.,**

*Intervenors for Respondent.*

**ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**JOINT BRIEF OF PETITIONERS  
TOWN OF WEYMOUTH AND FRRACS, ET AL.**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the Petitioners submit the following:

### **A. Parties:**

These consolidated cases are a direct appeal. Accordingly, D.C. Circuit Rule 28(a)(1)(A), requiring a list of all parties, intervenors, and *amici* who have appeared before the district court, is not applicable. The parties, *amici*, and entities moving to intervene and to participate as *amici* in this Court are listed below:

#### Petitioners

The Petitioner in cases 17-1135, 17-1176, 17-1220 is the Town of Weymouth.

The Petitioners in case 17-1139 are Fore River Residents Against the Compressor Station (FRRACS), Food & Water Watch, the City of Quincy, Massachusetts, Rebecca Haugh, Sandra Peters, Eastern Connecticut Green Action, Keep Yorktown Safe, West Roxbury Save Energy, Berkshire Environmental Action Team, Dragonfly Climate Collective, Grassroots Environmental Education, Safe Energy Rights Group (SEnRG), 350Mass South Shore Node, Toxic Action Center, and Stop the Algonquin Pipeline Expansion (SAPE).

#### Respondent

The Respondent in all cases is the Federal Energy Regulatory Commission.

Intervenors

Lori Hayden and Michael Hayden intervened in support of the Petitioner in case 17-1135.

Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline L.L.C., intervened in support of the Respondent in all cases.

Amici

The Petitioners are not aware of any *amici* in this matter.

**B. Rulings Under Review:**Case No. 17-1137:

- *Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline L.L.C.*, Order Issuing Certificate and Authorizing Abandonment, FERC Docket No. CP16-9-000, 158 FERC ¶61,061 (January 25, 2017), R. 1235, JA\_\_\_ (“Certificate Order”).

Case No. 17-1139:

- Certificate Order;
- *Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline L.L.C.*, Order Granting Rehearings for Further Consideration, FERC Docket No. CP16-9-001 (March 27, 2017), R. 1257, JA\_\_\_ (“March 2017 Tolling Order”);

- *Algonquin Gas Transmission, LLC et. al.*, Letter Order Granting Authorization to Proceed with Construction of Connecticut Facilities # 2 by Chief of Gas Branch 2, Office of Energy Projects, FERC Docket No. CP16-9-000 (April 13, 2017), R. 1264, JA\_\_\_\_; and
- *Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline L.L.C.*, Order Granting Rehearings for Further Consideration, FERC Docket No. CP16-9-003 (May 8, 2017), R. 1276, JA\_\_\_\_\_.

Case No. 17-1176:

- March 2017 Tolling Order.

Case No. 17-1220:

- *Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline L.L.C.*, Order on Rehearing, 160 FERC ¶61,016 (Aug. 21, 2017), R. 1323, JA\_\_\_\_\_.

**C. Related Cases:**

The consolidated cases on review have not previously been before this Court or any other court, as defined in D.C. Circuit Rule 28(a)(1)(c).

In addition to these consolidated cases, there are three related consolidated cases in the D.C. Circuit Court that present substantially the same issues:

Consolidated Case Nos. 16-1081, 16-1098 and 16-1103, *City of Boston, et al. v.*

*Federal Energy Regulatory Commission*, address the issue of whether the Atlantic

Bridge Project has been impermissibly segmented from the Access Northeast Project and the Algonquin Incremental Market Project by the Federal Energy Regulatory Commission in violation of the *National Environmental Policy Act*, 42 U.S.C. §4321. Oral argument was held on October 19, 2017, and the case is pending decision.

The Court has also ordered that *Allegheny Defense Project v. FERC*, Case No. 17-1098, be set for oral argument on the same day and before the same panel as the consolidated cases addressed herein.

/s/ Carolyn Elefant  
Carolyn Elefant

/s/ J. Raymond Miyares  
J. Raymond Miyares

January 30, 2018

## **RULE 26.1 CORPORATE DISCLOSURE STATEMENTS**

Fore River Residents Against Compressor Station (FRRACS) is an unincorporated association of citizens in Weymouth, Massachusetts whose members are directly impacted by the Commission's action. FRRACS has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in FRRACS.

Food and Water Watch is a 501(c)(3) non-profit with a mission to protect the environment. Food and Water Watch has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Food and Water Watch.

Eastern Connecticut Green Action is an unincorporated association in Connecticut, with several members directly impacted by the additions and replacements that will take place at the Chaplin Compressor Station site approved as part of the Atlantic Bridge Project. Eastern Connecticut Green Action has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Eastern Connecticut Green Action.

Keep Yorktown Safe is an unincorporated association in Yorktown, New York formed to oppose the Atlantic Bridge Project. Keep Yorktown Safe has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Keep Yorktown Safe.

West Roxbury Saves Energy is an unincorporated association in West Roxbury, Massachusetts which opposes infrastructure development. West Roxbury Saves Energy has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in West Roxbury Saves Energy.

Berkshire Environmental Action Team (BEAT) is a 501(c)(3) non-profit in Pittsfield, Massachusetts that works with community members to protect the environment from projects like Atlantic Bridge which will release more greenhouse gas into the environment. BEAT has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in BEAT.

Dragonfly Climate Collective (previously Capitalism v. the Climate) is an unincorporated association in Hartford, Connecticut. Dragonfly has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Dragonfly.

Safe Energy Rights Group (SEnRG) is a New York non-profit corporation dedicated to protecting the Northeast from unsafe energy structures and with members directly impacted by the project. SEnRG has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in SEnRG.

350 Mass South Shore is a 501(c)(3) non-profit in Boston, Massachusetts working to stop climate change, and with members who travel daily within the vicinity of the proposed Atlantic Bridge Compressor Station, and whose safety will be jeopardized by the project. 350 Mass South Shore has no parent companies, and there 350 Mass South Shore.

Grassroots Environmental Education is a 501(c)(3) nonprofit located in Port Washington and Rye, New York with a mission to educate the public about links between environmental exposures and human health.

Toxics Action Center is a 501(c)(3) non-profit with a mission to prevent pollution and which supports FRRACS. Toxic Action Center has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Toxic Action Center.

Stop the Algonquin Pipeline Expansion (SAPE) is an unincorporated organization in Peekskill, New York with members in close proximity to the project. SAPE opposes the project due to the safety risks that it will bring to the community. SAPE has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in SAPE.



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**GLOSSARY**

2017 Delegation Order	Agency Operations in Absence of a Quorum, 158 FERC ¶61,135 (2017)
Algonquin	Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C.
Applicants	Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C.
Atlantic Bridge Project	The Atlantic Bridge Project, as described in the Applicants' Abbreviated Application for Certificates of Public Convenience and Necessity and for Related Authorizations, under CP16-9-000 (October 22, 2017)
Calpine	Calpine Fore River Energy Center LLC
CEQ	Council on Environmental Quality
Certificate Order	Order Issuing Certificate and Authorizing Abandonment, 158 FERC ¶61,061.
Coalition	FRRACS, <i>et. al.</i>
Commission	Federal Energy Regulatory Commission
Commission's Best Practices	Office of Energy Projects, <i>Suggested Best Practices for Industry Outreach Programs to Stakeholders</i> (July 2015)
Consistency Determination	A determination by the OCZM pursuant to 16 U.S.C. §1456(c)(3)(A) that a project conforms to that state's coastal zone management plan.

CWA	<i>Clean Water Act</i>
CZMA	<i>Coastal Zone Management Act</i>
dBA	A-weighted decibels
dth	Dekatherms
EA	Environmental Assessment
EIA	Energy Information Administration
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FONSI	Finding of No Significant Impacts
FRRACS	Fore River Residents Against the Compressor Station
FRRACS Rehearing Request	Request for Rehearing of FRRACS, Food & Water Watch, R. Haugh, City of Quincy and Eleven Other Community Groups (Feb. 24, 2017)
GHG	Greenhouse Gas
GWSA	<i>Massachusetts Global Warming Solutions Act</i>
H&K Report No. 3316	Appendix 9G of Resource Report 9 in the Abbreviated Application
L90	Lowest Ambient Nighttime Level
L <sub>dn</sub>	Ambient day-night level



LNG	Liquid Natural Gas
March 2017 Tolling Order	Order Granting Rehearings for Further Consideration (Mar. 27, 2017)
MassDEP	Massachusetts Department of Environmental Protection
May 2017 Tolling Order	Order Granting Rehearing for Further Consideration (May 24, 2017)
MCP	Massachusetts Contingency Plan
MWRA	Massachusetts Water Resources Authority
NEPA	<i>National Environmental Policy Act</i>
NGA	<i>National Gas Act</i>
NSA	Noise Sensitive Areas
OCZM	Massachusetts Office of Coastal Zone Management
Petitioners	The Town of Weymouth and the Coalition
PHMSA	Pipeline and Hazardous Materials Safety Administration
Project	The Atlantic Bridge Project
Rehearing Order	Order on Rehearing, 161 FERC ¶61,255 (Dec. 13, 2017)
Rehearing Requests	Weymouth Rehearing Request and FRRACS Rehearing Request

Site	6 and 50 Bridge Street, the proposed location for the compressor station
Spectra	Spectra Energy Corporation
Weymouth	The Town of Weymouth, Massachusetts
Weymouth EA Comments	Town of Weymouth's Comments on the Environmental Assessment for the Atlantic Bridge Project (Jun. 1, 2016)
Weymouth Notice of Intent Comments	Comments of the Town of Weymouth on the Notice of Intent to Prepare a EA (Dec. 21, 2015)
Weymouth Rehearing Request	Request of the Town of Weymouth for Rehearing and Rescission of January 25, 2017 Order

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

Nos. 17-1135, 17-1139, 17-1176, 17-1220

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TOWN OF WEYMOUTH, ET AL.,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF OF PETITIONERS  
TOWN OF WEYMOUTH AND FRRACS, ET. AL.**

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**JURISDICTIONAL STATEMENT**

**I. THE PETITIONERS SATISFY THE JURISDICTIONAL  
REQUIREMENTS FOR BRINGING THIS PETITION.**

The *Natural Gas Act*, 15 U.S.C. §§717, *et. seq.* (NGA), requires a Certificate of Public Convenience and Necessity (“certificate”) from the Federal Energy Regulatory Commission (FERC or the “Commission”) for the construction of facilities for the transportation of natural gas. 15 U.S.C. §717f(c)(1)(A). Any person who has intervened in a Commission proceeding may seek rehearing of the Commission order within 30 days of the order’s issuance. 15 U.S.C. §717r(a). This Court has jurisdiction to review Commission orders issuing certificates, but limits

review to objections “urged before [FERC] in [an] application for rehearing” and denied in an order on the rehearing request. 15 U.S.C. §717r(b). If the Commission fails to act on the rehearing requests within 30 days, the rehearing requests are deemed denied by operation of law, and the Commission order is final for purposes of judicial review. 15 U.S.C. §717r(a). Judicial review must be sought within 60 days of the Commission’s denial. *Id.* §717r(b).

The Fore River Residents Against the Compressor Station, the City of Quincy and the other community and environmental petitioners (the “Coalition”) and the Town of Weymouth (collectively, the “Petitioners”) satisfy the jurisdictional requirements of the NGA. The Petitioners, all intervenors before the Commission proceeding,<sup>1</sup> urged the issues raised here in their various rehearing requests submitted within 30 days of the January 25, 2017 order granting the certificate under review (Order Issuing Certificate and Authorizing Abandonment, 158 FERC ¶61,061 (Jan. 25, 2017), R. 1235, JA\_\_\_\_ (the “Certificate Order”)).<sup>2</sup> Because of a loss of quorum on February 3, 2017, the Commission could not act on the rehearing requests within 30 days, and therefore the requests were denied by

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<sup>1</sup> Order Issuing Certificate and Authorizing Abandonment, 158 FERC ¶61,061 (Jan. 25, 2017), Appendix A (listing intervenors), R. 1235, JA\_\_\_\_.

<sup>2</sup> Request of the Town of Weymouth for Rehearing and Rescission of January 25, 2017 Order (Feb. 24, 2017), R. 1242, JA\_\_\_\_ (“Weymouth Rehearing Request”); Request for Rehearing of FRRACS, Food & Water Watch, R. Haugh, City of Quincy and Eleven Other Community Groups (Feb. 24, 2017), R. 1246, JA\_\_\_\_ (“FRRACS Rehearing Request”), (collectively, the “Rehearing Requests”).

operation of law on March 27, 2017. Weymouth filed a petition for judicial review on May 23, 2017, and the Coalition filed a joint petition for judicial review on May 25, 2017, both within 60 days of March 27, 2017.

On December 13, 2017, a day before the Commission was required to file the certified index to the record, the Commission issued its Order on Rehearing on the Certificate Order (“Rehearing Order”).<sup>3</sup> Because the Commission’s Certificate Order was final for review as of March 27, 2017, the Rehearing Order is not relevant to a determination of jurisdiction.<sup>4</sup>

## **II. THE COMMISSION’S ORDER IS FINAL FOR REVIEW BECAUSE THE COMMISSION LACKED BOTH A QUORUM AND THE AUTHORITY TO DELEGATE ISSUANCE OF THE TOLLING ORDER TO STAFF.**

The Commission and intervenors Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C. (the “Applicants” or “Algonquin”) argue that the Commission’s issuance of tolling orders on the Petitioners’ Rehearing Requests within 30 days of the time their petitions for review were filed rendered these petitions for judicial review premature for purposes of this Court’s jurisdiction. Both the Commission and Algonquin fail to recognize the special circumstances—specifically, the Commission’s loss of a quorum to act—that led to

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<sup>3</sup> Order on Rehearing, 161 FERC ¶61,255, R. 1388, JA\_\_\_\_ (“Rehearing Order”).

<sup>4</sup> The Petitioners, in an abundance of caution, choose to file a petition for judicial review of the newly issued rehearing order, but such filing should not be interpreted to be an abandonment of the arguments set forth herein.

the Petitioners' filing their petitions for judicial review when they did and the timeliness of those petitions.

On February 3, 2017, the Commission lost a quorum when Chairman Norman Bay departed the Commission, leaving only two out of five Commissioners remaining.<sup>5</sup> Consequently, the tolling order issued by the Commission's Secretary on March 27, 2017 (the "March 2017 Tolling Order"),<sup>6</sup> purporting to toll the time for action on the pending rehearing requests filed by Weymouth and the Coalition had no force or effect—and, as a result, the Commission's Certificate Order became final by operation of law under 15 U.S.C. §717r(b).

Whatever power the Commission itself might have to issue tolling orders and extend its time to issue a substantive decision on a request for rehearing, the Commission lacked the power to delegate that authority to the Secretary. Neither the NGA nor FERC's organizational statute, 42 U.S.C. §7171, authorizes the Commission to delegate its power to act on rehearing requests in any circumstances, let alone where a quorum does not exist. The NGA states that orders become final, "[u]nless the Commission acts" but does not permit the

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<sup>5</sup> See Agency Operations in Absence of a Quorum, 158 FERC ¶61,135, ¶2, at n. 5 (2017) ("2017 Delegation Order"), JA\_\_\_\_.

<sup>6</sup> Order Granting Rehearings for Further Consideration (Mar. 27, 2017), R. 1257, JA\_\_\_\_ (the "March 2017 Tolling Order").

Commission to appoint a proxy to act in its absence. 42 U.S.C. §7171(e), which establishes the three-member quorum requirement, authorizes the Commission Chairman to designate an Acting Chairman to sit in his absence, but that is the extent of the authorized delegation powers. More critically, had Congress wished to afford the Commission broader sub-delegation powers, it could have done so, just as it did in another section of the same Title, 42 U.S.C. §7252, which expressly empowers the Secretary of Energy to “delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive re-delegations of such functions.”

