RECORD NO. 18-1218

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

LORI BIRCKHEAD; LANE BRODY, Individually and as CEO of Walden's Puddle, a Wildlife Rehabilitation and Education Center; JIM WRIGHT; MIKE YOUNGER,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

TENNESSEE GAS PIPELINE COMPANY, LLC,

Intervenor for Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PAGE PROOF BRIEF OF PETITIONERS

Carolyn Elefant
LAW OFFICES OF CAROLYN ELEFANT
1440 G Street N.W., Eighth Floor
Washington, DC 20005
(202) 297-6100

Counsel for Petitioners

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LORI BIRCKHEAD, LANE BRODY individually and in official capacity as CEO of WALDEN'S PUDDLE, JIM WRIGHT and MIKE YOUNGER, **PETITIONERS** **v.** **FEDERAL ENERGY REGULATORY COMMISSION,** **RESPONDENT.**	**Docket No. 18-1218**

PETITIONERS
CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to this Court's Order dated August 9, 2018, the Petitioners hereby submit this Certificate as to Parties, Rulings and Related Cases.

I. PARTIES

Parties Before the Commission:
Lori Birckhead, Lane Brody (CEO Walden Puddle),
Mike Younger, Jim and Christine Wright

Allegheny Defense, Heartwood, Ohio Valley Environmental Coalition (collectively, Environmental Coalition)

Tennessee Gas Pipeline

Petitioners:
Lori Birckhead, Lane Brody (as CEO of Walden Puddle),
Jim Wright, Mike Younger

Respondent:
Federal Energy Regulatory Commission

Intervenors (to date)
Tennessee Gas Pipeline Company

II. RULINGS UNDER REVIEW

Tennessee Gas Pipeline Company, FERC Docket No. CP15-77-000, Order Issuing Certificate and Approving Abandonment, 156 FERC ¶61, 157 (September 6, 2016),

Tennessee Gas Pipeline Company., FERC Docket No. CP15-77-001, Order Denying Rehearing and Dismissing Clarification, 163 FERC ¶ 61,190 (June 12, 2018).

III. RELATED CASES

Related Cases Pending Before D.C. Circuit or FERC Relating to NEPA Review of Upstream & Downstream Emissions As Required By *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017):[1]

Allegheny Defense Project v. FERC, Docket No. 17-1098 (D.C. Cir. 2017);

Appalachian Voices v. FERC, Docket No. 17-1271 (D.C. Cir. 2017)

[1] The Commission's failure to address the upstream and downstream emissions associated with the subject project is only one of several issues that Petitioners raise on review.

Town of Weymouth et. al. v. FERC, Docket No. 17-1135 (D.C. Cir. 2017)

Otsego 2000 v. FERC, Docket No. 18-1188 (D.C. Cir. July 16, 2018).

FERC CASES:

Transco Gas Pipeline Company, 164 FERC ¶ 61,101 (August 10, 2018)

PennEast Pipeline, 164 FERC ¶61,098 (August 10, 2018)

Atlantic Coast Pipeline, 164 FERC ¶61,100 (August 10, 2018)

National Fuel Gas Supply Corp, 164 FERC ¶61,084 (August 10, 2018)

Florida Southeast Connection, 164 FERC ¶61,091 (August 10, 2018)

NEXUS Gas Pipeline, 164 FERC ¶61,054 (July 25, 2018)

Texas Eastern Transmission, 164 FERC ¶61,037 (July 20, 2018)

Millennium Pipeline Company, 164 FERC ¶61,039 (July 20, 2018)

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GLOSSARY	
CEII	Critical Energy Infrastructure Information
Citizens	Collective term for Petitioners Birckhead, Brody, Wright and Younger
Commission	Federal Energy Regulatory Commission
Compressor Station 563	The 60,000 horsepower compressor station located in Joelton, Tennessee where the Petitioners reside or work and which is the largest component of the project and central focus of Petitioners' challenge.
EA	Environmental Assessment
NEPA	National Environmental Policy Act
Project	Broad Run Project approved by the Commission Certificate Order
Tennessee	Tennessee Gas Pipeline Company LLC, the project applicant.
Site C1	Alternative compressor station site rejected by the Commission in favor of the proposed site for Compressor Station 563.

INTRODUCTION AND OVERVIEW

As this Court observed, "it is an inescapable fact that [natural gas] facilities must be built somewhere." *Minisink Res. for Envir. Preservation v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014). But somewhere does not -- or at least should not -- mean anywhere. Yet if the Commission's order approving the Broad Run Expansion Project stands, pipeline companies will gain unfettered discretion to construct interstate natural gas projects not just *somewhere* but *anywhere* they own or may purchase a site -- irrespective of the availability of an environmentally and operationally superior location.

The Commission's use of site ownership as a determinative factor to choose between two sites for a 60,000 horsepower compressor station in this case runs afoul of the National Environmental Policy Act's (NEPA) prohibition on advance commitments of resources that will "prejudice the [agency's] selection of alternatives" *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 508 (D.C. Cir. 2010). Site ownership is neither a relevant nor permissible factor under NEPA because Congress granted pipeline companies the power of eminent domain to acquire any site approved by the Commission. 15 U.S.C. §717f(h) (authorizing certificate holders to invoke eminent domain to acquire necessary property rights for the project). *See Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (noting that agency

action is arbitrary when it relies on factors that Congress has not intended it to consider). The Commission's reliance on site ownership also runs counter to the public interest by broadcasting to companies that they can insulate their preferred project site from the rigorous environmental scrutiny required by NEPA by simply purchasing it in advance. For this reason, along with the Commission's failure to consider the rather obvious alternative of a reduced size compressor station or to evaluate the upstream and downstream impacts of the project on climate change as required by this Court's ruling in *Sierra Club v. FERC*, 867 F.3d 1357, 1172 (D.C. Cir 2017), the Commission's order must be vacated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Section 717r of the Natural Gas Act, 15 U.S.C. §717r over this Petition for Review. Petitioners Lori Birkhead, Lane Brody, Jim Wright and Michael Younger (collectively, "Citizens") sought and were each granted intervention in the certificate proceeding before the Commission.[1] The Citizens filed a timely joint petition for rehearing of the Commission order granting the certificate on October 6, 2016.[2] On June 12, 2018,

[1] *See Tennessee Gas Pipeline Company*, Order Denying Rehearing and Dismissing Clarification, 163 FERC ¶ 61,190 (2018) at P. 3 (acknowledging individual members of Concerned Citizens for a Safe Environment as intervenors and accepting their rehearing request for review), JA_____.

[2] Petitioners' Joint Request for Rehearing, FERC Docket CP15-77, (October 6, 2016), Accession No. 20161006-5155, JA_____.

the Commission denied all rehearing requests, thus rendering the orders final for judicial review under Section 15 U.S.C. §717r(a). This Petition for Review is timely filed within sixty days of the Commission's order on rehearing. *See* 15 U.S.C. §717r(b).

