ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

DELAWARE RIVERKEEPER NETWORK, *et al.*, Petitioners	)	Case No. 18-1128 (lead) [Consolidated with 18-1144, 18-1220, 18-1225 18-1226, 18-1233. 18-1256]
v.	)	
FEDERAL ENERGY REGULATORY COMMISSION, Respondent	)	
New Jersey Division of Rate Counsel et al., Intervenors	)	

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 162 FERC ¶ 61,053 (January 19, 2018) And 164 FERC ¶ 61,098 (August 10, 2018)

PETITIONERS' JOINT REPLY BRIEF

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Commission	Federal Energy Regulatory Commission
Delaware Riverkeeper	Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum
Delaware Riverkeeper Rehearing Request	Request for Rehearing of Delaware Riverkeeper Network under CP15-558
Delaware Riverkeeper Scoping Comments	Scoping Comment of Delaware Riverkeeper Network under PF15-1, Feb. 13, 2014
Department	New Jersey Department of Environmental Protection
Final Environmental Impact Statement	Federal Energy Regulatory Commission, *PennEast Project Final Environmental Impact Statement*, under CP15-558 (2017)
Gas Act	Natural Gas Act
HALT	Homeowners Against Land Taking – PennEast, Inc.
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Hopewell	Township of Hopewell
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Respondent Amicus Brief	Amicus for Respondents filed by Interstate Natural Gas Association of America, Document 1780133 (Mar. 28, 2019)
JA	Joint Appendix
Key-Log Report	Letter dated September 9, 2016 written by Key-Log Economics to Secretary Kimberly Bose & Deputy Secretary Nathaniel J. Davis (Appendix to Delaware Riverkeeper Rehearing Request under CP15-558)
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Policy Integrity Amicus Brief	Amicus for Petitioners filed by Institute for Policy Integrity at New York University School of Law Document No. 1766336 (Dec. 28, 2019)
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Respondent Brief	Brief of Respondent Federal Energy Regulatory Commission, USCA Case No. 18-1128, Document No. 1778672
State Petitioners	New Jersey Rate Counsel, New Jersey Department of Environmental Protection, and Delaware and Raritan Canal Commission
State Brief	Brief submitted on behalf of New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Rate Counsel, and fully incorporated herein

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Add. to the Brief for Petitioners: 36 C.F.R. § 219.19 (2018); 71 Fed. Reg. 30632 (May 30, 2006). These listed statutes, etc., are contained in the Add. to this reply brief.

SUMMARY OF ARGUMENT

This case compels the Court to protect consumers and landowners from the Commission's dereliction of duty. The Court must hold the Commission accountable for its myriad failures in issuing PennEast's Certificate, which depicts a regulator beholden neither to statutory nor Constitutional requirements.[1] The Court should correct the Commission's abdication of responsibility for analyzing the upstream and downstream environmental impacts from natural gas production as well as from the pipeline itself. The Commission's failures to administer the Gas Act in a constitutionally sufficient manner, both substantively and procedurally, constitute independent legal grounds upon which the Court should vacate and remand.

[1] Petitioners join and adopt State Petitioners' arguments and claims for additional violations of the Commission's statutory duties.

ARGUMENT

I. The Commission Failed To Reasonably Analyze Upstream Natural Gas Production Impacts

The Commission makes no attempt to rehabilitate its false statements that "[t]he Project does not depend on additional shale gas production," and the Project will not cause "development of gas reserves." *See* Pet'rs' Br. 7. The Commission now contends that it satisified National Environmental Policy Act by identifying the number of new wells induced by the Project. Resp't Br. 53-54. Not so. "[M]erely stating the sum of the acres to be [impacted] . . . is not a description of *actual* environmental effects," and does not satisfy the National Environmental Policy Act. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 995 (9th Cir. 2004) (emphasis added); *see also* Pet'rs' Br. 7-8.

The Commission contends it is absolved from further analysis because the Project "has no identifiable dedicated supply area," or "information regarding the locale and number of specific wells" or "details about production methods." Resp't's Br. 50. However, these statements do not withstand scrutiny. The Commission already identified the "number of specific wells" that would be drilled to support the Project (between "2,400-4,600"), the "production methods" (natural gas well development), and the "supply area," (determining total water usage for

additional gas drilling needed to feed the Project based on the "average Marcellus shale well"). *See* Certificate Order at ¶ 204, 205 [JA__,__]. Consequently, the Commission has the data necessary to analyze the size, scope, and intensity of foreseeable induced well-pad development. *See* Pet'rs' Br. 6-10.

The Commission also concluded that it "reasonably found no forecasts in the record that would enable [it] to meaningfully predict production-related impacts." Resp't's Br. 49. But the reason the Commission "found no forecasts in the record" is because the Commission **never asked for any forecasts**. By deeming any inquiry into an entire category of impacts futile, the Commission excuses itself from making any effort to develop that record in the first place. Under the National Environmental Policy Act, if relevant information is unavailable, the Commission has an affirmative duty to seek it out. *See* 40 C.F.R. § 1502.16(b) (2018).

Additionally, even though the Commission never asked for data to inform its decision-making on this issue, the Delaware Riverkeeper Network proactively supplied precisely this information. *See* Pet'rs' Br. 10. The Commission conspicuously failed to explain why a review of this historical drilling and permitting activity would not be a reasonable way to identify the location of newly induced well-pad development. This is particularly glaring considering 1) the Marcellus Shale is the most prolific gas-producing formation in the country, 2) the Project's origin is surrounded by the Marcellus Shale's most productive counties,

and 3) many wells in these counties have been permitted and are merely awaiting take-away capacity. *Id*. Instead, the Commission offers, for the first time, a superficial *post hoc* argument that a "list of locations where drilling did not occur offers little information about where it will occur." Resp't's Br. 49. However, this position is belied by the Commission's contention that the pipeline's siting was appropriate because of its "**close proximity to the production areas of northern Pennsylvania.**" Final Environmental Impact Statement at ES-17 [JA__] (emphasis added).