In short, whatever general delegation authority may be enjoyed by the Commission, that authority cannot survive in the extraordinary circumstance when the Commission itself is unable to act due to the loss of a quorum and there is no express statutory support. Because the Commission “cannot by delegating its authority circumvent the statutory quorum requirement” (see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (finding that authority delegated by Board to panels of the Board’s own members did not survive loss of quorum)), the March 2017 Tolling Order is a nullity, and the Commission’s Certificate Order is final for purposes of review.

In their motions to dismiss,<sup>7</sup> the Commission and Algonquin cited numerous decisions that either do not apply to, or are readily distinguishable from the circumstances presented in this case. For example, although the Court in *New Process Steel LP v. NLRB*, 560 U.S. 674, 684 n. 4 (2010), found a delegation of power valid, it expressly cautioned that the decision did not extend to delegations to non-Board members and staff—which is the precise scenario here. As for the remaining decisions,<sup>8</sup> all involved statutes that could reasonably be interpreted as authorizing a delegation of authority—whereas there is no plausible way to read 42 U.S.C. §7172 as authorizing a delegation of authority by the Commission to the Secretary.

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<sup>7</sup> The Commission’s Motion to Dismiss for Lack of Jurisdiction (Jun. 30, 2017); Motion of Moveant-Intervenors Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C. to Dismiss the Petitions for Review (Jul. 17, 2017), JA\_\_\_\_.

<sup>8</sup> See *NLRB v. Bluefield Hospital, LLC*, 821 F.3d 534, 542 (4th Cir. 2016) (“whether the Board’s interpretation that the delegation of authority to Regional Directors survives despite the absence of a Board quorum is a reasonable one to which we owe deference.”); see also *UC Health v. NLRB*, 803 F.3d 669, 674 (D.C. Cir. 2015) (finding reasonable NLRB’s position that its governing statute authorized delegation to regional directors); *SSC Mystic Operating Co, LLC v. NLRB*, 801 F.3d 302 (D.C. Cir. 2015) (affirming delegation by 2-1 vote, finding that agency retained discretion to delegate under Laurel Baye ruling, with dissent holding delegation invalid).



Moreover, the delegated authority to the Secretary, even if it were valid and even if it survived the loss of a quorum, does not extend to the issuance of tolling orders over the types of rehearing requests filed by the Petitioners. Specifically, the Commission's limited delegation was as follows:

The Secretary, or the Secretary's designee, will be authorized to toll the time for action on rehearings of Commission action under all of the Commission's statutes....This authority will apply only to stand-alone rehearing requests. In other words, if a rehearing request is combined with any other request for Commission action, such as a request to intervene in a proceeding or for a stay of a proceeding, the Commission will continue to act on the rehearing request and the other requests contained in the filing, according to current procedures.

60 Fed. Reg. 62326-1 (December 6, 1995) (emphasis added). Both Weymouth and the Coalition filed rehearing requests bundled with requests for a stay.<sup>9</sup> The Commission's express limitations therefore excluded the Petitioners' Requests for Rehearing from those that the Secretary can toll.

Because the Commission lacked both a quorum to act on the Petitioners' pending rehearing requests and the authority to delegate action to the Secretary, the March 2017 Tolling Order is a nullity, and the Commission order issuing the Certificate Order became final for judicial review by operation of law as of March

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<sup>9</sup> Weymouth Rehearing Request, R. 1242, JA\_\_\_\_; Town of Weymouth's Motion for Stay of Order under CP16-9 (Feb. 24, 2017), R. 1243, JA\_\_\_\_FRRACS Rehearing Request, R. 1246, JA\_\_\_\_.

27, 2017. Thus, this Court has jurisdiction under Section 717r(b) of the NGA to hear the petitions for review.<sup>10</sup>

### STATEMENT OF THE ISSUES

1. Whether the Commission's Rehearing Order is final for review because the Commission lacked both a quorum and the authority to delegate issuance of the tolling order to staff.
2. Whether the Commission improperly issued its Certificate Order before the Massachusetts Office of Coastal Zone Management had certified the Project's compliance with the *Coastal Zone Management Act*.
3. Whether the Commission violated the *Natural Gas Act* by approving an admittedly unsafe combustible project that does not comply with the Pipeline and Hazardous Materials Safety Administration's regulations.
4. Whether the Commission failed to satisfy its *National Environmental Policy Act* obligations by not preparing an environmental impact statement and by relying upon incomplete, inadequate, or misleading information.
5. Whether the Commission violated the *National Environmental Policy Act* and the Council on Environmental Quality's final guidance on climate change and greenhouse gas emissions by failing to consider the impacts of the Project on air quality.

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<sup>10</sup> While the Petitioners firmly believe that the Rehearing Order is null, they have addressed the Rehearing Order herein, in the case that the Court determines the order to be valid.

6. Whether the Commission acted arbitrarily and capriciously in concluding that the Project will not adversely affect environmental justice communities disproportionately.

7. Whether the Commission's grant of a certificate under Section 7 of the *Natural Gas Act* was arbitrary, capricious, unsupported by substantial evidence, and contrary to the present and future public convenience and necessity.

### **STATUTES AND REGULATIONS**

Pertinent statutes and regulations appear in the Addendum to this brief.

### **INTRODUCTION**

At stake in this case is the Commission's ill-advised decision to approve the construction and operation of certain pipeline and compression facilities in New York, Connecticut, and Massachusetts (the "Atlantic Bridge Project" or the "Project"), including the construction and operation of a new compressor station in North Weymouth, Massachusetts, which, directly abuts the City of Quincy, both of which are densely populated communities. In addition to the new 7,700 horsepower compressor station in Weymouth, the Project will add an additional 31,950 horsepower of compression at existing compressor stations located along the existing pipeline system. Both the new Weymouth Compressor station and the upgrades at existing sites will imperil the health and safety of residents in the nearby communities through increase in noise, toxic emissions, and exposure to

catastrophic harm. Worse, because the compressor station is sited near environmental justice communities, the most vulnerable residents face disproportionate Project impact.

The Project's alleged benefits - ranging from lower cost gas to potential jobs - are illusory and do not justify the potential harm, and therefore, does not satisfy the public convenience and necessity standard, which is a prerequisite for project approval under Section 7f(h) of the NGA. Nor does the Project comply with the *Coastal Zone Management Act*, 16 U.S.C. §1456(c) (CZMA), another statutory prerequisite for approval under the NGA. Furthermore, the Project's environmental impacts have not undergone full analysis under the *National Environmental Policy Act*, 42 U.S.C. §4321, *et. seq.* (NEPA). In light of these shortcomings, this court must vacate the Certificate Order.

### STATEMENT OF THE CASE

On October 22, 2015, Algonquin filed an application for construction of the Atlantic Bridge Project pursuant to Section 7(c) of the NGA and Part 157 of the Commission's regulations (18 C.F.R. pt. 157).<sup>11</sup> The Petitioners thereafter successfully moved to intervene in the proceedings.<sup>12</sup>

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<sup>11</sup> Certificate Order, 158 FERC ¶61,061, ¶1, R. 1235, JA\_\_\_\_.

<sup>12</sup> *Id.*, ¶14 and Appendix A, JA\_\_\_\_.

On May 2, 2016, the Commission issued its Environmental Assessment (EA) for the Project.<sup>13</sup> The Petitioners submitted comments on the EA, noting its failure to take a hard look at the Project's significant impacts, including the impacts from coal ash and noise.<sup>14</sup> The Petitioners further noted that the Commission had neither engaged in any substantive environmental justice analysis that considered the fact that the area was already disproportionately overburdened by numerous highly polluting facilities, nor fully considered the public safety hazard presented by siting the proposed compressor station in the densely populated community of North Weymouth, immediately adjacent to a large electric-generating station and sewage pumping station.<sup>15</sup> Petitioners' comments also flagged the Commission's failure to consider emissions from greenhouse gases and the fact that the Commission had not met its burden to ensure that a need

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<sup>13</sup> EA, at 2-8, R. 782, JA\_\_\_\_.

<sup>14</sup> Town of Weymouth's Comments on the Environmental Assessment for the Atlantic Bridge Project (Jun. 1, 2016), at 10-14 R. 1100, JA \_\_\_\_ (the "Weymouth EA Comments"); Comments by Food & Water Watch (on behalf of FRRACS and Coalition Members) (June 1, 2016), R. 1092, JA\_\_\_\_; City of Quincy, MA (May 31, 2016), R. 1002, JA\_\_\_\_; Council Woman R. Haugh (Jun. 1, 2016), R. 1071, JA\_\_\_\_.

<sup>15</sup> Weymouth EA Comments, at 9, 12-14, R. 1100, JA\_\_\_\_; City of Quincy EA Comments, R. 1002, JA\_\_\_\_, Comments of Food & Water Watch/Coalition, R. 1092, JA\_\_\_\_.

for the Project has been demonstrated.<sup>16</sup> The Petitioners noted that even the minimal and deficient analysis contained within the EA demonstrated that the Project's impacts would be significant and therefore must be disclosed in an Environmental Impact Statement (EIS).<sup>17</sup> 42 U.S.C. §4332(c).

On January 25, 2017, the Commission published its Certificate Order on the Atlantic Bridge Project, making a finding of no significant impact (FONSI) and declining to prepare an EIS.<sup>18</sup> On February 24, 2017, Petitioners requested rehearing of the Commission's Certificate Order.<sup>19</sup>

On March 27, 2017, the Secretary of the Commission purported to grant rehearing by issuing a "Tolling Order," but only to give the Commission more time to decide the merits of the Petitioners' requests.<sup>20</sup> Considering that the Commission lacked a full quorum at the time of this Tolling Order, this purported grant was null and void, and the requests for rehearing were, as a matter of law, constructively denied. See 15 U.S.C. §717r(a) ("Unless the Commission acts upon the application

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<sup>16</sup> Comments of Food & Water Watch/Coalition EA Comments, at 4, R. 1002, JA\_\_\_\_.

<sup>17</sup> Weymouth EA Comments, at 2 – 6, R. 1100, JA\_\_\_\_; Comments of Food & Water Watch/Coalition EA Comments, at 5, R. 1002, JA\_\_\_\_.

<sup>18</sup> Certificate Order, 158 FERC ¶61,061, ¶70, R. 1235, JA\_\_\_\_.

<sup>19</sup> Weymouth Rehearing Request, R. 1242, JA\_\_\_\_; FRRACS Rehearing Request, R. 1246, JA\_\_\_\_; Sandra Peters Rehearing Request, R. 1245, JA\_\_\_\_.

<sup>20</sup> March 2017 Tolling Order, R. 1257, JA\_\_\_\_.

for rehearing within thirty days after it is filed, such application may be deemed to have been denied.”). The Petitioners timely filed petitions for review of the Certificate Order with this Court on May 23 and May 25, 2017.<sup>21</sup> *Id.* §717r(b) (appeals must be filed within 60 days after the order of the Commission). The cases were docketed as No. 17-1135 and No. 17-1139 and, on the Court’s own motion, consolidated.<sup>22</sup>

The Commission Secretary issued a second tolling order in May of 2017.<sup>23</sup> The May 2017 Tolling Order was issued in response to Weymouth’s Request for Rehearing on the March 2017 Tolling Order, described above. The matter docketed as No. 17-1176 is a petition for judicial review filed by Weymouth challenging the May 2017 Tolling Order. This petition was consolidated with the earlier filed cases upon the Court’s own motion.<sup>24</sup>

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<sup>21</sup> Town of Weymouth’s Petition for Review, JA\_\_\_\_; FRRACS Joint Petition for Review, JA\_\_\_\_.

<sup>22</sup> June 1, 2017 Court Order, JA\_\_\_\_.

<sup>23</sup> Order Granting Rehearing for Further Consideration (May 8, 2017), R. 1276, JA\_\_\_\_.

<sup>24</sup> September 21, 2017 Court Order, JA\_\_\_\_.

On June 30, 2017, the Commission moved to dismiss the consolidated cases for lack of jurisdiction, arguing that it had yet to issue a final rehearing order.<sup>25</sup> The Petitioners filed their joint opposition to the Motion to Dismiss on July 10, 2017.<sup>26</sup>

On August 21, 2017, the Commission formally acted on Weymouth's Request for Rehearing on the March 2017 Tolling Order, denying the request.<sup>27</sup> Although Weymouth maintains that the Commission constructively denied its Request for Rehearing on the March 2017 Tolling Order, it petitioned the Court for review, which was docketed as No. 17-1220, and consolidated with the Petitioners' pending cases.<sup>28</sup>

The Commission failed to file a certified index to its record by July 17, 2017, as ordered by this Court in its June 1, 2017 Order.<sup>29</sup> On September 22, 2017, the Court, on its own motion, issued a second Order directing the Commission to file the certified index to the record by October 6, 2017.<sup>30</sup> Two days before the

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<sup>25</sup> The Commission's Motion to Dismiss for Lack of Jurisdiction (Jun. 30, 2017), JA\_\_\_\_.

<sup>26</sup> Petitioners' Joint Opposition to Motion to Dismiss for Lack of Jurisdiction (Jul. 10, 2017), JA\_\_\_\_.

<sup>27</sup> Order on Rehearing, 160 FERC ¶61,016 (Aug. 21, 2017), R. 1323, JA\_\_\_\_.

<sup>28</sup> October 24, 2017 Court Order, JA\_\_\_\_.

<sup>29</sup> June 1, 2017 Court Order, JA\_\_\_\_.

<sup>30</sup> September 22, 2017 Court Order, JA\_\_\_\_.



Court ordered the certified index to be filed, the Commission moved the Court to defer the filing until after it had acted on the Petitioners' Requests for Rehearing on the Certificate Order.<sup>31</sup> The Court denied the Commission's motion on November 23, 2017 and ordered the filing of the index by December 14, 2017.<sup>32</sup>

On December 13, 2017, the Commission denied the Petitioners' Requests for Rehearing.<sup>33</sup> On December 14, 2017, the Commission filed the certified index to the record.<sup>34</sup>

### **STATEMENT OF THE FACTS**

On October 22, 2015, Algonquin filed a joint application to construct and operate the Atlantic Bridge Project, which will provide up to 132,705 dekatherms (dth) per day of transportation service to delivery points along the Algonquin system to the Maritime pipeline for delivery to points in New England and Canada.<sup>35</sup> As the second installment of the just-completed Algonquin Incremental

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<sup>31</sup> Motion to Defer Filing of the Certified Index to the Record or, in the Alternative, for Leave to Issue an Order on Rehearing (Oct. 4, 2017), JA\_\_\_\_.

<sup>32</sup> November 21, 2017 Court Order, JA\_\_\_\_.

<sup>33</sup> Rehearing Order, 161 FERC ¶61,255, R. 1388, JA\_\_\_\_.

<sup>34</sup> Certified Index to the Record (Dec. 14, 2017), JA\_\_\_\_.

<sup>35</sup> EA, at 1-1, R. 782, JA\_\_\_\_.

Market project, which went into service in January 2017,<sup>36</sup> the Atlantic Bridge Project expands the capacity of Algonquin's pipeline highway, which extends from the mid-Atlantic region to New England and beyond.

Algonquin has proposed, in this case, a drastic reconfiguration of its pipeline network by reversing the existing flow direction of gas so as to travel north to Canada.<sup>37</sup> In order to achieve this flow reversal, Algonquin proposes to (1) construct a new 7,770 horsepower compressor station on a peninsula of land in the densely populated neighborhood of North Weymouth,<sup>38</sup> which also abuts several residential neighborhoods within the City of Quincy, and (2) add 31,950 horsepower to two existing compressor station sites.<sup>39</sup>

## **I. PUBLIC SAFETY RISKS**

Algonquin proposes to site the compressor station on a 12.3-acre parcel of land (the "Site"), 4.0 acres of which would be permanently enclosed for the

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<sup>36</sup> *City of Boston et. al. v. FERC*, Docket 16-1081 (argument held October 19, 2017). There, a coalition of environmental petitioners argued that the Algonquin Incremental Market project had been impermissibly segmented from Atlantic Bridge. Because the Algonquin Incremental Market-Atlantic Bridge segmentation issue is currently before this Court, the Coalition does not raise that challenge here.