STATEMENT OF THE ISSUES

1. Whether the Commission's rationale for adopting the Applicant's proposed and preferred compressor station site was arbitrary, capricious and unsupported by substantial evidence when the Commission relied on site ownership as the pivotal selection factor -- even though any of the sites could have been acquired through exercise of eminent domain -- and thereby arbitrarily rejected Site C1, which was the environmentally and operationally superior alternative based on substantial evidence in the record.

2. Whether the Commission violated the National Environmental Policy Act (NEPA) and the CEQ regulations by failing to consider the reasonable alternative of downsizing the compressor station at the existing site, or relocating the compressor station to a central location between two existing compressor stations?

3. Whether the Commission's conclusion that it need not consider the reasonably foreseeable indirect upstream and downstream environmental effects of the Project, including the greenhouse gas, health, and climate effects when tools

used by other federal agencies exist to measure such impacts, violates NEPA, the CEQ regulations, and is arbitrary and capricious.

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

On January 30, 2015, Tennessee Gas Pipeline Company, LLC (Tennessee) filed an application for construction of the Broad Run Expansion Project (Project) pursuant to Section 7(c) of the NGA and Part 157 of the Commission's regulations (18 C.F.R. pt. 157). Certificate Order, 156 FERC ¶ 61,157, JA_____. In December 2014, prior to filing its application, Tennessee had already acquired the site for Compressor Station 563, the main object of the Citizens' challenge.[3]

The Citizens each intervened,[4] and thereafter submitted comments on the application. JA____. On March 11, 2016, the Commission released the Environmental Assessment (EA) for the Project (JA____). Both the Citizens collectively and their consultant Dr. William Robertson who is a physicist and professor individually submitted comments on the EA. *See* Citizens' Comments (April 11, 2016), JA _____, Robertson Comments June 6 and 26, 2016 (JA. ____, JA_____); *also* Comments September 5, 2016 (supplementing EA comments).

[3] *See* Parcel Records, online at https://maps.nashville.gov/ParcelViewer/PrintRecord.html?pin=2208 (showing acquisition of site by Tennessee on December 31, 2014).

[4] Motions to Intervene, JA____, JA____, JA_____ and JA_____.

On September 6, 2016, the Commission issued a certificate of necessity and convenience for the Project. JA_____. The next day, Dr. Robertson, on behalf of Citizens, filed a request for release of the flow diagrams and hydraulic models for the project to conduct an independent evaluation. *See* Initial CEII Request (September 7, 2016), JA_____. The flow diagrams and hydraulic models were not publicly available because the applicant had classified them as confidential critical energy infrastructure information (CEII).

On October 6, 2016, the Citizens filed a petition for rehearing of the Certificate Order. JA_____. Because Dr. Robertson had not yet received the flow diagrams and hydraulic models when the rehearing request was filed, the Citizens could not independently verify or challenge the Commission's finding that the compressor station was appropriately sized.

In November 2016, the Commission released some of the requested documents. Following several rounds of appeals, the Commission agreed to release updated flow diagrams in May 2017, but not the hydraulic models. *See* Commission Letters, JA_____, JA_____. In June 2017, Dr. Robertson submitted a report based on the additional, but still incomplete flow diagrams received. A year later, the Commission denied rehearing, with Commissioner LaFleur concurring and Commissioner Glick dissenting in part. Rehearing Order, JA_____. This petition ensued.

STATEMENT OF THE FACTS

I. DESCRIPTION OF THE PROJECT AND PARTIES

This petition for review arises out of the Commission's grant of a certificate of convenience to Tennessee for the Broad Run Expansion Project (Project) which will be used by a single shipper, Antero to transport up to 200,000 dekatherms/day of natural gas produced in the Utica and Marcellus supply areas to Southeastern Markets. Certificate Order at P. 1, JA_____. The project encompasses the construction of four new compressor stations in three different states and modifications to two existing compressor stations both located in Kentucky. Certificate Order at P. 2-3, JA_____. By far, the largest and most expensive component of the Broad Run Project is Compressor Station 563 which would be located in the Joelton neighborhood in Nashville, Tennessee where the four petitioners reside and is the central focus of this challenge.

Compressor Station 563 is 60,000 horsepower, consisting of two 30,000 horsepower ISO rated Solar Titan 250 turbine/compressor units and necessary auxiliary equipment. Certificate Order at P.2, JA_____. The compressor station is unusually large, ranking among just a small percentage of compressor stations nationwide with capacity in excess of 40,000 horsepower. *See* Citizens' EA Comments at 10 (citing EIA Report on Natural Gas Compressors), JA_____.

Tennessee proposed to locate Compressor Station 563 on a 43.2 acre tract in Joelton, Tennessee. The proposed site abuts a dozen residential properties, nine of

which are currently occupied. Citizens' Rehearing Request at 10 and Exhibit 2, JA_____. The EA identified 25 residences within a half-mile radius of Station 563 (*see* Environmental Assessment (EA) at Table 3-4, JA_____) while records produced by the Citizens listed 64 sites within that same range.[5] Compressor Station 563 would be located in a high seismicity area (EA at 24, JA_____, EA Table 3.4, JA_____), with the topography dominated by karst. *Id*. Construction of the station requires the clearing of 42.8 acres of trees, 30 acres of which are mature trees. *See* Supplement to Application, October 2015 at 4.1, EA_____. The Compressor Station 563 will destroy 23.7 acres of prime farmland and permanently preclude any agricultural use on the site for the life of the project. EA Table 3.4, JA_____, EA at 30, JA_____. The station would also exceed major source thresholds for NOx and CO, thus requiring a major permit under Title V of the Clean Air Act. EA at 97, JA____

Petitioners Birckhead, Wright, and Brody reside in or own businesses in Joelton, Tennessee. Ms. Birckhead and her family own a farm a scant 1000 feet from the compressor station site which supports three families of tenant farmers who make their livelihood from products they raise on the farm. *See* Birckhead Declaration of Standing, Doc. #1744749. Ms. Brody serves as CEO of Walden's

[5] On rehearing, Concerned Citizens submitted data from the Davidson County Assessor of Property office showing 64 properties within a half-mile radius of the site to rebut the information contained in the EA. Citizens' Rehearing Request at 10 and Exhibit 2, JA_____.

Puddle, a 501(c)(3) organization that operates a wildlife rehabilitation center and Mr. Wright and his wife operate a pet boarding facility, both within a mile radius of the compressor station site. Petitioner Younger lives in an adjacent county, approximately five miles from the compressor station site and prepared a report on the safety of Tennessee's pipeline system which was submitted to the Commission in this proceeding. After Tennessee proposed the compressor station, these petitioners along with other community members formed a group known as Concerned Citizens for a Safe Environment to oppose the project.[6] Dr. William Robertson, who resides on the pipeline about two miles from the 563 station, is a physicist and professor who assisted in technical review and attempted to independently verify the Commission's assessment of the project from an engineering and operations perspective.