<sup>37</sup> Certificate Order, 158 FERC ¶61,061, ¶10, R. 1235, JA\_\_\_\_.

<sup>38</sup> *Id.*, ¶5, JA\_\_\_\_.

<sup>39</sup> City of Quincy, Massachusetts, Motion to Intervene (Nov. 24, 2015), R. 403, JA\_\_\_\_; Certificate Order, 158 FERC ¶61,061, ¶6, R. 1235, JA\_\_\_\_.

facility.<sup>40</sup> The siting of the compressor station on a small peninsula of land in an urban center carries with it significant safety risks that are not typically associated with compressor stations, which are generally located on larger parcels and in rural locations.<sup>41</sup> Notably, there are 587 “residential structures” within a half mile of the proposed facility,<sup>42</sup> many of which are within the 785-foot “potential impact radius.”<sup>43</sup> A large number of these residential structures are multifamily dwellings. The Site also directly abuts two recreational parcels, which are used by the surrounding community.<sup>44</sup> The number of residents living and recreating in the surrounding area is therefore significantly undervalued in the EA.<sup>45</sup>

The Site is also located 500 feet from the Fore River and within a Hurricane Inundation Zone.<sup>46</sup> The Site will become inaccessible during and after a Category

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<sup>40</sup> Certificate Order, 158 FERC ¶61,061, ¶170, R. 1235, JA\_\_\_\_; EA, at 1-11, R. 782, JA\_\_\_\_.

<sup>41</sup> Weymouth EA Comments, Exhibit E, at 6, R. 1100, JA\_\_\_\_; Comments of the Town of Weymouth on the Notice of Intent to Prepare a EA (Dec. 21, 2015), at 10, R. 468, JA\_\_\_\_ (“Weymouth Notice of Intent Comments”).

<sup>42</sup> EA, at 3-19, Table 3.5.1-1, R. 782, JA\_\_\_\_.

<sup>43</sup> Weymouth Request for Rehearing, at 26, R.1242, JA\_\_\_\_; Weymouth Notice of Intent Comments, at 10 and Exhibit B, R. 468, JA\_\_\_\_.

<sup>44</sup> Certificate Order, 158 FERC ¶61,061, ¶166, R. 1235, JA\_\_\_\_.

<sup>45</sup> Weymouth Notice of Intent Comments, at 10, R. 468, JA\_\_\_\_.

<sup>46</sup> Weymouth EA Comments, at 13-14 and Exhibit B, R. 1100, JA\_\_\_\_.

2 hurricane, and will be completely submerged after a Category 4 hurricane.<sup>47</sup>

Although Massachusetts Governor Charles D. Baker recognized that the risk of flooding is significant and warrants additional consideration by the Massachusetts Office of Coastal Zone Management,<sup>48</sup> the Commission did not take a hard look at these risks.

The peninsula is bisected by state highway Bridge Street (Route 3A), which crosses the Fore River to the west and runs through residential areas to the east. Due to the unique geography of the peninsula, individuals would be forced, in the event of an incident requiring evacuation, either to drive over the Fore River Bridge, which would likely be impacted by the incident itself, or through the adjacent residential areas, to escape the hazard.<sup>49</sup>

Furthermore, the surrounding industrial uses increase the risks associated with an incident at the Site. For example, directly south of the Site is a 787-megawatt electric-generating power plant, owned and operated by Calpine Fore River Energy Center LLC (“Calpine”).<sup>50</sup> The Calpine facility has a large oil tank 400 feet from the proposed Site, which was not designed to sit immediately next to

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<sup>47</sup> *Id.*

<sup>48</sup> Letter from Governor Charles D. Baker to Mayor Robert L. Hedlund (Jul. 14, 2017), JA\_\_\_\_.

<sup>49</sup> Weymouth EA Comments, at 13-15, R. 1100, JA\_\_\_\_.

<sup>50</sup> EA, at 3-20, R. 782, JA\_\_\_\_.

a potentially off gassing and explosive compressor station.<sup>51</sup> Additionally, the Site is in close proximity to the heavily trafficked Fore River Bridge, under which oil tankers frequently pass.<sup>52</sup> Due, in part, to these clear public safety concerns, the Massachusetts Energy Facilities Siting Board called for the preparation of an EIS.<sup>53</sup> These concerns fell on deaf ears.

## II. ENVIRONMENTAL IMPACTS

Notwithstanding the fact that the EA is clearly deficient, as detailed *infra*, what is known about the Project demonstrates that its impacts will be significant. The Commission's decision to proceed without an EIS is especially inexcusable in light of the fact that the Commission's *Suggested Best Practices for Industry Outreach Programs to Stakeholders* states that projects for which an EIS should be prepared include those "with new aboveground facilities near population centers."<sup>54</sup> The Commission is proposing to authorize the location of a highly dangerous above-

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<sup>51</sup> Comments of the Town of Weymouth in PF15-12, at 5, R. 278, JA\_\_\_\_; see also *In the Matter of the Petition of Sithe Edgar Development, LLC for Approval to Construct a Bulk Generating Facility in the Town of Weymouth, Massachusetts*, Final Decision, EFSB 98-7 (Feb. 11, 2000), Condition G, JA\_\_\_\_.

<sup>52</sup> Certificate Order, 158 FERC ¶61,061, ¶236, R. 1235, JA\_\_\_\_\_.

<sup>53</sup> Comments of Massachusetts Energy Facilities Siting Board, at 6, R.479, JA\_\_\_\_\_.

<sup>54</sup> Weymouth EA Comments, at 2, n. 5, R. 1100, JA\_\_\_\_; Weymouth Notice of Intent Comments, at 6, R. 468, JA\_\_\_\_ (citing Federal Energy Regulatory Commission, Office of Energy Projects, *Suggested Best Practices for Industry Outreach Programs to Stakeholders* (July 2015), at 11, *available at* <https://www.ferc.gov/industries/gas/enviro/guidelines/stakeholder-brochure.pdf> ("Commission's Best Practices"))).

ground compressor station in the densely populated neighborhood of North Weymouth. It should have followed its own policy and completed an EIS.

**a. Site Contamination**

The Site is not pristine, raw land for which only potential pollution from future incidents need be taken into account. The Site is already heavily contaminated with coal ash,<sup>55</sup> which can cause cancer and neurological damage in humans and harm and kill wildlife, especially fish and other water-dwelling species.<sup>56</sup> Although this pre-existing coal ash may be released into the environment during construction,<sup>57</sup> the Commission has refused to study the environmental impacts from such a release and instead has inappropriately relied upon the claimed existence of a soil and groundwater plan (which has not yet even been provided to the Commission) to justify its FONSI.<sup>58</sup>

**b. Noise Impacts**

The Commission has also failed to conduct an independent investigation of the noise impacts from the facility, and instead has inappropriately relied upon the

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<sup>55</sup> EA, at 2-8, R. 782, JA\_\_\_\_.

<sup>56</sup> Weymouth EA Comments, at 10, R. 1100, JA\_\_\_\_.

<sup>57</sup> *Id.*; Weymouth Rehearing Request, at 32, R. 1242, JA\_\_\_\_(referencing Comments of Dr. Curtis Nordgaard, (May 20, 2016), R. 959, JA\_\_\_\_(scientific references on the toxicity of coal ash constituents)).

<sup>58</sup> EA, at 2-8, R. 782, JA\_\_\_\_.

Algonquin's clearly deficient analysis. Notably, the existing background sound levels used in the noise analysis—both the ambient day-night level ( $L_{dn}$ ) and the lowest ambient nighttime level ( $L_{90}$ )—are based on short-term measurements that were sampled for just three minutes at each location.<sup>59</sup> As the Petitioners demonstrated to the Commission, long-term monitoring over the course of at least one to two weeks is necessary in order to capture the range of environmental and anthropogenic conditions that may occur at a site.<sup>60</sup> Additionally, the measurement positions utilized in Algonquin's study were located near roadways,<sup>61</sup> and are therefore not representative of the majority of sensitive receptors in the area. Finally, the noise survey did not take into account tone, frequency levels and duration of sound, factors which also impact nearby residents.<sup>62</sup>

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<sup>59</sup> Algonquin Gas Transmission, LLC's Abbreviated Application (Oct. 22, 2015), at Resource Report 9, Appendix 9G, H&K Report No. 3316, §9, Table F (Oct. 5, 2015) ("H&K Report No. 3316") and Appendix, Tables 3-6, at 19-22, R. 358, JA\_\_\_\_.

<sup>60</sup> Request of the Town of Weymouth for Rehearing and Rescission (Feb. 24, 2017), at 37, R. 1242, JA\_\_\_\_ (citing ANSI/ASA S12.9-1992/Part 2, *Quantities and Procedures for Description and Measurement of Environmental Sound. Part 2: Measurement of long-term, wide area-sound*, R2013).

<sup>61</sup> EA, at 2-108, Fig 2.8.3-4, R. 782, JA\_\_\_\_.

<sup>62</sup> Sandra Peters Rehearing Request, at 11, R. 1245, JA\_\_\_\_\_.

The Commission also refused to consider the King's Cove and Lovell's Grove conservation parcels, located immediately adjacent to the Site, as noise sensitive areas ("NSAs"). Instead, the Commission asserts that these conservation parcels cannot be valued for solitude and tranquility, and are thus, not worthy of the NSA designation.<sup>63</sup> This is not only factually incorrect, but also discredits the North Weymouth neighborhood, and perpetuates the very environmental injustices that the NEPA process was created, in part, to address.

Most shocking of all, however, is the Commission's staunch refusal to consider the noise emissions from a blowdown at the compressor station. Because the King's Cove conservation parcel is only 80 to 90 feet from the compressor station's noise producing equipment, the noise level at the property boundary would be at least 71 dBA during a blowdown event.<sup>64</sup> Clearly, the noise impacts of the Project on the abutting King's Cove conservation parcel will be significant and warrant further review.

**c. Traffic Impacts**

The Commission's traffic analysis is based on outdated plans and fails to capture the fact that Algonquin has moved its proposed staging area across Bridge

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<sup>63</sup> Order on Rehearing, 161 FERC ¶61,255, ¶127, R. 1388, JA\_\_\_\_ (noting that, given their location near a "transportation corridor and a developed industrial area" that the conservation areas "do not rise to the level of a park or wilderness area that would be valued for their solitude and tranquility.").

<sup>64</sup> *Id.*, ¶11, JA\_\_\_\_.



Street (Route 3A) and onto the Calpine property.<sup>65</sup> Instead of fully reviewing the impacts associated with trucks having to cross Bridge StreetRoute 3A or enter the Site or construction staging area from a different direction on Bridge Street, the Commission provided only a conclusory statement that the staging area's changed location is not significant.<sup>66</sup> This falls far short of the reasoned analysis required by NEPA.

**d. Air Quality Impacts and Greenhouse Gas Emissions**

The Commission refused to estimate greenhouse gas emissions that would come directly from the construction and operation of the Project facilities. Despite the fact that the Project purports to add 132,705 dth per day of firm transportation service, the Commission refuses to quantify the impacts from GHG on the environment – yet another example of its failure to comply with NEPA.<sup>67</sup> Moreover, the Commission dismissed any potential air quality impacts outside of an arbitrary 10-mile radius of the Project.<sup>68</sup>

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<sup>65</sup> Supplemental Information for the Atlantic Bridge Project (Jun. 29, 2016), at 1, R. 1179, JA\_\_\_\_.

<sup>66</sup> Order on Rehearing, 161 FERC ¶61,255, ¶88, R. 1388, JA\_\_\_\_.

<sup>67</sup> EA, at 2-143, R. 782, JA\_\_\_\_.

<sup>68</sup> FRRACS Rehearing Request, at 32-33, R. 1246, JA\_\_\_\_.

### III. IMPACTS TO ENVIRONMENTAL JUSTICE COMMUNITIES

The Project's impacts will be borne primarily by environmental justice communities and those individuals residing in areas that are already over-industrialized. Specifically, there are four environmental justice communities within a half-mile of the proposed Site, two of which, Germantown and Quincy Point, are located within the City of Quincy.<sup>69</sup> Half of the environmental justice communities have a median annual household income that is at or below 65 percent of the statewide median income for Massachusetts, and all four communities have minority populations that are greater than 25 percent.<sup>70</sup>

Moreover, these communities are already surrounded by numerous highly polluting and dangerous industrialized facilities. Within 0.85 miles of the proposed unit are the following uses:

- 1) A gasoline and oil depot (Citgo Marine Petroleum Terminal);
- 2) A chemical plant (Twin Rivers Technologies);
- 3) Two power plants (Calpine and Braintree Electric Light Department);
- 4) A regional sewage pump station (the Massachusetts Water Resources Authority ("MWRA"));
- 5) A sewage pelletizing plant (MWRA);
- 6) A hazardous waste transfer and treatment facility (Clean Harbors);
- 7) Smaller oil storage facilities and tanks (Calpine); and
- 8) The Algonquin Pipeline.<sup>71</sup>

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<sup>69</sup> EA, at 2-78, R. 782, JA\_\_\_\_.

<sup>70</sup> *Id.*

<sup>71</sup> Weymouth EA Comments, at 1, n.2, R. 1100, JA\_\_\_\_ (citing Weymouth Notice of Intent Comments, Exhibit B, R. 468, JA\_\_\_\_).

Instead of actually taking a hard look at the fact that the abutting communities would be saddled with yet another dangerous and polluting facility, the Commission inappropriately relied upon the fact that the facility would be located in the General Industrial District under the Weymouth Zoning Ordinance.<sup>72</sup> However, consistency with local zoning cannot form the basis for a FONSI, especially given that the Massachusetts Energy Facility Siting Board has ordered Calpine, the prior owner of the Site, to work with Weymouth to determine a community-appropriate use for Site.<sup>73</sup>

### STANDING

The Petitioners satisfy the criteria for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), which requires (1) injury-in-fact; (2) causation; and (3) redressability. See also Circuit Rule 28(a)(7). First, Weymouth is directly and significantly impacted by the compressor station, which is located within the Town. Given the compressor station's proximity to populated areas, noisy operation and toxic emissions, it directly threatens the health and safety of Weymouth residents. The compressor station will also be a "permanent aesthetic eyesore" for those in the immediate vicinity. See *Moreau v. FERC*, 982

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<sup>72</sup> EA, at 2-79, R. 782, JA\_\_\_\_.

<sup>73</sup> Weymouth EA Comments, at 7, R. 1100, JA\_\_\_\_ (citing *In the Matter of the Petition of Sithe Edgar Development, LLC for Approval to Construct a Bulk Generating Facility in the Town of Weymouth, Massachusetts*, Final Decision, EFSB 98-7 (Feb. 11, 2000), Condition L).

F.2d 556, 565 (D.C. Cir. 1993) (finding that a pipeline’s “permanent aesthetic eyesore” and “continuing safety hazards” constituted “injury in fact” sufficient to establish standing by adjacent property owners). Further, Weymouth’s injuries are directly traceable to the challenged Commission’s Certificate Order, in the absence of which, Algonquin would not have authority to construct or operate the compressor station in Weymouth.<sup>74</sup> Finally, Weymouth’s injuries are capable of redress by this Court that can vacate the Certificate Order and prevent construction of the Project.

Because only one of the Coalition Petitioners must show standing for this court’s jurisdiction to attach in Docket No. 17-1137,<sup>75</sup> in the interest of brevity, this section establishes standing for FRRACS and the City of Quincy, two of the lead petitioners in that case,<sup>76</sup> and Sandra Peters, who filed a separate rehearing request. FRRACS, an organization of community members formed to oppose the Project

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<sup>74</sup> See Certificate Order, 158 FERC ¶61,016, ¶5, R. 1235, JA\_\_\_\_.

<sup>75</sup> See *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994) (finding analysis of standing unnecessary for all petitioners where one petitioner established standing).