II. THE CERTIFICATE PROCEEDING

On January 30, 2015, Tennessee Gas filed its application for the Project. JA____. Tennessee Gas originally proposed four project sites within Davidson County. Following public comments on the application, the Commission instructed Tennessee Gas to analyze other site alternatives, including Site C1 which had been identified by the Citizens and Dr. Robertson in their comments. EA at 127, JA____. In November 2015, Tennessee Gas submitted additional

[6] The individual petitioners are intervenors, but Concerned Citizens for a Safe Environment is not. *See* Rehearing Order at P. 2, JA_____ (acknowledging individual petitioners as intervenors).

information on eight site alternatives, including Site C1 located in Cheatham County. None of these alternatives contemplated a smaller-sized compressor station either at the proposed site or a different location.

The Commission released the EA for the project in March 2016. JA_____. The 216-page EA devoted just two paragraphs and a single table to the comparison of the alternative sites for Compressor Station 563. The EA acknowledged many of Site C1's advantages over that of the proposed site, but added that "Tennessee has identified a landowner willing to negotiate sale of the property at the proposed site."[7] The EA concluded that "that none of the alternatives offer significant environmental advantages over the proposed site for Compressor Station 563." EA at 127-129, JA_____.

The Citizens and Dr. Robertson submitted individual comments criticizing the EA, arguing that Site C1 was superior to the proposed site on virtually every metric and that the EA impermissibly relied solely on site ownership as a determinative factor. Citizens' EA Comments 15-17, JA_____; Robertson Comments (June 6, 2016), JA_____. In addition, Dr. Robertson described two other advantages to Site C1: it would avoid preemption of a local zoning ordinance

[7] The EA was incorrect. As noted earlier, Tennessee had not merely negotiated a potential sale but outright acquired the site on December 31, 2014 prior to filing its application. *See* Parcel Maps, online at https://maps.nashville.gov/ParcelViewer/PrintRecord.html?pin=2208.

prohibiting the siting of an industrial facility like a compressor station in an area zoned for agriculture/residential use and it would split the difference between two adjacent compressor stations on either side, thereby allowing for reduction of the size of the compressor station and a concomitant decrease in emissions. The Citizens and Dr. Robertson also argued that Compressor Station 563 was not needed or overbuilt and that the EA should have considered downsizing the compressor station as an alternative. Citizens' Comments at 5, JA_____; Robertson Comments, JA____.

On September 6, 2016, the Commission issued a certificate for the Project, and adopted Tennessee's proposed site for Compressor Station 563. The Commission agreed with the EA's conclusion that Site C1 did not offer any significant environmental advantages (Certificate Order at P. 111, JA____) but oddly, and apparently *sua sponte* amended two of the EA's key findings. First, the Commission stated that the EA mistakenly concluded that Site C1 would remove only 33.8 acres of trees and that it would instead remove 42.8 acres - the same amount as the proposed site. *Id*. Second, the Commission found that "Tennessee indicated that the landowner [for Site C1] would be unlikely willing to sell" when the EA found that the landowner for the proposed site *would* be likely to sell. *Id*. These are two distinct scenarios. The Commission's revised findings regarding the

Site C1 landowners' inability to sell was outside scope of the EA and the record since there is no indication that Tennessee had ever contacted the Site C1 owner.

The Commission's alternatives analysis fell short for other reasons. Most seriously, the Certificate Order never acknowledged the additional advantages of Site C1 over the proposed site: avoiding preemption of a local ordinance and allowing construction of a smaller compressor station that could still fulfill the project purpose of delivering 200,000 decatherms/day. The Commission also found that the Compressor Station 563 was necessary and "properly designed" -- but it did not consider the alternative of whether a smaller compressor station could be located at the same site and still serve the project's goals. Certificate at P.17, JA_____.

The Citizens disagreed with the Commission's conclusion that the compressor station was appropriately sized. To challenge the Commission's findings on rehearing, Dr. Robertson, acting on behalf of the Citizens, immediately requested Tennessee Gas' flow diagrams and hydraulic models from the Commission under its rules for obtaining confidential information. Robertson CEII Request (September 7, 2016), JA_____. On November 22, 2016, the Commission partially granted Dr. Robertson's request, but the materials were incomplete. After several rounds of appeal, Dr. Robertson finally received the updated flow diagrams -- but not the critical hydraulic models -- on June 9, 2017. *See* CEII Correspondence, JA_____ - JA_____.

In the meantime, on October 6, 2016, the Citizens had no choice but to file their rehearing request without the benefit of the flow diagrams to avoid missing the statutory deadline for rehearing. On rehearing, the Citizens reiterated many of the arguments they had raised in the original EA comments, and incorporated Dr. Robertson's opinion regarding the compressor station overbuild that he had prepared without the benefit of the flow diagrams and hydraulic models. Citizens' Rehearing Request at 30-35, JA_____. The Citizens also argued that the Commission violated NEPA by failing to evaluate the climate change impacts associated with the project's reasonably foreseeable upstream and downstream activities. Citizens' Rehearing Request at 50-57, JA_____.

The Commission denied rehearing and affirmed the grant of a certificate that adopted Tennessee Gas' proposed site for Compressor Station 563. Commissioner Glick dissented in part, finding that the Commission could not find that the project is in the public interest without making a "best effort to consider a project's potential contribution to climate change." Rehearing Order, Glick Dissent, JA____. Commissioner LaFleur concurred in part, agreeing that the "GHG impacts analysis is inadequate, and in particular, failed to sufficiently consider the upstream and downstream GHG impacts of the project." But Commissioner LaFleur then conducted her own cursory review of the project's downstream

impacts and concluded that they were not significant. Rehearing Order, LaFleur Concurrence, JA_____.

At some point during the twenty months that the Citizens' rehearing request was pending, the Commission granted Tennessee's notice to proceed with construction. Compressor Station 563 is now fully built and has gone into service.[8]

SUMMARY OF ARGUMENT

Compressor Station 563, a 60,000 horsepower compressor station is the largest and most expensive component of the Broad Run Expansion Project, which was authorized by the Commission in its Certificate Order issued in June 2018 and the focus of the Citizens' challenge. Certificate Order, JA_____. On review, this Court must vacate and remand the Commission's due to three specific violations of the NEPA.

First, the Commission's selection of the applicant's proposed site for Compressor Station 563 instead of Site C1 was arbitrary and capricious and in violation of NEPA because the Commission's choice cannot be rationally tied to the "facts found" (*Del. Riverkeeper Network*, 753 F.3d at 1313) which demonstrated that Site C1 was environmentally and operationally superior on every metric, including proximity to fewer residences and fewer high intensity

[8] *See* Tennessee Gas Update (November 15, 2018), FERC e-Library, Accession Number 20181115-5021 (online at www.ferc.gov) (stating that Compressor Station 563 is in service).

impacts on sensitive resources such as farmland, a park and forests. Moreover, Site C1 would have reduced project emissions by 40 percent. Instead, the Commission improperly relied on Tennessee Gas' ownership of the proposed site as the determinative factor for its selection, notwithstanding that site ownership is irrelevant under NEPA because certificate holders are vested with eminent domain powers. *See* 15 U.S.C. §717f(h). And, the Commission's reliance on site ownership as a key factor would pave the way for future NEPA violations by encouraging applicants to buy up sites to insulate their project from rigorous environmental scrutiny.

Second, the Commission disregarded NEPA's command that federal agencies rigorously explore and objectively evaluate all reasonable alternatives in its environmental assessment - specifically, the alternative of constructing a smaller compressor station at the same site, or at another site closer to the midway point between two other compressor stations. *See W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) ("The existence of a viable but unexamined alternative renders an EA inadequate."). Although the Commission considered eight project alternatives, all were essentially some version of "same trailer, different park" (or rather, same compressor station, different site) - an approach nixed by this Court in *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575

(D.C. Cir. 2016) which found that review of multiple iterations of essentially the same proposal falls short under NEPA.

Finally, the Commission order continues to flout this Court's ruling in *Sierra Club v. FERC*, 867 F.3d 1357, an error initially committed in *Dominion Gas Transmission*, 163 FERC ¶ 61,128 (May 2018) that persists. In *Sierra Club*, the Commission held that downstream greenhouse gas emissions are an indirect effect of natural gas projects, triggering the Commission's obligation under NEPA to estimate the emissions enabled or to explain why it could not do so. Instead, the Commission did neither, instead insisting that greenhouse gas emissions are something other than an "indirect effect." The Commission's failure to abide by this Court's binding precedent violates NEPA and warrants vacating the order.

STANDING

The Citizens all satisfy the test for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), which requires a showing of (1) injury-in-fact; (2) causation; and (3) redressability. All of the Citizens reside in or own businesses in Joelton, Davidson County, Tennessee in close proximity to Compressor Station 563 which at 60,000 horsepower is the largest component of the project. As such, each of the Citizens are directly injured by the Commission's orders approving the Compressor Station which damages the aesthetics and environmental characteristics of the area and jeopardizes the Petitioners' health,

safety and economic well-being. *See Moreau v. FERC*, 982 F.2d 556 (D.C. Cir. 1993) (finding landowner has standing to challenge pipeline on abutting property because of damage to her aesthetic and environmental well being). *See also* Birckhead Declaration, Doc. #1744749. (describing grounds for standing). The Citizens' injury may be redressed by a ruling vacating the Commission's decision and requiring it to re-examine the project alternatives and adopt Site C1 and to consider the project's upstream and downstream climate change impacts along with measures to mitigate adverse impacts.

STANDARD OF REVIEW

Under the applicable arbitrary and capricious standard of review to an agency decision under both NEPA and the Natural Gas Act, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) A reviewing court must find an agency action arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

Findings of fact unsupported by substantial evidence are not entitled to deference. 15 U.S.C. §717r(b) ("findings by the Commission as to the facts, if supported by substantial evidence, shall be conclusive"). Moreover, [s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).

NEPA also 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).

ARGUMENT

I. THE COMMISSION VIOLATED NEPA BY IMPERMISSIBLY RELYING ON SITE OWNERSHIP AS THE DETERMINATIVE FACTOR TO REJECT SITE C1 WHICH WAS ENVIRONMENTALLY AND OPERATIONALLY SUPERIOR.

The goal of NEPA is "to reduce or eliminate environmental damage." *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004). Therefore, NEPA commands federal agencies such as the Commission to fully consider the environmental effects of the construction of proposed natural gas infrastructure.

(*Minisink Safety v. Fed. Energy Regulatory Comm'n*, 762 F.3d 97 (D.C. Cir. 2014). The NEPA process should further "identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Although NEPA does not mandate a particular result, nevertheless, the Commission must demonstrate that its choice of one project alternative over another is rationally connected to the evidence in the record. *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

Here, the Commission's selection of the proposed site lacks any rational connection to the facts which show that Site C1 was environmentally superior on every metric considered in the EA. What's more, due to Site C1's more favorable location midway between two existing compressor stations, it offered an added advantage that the EA erroneously never considered at all: the potential for construction of a much smaller compressor station and a concomitant forty percent reduction of emissions. Still, even with all evidence pointing in the direction of Site C1, the Commission abruptly veered off course, choosing to adopt the proposed site based on nothing more than Tennessee's claim that the owner was willing to sell (*See* EA at 127, JA____), thereby potentially avoiding the exercise of eminent domain.

The Commission's reliance on site ownership violates NEPA's prohibition on advance actions (such as Tennessee's acquisition of the site for Compressor Station 563 prior to filing its application) that "prejudice the [agency's] selection of alternatives" *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 508 (D.C. Cir. 2010). Moreover, consideration of factors such as site ownership or avoidance of eminent domain is neither a relevant or permissible consideration under the Commission's environmental assessment of the project because Congress grants pipelines certificate holders the power to acquire property rights necessary for a project through use of eminent domain. 15 U.S.C. § 717f(h). Moreover, because the Commission independently reviews the impact of eminent domain as part of its balancing test for project approval under Section 7,[9] considering the potential for use of eminent domain during environmental review is unnecessary and duplicative.

[9] *See Certificate of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶61,227 (1999) at p. 25, *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶61,094 (2000) (Certificate Policy Statement) (describing that Commission balances project benefits such as market need against adverse impacts such as potential use of eminent domain to determine whether the project will satisfy the public necessity and convenience under Section 7 of the Natural Gas Act).

A. Record Evidence Demonstrates That Site C1 Was Environmentally Superior on All Counts.

TABLE SUMMARIZING COMPARATIVE ANALYSIS[10]

Metric	Proposed Site	Site C1
Number of Acres	43.2	43.2
Wetlands Crossed	0	0
Perennial Waterbodies crossed	0	0
Intermittent Waterbodies	1[11]	1
Ponds and Lakes	0	0
Wells within 150 ft	1	0
Floodplains	0	0
Prime Farmland	23.6	0.7
Steep Slopes	29.3	41.4
Sinkholes potential (acres)	42.9	42
High Seismicity areas	2	0
NRHP Eligible sites within ½ mile	2	0
Critical Wildlife habitat	0	0
Forest land impact (acres)	42.8	33.8
Residences within 0.5 mi	25	13[12]
Parks within 1 mile	1	0

Site C1 is superior to the proposed site on those metrics that are significant under Commission precedent or NEPA. *See* EA Table, JA____ The proposed site is within at least a half-dozen more residences than Site C1 (EA at 127, JA____)

[10] The data in this table is derived from Table 3-4, EA at 127, JA_____.

[11] Table 3-4 does not list the proposed site as impacting an intermittent stream; that information is contained in Table 2-2, EA at 38, JA____ (showing that proposed site will impact several streams).