<sup>76</sup> It bears noting that the remaining organizations that are petitioners in this case have at least one member who resides within the community where the project is proposed, and thus standing is self-evident. See *Horsehead Resource Dev.*, 16 F.3d at 1259 (finding standing for environmental organization to challenge project when members reside in the same community). Standing is similarly self-evident for Rebecca Haugh, who is a Councilwoman in the Town, representing North Weymouth, the Site of the proposed compressor station.

has standing because its individual members have standing. See *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011). Christa Dunn and Susan Whitehouse Greene, two FRRACS members filed declarations<sup>77</sup> describing the injuries that they would suffer as a result of the compressor station. Ms. Dunn, who lives within a half mile of the compressor station, expressed concerns largely about air quality impacts, noxious odors and noise blowdowns. Ms. Greene - whose home is a scant 1,400 feet from the compressor station - discussed fears about deterioration of air quality, safety risks and potential explosions that have occurred at other gas facilities, ongoing noise from operation of the compressor station and blowdowns and devaluation of her property value. Ms. Greene and Ms. Dunn also testified that the injuries that they will suffer would also be experienced by many of FRRACS' 950 members. Both Ms. Greene and Ms. Dunn's declarations demonstrate injury-in-fact caused directly by the proposed compressor and that can be remedied by vacating the Commission certificate - and therefore, serve as a basis for establishing FRRACS' standing. Ms. Peters, an individual landowner near the proposed compressor station also has individual standing as an impacted landowner within the vicinity of the facility.<sup>78</sup> See *Moreau v. FERC*, 982 F.2d at

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<sup>77</sup> See FRRACS Petition for Review (May 25, 2017), Declarations in Support of Standing.

<sup>78</sup> Sandra Peters, Motion to Intervene (Nov. 20, 2015), R. 388, JA\_\_\_\_\_.

556 (finding that individual landowners abutting pipeline property have standing to challenge FERC certificate order).

The City of Quincy also has standing. The Compressor Station abuts residential communities within the City that will face safety risks and air quality deterioration as a result of the Compressor Station.<sup>79</sup> Moreover, two of the environmental justice communities impacted by the project - Germantown and Quincy Point - are located in the City.<sup>80</sup> As with the other petitioners, the City of Quincy suffers injury in fact as a result of the project that may be redressed by this Court.

### **SUMMARY OF THE ARGUMENTS**

The Certificate Order fails to comply with applicable law, and is not supported by the evidence in the record and, as such, much be vacated.

First, the Commission issued the Certificate Order in violation of the CZMA. Congress, recognizing the importance of sensitive coastal zones enacted the CZMA and empowered states to adopt enforceable policies to protect land and water uses and natural resources in these coastal zones. 16 U.S.C. §1453(6a); 15 C.F.R. §930.11(h). A key component of the CZMA is the prohibition on the

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<sup>79</sup> See City of Quincy Motion to Intervene, R. 403, JA\_\_\_\_ (describing impacts to City).

<sup>80</sup> *Id.*

issuance of any federal license “affecting any land or water use...[within] the coastal zone” without a prior determination by the state’s Office of Coastal Zone Management that the proposed activity is consistent with the enforceable policies of its Coastal Zone Management Plan. 16 U.S.C. §1456(c)(3)(A). Although this provision is preserved by the NGA (15 U.S.C. §717b(d)), the Commission ignored the safeguards employed to protect these areas and illegally issued a Certificate that “affect[s]...land or water use...[within] the coastal zone.” 16 U.S.C. §1456(c)(3)(A). The Certificate and the Certificate Order are therefore invalid.

Second, the Certificate Order is also invalid under Section 7 of the NGA, because the Commission failed to independently guarantee that the Project could operate safely. Here, the Commission took Algonquin’s word that it would comply with applicable standards instead of determining independently whether Algonquin’s promised compliance was realistic or feasible. Furthermore, despite real public safety risks associated with the compressor station, the Commission only cursorily considered these risks and, in doing so, masked the true public safety hazards of siting the compressor station in a densely populated community and immediately adjacent to a natural gas electric-generating facility and a sewage pumping facility. This is inexcusable and cannot form the basis for a FONSI.

Third, the Commission’s actions run directly counter to NEPA, which Congress enacted “to promote efforts which will prevent or eliminate damage to

the environment and biosphere and stimulate the health and welfare of man” and “to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 U.S.C. §4321. “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989).

Here, the Commission stubbornly relied on misleading and deficient data, and refused to address the Project’s most significant impacts, including noise, coal ash, traffic and safety. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1157 (N.D. Cal. 2013) (the Commission’s refusal to address the most pressing issues posed by the Project defeats “the basic thrust’ of NEPA”—to ensure “that agencies consider the range of possible environmental effects before resources are committed and the effects are fully known.”) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir.1975)). NEPA does not countenance the Commission’s failure to give a “hard look” at the real and present danger this Project presents to environmental justice communities. *Kleppe*, 427 U.S. at 410, n. 21.

Fourth, the Commission ignored its obligation to consider the cumulative quantify the impacts of Greenhouse Gas (GHG) emissions of the Project or to evaluate whether the Project would interfere with Massachusetts’ ability to meet its



climate change goals.<sup>81</sup> Moreover, the Commission refused to consider any air quality impacts outside of an arbitrary 10-mile radius of the Project.

Fifth, as significant as the adverse impacts of the proposed Project are, they are worse for the impacted environmental justice communities that are already saddled with other nearby infrastructure. Yet, as required by Executive Order 12,898, the Commission did not adequately consider project impacts to the environmental justice communities.

Sixth, the Commission also failed to demonstrate a need for the project as required under the public necessity and convenience standard of Section 7 of the NGA and the Commission's own policy statement. At least half (if not more) of the Project's gas is destined for export and does not serve domestic need, and recent analyses of the New England energy market show adequate gas supply exists for the foreseeable future.

For all of these reasons, the Commission must vacate the certificate order.

### **STANDARD OF REVIEW**

The Commission's orders, including those approving Section 7 certificate applications, are reviewed under the familiar arbitrary and capricious standard. See *Minisink Residents for Env't Preservation v. FERC*, 762 F.3d 97, 106 (D.C. Cir. 2014), citing *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75-76 (D.C. Cir. 2004). The

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<sup>81</sup> Certificate Order, 158 FERC ¶61,016, ¶110, R. 1235, JA\_\_\_\_\_.

reviewing court must ensure “that the Commission’s decisionmaking is reasoned, principled, and based upon the record” (*W. Res., Inc. v. FERC*, 9 F.3d 1568, 1572 (D.C. Cir. 1993) (quotations omitted)) and evaluate “whether there has been a clear error of judgment.” *Minisink Residents for Env’t Preservation*, 762 F.3d, at 106 (quotations omitted). Commission findings must be supported by substantial evidence in the record. *Washington Gas Light Company v. FERC*, 532 F.3d 928, 933 (D.C. Cir. 2009) (remanding FERC’s unsupported findings regarding safety impacts of liquid natural gas (LNG) facility). Unsupported or conclusory findings by an agency are not entitled to deference. *NetCoalition v. SEC*, 615 F.3d 525, 538 (D.C. Cir. 2010).

In reviewing an agency’s compliance with NEPA, the Court must “ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.” *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (citation omitted); *Marsh*, 490 U.S. at 371 (“NEPA ensures that the agency will not act on incomplete information.”). “If the risk of a[n event] is not insignificant, then NEPA obligates...a hard look at the environmental consequences of that risk.” *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1032 (9th Cir. 2006) (citations omitted).

When petitioners challenge a decision not to prepare an EIS, the Court reviews the FONSI to determine whether the agency has taken a “hard look” at all relevant environmental issues and has made a “convincing case for its finding.” *Grand Canyon Trust v. FAA*, 290 F.3d 339, 341 (D.C. Cir. 2002) (internal quotations omitted). “Judicial review of an agency’s finding of ‘no significant impact’ is not...merely perfunctory as the court must insure that the agency took a ‘hard look’ at the environmental consequences of its decision.” *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, at 410, n. 21 (1976)).

NEPA prohibits an agency from relying upon conclusory statements by the applicant that are unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc. v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992.), *supplemented*, 798 F. Supp. 1484 (W.D. Wash. 1992), *aff’d sub nom. Seattle Audubon Soc. v. Espy*, 998 F.2d 699, (9th Cir. 1993), and *aff’d in part, appeal dismissed in part sub nom. Seattle Audubon Soc. v. Espy*, 998 F.3d 699 (9th Cir. 1993). The agency cannot blindly accept an applicant’s statements as fact, and instead has an independent duty to evaluate the information submitted. 40 C.F.R. §1506.5; see *Van Abbema v. Fornell*, 807 F.2d 633, 642 (7th Cir. 1986) (“The [agency] has a duty to ensure the accuracy of information that is important to the decision it is making, at least when obvious errors are brought clearly to its

attention.”). “Although the standard of review is deferential,...simple, conclusory statements of ‘no impact’ are not enough to fulfill and agency’s duty under NEPA.” *Del. Riverkeeper*, 753 F.3d at 1313 (citations omitted).

## ARGUMENT

### **I. THE COMMISSION IMPROPERLY ISSUED ITS CERTIFICATE ORDER BEFORE THE MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT HAD CERTIFIED THE PROJECT’S COMPLIANCE WITH THE *COASTAL ZONE MANAGEMENT ACT*.**

The Commission violated the NGA, 15 U.S.C. §717b(d), and the *Coastal Zone Management Act*, 16 U.S.C. §1456(c)(3)(A), when it approved Algonquin’s application and issued the Certificate Order before the Massachusetts’ Office of Coastal Zone Management (OCZM) determined that the Project is consistent with Massachusetts’ coastal zone management program, as required by the CZMA.

Congress adopted the CZMA to encourage the states to protect their fragile coastal resources through the development of federally approved coastal zone management programs. 16 U.S.C. §1452(1).<sup>82</sup> Once a state’s management program receives federal approval, the state must review all projects receiving federal licenses and permits to ensure that they are consistent with the enforceable policies

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<sup>82</sup> The CZMA permits states to develop “management programs” for their coastal zones. 16 U.S.C. §1453(12). These programs include “enforceable policies,” which are “legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a [s]tate exerts control over private and public land and water uses and natural resources in the coastal zone.” 16 U.S.C. §1453(6a).

of the program (the “Consistency Determination”). 16 U.S.C. §1456(c)(3)(A). The Consistency Determination must occur prior to the issuance of the federal license “affecting any land” within the coastal zone:

[A]ny applicant for a required [f]ederal license or permit... affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing... agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.... No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification....

*Id.* (emphasis added). Accordingly, because Massachusetts has a federally approved coastal zone management program,<sup>83</sup> the CZMA expressly and unambiguously prohibits the Commission from issuing any license affecting land within the coastal zone until such time as the Commonwealth has issued its Consistency Determination for the project.

While the NGA preempts some state and local laws, it expressly preserves the state law certification requirements of the CZMA. 15 U.S.C. §717b(d) (“nothing in this chapter affects the rights of States under...the Coastal Zone

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<sup>83</sup> In 1978, the National Oceanic and Atmospheric Administration approved the Commonwealth’s Coastal Zone Management Program Plan. See Weymouth Rehearing Request, at 15, n.50 R. 1242, JA\_\_\_ (citing Massachusetts Coastal Zone Policy Guide (Oct. 2011), at 2, *available at* <http://www.mass.gov/eea/docs/czm/fcr-regs/czm-policy-guide-october2011.pdf>).

Management Act....”); see also *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.*, 833 F.3d 360, 368 (3d Cir. 2016). The NGA’s meaning is self-evident: The Commission must comply with the CZMA, which requires applicants to obtain a Consistency Determination before the issuance of any federal license that affects land within the coastal zone.<sup>84</sup>

In *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006), this Court considered the Commission’s issuance of a certificate before the applicant had obtained a *Clean Water Act* (CWA) water quality certification. See 33 U.S.C. §1341(a)(1). Notably, the CWA “requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters.” *PUD NO. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707 (1994) (emphasis added). The Court reiterated the need for the Commission to wait until the issuance of the water quality certificate:

[T]he decision whether to issue a section 401 certification generally turns on questions of state law. FERC’s role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state’s power to block the project would be meaningless.... FERC, in other words, may not act based on any

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<sup>84</sup> Congress amended both the NGA and the CZMA in 2005. *Energy Policy Act*, Pub. L. No. 109-58, §§311, 314-6, and 382, 119 Stat. 594, 685, 690-91, and 735 (2005). Congress did not create an exception in either statute for compliance with CZMA’s requirements. By refraining from creating such an exemption, Congress demonstrated its choice not to reduce the power of states under the CZMA.

certification the state might submit; rather, it has an obligation to determine that the specific certification required by section 401 has been obtained, and without that certification, FERC lacks authority to issue a license.

*City of Tacoma*, 460 F.3d at 68 (citation omitted).

Recently, in *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017), this Court narrowed the holding in *City of Tacoma*, but in a way that cannot be extrapolated to the CZMA. In *Delaware Riverkeeper*, the Commission issued a conditional certificate that precluded the applicant from commencing construction until it had obtained a water quality certificate for the project. *Id.* at 393. The Court, in upholding the certificate, concluded that a license prohibiting construction until issuance of a CWA certificate did not allow for “any activity...which may result in any discharge into the navigable waters,” and thus was permissibly issued under both the CWA and the NGA. *Id.* at 399 (citing 33 U.S.C. §1341(a)(1)).

The same analysis is not applicable here because the CZMA more broadly precludes the issuance of any federal license or permit that would allow its holder “to conduct an activity...affecting any land or water use or natural resource of the coastal zone of that state...” 16 U.S.C. §1456(c)(3)(A) (emphasis added). Delaying the physical construction of a facility until issuance of a consistency determination does not prevent the land on which the facility will be constructed from being “affected” by the granting of the license. Indeed, in three separate proceedings,

Algonquin has asserted that the Certificate Order acts to preempt Weymouth's otherwise applicable local wetland and zoning laws governing the use of the coastal site. *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission and the Town of Weymouth, Massachusetts*, D. Mass. Case No 1:17-cv-10788-DJC; *In the Matter of Algonquin Gas Transmission LLC*, MassDEP OADR Docket Nos. 2017-011 and 2017-012; *In the Matter of Algonquin Gas Transmission LLC*, MassDEP OADR Docket No. WET-2016-25.

On December 29, 2017, Judge Casper of the District of Massachusetts held that, because Algonquin holds a FERC Certificate, the NGA preempts Weymouth's Wetland Protection Ordinance with respect to the Site.<sup>85</sup> *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission and the Town of Weymouth, Massachusetts, supra*, Memorandum and Order (Dec. 29, 2017), JA\_\_\_\_. The Certificate therefore has already been held to permit Algonquin to evade local protections adopted to safeguard the very same sensitive coastal areas that are the subject of the Commonwealth's coastal zone management plan.<sup>86</sup> There can be no clearer evidence that the Certificate allows its holder to "affect...any land

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<sup>85</sup> No final judgment has been entered. Fed. R. Civ. P. 58(a).

<sup>86</sup> Notwithstanding the argument made herein, the Town maintains that the Certificate does not carry with it preemptive power until the OCZM issues its Consistency Determination, and expects to appeal the District Court's ruling when a final judgment is entered.



or water use or natural resource of the coastal zone of [the] state.” 16 U.S.C.

§1456(c)(3)(A).

Instead of waiting until the OCZM had issued its Consistency Determination,<sup>87</sup> the Commission attempted to circumvent the clear statutory mandate. Condition 16 of Appendix B in the Certificate Order requires Algonquin to submit a copy of the OCZM’s Consistency Determination prior to “construction” of the compressor station.<sup>88</sup> Although the Certificate Order precludes “construction” on the coastal site, it nevertheless, as demonstrated above, authorizes Algonquin to take actions affecting the Weymouth Site. The Commission should not have issued its Certificate Order without a Consistency Determination and therefore its Certificate Order violates the CZMA.