[12] As discussed infra, data from the Davidson County Records submitted to the Commission show only one residence within .5 miles of Site C1.

and directly adjacent to nine residences (compared to zero for Site C1)[13] -- a factor that the Commission has in prior cases viewed as significant.[14] The proposed site will permanently destroy 23.6 acres of prime farmlands compared to .7 acres at C1, clear 44 acres of forest in contrast to 33. 7 acres for Site C1[15] and impacts a park (EA at 127, JA_____), making the intensity of impacts far more severe than Site C1. *See* 40 C.F.R. § 1508.27(b)(3) (defining intensity of impacts to include unique geographic characteristics like farmland and parkland).

Site C1 also offers an added environmental advantage over the proposed site because it better splits the distance between the two adjacent compressor stations,

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[13] Approximately a dozen residences abut the proposed site. *See* Citizens' Rehearing Request Att. 2 (Davidson County Records), JA _____; *also* EA at 79, JA____ (acknowledging "a few residences within 1000 feet of Compressor 563); EA at 72, JA____ (noting closest residence is just 75 feet away from Compressor 563 site).

[14] See *Algonquin Gas Transmission*, 161 FERC ¶61,255 (2017) at P. 142 (rejecting site with 60 homes within 50 feet of compressor station even though it has fewer homes in half mile radius than alternative); *Millennium Pipeline*, 117 FERC ¶61,319, n. 139 (2006) (finding High Meadow Road site is the preferred location for the compressor station, because there will be fewer residences in close proximity to the site), *vacated other grounds*, *Algonquin Pipeline*, 129 FERC ¶61,049 (2009); *Florida Gas Transmission*, 100 FERC ¶61,282 at P. 39 (2002) (noting "it is preferable to site a compressor station where there are fewer existing residences" and adopting that alternative).

[15] The Commission determined in both the certificate order and on rehearing that the number of trees to be removed at Site C1 was erroneous Certificate Order, P.111, JA_____, Rehearing Order at n. 40, JA_____. But the November 15, 2015 filing referenced by the Commission to support its modified tree count does not contain the information represented by the Commission in its Rehearing Order. *See* Tennessee Gas Supplementary Filing, Nov. 15, 2015, JA_____.

thereby allowing the company to decrease the size of the compressor station and reduce air emissions by 40 percent.[16] The Commission dismissed the 40 percent emissions reduction as "insignificant," because the project's emissions are already below National Ambient Air Quality Standards. Rehearing Order, P.26, JA__. The Commission failed to even consider the possibility that such a substantial emissions reduction might mitigate other project impacts - such as to remediate the project's exceedance of major source thresholds for NOx and CO. EA at 97, JA____ ,[17] or reduce the cumulative air quality impacts of the entire project. The Commission's reliance on conclusory statements unsupported by data or analysis that a 40 percent reduction in air emissions at a 60,000 horsepower compressor station is "insignificant" does not satisfy NEPA. *Seattle Audubon Soc. v. Moseley*, 798 F. Supp. at 1482.

The Commission mentioned two other factors - stream crossings and steep-sloped terrain -- where it erroneously suggested that Site C1 was less favorable than the proposed site. For example, the Commission noted that Site C1 would

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[16] *See* Rehearing Request, Exhibit 1 (Robertson engineering calculations showing relationship between compressor station size and distance from other stations).

[17] Although the EA is the place for evaluating the significance of the 40 percent reduction in emissions, (*See Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (rejecting agency explanation not contained in EA), the EA failed to even consider the alternative of downsizing the compressor station - a separate ground for error addressed in Part II.

cross an intermittent stream, while overlooking that the proposed site would cross two ephemeral-intermittent streams and one intermittent stream.[18] Site C1 also consists of 41.4 acres of steep-sloped terrain versus 29.3 acres for he proposed site. Yet the Commission does not explain why twelve more acres of sloped terrain would make Site C1 a less desirable alternative than the proposed site when Tennessee Gas chose sites with even more acres of sloped terrain for two of the other compressor stations included in the Broad Run Project.[19] Tennessee's selection of steep-sloped sites show that any construction challenges are readily managed - in contrast to impacts such as proximity to houses or effects on resources which can only be mitigated by avoiding the site.[20]

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[18] *See* Table 2-2, EA at 38, JA____ (identifying two ephemeral-intermittent and one intermittent streams that would be crossed or impacted by CS 563) and EA at 42, JA_____ (describing methodology to be used for crossing of ephemeral-intermittent stream at proposed site).

[19] As shown in Resource Report 10 to the Application, JA____, Tennessee's site for Station 118A has topography listed as steep slopes/extreme topography for 43.5 acres out of the total site acreage of 46.1 acres and the site for compressor 119A has topography listed as steep slopes/extreme topography for 46.9 acres out of the total site acreage of 47.5 acres.

[20] *See e.g.,* 149 FERC ¶ 61,199, Order Issuing Certificates and Approving Abandonment in Docket Nos. CP13-499-000 and CP13-502-000, at 76 (finding that imposition of "site-specific construction recommendations and mitigation measures for several steep slope and karst areas" would "adequately protect karst features and related resources such as groundwater.")

B. The Commission Improperly Relied on Site Ownership To Choose Between Sites.

As shown, a side by side comparison of the evidence demonstrates that Site C1 was environmentally superior to the proposed site in significant ways including lack of residences adjacent to the site, fewer impacts on unique natural resources like forest, farmland and parks and a potential for a smaller compressor station with fewer emissions. But the Commission disregarded Site C1's environmental advantages, instead approving the proposed site because "Tennessee indicated that the landowner [for Site C1] would be unwilling to sell while Tennessee had found a landowner willing to sell property at the proposed site." Rehearing Order, P. 25, JA_____. In defense of its choice, the Commission asserted that site ownership was not dispositive and is consistent with the Commission's policy of considering the impact, and minimizing use of eminent domain. *Id*. The Commission erred.

1. Consideration of site ownership is irrelevant.

The Commission's reliance on site ownership to distinguish between site alternatives was arbitrary and capricious. Site ownership is not a relevant factor in environmental review of a project because a company granted a certificate by the Commission is vested with eminent domain authority and can acquire any site necessary to construct the project eventually approved by the Commission. *See* Section 7f(h) of Natural Gas Act, 15 U.S.C. §717f(h). The Natural Gas Act's grant of eminent domain authority renders an owner's willingness or unwillingness to

sell or negotiate easement rights irrelevant to the Commission's alternatives analysis under NEPA.

While the Commission correctly asserts that it considers potential use of eminent domain as a factor in project review (Rehearing Order at P. 25, JA___), it does so as part of determining whether a project serves the public convenience and necessity under Section 7 of the Natural Gas Act, and not as part of its NEPA review. Under the Certificate Policy Statement, the Commission must first balance the project's benefits such as market need against adverse impacts such as the exercise of eminent domain. *See Certificate of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶61,227 (1999) at p. 25. ***"Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis…"*** Certificate Order, P. 15, JA_____ (emphasis added).