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<sup>87</sup> Algonquin submitted its Consistency Determination application to OCZM on February 23, 2015. Correspondence of the Massachusetts Office of Coastal Zone Management to Algonquin Gas Transmission, LLC (Aug. 5, 2016), at 1, R. 1199, JA \_\_\_\_\_. On August 3, 2016, Algonquin and the OCZM agreed to a one-year stay of the consistency review period to allow for additional time for information necessary for OCZM’s review. *Id.* Thereafter, on August 1, 2017, the OCZM requested an additional six-month extension, as well as additional documentation. See Letter from Robert Boeri, Project Review Coordinator, Office of Coastal Zone Management to Mike Tyrrell, Algonquin Gas Transmission, LLC (Aug. 1, 2017), JA \_\_\_\_\_. Algonquin subsequently agreed. See Letter from Gary A. Davis, Jr., Enbridge, to Mike Tyrrell, Project Review Coordinator, Office of Coastal Zone Management (Aug. 2, 2017), JA \_\_\_\_\_. At the time of this filing, the OCZM has yet to issue a decision.

<sup>88</sup> Certificate Order, 158 FERC ¶61,061, Appendix B, Condition 16, R. 1388, JA \_\_\_\_\_.

The NGA Certificates empower the license holder to take land by eminent domain.<sup>89</sup> Generally, “[o]nce a certificate has been granted, the [NGA] allows the certificate holder to obtain private property by eminent domain.” *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (citing 15 U.S.C. §717f(h)); see also *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427, 430 (D. R.I. 1990) (Condemnation proceedings may proceed despite the fact that landowners had appealed the underlying Order). Algonquin’s Certificate does not limit this condemnation power. Therefore, notwithstanding the fact that the OCZM has yet to issue a Consistency Determination, if land within the coastal zone is necessary to the operation of the Project and the property owner is unwilling to convey it, Algonquin may take the land by eminent domain.<sup>90</sup>

Accordingly, the Commission violated the NGA and the CZMA when it granted Algonquin a Certificate that permits them to take actions “affecting any

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<sup>89</sup> *Id.*, Appendix B, Condition 4, JA\_\_\_\_.

<sup>90</sup> Algonquin has purported to purchase and acquire the principal coastal zone property affected by the Certificate Order (the Weymouth Compressor Station Site), but the validity of that conveyance is the subject of a separate case currently pending in Massachusetts’ Land Court. See *Robert L. Hedlund Mayor of the Town of Weymouth on Behalf of the Planning Board of Weymouth v. Calpine Fore River Energy Center, LLC, et al*, Massachusetts Land Court Docket 17 MISC 000628. Therefore, the practical need for the exercise of eminent domain authority in this case is uncertain. However, there can be no doubt that the eminent domain power has been created by the Certificate Order, which therefore clearly allows Algonquin “to conduct an activity...affecting any land or water use or natural resource of the coastal zone of that state....” 16 U.S.C. §1456(c)(3)(A).

land or water use or natural resource of the coastal zone of that state...” (16 U.S.C. §1456(c)(3)(A)) before a Consistency Determination has been made.

**II. THE COMMISSION VIOLATED THE *NATURAL GAS ACT* BY APPROVING AN ADMITTEDLY UNSAFE COMBUSTIBLE PROJECT THAT DOES NOT COMPLY WITH THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION’S REGULATIONS.**

Safety is a critical factor in determining whether a project meets the public interest standard under Section 7 of the *Natural Gas Act*. See *Washington Gas Light Company*, 532 F.3d at 933 (finding that an unsafe project would not satisfy the public interest under Section 717f(e)); see also *Weaver’s Cove LNG*, Order Granting Certificate (Kelly, dissenting), 112 FERC ¶61,070 (Jul. 15, 2005) (objecting to the Commission’s approval of an LNG certificate that raises significant unresolved safety issues). Here, substantial evidence in the record shows that the Project is both inherently unsafe and non-compliant with the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations, as detailed below.

**a. The Commission has an Independent Obligation to Evaluate the Plausibility of Pipelines’ Safety Commitments.**

PHMSA is the federal agency with responsibility for ensuring pipeline safety under 49 U.S.C. §§60101, *et. seq.* PHMSA does not review the safety of pipeline facilities during the certificate process. Instead, Section 157.14(a)(10)(vi) of the Commission’s regulations require that an applicant certify that it will design,

install, inspect, test, construct, operate, replace, and maintain the facility for which a Certificate is requested in accordance with federal safety standards and plans for maintenance and inspection. See 18 C.F.R. §157.14(a)(10)(vi). Even though an applicant certifies compliance with PHMSA regulations in its application, the Commission remains obligated to evaluate whether the applicant can realistically satisfy those standards.

In *Washington Gas Light Company*, 532 F.3d at 933, the Commission found that an LNG facility would operate safely based on the applicant's assertion that the local utility company could upgrade its pipelines in time to accept the new delivery. The local utility appealed, arguing that LNG gas flowing through its pipes would cause safety hazards including increased pipeline leaks. The Court found that the Commission had failed to demonstrate that the project would operate safely, given the need for upgrades on the local utility system, and returned the matter to the Commission for additional review. *Washington Gas Light Company* thus stands for the proposition that the Commission must independently review an applicant's assumptions about public safety to satisfy the public interest under Section 7 of the *Natural Gas Act*. The Commission cannot simply take an applicant at its word that its project will comply with applicable safety regulations.

As in *Washington Gas Light Company*, the Commission's efforts to determine whether the proposed compressor station would realistically comply

with PHMSA regulations fell short. The compressor station is proposed to be sited in close proximity to a sewage pumping station and an electric generation facility, creating the possibility that a fire could be communicated to the compressor.<sup>91</sup> See 49 C.F.R. §192.163(a) (outlining compressor station design and construction requirements). Yet the Commission dismissed these concerns, finding that “Algonquin has committed to comply with the PHMSA regulations and PHMSA is responsible for ensuring compliance.”<sup>92</sup>

The Commission is required to evaluate the plausibility of Algonquin’s claims. At the very least, the Commission is obligated to consult with PHMSA to gain a better understanding whether Algonquin’s commitment to abide by PHMSA regulations was reasonable. But the record in this proceeding shows that no such exchange took place. Accordingly, this case is a far cry from *Murray Energy v. FERC*, 629 F.3d 231, 240 (D.C. Cir. 2011), where the record evinced multiple communications from PHMSA to the Commission assuring that the project as proposed would not pose safety risks.

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<sup>91</sup> EA at 3-20, R. 782, JA\_\_\_\_; Weymouth EA Comments, at 1, n.2, R. 1100, JA\_\_\_\_ (citing Weymouth Scoping Comments, Exhibit B, R. 468, JA\_\_\_\_); see also, S. Peters Comments, at 4-6, R. 1109, JA\_\_\_\_ (addressing safety issues).

<sup>92</sup> Certificate Order, 158 FERC ¶61,061, ¶227, R. 1235, JA\_\_\_\_.

Because there is no evidence in the record that Algonquin can comply with PHMSA requirements, 49 C.F.R. §192.163(a), the Commission's conclusion is unsubstantiated and its order must be vacated.

**b. The Commission Ignored Evidence Showing that the Project is Unsafe.**

Even assuming that the Project will comply with PHMSA standards, that compliance does not guarantee that it will operate safely. The Commission erred by ignoring evidence showing that, even in spite of PHMSA compliance, the Project poses unacceptable risk. The Commission's "refusal to come to grips with [an intervenor's] rebuttable evidence is irreconcilable with the Commission's responsibility to support its decisions with substantial evidence." *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992). The failure to do so warrants vacating the certificate.

The record before the Commission documents the hazard that the compressor station poses for the surrounding communities. For starters, the Project is inherently unsafe due to the present location in close proximity to the Fore River Bridge with frequently passing oil tankers.<sup>93</sup> Moreover, despite the compressor station's location in a hurricane inundation zone, the Commission—over the

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<sup>93</sup> Certificate Order, 158 FERC ¶61,061, ¶¶181 – 183, 236, R. 1235, JA\_\_\_\_ (referencing comments regarding project dangers).

objection of the Massachusetts Energy Facilities Siting Board<sup>94</sup>—refused to take any additional steps to protect the public from potential catastrophic harm.

Notably, the Commission did not require preparation of an emergency response plan, and instead permitted Algonquin to defer the preparation of this essential safety component to a later date.<sup>95</sup> This is inexcusable in light of the other highly dangerous industrial uses in the vicinity and the documented issues with a possible evacuation.

The recent track record of Algonquin’s parent company, Spectra Energy Corporation (“Spectra”),<sup>96</sup> on safety only highlights the likely safety risks. The record contains evidence of a two recent Spectra incidents—a pipeline explosion in Pennsylvania, which culminated in \$100 million in damages,<sup>97</sup> and a frozen valve at a metering station, which resulted in release of natural gas for several

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<sup>94</sup> Comments of Massachusetts Energy Facilities Siting Board, at 6, R.479, JA\_\_\_\_.

<sup>95</sup> Certificate Order, 158 FERC ¶61,061, ¶183, R. 1235, JA\_\_\_\_\_

<sup>96</sup> Spectra Energy was recently acquired by Enbridge Energy Partners. See Enbridge and Spectra Merger FAQ, available here: <https://www.enbridge.com/investment-center/investor-faqs/enbridge-and-spectra-merger-faqs-updated>, JA\_\_\_\_\_.

<sup>97</sup> Cusick, Marie, NPR, *Spectra expects to pay \$100 million after pipeline blast* (Aug. 4, 2016), *available at* <https://stateimpact.npr.org/pennsylvania/2016/08/04/spectra-expects-to-pay-100-million-after-pipeline-blast/>, JA\_\_\_\_\_.

hours.<sup>98</sup> These incidents cast doubt on Spectra's ability to operate the Weymouth compressor station competently and safely and at a minimum require the Commission to take a critical, independent look at Commission's assurances.

Spectra itself concedes the substantial risks in its operations as sufficiently credible to warrant their disclosure to investors in a recent Security and Exchange Commission's form 10-K.<sup>99</sup> These risks include the potential for terrorism, including cyber-terrorism, which could result in "physical damage to high profile facilities...that may not be covered, or covered fully, by insurance."<sup>100</sup> In addition, "[t]here are a variety of hazards and operating risks inherent in natural gas gathering and processing, transmission, storage, and distribution activities...such as leaks, explosions and mechanical problems" that could cause substantial financial losses...and significant injury, loss of life, significant damage to property, environmental pollution and impairment of operations.<sup>101</sup> "For pipeline and storage

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<sup>98</sup> Trufant, Jessica, Patriot Ledger, *Officials Blast Spectra Over Gas Valve Monitoring* (Feb. 7, 2017), available at <http://www.patriotledger.com/news/20170207/officials-blast-spectra-over-gas-valve-monitoring-after-leak> (showing video of Town meeting raising concerns), JA\_\_\_\_.

<sup>99</sup> Spectra Energy Corporation, Form 10-K (Dec. 31, 2015) ("Spectra's Form 10-K") (disclosing risks of terrorism and explosion and lack of adequate insurance coverage for damage), available at <https://www.sec.gov/Archives/edgar/data/1373835/000137383516000014/se-2015123110k.htm>, JA\_\_\_\_.

<sup>100</sup> *Id.* at 31 (emphasis added), JA\_\_\_\_.

<sup>101</sup> *Id.* at 29, JA\_\_\_\_.



assets located near populated areas, including residential areas, commercial business centers, industrial sites and other public gathering areas, the level of damage resulting from these risks could be greater.<sup>102</sup>

The Commission failed to address any of these concerns, either in its Certificate Order or its Order on Rehearing.

### **III. THE COMMISSION FAILED TO SATISFY ITS NEPA OBLIGATIONS.**

#### **a. The Commission Violated NEPA by Failing to Prepare an Environmental Impact Statement.**

Under NEPA, the Commission is required to prepare an EIS for major actions that significantly impact the human environment. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2004). Determining whether an action “significantly” affects the environment “requires consideration of both context and intensity.” 40 C.F.R. §1508.27. Intensity means “the severity of the impact.” *Id.* at §1508.27(b).

When considering the severity of the impacts, the reviewing agency may consider up to 10 factors that help inform the “significance” of a project, including:

- Intensity Factor 2: “The degree to which the proposed action affects public health or safety;”
- Intensity Factor 3: “Unique characteristics of the geographic area such as proximity to...park lands, ... wetlands, wild and scenic rivers, or ecologically critical areas;”

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<sup>102</sup> *Id.* (emphasis added).

- Intensity Factor 4: “The degree to which the effects on the quality of the human environment are likely to be highly controversial;” and
- Intensity Factor 5: “The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”

*Id.* Courts have held that even one of these factors may be sufficient to require preparation of an EIS. *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001). Not only does the Atlantic Bridge Project readily meet these factors as a whole, but the Commission’s own guidance on preparing environmental review documents also requires the completion of an EIS when a project involves the siting of a compressor station in a densely populated community like North Weymouth.<sup>103</sup> The Commission’s decision to issue the FONSI is therefore clearly arbitrary and capricious in light of its own guidance. See *Van Abbema*, 807 F.2d at 642.

**i. *Intensity Factor 2: Public Safety***

With respect to Intensity Factor 2, the proposed compressor station threatens public safety by placing a fire and explosion hazard in close proximity to

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<sup>103</sup> See Comments of the Town of Weymouth under CP16-9, R. 468, JA\_\_\_\_ (citing Federal Energy Regulatory Commission, Office of Energy Projects, *Suggested Best Practices for Industry Outreach Programs to Stakeholders* (July 2015), at 11, available at <https://www.ferc.gov/industries/gas/enviro/guidelines/stakeholder-brochure.pdf> (“Commission’s Best Practices”) (identifying “projects...with new major aboveground facilities near population centers” within the category of projects requiring an EIS)).

residential areas, a major thoroughfare, a regional sewer pump station, bulk amounts of hazardous materials, and the Fore River Bridge.<sup>104</sup> As described above, public safety risks are further exacerbated by the fact that the public's ability to evacuate the area in the case of an emergency is compromised by the unusual geography of the area and the road configuration. The Commission's answer to these concerns—that a yet-to-be-created plan approved by another federal agency will adequately mitigate any harm—is unavailing and inconsistent with NEPA mandate to take a “hard look” at the environmental impacts of a project.<sup>105</sup> *Kleppe*, 427 U.S. at 410 n. 21.

Yet, even if Algonquin adopted a PHMSA-approved emergency response plan, such a plan would not change the basic facts that the facility itself presents a significant risk to public safety and that evacuation from the area would be very difficult due to the unique geography of the peninsula. Specifically, as noted, the facility is located within a Hurricane Inundation Zone and will become inaccessible during a Category 2 storm.<sup>106</sup> If the area becomes inaccessible during

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<sup>104</sup> Weymouth EA Comments, at 2, n. 5, R. 1100, JA\_\_\_\_; Weymouth Notice of Intent Comments, Exhibit C, R. 468, JA\_\_\_\_.

<sup>105</sup> Certificate Order, 158 FERC ¶61,061, ¶70, R. 1235, JA\_\_\_\_ (reliance on the mitigation plans in finding that impacts will be insignificant).

<sup>106</sup> Weymouth EA Comments at 13-14 and Exhibit B, R. 1100, JA\_\_\_\_.

a storm, the risks to public safety would be significant. The Commission was obligated to consider these impacts.<sup>107</sup>

**ii. *Intensity Factor 3: Unique Geography***

Intensity Factor 3 further demonstrates the need to prepare an EIS.

Algonquin proposes to construct the compressor station on coastal land directly abutting two conservation parcels on a peninsula surrounded by the Fore River, the Fore River Estuary, and King's Cove.<sup>108</sup> Although the Project will not physically alter the conservation and recreational parcels abutting the Site, the Project will emit noise and air emissions, inevitably impairing the public's ability to use these scenic spaces, a fact that even the Commission recognizes.<sup>109</sup> See *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (NEPA requires discussion of indirect effects of agency action, provided that such effects are not remote or speculative).