The Commission contemplated and condoned the project's potential use of eminent domain as part of its Section 7 analysis. In concluding that the project would serve the public necessity and convenience, the Commission expressly found that the project's benefits such as serving strong market demand outweighed the adverse impact on landowners. The Commission characterized landowner impacts as minimal because Tennessee owned or could acquire by necessary property rights by negotiation and if it could not, landowners would

receive "appropriate levels of compensation" as decided by a court in an eminent domain proceeding. Certificate Order, P. 20, JA____. Having concluded that project's potential eminent domain impacts were minimal and consistent with the public convenience and necessity, the Commission acted irrationally by invoking the potential use of eminent domain (which it had already deemed acceptable) as a factor of such grievous consequence during environmental review that it justified the choice of the proposed site over Site C1.[21]

2. Reliance on site ownership is incompatible with NEPA.

Not only is the Commission's reliance on site ownership to choose between sites irrelevant, it is also inconsistent with the underlying purpose of NEPA. The CEQ regulations provide that a non-federal applicant seeking federal authorization for a project may not take any action concerning the project that would have an adverse environmental impact or limit the choice of reasonable alternatives. *See* 40 C.F.R. §§ 1506.1(a)(1)-(2); *also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 508 (D.C. Cir. 2010) ("[A]gencies preparing an EIS shall not commit resources prejudicing the selection of alternatives before making a final decision). The proper inquiry in a NEPA case is ... not whether an agency has

[21] Moreover, the Commission's assumption that Tennessee would need to use eminent domain to acquire Site C1 is speculative at best. The record contains no evidence of the Site C1 owner's unwillingness to sell, particularly at the $1.4 million sale price that Tennessee paid for the proposed site that it acquired prior to filing its application.

focused on its preferred alternative, but instead whether it has gone too far in doing so, reaching the point where it actually has `[l]imit[ed] the choice of reasonable alternatives'" *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 206 (4th Cir. 2005).

The Commission's myopic focus on site control foreclosed serious consideration of Site C1 in violation of the CEQ regulations even though Site C1 was environmentally advantageous to the proposed site. Moreover, the Commission's decision makes for poor policy going forward. The Commission's choice of an environmentally inferior site rather than a more benign location based almost solely on site ownership broadcasts a message to future applicants to buy up property along their desired route irrespective of environmental considerations so as to lock their preferred route in place and insulate it from any modifications by the Commission. This is not an approach that serves the public interest. For that reason, the Commission's decision finds no support in *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960 (D.C. Cir. 2000). There, this Court affirmed the Commission's choice of an environmentally inferior project alternative because it advanced the Commission's longstanding policy of promoting competition in gas markets. By contrast here, the Commission's choice of an environmentally inferior alternative based on Tennessee's ability to acquire

the site does not advance a legitimate policy but instead encourages future applicants to violate NEPA.

The cases that the Commission cites on rehearing to support its reliance on site control are readily distinguishable because they involved scenarios where site ownership was a secondary rather than dispositive factor. Rehearing Order at n. 47, JA_____. Ironically, in *Natural Fuel Gas Supply*, 158 FERC ¶61,145 at P. 101 (2017), the Commission's primary reason for rejecting a project alternative was due to its proximity to more residences than the applicant's preferred option -- a factor which the Commission found irrelevant when choosing between the proposed site and Site C1. At best, the applicant's ability to avoid eminent domain in *Natural Fuel Gas* was a secondary consideration - and a factor that was not, as here, challenged by the parties. In *Algonquin Gas Transmission*, 154 FERC ¶61,038 at P.241 (2016), the proposed site was located within an existing right-of-way and consistent with the Commission's preference for co-location (*see* 18 C.F.R. § 380.15(e)) while the site that was rejected would not have been co-located thus requiring acquisition of additional rights. *Algonquin Gas* therefore does not support the Commission's purported practice of eminent domain avoidance but instead, is an example of the Commission's preference for co-location - a permissible environmental consideration because it minimizes adverse environmental impacts.

To sum, the Commission's reliance on site control and avoidance of eminent domain as the determinative factor for selecting the proposed site over Site C1, the environmentally and operationally advantageous alternative, was arbitrary and capricious. Although potential use of eminent domain is arguably relevant to the Commission's balancing test of project benefits against impacts for purposes of granting a certificate under Section 7 of the Natural Gas Act, it plays no role in the Commission's environmental analysis. Moreover, use of site control as a determinative factor is incompatible with NEPA. For these reasons, this Court must vacate the Commission order and direct the Commission to approve Site C1.

II. THE COMMISSION VIOLATED NEPA BY FAILING TO CONSIDER THE REASONABLE ALTERNATIVE OF CONSTRUCTION OF A SMALLER COMPRESSOR STATION.

Consideration of alternatives is the fundamental requirement of NEPA, in order to ensure that an agency has taken a "hard look" at the environmental consequences of its actions. *Balt. Gas & Elec. Co*, 462 U.S. at 97. Section 1502.8 of the Council on Environmental Quality's regulations state that alternatives are "the heart" of an environmental analysis. NEPA requires the Commission to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." *See Utahns for Better Transp.*, 305 F.3d 1152 at 1166 (10th Cir. 2002). "The existence of a viable but unexamined alternative

renders an EA inadequate." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (citations omitted).

An agency must consider a reasonable range of alternatives that that will serve the project's goals. *See, e.g., Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016). Numbers alone do not determine reasonableness; an alternatives analysis encompassing multiple iterations of the same action falls short under NEPA. Thus, in *Union Neighbors*, 831 F.3d at 575, this Court found that the Fish and Wildlife Agency's EIS for a proposed wind project did not comport with NEPA because even though the agency evaluated six different iterations of a proposed wind project, it refused to consider any "economically feasible alternative that would take fewer Indiana bats than the Applicant's proposed project." Likewise, in *Oregon Natural Desert v. Bureau of Land Management*, 531 F.3d 1114, 1145 (9th Cir. 2008), the Court invalidated the Bureau of Land Management's EIS because all of the alternative land management plans considered would have allowed for limited use by off-road vehicles and did not consider an alternative of simply closing off large areas to off-road vehicle use to reduce their impacts.

The Commission committed the same error in ignoring mid-range or compromise alternatives that this Court found fatal in *Union Neighbors*. Here, the Commission considered twelve different alternatives to the proposed site for

Compressor Station 563, yet each alternative was really nothing more than some version of "Same Trailer, Different Park"[22] - or in this instance, same 60,000 horsepower compressor station, different site location. The EA never reviewed the option of constructing a smaller-sized compressor station whether at the proposed site, or another location - notwithstanding that the Citizens suggested this option on several occasions. It was not until rehearing -- after both the EA was issued and the certificate order was granted -- that the Commission attempted to address the omitted alternatives that the Citizens had identified earlier. The Commission's delayed respond to the Citizens' arguments involving alternatives will not cure the EA's deficiencies. *See Blue Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (affirming that "[t]he EA . . . is where the [agency's] defense of its position must be found").

A. The EA did not consider the option of a smaller compressor station at Site C1 or some other midway point.

Prior to preparing the EA, the Commission was aware of the potential downsizing alternative. *See also Union Neighbors United, Inc.*, 831 F.3d 564, 575 (noting that many alternatives overlooked by agency had been submitted by commenters). As early as February 2016, before the EA was released, Citizens filed comments on the Broad Run Project application, noting the unusually large

[22] Same Trailer, Different Park is the debut album by country music artist Kasey Musgraves (https://en.wikipedia.org/wiki/Same_Trailer_Different_Park) and an apt analogy for a project that is located within Nashvile, Tennessee.

size of the 60,000 horsepower compressor station and asking for consideration of a smaller-sized alternative. Subsequently, in June 2016 following release of the EA, Dr. Robertson submitted two letters in support of Site C1, explaining that its location midway between two existing compressor stations would "mak[e] it a better engineering choice from an efficiency standpoint in terms of power required to move the same fixed volume of gas. Robertson Letter, June 6, 2016, JA____. Relying on conversations with engineers at a nearby similar compressor station and his evaluation of publicly available information, Dr. Robertson predicted that locating the compressor station at Site C1 could be downsized by a third, which could result in a 40 percent reduction of emissions.

The EA briefly considered several system alternatives consisting of expanding Tennessee's pipeline system in lieu of adding any compression, or replacing some of the proposed compression with additional pipelines - both of which were reject. EA at 124, JA____. The EA then considered various different site locations or all of the project compressor stations, including Compressor Station 563. Yet the EA never considered that Site C1 could allow for reducing the size of the compressor station. Indeed, the EA never discussed the prospect of downsizing any of the compressor stations, even though such an alternative is rather obvious, and in any event, had been raised by the Citizens and Dr.

Robertson. At a minimum, an agency is required to respond to the public comments in the EA.

The Commission's Certificate Order likewise ignored the alternative of a reduced size compressor station at Site C1. Certificate Order, P. 111, JA____. Although the Certificate Order compared Site C1 and the proposed site, the Commission never mentioned Site C1's most significant advantage: the ability to reduce the compressor station size along with air emissions. It was not until June 2018 -- more than two years after the Citizens and Dr. Robertson first raised the alternative of a downsized project at Site C1 -- that the Commission addressed, and predictably rejected one of their proposed alternatives.

Significantly, the Rehearing Order never made a finding as to whether a reduced compressor station at Site C1 was feasible. Instead, the Commission "accep[ted] Intervenors' assertion that the size of the compressor could have been decreased if Site C1 had been selected." Rehearing Order, P. 26, JA___. Even so, the Commission found that a smaller compressor was not a significant advantage over the proposed site because the project's projected emissions levels were below significant levels and in any event, Tennessee planned to mitigate impacts. *Id*.

The Commission's response finds no support in either the record or simple common sense. As noted in the EA, the proposed compressor station exceeds

major source thresholds for NOx and CO. EA at 97, JA____,[23] which a 40 percent reduction in emissions could mitigate. Second, the entire Broad Run Project includes three other new compressor stations and two compressor station upgrades, all adding capacity. At the very least, reduction in emissions at Compressor Station 563 could have yielded an overall project benefit by offsetting emissions releases by other compressor stations. *Cf, Millennium Pipeline*, CP11-515, 140 FERC ¶ 61,045 (2012) (Wellinghoff dissent acknowledging EA findings that reduction in compressor station size would also reduce emissions and yield air quality benefits). Finally, reducing compressor station size and emissions would relieve Tennessee of costly mitigation obligations and decrease the overall cost of the project as well.

In failing to consider the alternative of a smaller sized compressor station at Site C1, the EA falls short of NEPA's requirement to identify and explore a reasonable range of alternatives and therefore, must be vacated. Moreover, the Commission's attempt to save face by belatedly addressing alternatives brought to its attention two years prior deserves no deference since the "explanation was not provided in the EA." *See Blue Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

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[23] Although the EA is the place for evaluating the significance of the 40 percent reduction in emissions, (*See Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (rejecting agency explanation not contained in EA), the EA failed to even consider the alternative of downsizing the compressor station - a separate ground for error addressed in Part II.

B. The EA failed to consider the alternative reducing the size of the compressor station at the proposed site due to overbuild.

The EA also failed to consider the Citizens' argument that the compressor station was overbuilt and that a smaller sized compressor station could have been built at the site. EA Comments (describing compressor station overbuild), JA____. In September 2016, Dr. Robertson submitted a report demonstrating through engineering calculations that the proposed compressor station was overbuilt. The Certificate Order found, without analysis, that the Compressor Station was properly designed to transport 200,000 decatherms/day. Certificate Order, P. 17, JA____.

The Citizens challenged the Commission's findings on rehearing, attaching Dr. Robertson's preliminary calculations showing that the station was overbuilt. As described earlier, Dr. Robertson attempted to obtain the flow diagrams and hydraulic studies relied on by the Commission but was unable to do so in time to include the information in the rehearing request. Nine months later, Dr. Robertson received some but not all of the information requested and filed comments alerting the Commission to an error that showed more gas exiting the upstream compressor station than had entered - a situation that is not possible in practice. Dr. Robertson calculated that had the correct volume been used, a 40,000 horsepower compressor station at the proposed site would have been adequate to serve the project's goals of transporting 200,000 decatherms. *See* Robertson CEII Submission, (June 2017)

JA_____ (describing results). Even though the Commission prevented Dr. Robertson from receiving the CEII studies in a timely fashion, it rejected his later filed reports as untimely thus depriving the Citizens of an opportunity to meaningfully comment on the project.

In any event, even without the updated information, Dr. Robertson's preliminary studies show that Compressor Station 563 is overbuilt, and that a viable and less impactful alternative would have been to downsize the compressor station or eliminate it entirely. Because the EA failed to consider this reasonable option, it must be rejected.

C. Earlier Cases Affirming the Commission's Choice of Compressor Station Alternatives Is Distinguishable.

Both *Minisink Residents for Envtl. Pres. v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) and *Myersville Citizens for Rural Comm. v. FERC*, 783 F.3d 1301 (2015), two earlier cases involving NEPA challenges to Commission-approved compressor stations based on failure to consider alternatives are distinguishable. In both *Minisink* and *Myersville*, the court found that the Commission had fully considered the various alternatives identified by intervenors but ultimately determined that those options- which would have involved construction of several additional miles of pipeline - were environmentally inferior to the proposal ultimately approved. By contrast, here, the Commission completely overlooked the alternatives proposed by the Citizens, specifically the option of a smaller compressor station at Site C1. Nor

did the Commission take into account the significant benefits afforded by Site C1 in the form of reduced emissions and instead relied on an impermissible factor of site control to choose between the sites. In short, the significant advantages of Site C1 over the proposed site, the Commission's reliance and site control and its cursory and incomplete alternatives analysis set this case far apart from *Minisink* and *Myersville.*

III. THE COMMISSION VIOLATED NEPA BY FAILING TO CONSIDER THE UPSTREAM AND DOWNSTREAM IMPACTS OF THE PROJECT ON CLIMATE CHANGE.