The Commission's limited view of what constitutes a significant impact (*i.e.*, only those that physically disturb the Weymouth Site) is wholly inappropriate and

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<sup>107</sup> It bears noting that the public safety issues have a secondary impact - on devaluation of nearby properties - that the EA also failed to consider. See S. Peters Rehearing Request, at 7-8, R. 1245, JA\_\_\_\_.

<sup>108</sup> EA, at 2-65, R. 782, JA\_\_\_\_.

<sup>109</sup> Rehearing Order, 161 FERC ¶61,255, ¶29, R. 1388, JA\_\_\_\_ ("The EA found that 'use of the Kings Cove parcel by the public would not be impacted during or after construction of the compressor station,' although there could be some noise and visual impacts." (emphasis added)).

places the beauty of this unique coastal area at jeopardy.<sup>110</sup> The Commission should not be permitted to strip these conservation restrictions and coastal resources of their inherent value without a full and complete EIS.<sup>111</sup>

**iii. *Intensity Factor 4: Highly Controversial Impacts***

In order for an action to be highly controversial, there must be a dispute over the size, nature, or effect of the action, rather than merely the existence of opposition to it. See *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2d Cir. 1992). Under this definition, the Atlantic Bridge project qualifies as controversial because of disputes over the nature and effect of the action. On the one hand, the Project opponents have documented dozens of impacts that the Project will have on safety, health, and environmental resources.<sup>112</sup> On the other

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<sup>110</sup> EA, at 2-66, R. 782, JA\_\_\_\_.

<sup>111</sup> Moreover, as noted, these conservation restrictions were conveyed to Weymouth as mitigation for the construction and operation of the adjacent Calpine power plant. EA, at 3-20, R. 782, JA\_\_\_\_. But the siting and operation of the proposed compressor station immediately adjacent to the King's Cove and Lovell's Grove Parcels will deprive the Town of benefit of this mandated mitigation, a significant impact on both existing and future conservation and recreation sites along the scenic Fore River.

<sup>112</sup> Notably, during the comment period, numerous individuals, as well as state and local officials and state agencies, filed comments that cast "serious doubt upon the reasonableness" of the Commission's conclusions." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 736; see also *California v. U.S. Dep't of Transp.*, 260 F. Supp. 2d 969, 973 (N.D.Cal. 2003) ("[T]he volume of comments from and the serious concerns raised by federal and state agencies specially charged with protecting the environment [may] support a finding that an EIS" is necessary."); *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1158 (same).

hand, the Commission and Algonquin view the Project's impacts as minor and imply that intervenors have exaggerated the harms. Because the sides are so far apart in their views of the Project's impacts, an EIS should have been required to allow for more extensive review and resolution of these factual disputes.

**iv. *Intensity Factor 5: Unique or Unknown Risks***

The Commission must prepare an EIS because the environmental effects of the Project are highly uncertain. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) ("significant environmental impact" mandating preparation of EIS where "effects are highly uncertain or involve unique or unknown risks." (citation omitted)). "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data...or where the collection of such data may prevent speculation on potential...effects." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 732 (citations and quotations omitted).

The compressor station is proposed to be sited in a densely populated coastal area adjacent to fragile ecological resources and with limited road access. This location greatly increases the risks posed by an emergency event at the Site as compared to the typical compressor station location (*i.e.*, a rural setting on a large parcel of land). Moreover, the proposed Site is next to an 787-megawatt electric

generating facility.<sup>113</sup> If an incident were to occur, it is unknown whether the adjacent electric generating facility would be impacted and what effect that could have on the surrounding environment. Furthermore, the Commission has not reviewed an emergency response and evacuation plan for the compressor station. The scope of those impacts is therefore equally unknown.

In sum, the Commission's EA lack analysis of the NEPA context and intensity factors that are supposed to be the basis for choosing whether to prepare an EIS. This is especially inexplicable in light of the fact that the Commission's *Suggested Best Practices for Industry Outreach Programs to Stakeholders* states that projects for which an EIS should be prepared include those "with new aboveground facilities near population centers."<sup>114</sup> Despite this guidance, the Commission erroneously states that an EIS is not warranted because the Project primarily involves "take-up and re-lay and modifications to existing facilities" and the "EA concludes that the impacts associated with this project can be mitigated to support a finding of no significant impact."<sup>115</sup> If the Commission is going to ignore its own Best Practices guidelines so blatantly, it must at least offer some sort of explicit rationale for doing so beside stating that Commission's Best Practices does

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<sup>113</sup> EA, at 3-20, R. 782, JA\_\_\_\_.

<sup>114</sup> Commission's Best Practices, *surpa.*, JA\_\_\_\_.

<sup>115</sup> Certificate Order, 158 FERC ¶61,061, ¶70, R. 1235, JA\_\_\_\_.

not bind its actions.<sup>116</sup> Without a more reasoned analysis, the Commission must be found to have acted arbitrarily and capaciously by refusing to prepare an EIS.

**b. The Commission’s Environmental Assessment is Based on Incomplete, Inadequate, or Misleading Information.**

The Commission based its Finding of No Significant Impacts on incomplete and inadequate information—thereby undermining its decision to proceed without an EIS. *Marsh*, 490 U.S. at 371 (“NEPA ensures that the agency will not act on incomplete information.”). Specifically, there are three principal areas of deficiency in the EA: (1) the coal ash analysis; (2) the noise analysis; and (3) the traffic analysis.

**i. *The Commission violated its NEPA obligations when it refused to provide any description of the environmental impacts of a coal ash release caused by the construction of the Weymouth compressor station.***

Despite the fact that coal ash was flagged as a “Recognized Environmental Condition” in the Phase I Site Assessment submitted by Algonquin,<sup>117</sup> the EA is silent about the environmental effects of disturbing coal ash fill during construction activities, and instead includes only general statements about what Algonquin would do if soil contamination is encountered. This is wholly inadequate. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1032 (“If the risk of a[n event] is not

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<sup>116</sup> Rehearing Order, 161 FERC ¶61,255, ¶68, R. 1388, JA\_\_\_\_.

<sup>117</sup> EA, 2-8, R. 782, JA\_\_\_\_.



insignificant, then NEPA obligates...a hard look at the environmental consequences of that risk.”).

In *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 733 (1983), the Court stated:

To determine whether [NEPA]...requires consideration of a particular effect, we must look to the relationship between that effect and the change in physical environment caused by the major federal action at issue...[looking for] a reasonably close causal relationship...like the familiar doctrine of proximate cause from tort law.

Obviously, there is a “reasonably close causal relationship” between the construction of a compressor station on a site that is contaminated with coal ash and the release of that coal ash into the environment. According to a report cited in Weymouth’s comments on the EA, coal ash can cause cancer and neurological damage in humans, and harm and kill wildlife, especially fish and other water-dwelling species.<sup>118</sup> The cited report also describes the various ways in which coal ash can be released into the environment, particularly during construction.<sup>119</sup>

Unlike the harm resulting from the likelihood of starting a war (*No GWEN Alliance of Lane County, Incorporated v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988)),

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<sup>118</sup> Weymouth EA Comments, at 10, R. 1100, JA\_\_\_\_.

<sup>119</sup> *Id*; see also Weymouth Rehearing Request, at 32, R. 1242, JA\_\_\_\_ (referencing Comments of Dr. Curtis Nordgaard, (May 20, 2016), R. 959, JA\_\_\_\_ (scientific references on the toxicity of coal ash constituents)).

the release of coal ash is not a “remote” possibility or “highly speculative,” and brings with it significant environmental harm. See San Luis Obispo Mothers for Peace, 449 F.3d at 1035 (finding that an EA that did not consider the possibility of a terrorist attack is inadequate); *cf.*, *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980) (*per curiam*) (“impact statement need not discuss remote and highly speculative consequences.”). The Commission was therefore required to study the environmental impacts from a release.

The Commission’s statements in the EA and its Certificate Order do not begin to satisfy its NEPA obligations. Despite recognizing the “historic filling of the site with coal ash” and the “hazardous” nature of this substance,<sup>120</sup> neither the Commission nor Algonquin have provided any analysis of the routes by which coal ash fill at the Site could be released into the environment during construction and operation of the compressor station, any explanation of how such releases will be prevented, or any description of the environmental effects of such a release.

Algonquin’s statement that they will construct the Project in accordance with an unexpected contamination encounter procedure that has not been provided to the Commission is hollow and no substitute for a hard look at the impacts of a release. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) (“Simple, conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty

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<sup>120</sup> Rehearing Order, 161 FERC ¶61,255, ¶65, R. 1388, JA\_\_\_\_.

under NEPA.”). Algonquin cannot wait until starting construction to develop a plan for managing toxic and carcinogenic waste at the Site since it is already known to be present. That plan should have been reviewed by the Commission as part of its NEPA obligation.

Furthermore, the Commission’s statement in the Certificate Order that a Licensed Site Professional will monitor “compliance with the applicable provisions” of the Massachusetts Contingency Plan (MCP) is meaningless.<sup>121</sup> First, coal ash is essentially exempt from the requirements of the MCP.<sup>122</sup> 310 CMR §40.0006 (definitions of Anthropogenic Background and Historic Fill); 310 CMR §40.0317(9) (coal ash exemption from reporting requirement). Second, when

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<sup>121</sup> See Certificate Order, 158 FERC ¶61,061, ¶129, R. 1235, JA\_\_\_\_; Rehearing Order, 161 FERC ¶61,255, ¶66, R. 1388, JA\_\_\_\_.

<sup>122</sup> Weymouth also questions Algonquin’s ability to carry out construction in compliance with the MCP. Specifically, Calpine notified the Massachusetts Department of Environmental Protection (MassDEP) that two “Reportable Conditions” under the MCP had been identified at the site: floating oil in a monitoring well and petroleum-contaminated soil. Release Tracking Number (RTN) 4-26230 and 4-26243. MassDEP’s Bureau of Waste Site Cleanup guidance states that construction at sites where contamination has been found in reportable amounts and has not yet been fully addressed must be conducted under one of the five remedial action alternatives specified in the MCP. See Massachusetts Department of Environmental Protection, *Construction of Buildings in Contaminated Areas*, Policy #WSC-00-425 (January 2000), available at <http://www.mass.gov/eea/docs/dep/cleanup/laws/00-425.pdf>, JA\_\_\_\_. Algonquin has, as yet, filed no plan for carrying out construction at the compressor station site under any of the available approaches. These facts certainly do not support a conclusion that Algonquin actually intends to carry out construction in compliance with the MCP.

Algonquin encounters an inconvenient requirement of the MCP, it is sure to take the position that the provision is not “applicable” because it is preempted by NGA.<sup>123</sup> Thus, the Certificate Order’s statement demonstrates only the Commission’s lack of understanding of the NGA and the MCP and its failure to give meaningful consideration to the impacts of the Project. It certainly falls far short of the required hard look at the effects of a coal ash release on the environment. Simply stating that Algonquin will follow a yet-to-be-created response plan does not begin to describe the potential harm that may occur from a release.

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<sup>123</sup> Algonquin has a demonstrated track record of utilizing the NGA to evade local protections and controls. As stated above, *supra*, in three separate proceedings, Algonquin has asserted that the conditional Certificate Order acts to preempt Weymouth’s otherwise applicable local wetland and zoning laws governing the use of the coastal site. *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission and the Town of Weymouth, Massachusetts*, D.Mass. Case No 1:17-cv-10788-DJC; *In the Matter of Algonquin Gas Transmission LLC*, MassDEP OADR Docket Nos. 2017-011 and 2017-012; *In the Matter of Algonquin Gas Transmission LLC*, MassDEP OADR Docket No. WET-2016-25. In fact, as noted *supra*, Judge Casper of the District of Massachusetts held that, because Algonquin holds a certificate, the NGA preempts the Town’s Wetland Protection Ordinance. If the Commission’s FONSI conclusion is based on compliance with the MCP, then its Certificate Order should require such compliance with the state program. Any Certificate Order lacking this condition is hallow. *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission and the Town of Weymouth, Massachusetts, supra*, Memorandum and Order (Dec. 29, 2017).

**ii. *The Commission's blind reliance on the obviously inaccurate and incomplete noise analysis violates its NEPA obligations to take a hard look at the Project's impacts.***

The noise impact analysis (1) fails to establish an accurate baseline, (2) does not include the King's Cove and Lovell's Grove Parcels as noise sensitive areas, (3) mischaracterizes the impacts to these conservation parcels, (4) neglects to consider evidence regarding the frequency of blowdowns, and (5) fails to consider tone noise and vibrations, all essential data for an informed decision. In the face of specific challenges by Weymouth, the Coalition, and other interveners, the Commission's unquestioning reliance on the Algonquin's noise analysis runs afoul of the Commission's duty to take a "hard look" at the environmental impacts and independently verify information submitted by the applicant. See 40 C.F.R. §1506.5 ("The agency shall independently evaluate the information submitted and shall be responsible for its accuracy."); *Van Abbema*, 807 F.2d at 642; *Coalition for Healthy Ports v. Coal. for Healthy Ports v. United States Coast Guard*, No. 13-CV-5347 (RA), 2015 WL 7460018 (S.D.N.Y. Nov. 24, 2015). Presenting accurate information is necessary to ensure a well-informed and reasoned decision, both of which are procedural requirements under NEPA. *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

First, Algonquin's noise analysis is based on inaccurate sound monitoring results, sound measurements that do not conform to standard methodologies or

practice, and an oversimplification of background sound level reporting around the Site. The existing background sound levels used in the noise analysis are based on short-term measurements that were sampled for just three minutes at each location.<sup>124</sup> This is shockingly inadequate and cannot possibly be said to capture a true representation of the overall background sound levels. As Weymouth highlighted in its Rehearing Request, this practice does not come close to standard practice in the field of acoustics.<sup>125</sup> Long-term monitoring over the course of at least one to two weeks is necessary in order to capture the range of environmental and anthropogenic conditions that may occur at a site in order to provide an estimate of the Ldn or L90 for a given site.<sup>126</sup> Even the authors of the noise assessment recognize this clear limitation in the analysis:

In our opinion, the measured ambient sound data adequately quantifies and is representative of the existing ambient environment at the identified receptors/NSAs for the meteorological conditions that occurred during the sound survey.<sup>127</sup>

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<sup>124</sup> Algonquin Gas Transmission, LLC's Abbreviated Application (Oct. 22, 2015), at Resource Report 9, Appendix 9G, H&K Report No. 3316, §9, Table F (Oct. 5, 2015) ("H&K Report No. 3316") and Appendix, Tables 3-6, at 19-22, R. 358, JA\_\_\_\_.

<sup>125</sup> Weymouth Rehearing Request, at 37, R. 1242, JA\_\_\_\_ (citing ANSI/ASA S12.9-1992/Part 2, *Quantities and Procedures for Description and Measurement of Environmental Sound. Part 2: Measurement of long-term, wide area-sound*, R2013).

<sup>126</sup> *Id.*

<sup>127</sup> H&K Report No. 3316 at 6, JA\_\_\_\_ (emphasis added).

In other words, the measurement results are representative only of the conditions that occurred over the three minutes during which the monitoring was conducted (on August 14, 2015).<sup>128</sup>

However, the Commission cursorily rejected the Petitioners' critique in its Rehearing Order, claiming, without any discussion of the report cited by Weymouth, that there "is no established criteria on the amount of time...to be used to characterize baseline conditions."<sup>129</sup> The Commission's broad statement does not demonstrate that it took a hard look at the information presented by Weymouth challenging the methodology. This, coupled with the obvious limitation of the study's results, clearly reveals the deficiencies in the noise impacts analysis. See Marsh, 490 U.S. at 371 (NEPA imposes a set of procedural requirements on federal agencies to "[ensure] that the[y] will not act on incomplete information....").

Furthermore, the measurement positions shown in Figure 2.8.3-4<sup>130</sup> and used in the Ambient Sound Survey were placed next to major roadways and are not representative of the majority of sensitive receptors in the area.<sup>131</sup> Most residences

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<sup>128</sup> H&K Report No. 3316 at Appendix, Tables 3-6, at 19-22, JA\_\_\_\_.

<sup>129</sup> Rehearing Order, 161 FERC ¶61,255, ¶125, R. 1388, JA\_\_\_\_.

<sup>130</sup> EA, at 2-108, Fig. 2.8.3-4, R. 782, JA\_\_\_\_.

<sup>131</sup> *Id.*, at 2-104, Table 2.8.3-1, JA\_\_\_\_.

in the area are located on secondary streets, but Measurement Positions 1 and 5 are located within approximately 50 feet of Bridge Street, a state highway.<sup>132</sup>

Similarly, Measurement Position 4 is located on Monatiquot Street, the first street adjacent to the Calpine power plant.<sup>133</sup> These measurement positions are not representative of the residential or recreational areas near the proposed compressor station Site. The Commission cannot rely upon the fact that there is no standard methodology to be used to characterize baseline conditions in concluding that the Algonquin's data are adequate.<sup>134</sup> Where, as here, the modeling results revealing gaping holes in Algonquin's analysis, the Commission should have independently collected sound data from the yards of homes on the secondary streets, where most of the residences are located, or required Algonquin to submit data that accurately portray the Project's impacts on the community. See 40 C.F.R. §1506.5(a), (c) (Commission is ultimately responsible for the preparation of environmental documents).

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<sup>132</sup> *Id.*, at 2-108, Fig. 2.8.3-4, JA\_\_\_\_.

<sup>133</sup> *Id.* The sound data also misrepresent the true baseline because most of the homes are set back from Bridge Street and Monatiquot Street by 200 to 800 feet, not by 50 feet as asserted. *Id.*, at 2-108, Fig. 2.8.3-4, JA\_\_\_\_. Using roadside monitoring points skews the baseline sound levels upward and therefore improperly masks the true noise impacts from the compressor station.

<sup>134</sup> Rehearing Order, 161 FERC ¶61,255, ¶125, R. 1388, JA \_\_\_\_.



Second, the Commission's EA is incomplete because it did not consider the King's Cove and Lovell's Grove Parcels as NSAs. The Commission has attempted to gloss over this fact by addressing the potential impacts to these parcels in the Certificate and Rehearing Orders.<sup>135</sup> This is not sufficient to satisfy its NEPA obligations.

While NSA is not a defined term in the Commission's regulations, the clear intent is for areas where people congregate and seek quiet – such as conservation lands – to be identified.<sup>136</sup> 18 C.F.R. §380.12(k)(4)(v)(A) (“The noise attributable to any new compressor station...must not exceed a day-night sound level...of 55 dBA at any pre-existing noise-sensitive area (such as schools, hospitals, or residences).”). Outdoor recreational areas, such as the King's Cove and Lovell's Grove Parcels, cannot be fully enjoyed if noise levels that are unacceptable at schools, hospitals, or residences, are exceeded. The Commission's claim that urban conservation parcels cannot be valued for solitude and tranquility (see Order on Rehearing, 161 FERC ¶61,255, ¶127, R. 1388, JA\_\_\_\_(noting that, given their

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<sup>135</sup> Certificate Order, 158 FERC ¶61,061, ¶220, R. 1235, JA\_\_\_\_; Rehearing Order, 161 FERC ¶61,255, ¶128, R. 1388, JA\_\_\_\_.

<sup>136</sup> The Federal Aviation Administration also uses NSA as a regulatory benchmark and states that the term may include residential neighborhoods, education, health, religious sites and structures, cultural, historical and outdoor recreational areas. *Runway 27 Coalition, Inc. v. Engen*, 679 F. Supp. 95, 99 (D. Mass. 1987) (citing FAA Order 1050.1B, App. 3, ¶5(f), which was intended to give preference to certain departure and arrival routes that were not routed over noise sensitive areas).

location near a “transportation corridor and a developed industrial area” that the conservation areas “do not rise to the level of a park or wilderness area that would be valued for their solitude and tranquility.”)), is disrespectful of the North Weymouth neighborhood, and continues the very environmental injustices that the NEPA process was created, in part, to address. Clearly, noise monitoring at these two conservation sites should have been conducted.

The Commission attempts to mask this deficiency in the EA by asserting in its Certificate Order that the impacts to the King’s Cove Parcel will be “up to 2 dBA noise increase, which is not perceptible.”<sup>137</sup> However, this calculation is predicated on incorrect and unsubstantiated assertions. For example, the Commission states that “the area is characterized by recorded ambient noise levels of 70.4 dBA L<sub>dn</sub>.”<sup>138</sup> But this is just one data point (Measurement Position 1)<sup>139</sup> located 610 feet south-southeast of the proposed compressor station along Bridge Street.<sup>140</sup>

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<sup>137</sup> Certificate Order, 158 FERC ¶61,061, ¶220, R. 1235, JA\_\_\_\_.

<sup>138</sup> *Id.*, at ¶220, JA\_\_\_\_; see also EA, at 2-104, Table 2.8.3-1 R. 782, JA\_\_\_\_.

<sup>139</sup> EA, at 2-104, Table 2.8.3-1 R. 782, JA\_\_\_\_.

<sup>140</sup> Weymouth could not have raised a challenge to the 2dBA increase figure at the King’s Cove Parcel in its public comments on the EA because that figure first appeared in the Order.

In fact, the northern extent of the King's Cove Parcel is almost as close to Measurement Position 2 as it is to Measurement Position 1. To contrast the two, there is a 15.5 dB difference in the reported existing  $L_{dn}$  between Measurement Position 1 (70.4 dBA) and Measurement Position 2 (54.9 dBA).<sup>141</sup> Given the proximity of areas of the King's Cove Parcel to the proposed Compressor Station, and the incomplete background sound level data in the area, the potential change in noise level attributable to the Project at the King's Cove Parcel appears to be much greater than what is contemplated in Paragraph 220 of the Certificate Order and Paragraph 129 of the Rehearing Order.

Based on calculations of the background sound levels at the King's Cove Parcel closest to the proposed equipment, the Compressor Station may result in an increase in sound level of 10 to 20 dBA, depending on the actual background sound level, which would be perceived as a double to quadrupling of loudness.<sup>142</sup> This contradicts the Commission's asserted 2 dBA increase based on a noise receptor 70 feet away from the proposed compressor station.<sup>143</sup>

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<sup>141</sup> Algonquin Gas Transmission, LLC's Abbreviated Application (Oct. 22, 2015), at Resource Report 9, at 9-51, R. 358, JA \_\_\_\_; see also Weymouth Rehearing Request, Exh. 8, ¶10 (Affidavit of Edward Duncan (Feb. 24, 2017)) R. 1242, JA \_\_\_\_.

<sup>142</sup> Weymouth Rehearing Request, Exh. 8, ¶10 (Affidavit of Edward Duncan (Feb. 24, 2017)) R. 1242, JA \_\_\_\_.

<sup>143</sup> Certificate Order, 158 FERC ¶61,061, ¶220, R. 1235, JA \_\_\_\_.

The Commission also based its 2 dBA calculation on the fact that the King's Cove Parcel is "80 to 90 feet away from the noise producing equipment."<sup>144</sup> This statement is unsupported by any evidence in the record. The Commission has not referenced any information depicting the location of the noise producing equipment. It is unclear whether this calculation is to the property boundary or to the walking path. The Commission's conclusory, unsubstantiated claim that it used the "closest location of the Kings Cove parcel to identify the maximum impact that the compressor station could contribute,"<sup>145</sup> fails to demonstrate that it has truly considered environmental concerns in its decision-making process. *Kleppe*, 427 U.S. at 410 n.21; *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011).

The Commission did not consider the impacts of a blowdown, asserting only that blowdowns are infrequent and that the events will be at or below 60 dBA at a distance of 300 feet.<sup>146</sup> But this unsubstantiated and conclusory statement cannot form the basis for a FONSI, especially with respect to those individuals visiting and engaged in recreation on the King's Cove Parcel directly abutting the proposed

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<sup>144</sup> *Id.*

<sup>145</sup> Order on Rehearing, 161 FERC ¶61,255, ¶128, R. 1388, JA\_\_\_\_.

<sup>146</sup> Certificate Order, 158 FERC ¶61,061, ¶223, R. 1235, JA\_\_\_\_.

facility. Assuming that the King's Cove parcel is 80 to 90 feet from the noise producing equipment, the cited noise level corresponds to 71 dBA, assuming a 6 dB addition per halving of the distance, accounting for geometric spreading.<sup>147</sup>

Finally, as Intervenor Sandra Peters pointed out, the EA failed to consider the tone noise and vibrations that the compressor station will emit.<sup>148</sup> The Certificate Order was non-responsive on this point, noting only that the vibrations will not impact fish and wildlife - but did not discuss impacts on humans.<sup>149</sup>

The Commission has presented no data to support its assertion in both the EA and the Certificate Order that blowdowns are infrequent.<sup>150</sup> Given the large number of compressor stations currently in operation,<sup>151</sup> information on the

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<sup>147</sup> Weymouth Rehearing Request, Exh. 8, ¶11 (Affidavit of Edward Duncan (Feb. 24, 2017)) R. 1242, JA \_\_\_\_.

<sup>148</sup> Sandra Peters Rehearing Request, at 11-13, R. 1245, JA\_\_\_\_.

<sup>149</sup> Certificate Order, 158 FERC ¶61,061, ¶155, R. 1235, JA\_\_\_\_.

<sup>150</sup> EA at 2-111, R. 782, JA\_\_\_\_; Certificate Order, 158 FERC ¶61,061, ¶223, R. 1235, JA\_\_\_\_.

<sup>151</sup> U.S. Energy Information Administration, Office of Oil and Natural Gas, *Natural Gas Compressor Stations on the Interstate Pipeline Network: Developments since 1996*, 1, (Nov. 2007) available at [https://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngcompressor/ngcompressor.pdf](https://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngcompressor/ngcompressor.pdf) (stating that there were over 1,200 natural gas compressor stations operating nationwide as of 2006).

frequency of blowdowns is available and should have been presented and considered.<sup>152</sup>

The Commission's blind reliance on incomplete and misleading material regarding the background noise levels and blowdowns and its failure to identify key conservation areas as NSAs violate its duty to take a "hard look" at noise impacts from the facility and render its decision arbitrary and capricious. *Van Abbema*, 807 F.2d at 642.

**iii. *The Commission's traffic analysis is wholly deficient because it is based on outdated plans.***

The traffic analysis contained in the EA is based on old and outdated information and cannot form the basis for the Commission's FONSI. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1257 (10th Cir. 2011) *cert. denied sub nom. Colorado Min. Ass'n v. Dep't of Agric.*, 568 U.S. 928 (2012) ("The duty to prepare a supplemental EIS is based on the need to facilitate informed decisionmaking."). When there are "substantial changes in the proposed action that are relevant to

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<sup>152</sup> On November 29, 2017, a blowdown occurred at a Kinder Morgan pipeline in Richmond, Massachusetts. See Heather Bellow, *Pipeline gas release terrifies Richmond residents – and raises questions*, The Berkshire Eagle, December 27, 2017, available online <http://www.berkshireeagle.com/stories/pipeline-gas-release-terrifies-richmond-residents-and-raises-questions,528055>, JA\_\_\_\_. The blowdown lasted about 40 minutes and, after the incident, residents living approximately a quarter mile away reported hearing loss and a vibration sensation throughout their bodies. *Id.*

environmental concerns” (40 C.F.R. §1502.9(c)), the agency must prepare a revised EIS. Given that the intent of NEPA is to ensure informed decision-making, this provision should also apply to Environmental Assessments.

On June 29, 2016, Algonquin informed the Commission that it moved its proposed staging area across Bridge Street to the Calpine property.<sup>153</sup> Not only did the Commission ignore Weymouth’s request to revise its EA accordingly,<sup>154</sup> but its Certificate Order does not even acknowledge that this change occurred. The Commission made a weak attempt in its invalid Rehearing Order to address the change to the Project, but its conclusory statements that the change is not significant falls far short of a reasoned analysis as required under NEPA.<sup>155</sup> Where, as here, the Project has changed substantially to affect local traffic patterns significantly, the Commission’s stubborn reliance upon the outdated plans does not comply with NEPA.

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<sup>153</sup> Supplemental Information for the Atlantic Bridge Project (Jun. 29, 2016), at 1, R. 1179, JA\_\_\_\_.

<sup>154</sup> June 29 and August 3, 2016, Supplemental Filings (Aug. 22, 2016), at 3, R. 1206, JA\_\_\_\_.

<sup>155</sup> Order on Rehearing, 161 FERC ¶61,255, ¶88, R. 1388, JA\_\_\_\_.

**IV. THE COMMISSION VIOLATED NEPA AND THE COUNCIL ON ENVIRONMENTAL QUALITY'S FINAL GUIDANCE ON CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS BY FAILING TO CONSIDER THE IMPACTS OF THE PROJECT ON AIR QUALITY.**

Between the new 7,700 horsepower compressor station to be sited in Weymouth and the 31,950 hp to be added at existing compressor stations, the Project will result in a significant increase in emissions. Yet, the Commission failed to quantify GHG emissions or discuss whether the Project will interfere with state targets to reduce GHG, contrary to the revised Council on Environmental Quality (CEQ) Guidelines on GHG emissions and climate change impacts.<sup>156</sup>

Under the CEQ Final Guidance on Climate Change, an agency must now quantify and analyze the direct and indirect climate change impacts from a given project using GHG emissions as a proxy for climate change impacts.<sup>157</sup> The Guidance directs agencies to look at the life-cycle GHG emissions of a project, including upstream activities, like natural gas extraction and downstream activities such as the foreseeable results of the project such as burning gas after transport. Finally, the Guidance requires agencies to quantify GHG emissions unless they can demonstrate that no tools exist for doing so. The quantification requirement

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<sup>156</sup> Per the Federal Register Notice of Availability, the CEQ Final Guidance became effective August 5, 2016. 81 FR 51866 (Aug. 5, 2016).

<sup>157</sup> See CEQ Final Guidance, 81 FR 51866 (August 2016); see also *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (remanding FERC order for failure to evaluate “reasonable foreseeable” emissions from downstream power plant fed by proposed pipeline).



prevents agencies from casually dismissing climate change impacts as overly speculative.

In *Sierra Club v. FERC*, this Court vacated a Commission order approving a pipeline certificate where the Commission failed to quantify the impacts of GHG emissions. Specifically, the court ruled that the EIS for the project was required to either quantify the impact of GHG emissions resulting from burning gas from the pipeline or explain why it failed to do so. *Sierra Club v. FERC*, 867 F.3d 1375 (D.C. Cir. 2017). Here, the EA summarily disregards the Project's impacts on climate change effects. The EA found that GHG emissions would increase as a result of the Atlantic Bridge Project, but that nevertheless, these increased emissions were too small to have an impact on climate change, and that there is "no standard methodology to determine how a project's relative small incremental contribution to GHG emissions would translate into physical effects on the global environment."<sup>158</sup> Per the CEQ Final Guidance on GHG emissions, this is not an appropriate approach.<sup>159</sup>

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<sup>158</sup> EA, at 2-143, R. 782, JA\_\_\_\_.

<sup>159</sup> CEQ Final Guidance, at 11 (a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA.")