A. The Commission Failed to Consider The Project's Reasonably Foreseeable Downstream Impacts

In *Sierra Club v. FERC*, 867 F.3d at 1372 (D.C. Cir. 2017), this Court found that NEPA requires the Commission to consider the indirect but reasonably foreseeable impacts of natural gas pipelines which includes the downstream greenhouse gas emissions resulting from burning of gas transported by the pipeline. Although the Commission had claimed that it lacked information regarding the amount of gas that would be burned downstream, the Court found that the Commission could "make educated assumptions" about use of gas based on its knowledge that the pipeline in that case would transport 1.1 million dekatherms per day. *Sierra Club* at 1374.

Applying *Sierra Club*, federal district courts in other jurisdictions reached similar results. In *San Juan Citizens Alliance v. U.S. Bureau of Land Management*,

2018 WL 2994406 (D.N.M. June 14, 2018), the court rejected BLM's claim that "consumption is not an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption." *Id*. at *21. Instead, the court ruled that BLM's "statement is circular and worded as though it is a legal conclusion…[and] it is contrary to the reasoning in several persuasive cases that have determined that combustion emissions are an indirect effect of an agency's decision to extract those natural resources." *See W. Org. of Res. Councils v. U.S. Bureau of Land Mgnt.*, No. 16-21 GF-BMM, 2018 WL 1475470, *13 (D. Mont. March 26, 2018) (finding that NEPA requires consideration of environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under agency plan within the EIS). The *San Juan* court continued that "it is erroneous to fail to consider, at the earliest feasible stage, the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under the proposed agency action." *Id*. at *24. Accordingly, the court found that BLM's action was "arbitrary" due to its failure to estimate the amount of greenhouse gas emissions which will result from consumption of the oil and gas produced as a result of the development of wells in the leased areas. *See also Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097-99 (D. Mt. 2017); *Dine Citizens Against Ruining Our*

Env't v. U.S. Office of Surface Mine Reclamation and Enforcement, 82 F. Supp. 2d 1201, 1213 (D. Colo. 2015).

As in *San Juan*, where BLM was reversed, the Commission likewise departed from *Sierra Club* and failed to evaluate the environmental impacts associated with the downstream greenhouse gas emissions resulting from the project. Rehearing Order, P. 58, JA_____. The Commission's action continues its practice of of defying this Court's precedent, a practice that began in *Dominion Transmission Inc*., 163 FERC ¶ 61,128 (2018) (refusing to consider upstream and downstream greenhouse gas impacts) which is also on review before this Court.

Here, the Commission explained that "the gas to be transported by the Project will be delivered by the project's sole shipper, a producer, into the interstate natural pipeline grid and not to a specific end user" and thus, "the Commission does not know where the gas will ultimately be consumed…" *Id* at P. 58. But in fact, the record does contain information regarding the destination of the gas: the project will transport gas to service "the growing demand...to markets in the southeastern United States." Rehearing Order at P. 27, JA_____. Indeed, as Commissioner LaFleur explained in her concurrence, "it is reasonably foreseeable in the vast majority of cases that the gas being transported by a pipeline we authorize will be burned for electric generation or residential, commercial, or industrial end uses. In those circumstances, there is a reasonably close causal

relationship between the Commission's action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result…" LaFleur Concurrence, JA_____.

Moreover, that the Commission may lack additional information on downstream impacts does not excuse its failure to consider them. As Commissioner Glick stated in his dissent:

> In deeming an entire category of potential consequences not reasonably foreseeable and any inquiry into the matter an "exercise in futility," the Commission excuses itself from making any effort to develop that record in the first place. That falls short of our obligations under NEPA and the NGA to make our "best efforts" to identify the consequences that our decisions will have for communities, individuals, and the environment.

Glick Dissent, JA_____.

The record contains sufficient information on the amount of gas to be transported-- 200,000 decatherms -- and its destination -- Southeast markets - to enable the Commission to analyze the downstream greenhouse gas impacts of the project as required by this Court in *Sierra Club*. To the extent that the information was unavailable, the Commission had an affirmative duty to seek it out. The Commission's failure to carry out these obligations violates both NEPA and the Natural Gas Act and as such, the Commission Order must be vacated.

B. The Commission Failed to Consider the Project's Upstream Impacts.

The Commission likewise erred in failing to consider the project's upstream impacts such as induced gas production, again finding no causally related and connected upstream activities that are reasonably foreseeable. Rehearing Order at P. 63, JA____. Here, the Commission's order is internally inconsistent. The Commission expressly determined a need for the project to deliver 200,000 decatherms a day for Antero, a gas producer. Absent construction of the pipeline, Antero would not extract and produce this gas because it would not have the ability to bring the gas to market. By finding a project need, the Commission thus acknowledges the purportedly elusive link between gas production and the pipeline. Because the record shows that construction of the pipeline will induce upstream gas production, the Commission erred in failing to evaluate the impact of upstream greenhouse gas emissions for the same reasons discussed with respect to downstream emissions. Accordingly, the Commission's order must be vacated.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioners respectfully request that this Court vacate the Commission order approving the Broad Run Project and specifically, Compressor Station 563 and remand the proceeding to the Commission for compliance with its obligations under NEPA.

/s/ Carolyn Elefant
Carolyn Elefant
LAW OFFICES OF CAROLYN ELEFANT
1440 G Street NW
Washington DC 20005
Telephone: (202) 297-6100
carolyn@carolynelefant.com
Attorney for Petitioners

Date: November 26, 2018

CERTIFICATE OF COMPLIANCE

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Dated: November 26, 2018

/s/ Carolyn Elefant
Counsel for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of November, 2018, I caused this Page Proof Brief of Petitioners to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Scott R. Ediger
Elizabeth E. Rylander
Robert H. Solomon
FEDERAL ENERGY REGULATORY COMMISSION (FERC)
OFFICE OF GENERAL COUNSEL
888 First Street, NE
Washington, DC 20426
(785) 218-6412

Counsel for Respondent

Brian D. O'Neill
Michael R. Pincus
VAN NESS FELDMAN, LLP
1050 Thomas Jefferson Street, NW, Suite 700
Washington, DC 20007
(202) 298-1983

Intervenor for Respondent

/s/ Carolyn Elefant
Counsel for Petitioners

ADDENDUM

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§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing. Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission. No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity.

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section

temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

(A)natural gas sold by the producer to such person; and

(B)natural gas produced by such person.

(d) Application for certificate of public convenience and necessity. Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity. Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act [*15 USCS §§ 717* et seq.] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the isssuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate customers.

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served. Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc. When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $ 3,000.

40 CFR 1500.2

This document is current through the November 19, 2018 issue of the Federal Register. Title 3 is current through November 2, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1500 -- PURPOSE, POLICY, AND MANDATE

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609)* and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55990, Nov. 28, 1978.

Annotations

Case Notes