The Commission committed a second error: despite repeated requests to address the issue, the Commission failed to discuss whether the Project will interfere with the targets outlined in the *Massachusetts Global Warming Solutions Act* (GWSA) to GHG emissions to 80% below 1990 levels by 2050 and 25% by 2020. The Massachusetts Supreme Judicial Court recently ordered the MassDEP to issue rules reducing GHGs, finding that the GWSA “requires the department to promulgate regulations that address multiple sources or categories of greenhouse gas emissions, impose a limit on emissions that may be released, limit the aggregate emissions released from each group of regulated sources or categories of sources, set emission limits for each year, and set limits that decline on an annual basis.” *Kain v. Dep’t of Env’tl. Protection*, 474 Mass. 278, 292 (2016). The CEQ Guidance acknowledges the relevance of state climate change goals. Specifically, the CEQ Guidance suggests that consistency with goals such as those outlined in GWSA should be included in agencies’ environmental review:

To provide a frame of reference, agencies can incorporate by reference applicable agency emissions targets such as applicable Federal, state, tribal, or local goals for GHG emission reductions to provide a frame of reference and make it clear whether the emissions being discussed are consistent with such goals.<sup>160</sup>

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<sup>160</sup> Council on Environmental Quality Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, December 18, 2014 at 11 *available at* [https://www.whitehouse.gov/sites/default/files/docs/nepa\\_revised\\_draft\\_ghg\\_guidance\\_searchable.pdf](https://www.whitehouse.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance_searchable.pdf).

The Certificate Order bypasses consideration of Massachusetts' climate change goals.<sup>161</sup> The Certificate Order appears to acknowledge the Massachusetts program but without further discussion simply concludes that "the EA appropriately considered the GHG emission and climate change implications of the project."<sup>162</sup> Because the Commission does not cite any evidence to support its conclusion, its finding regarding consideration of GHG emissions is arbitrary and capricious.

Finally, the Commission continued to apply its arbitrary 10-mile rule to exclude consideration of air quality impacts beyond that range,<sup>163</sup> and thus, performed only a cursory, generic analysis of the Project impacts on Marcellus Shale development.<sup>164</sup> Yet, the Environmental Protection Agency has made clear that the Commission's approach is not acceptable. In a previous case involving Algonquin, the EPA stated that:

The EIS should have more fully considered the potential for increased gas production associated with the development of the related pipeline capacity. In addition, we note that the FEIS [Final Environmental Impact Statement] discussion continues to make reference to gas extraction occurring more than 10 miles from the

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<sup>161</sup> Certificate Order, 158 FERC ¶61,061, ¶201, R. 1235, JA\_\_\_\_.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*, ¶115, JA\_\_\_\_.

<sup>164</sup> *Id.*, ¶172, JA\_\_\_\_.

proposed project location as a rationale for limiting the discussion of cumulative impacts. Geographic proximity is not in and of itself the standard for NEPA's requirement to consider impacts that have a reasonably close causal relationship to the proposed federal action.<sup>165</sup>

Because the Marcellus impacts fall outside the 10-mile radius, the Commission's analysis was inadequate because as the Commission itself admits, the estimates of impacts are "generic in nature and reflect a significant amount of uncertainty."<sup>166</sup> Thus, the Commission's resulting conclusion that the Project impacts associated with Marcellus Shale extraction and production are minimal is unsupported by evidence, and must be done over or alternatively, the Commission should be required to justify its rationale for imposing an arbitrary 10-mile rule on air emissions.

**V. THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT THE PROJECT WILL NOT ADVERSELY AFFECT ENVIRONMENTAL JUSTICE COMMUNITIES DISPROPORTIONATELY.**

The Commission's conclusion that the Weymouth compressor station would not result in any significant impacts on the nearby environmental justice communities is based entirely on flawed assumptions and therefore cannot form

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<sup>165</sup> EPA Region 1 Comments on FERC's Final Environmental Impact Statement on Spectra's Algonquin Incremental Market Expansion Project, FERC Docket CP14-96-000, March 2, 2015 at 5 (emphasis added), JA\_\_\_\_.

<sup>166</sup> Certificate Order, 158 FERC ¶61,061, ¶¶117-118, R. 1235, JA\_\_\_\_\_.

the basis for a FONSI.<sup>167</sup> “The principle of environmental justice encourages agencies to consider whether the projects they sanction will have a ‘disproportionately high and adverse’ impact on low-income and predominantly minority communities.” See *Sierra Club*, 867 F.3d at 1368. Executive Order 12,898 mandates that federal agencies include environmental-justice analysis in their NEPA reviews.<sup>168</sup> *Id.* (As with other aspects of an EA, an “environmental justice analysis is measured against the arbitrary-and-capricious standard.” *Id.*).

Despite the clear mandate to take a hard look at the Project’s impact on environmental justice communities, the Commission’s analysis ignores the realities faced by these communities. Namely, within 0.85 miles there are already numerous highly polluting facilities.<sup>169</sup> The record establishes that Weymouth suffers—more so than almost every other Massachusetts community—from a great many of the

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<sup>167</sup> *Id.*, ¶¶65-66, JA\_\_\_\_.

<sup>168</sup> The Massachusetts Secretary of Energy and Environmental Affairs also issued an Environmental Justice Policy. *Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs* (2017), available at <http://www.mass.gov/eea/docs/eea/ej/2017-environmental-justice-policy.pdf>, JA\_\_\_\_. The Policy was deemed necessary because established, densely populated, lower income communities such as Weymouth are often burdened with industrial areas that can pose significant risks to public health and the environment. Historically these communities have not been given a voice in the decision to host these industries and have not been made aware of the nature of the risks they now bear. Large industrial facilities such as those already in Weymouth cause the community to suffer an unequal exposure to serious environmental and related public health problems.

<sup>169</sup> Weymouth Rehearing Request, Exhibit C, R. 1242, JA\_\_\_\_.

consequences of the region's reliance on natural gas. Additionally, Weymouth already has some of the largest natural gas pipelines in Massachusetts, including one of the largest natural gas-fired electrical generating facilities in Massachusetts – the abutting Calpine facility. It has a metering and regulating station within a few hundred feet of the proposed compressor station location. Indeed, if the proposed compressor station were built, Weymouth would be the only Massachusetts community with a pipeline, a natural gas-fired generating facility, a metering station, and a compressor station.<sup>170</sup> Each of these facilities carries a non-negligible risk of environmental harm to both Weymouth and the abutting environmental justice communities located in Quincy. Collectively, they demonstrate that environmental injustices are already borne by these communities. The addition of the proposed compressor station would exacerbate the injustice, in conflict with state and federal policies to mitigate the disproportionate effects of environmental harm.

Instead of recognizing the situation already faced by those in the surrounding area, the Commission relies upon the Project's compliance with local zoning to support its FONSI.<sup>171</sup> However, consistency with local zoning cannot

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<sup>170</sup> Weymouth EA Comments, at 1, n.2, R. 1100, JA\_\_\_\_ (citing Weymouth Notice of Intent Comments, Exhibit B, R. 468, JA\_\_\_\_).

<sup>171</sup> EA, at 2-79, R. 782, JA\_\_\_\_.

form the basis for a FONSI. 42 U.S.C. §4331 (NEPA requires that federal agencies “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities.”). The whole point of the environmental justice analysis is to ensure that one community is not overburdened with highly polluting and dangerous facilities. *Id.* The Commission has essentially concluded that, because the Site is surrounded by other industrial facilities, siting the compressor station there would be appropriate.

The Commission also based its FONSI on its assertion that most of the Project’s pipeline and facilities would be located outside of the environmental justice communities.<sup>172</sup> This ignores the fact that underground pipelines bring with them very different impacts than an above ground compressor station. The purpose of the environmental justice review is to force agencies to focus on disenfranchised communities to avoid saddling them with infrastructure. Even if a project’s overall impacts are minimal, the concentrated impacts on an environmental justice community can still be acute. This is certainly the case here where environmental justice communities are consigned to live in the shadow of multiple highly polluting industrial facilities.

As explained above, the Commission clearly does not recognize the unique urban environment in which the facility will be sited. The King’s Cove and

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<sup>172</sup> *Id.*

Lovell's Grove conservation areas, created as part of a mitigation plan for the Calpine facility, are urban parks designed for quiet reflection along the waterfront. By stating that these conservation parcels cannot be valued for solitude and tranquility because of their urban setting,<sup>173</sup> the Commission not only ignores the factual realities of city life, but also discredits the environmental justice communities that use these spaces and perpetuates the very environmental injustices that the NEPA process was created, in part, to address and which were sought to be ameliorated by the establishment of these conservation areas.

The EA adds insult to injury by suggesting that environmental justice communities will benefit from the creation of additional jobs. Yet the record shows that the Project will create only a tiny handful of jobs, while diminishing property values.<sup>174</sup>

Furthermore, the Commission issued its FONSI despite clear procedural issues with the EA process. Specifically, despite the Commission's claims that "all public documents were readily available to the public, including environmental justice communities during review,"<sup>175</sup> undersigned counsel had significant issues

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<sup>173</sup> Order on Rehearing, 161 FERC ¶61,255, ¶127, R. 1388, JA\_\_\_\_ (noting that, given their location near a "transportation corridor and a developed industrial area" that the conservation areas "do not rise to the level of a park or wilderness area that would be valued for their solitude and tranquility.").

<sup>174</sup> Comments of Councilwoman Rebecca Haugh (Apr. 23, 2015), R. 30, JA\_\_\_\_.

<sup>175</sup> Certificate Order, 158 FERC ¶61,061, ¶187, R. 1235, JA\_\_\_\_.



accessing the documents on both the FERC docket and the alternate eLibrary webpage. The Commission brushes away this concern in its Rehearing Order, noting that online assistance is available during work hours and that documents are available in centralized locations.<sup>176</sup> These arguments miss the fact that most of the outages took place on evenings and weekends, when the help desk would not be available and other locations to view the documents would be closed. Clearly, the Commission has not had to rely on its online assistance to access documents.

The Commission's cursory assessment of impacts on the environmental justice communities is inadequate under Executive Order 12,898, and accordingly, the Certificate Order should be vacated.

**VI. THE COMMISSION'S GRANT OF A CERTIFICATE UNDER SECTION 7 OF THE *NATURAL GAS ACT* WAS ARBITRARY, CAPRICIOUS, UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND CONTRARY TO THE PRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY.**

Under Section 7 of the *Natural Gas Act*, the Commission may grant certificates only if it finds that the proposed project is "required by the present and future public necessity and convenience." 15 U.S.C. §717f(e). The applicant carries the burden of proof to establish that a certificate is in the public necessity and convenience under Section 7. See *Sunray Mid-Continent Oil v. Federal Power*

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<sup>176</sup> Rehearing Order, 161 FERC ¶61,255, ¶99, R. 1388, JA\_\_\_\_.

*Comm'n*, 364 U.S. 137, 157 (1960) (finding that Commission was reasonable to require applicant to prove need for a limited certificate).

A showing of “public need” (as opposed to “private need”) is a constitutionally imperative requirement of the “public convenience and necessity” since Section 7(h) of the NGA empowers certificate holders to exercise the power of eminent domain. 15 U.S.C. §717f(h). Absent public need, Section 7(h) would violate the Fifth Amendment’s prohibition on takings of property for private gain. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005).

Section 7 of the NGA applies only to interstate gas projects. See *Distrigas Corp. v. Federal Power Comm’n*, 495 F.2d 1057, 1062 (D.C. Cir. 1974) (contrasting interstate scope of Section 7 of NGA with Section 3 which applies to export facilities). Need must be demonstrated with respect to domestic demand served by interstate pipelines. Interstate commerce and foreign commerce are two distinct concepts in the Constitution. *Border Pipe Line Co. v. Fed. Power Comm’n*, 171 F.2d 149, 150 (D.C. Cir. 1948). The NGA retains this distinction, defining interstate commerce as exclusive of foreign commerce. See 15 U.S.C. §717(a)(6) (defining interstate commerce as commerce at any point between states but only insofar as commerce takes place in US). The Commission’s Certificate Policy Statement also takes account of need as a factor when balancing the benefits and

burdens of a project.<sup>177</sup> The Certificate Policy Statement applies a sliding scale approach such that projects with substantial adverse impacts face a higher standard for proof of project need.

Algonquin failed to meet its burden of showing that there is any public need for the Project, let alone sufficient need to justify the adverse impacts. Although Algonquin represents that the project is fully subscribed, at least 52 percent of the capacity (as calculated by the Coalition) is bound for export.<sup>178</sup> Indeed, even the Commission itself admits that almost half of the capacity will leave the county.<sup>179</sup> Foreign demand does not suffice to demonstrate public need under Section 7 of the NGA, which requires that need be shown to exist in domestic markets.

Looking outside the Precedent Agreements as the Commission may do under the Certificate Policy Statement, a review of market trends shows that the overall need for natural gas is unlikely to increase and, by all indications, will likely precipitously decline. Furthermore, a Report commissioned by the Massachusetts Attorney General and released in 2015 shows that New England

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<sup>177</sup> See Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶61,227 (Sept. 15, 1999), clarified, 90 FERC ¶61,128 (Feb. 9, 2000), further clarified, 92 FERC ¶61,094 (July 28, 2000).

<sup>178</sup> The record contains different calculations of the amount of gas destined for export, ranging from 64.5% (Food & Water Watch EA Comments, at 2, R. 1092, JA\_\_\_\_\_) to 85% (Alice Arena Comments, (Oct. 16, 2017), R. 1218, JA\_\_\_\_\_).

<sup>179</sup> Certificate Order, 158 FERC ¶61,061, ¶121, R. 1235, JA\_\_\_\_\_.

need is fully met by existing supplies and that additional gas supplies will not be necessary until 2030.<sup>180</sup> Even more recently, the *Annual Energy Outlook 2017* released by the Energy Information Administration (EIA) found that, by 2018, the United States is expected to become a net exporter of natural gas on an average annual basis.<sup>181</sup>

The Commission's practice of unquestioningly adopting an applicant's assertion of need without any further independent investigation, has alarmed even the Commissioners themselves. When Chairman Norman Bay departed the Commission in February 3, 2017 he issued a statement, in another compressor station proceeding, expressing concern about the Commission's somewhat casual approach to determining project need, reminding his colleagues that "LNG import terminals that were built during the early 2000 time period became stranded as shale gas increasingly substituted for LNG imports from overseas." Separate Statement of Norman Bay, *Northern Gas Fuel Supply*, 158 FERC ¶61,145 (2017). Since then, Chairman Bay's successor, Chairman Kevin McIntyre has called for a

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<sup>180</sup> *Power System Reliability in New England*, Alliance Group (Nov. 2015) available at <http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf>, JA\_\_\_\_.

<sup>181</sup> *Annual Energy Outlook 2017*, with projections to 2050, Energy Information Administration, available at [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf), JA\_\_\_\_.

reevaluation of the Commission's practices for reviewing projects under its Certificate Policy Statement.<sup>182</sup>

All of these developments indicate the necessity of a far more robust inquiry into need than the Commission has undertaken to date, including with respect to the compressor station. Moreover, under the Certificate Policy Statement's sliding scale approach, even ordinary need does not suffice. Given the Project's extensive adverse impacts, only a demonstration of extraordinary public need could outweigh the extraordinary harm. This Project does not even come close to satisfying that standard.

### **CONCLUSION AND RELIEF REQUESTED**

For the foregoing reasons, Petitioners respectfully request that the Court find that the Project fails to satisfy the requirements of Section 7 of the NGA and vacate the Certificate Order and the Rehearing Order, or in the alternative, remand the proceeding to the Commission for compliance with NEPA.

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<sup>182</sup> FERC News Release, FERC to Review its 1999 Pipeline Policy Statement (Dec. 21, 2017), *available at* <https://www.ferc.gov/media/news-releases/2017/2017-4/12-21-17.asp#.Wmdjx5M-dPM>, JA\_\_\_\_.

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Date: January 30, 2018

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of this Court's order of November 21, 2017, because this brief contains 18,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1). Microsoft Word 2016 computed the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Microsoft Word 2016, Times New Roman) in 14 point font.

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Dated: January 30, 2018

/s/ Carolyn Elefant  
Carolyn Elefant

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on January 30, 2018, I cause a true and correct copy of the foregoing Joint Brief of the Petitioners Town of Weymouth and FRRACS, *et. al.*, to be served on all registered counsel via the electronic filing system of the U.S. Court of Appeals for the D.C. Circuit.

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