Assessing the size, scope, and intensity of the impacts from the induced well-pad development is critical here because the total land disturbance of that pad development would be 360 percent more than the land disturbance for the construction of the entire Project. Pet'rs' Br. 8-9. The Commission's disclosure of this massive footprint increase only after the Final Environmental Impact Statement was issued, and with no concomitant analysis, is grounds for vacatur and/or remand. 40 C.F.R. § 1502.9(c)(1)(ii) (2018) (supplemental analysis required where "significant new . . . information relevant to environmental concerns" is provided). Merely discussing outputs, such as acres to be developed or total wells to be developed, tells decision-makers and the public nothing about the actual environmental impacts on particular resources, which is what the National Environmental Policy Act demands. *See* 40 C.F.R. § 1502.16(b) (2018).

II. The Commission's Excuses for Refusing to Monetize Significant Climate Damages Fail

The Commission wrongly implies this Court already resolved the Social Cost of Carbon issue. Resp't Br. 55. *Appalachian Voices v. FERC* held only that petitioners insufficiently raised the issue. 2019 WL 847188 at *2 (D.C. Cir. Feb. 19, 2019). Regarding *EarthReports v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), the Court subsequently ordered the Commission to reassess whether its reasoning "still holds," *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017), and the Commission then disavowed a key argument. *See* Policy Integrity Br. 21 & n.13 (citing *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 at P 48 (2018) ("Sabal Remand")).

The Commission argues that imperfect consensus on discount rates prevents using any Social Cost of Carbon estimates. Resp't's Br. 56. Yet the Interagency Working Group's estimates are "scientifically derived" and "generally accepted," Pet'rs' Br. 13, and the Commission admits the "values across a range" "provide a consistent approach for agencies." Sabal Remand at ¶ 45. Consensus has developed even further since *EarthReports*. Policy Integrity Amicus.Br. 21. But even using the most conservative value, the Project's annual climate damages are minimally $250 million, Pet'rs' Br. 14, and not, as the Commission's analysis suggests, $0. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008)

(holding that even given a range, "the value of carbon emissions reductions is certainly not zero," and rejecting any distinction between "no value" and "zero value"). Policy Integrity Amicus Br. 21-22.[2]

The Commission argues it cannot determine whether monetized damages are significant. Resp't's Br. 56. Yet monetization provides "indispensable data" for assessing actual impacts and significance. Pet'rs' Br. 12, 14. (The Commission routinely assigns significance to monetized benefits, notably designating the Project's $4 million in property taxes a "minor to moderate positive effect.") Final Environmental Impact Statement at ES-13, 4-197 [JA__, __]. The Commission's failure to similarly assess the significance of at least $250 million of climate costs is arbitrary. *See* Policy Integrity Amicus Br. 14-17. As for "alternative mode[s] of evaluation," Pet'rs' Br. 13, the Commission admits it cannot ascribe significance to purely volumetric estimates of emissions. Resp't's Br. 52. Regional comparisons are misleading because even a "very small portion" of a "gargantuan source of [harmful] pollution" may "constitute a gargantuan source of [harmful] pollution on its own terms." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019). Only monetizing climate damages "meaningfully disclos[es]" the Project's

[2] Suggesting that the estimates' range is too wide, Resp't Amicus Br. 21 (citing *WildEarth Guardians v. Zinke*, 2019 WL 1273181 (D.D.C. Mar. 19, 2019)), fails for the same reason.

contributions to real-world impacts and allows the statutorily required significance assessment. Pet'rs' Br. 12; Policy Integrity Amicus Br. 9-14.[3]

III. The Commission's Failure To Address Ecosystem Services Modeling Is Arbitrary and Capricious.

The Commission made no attempt to specifically describe why it failed to use an ecosystem services model to monetize the Project's impacts. *See* Pet'rs' Br. 14-16. The Commission only broadly states it "has consistently found monetizing environmental impacts to be inappropriate for project-level decision-making." Resp't's Br. 56. However, this Court has found exactly this type of generalized reasoning for rejecting a specific proposed methodology unacceptable. *See Sierra Club*, 867 F.3d at 1375; *see also Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-1214 (9th Cir. 1998) (holding National Environmental Policy Act analysis that failed to reference material containing scientific viewpoints opposing agency's conclusions about the project's environmental consequences inadequate).

Ecosystem services modeling is regularly used to provide useful information on the impacts of proposed projects. Pet'rs' Br. 14-16. Indeed, the Forest Service's land management planning regulations specifically contemplate the examination of

[3] Additional arguments against the Social Cost of Carbon, Respondent Amicus Br. 11-21, are refuted by *amicus* Policy Integrity. Policy Integrity Amicus Br. 4-14, 17-24.

ecosystem services. *See, e.g.*, 36 C.F.R. § 219.19 (2018) (defining "ecosystem services"). Petitioners spent significant time and resources commissioning an expert report that identified this issue and alerted the Commission that it must consider ecosystem services in numerous comments *See* Delaware Riverkeeper's Scoping Comments at 6, 9 [JA__,__]; Delaware Riverkeeper's Comments 5, 34-35, 58, addendum (Key-Log Report) [JA__,__-__,__,__-__]; Delaware Riverkeeper's Rehearing Request at 65, 67-68, 118, 185, addendum (Key-Log Report) [JA__,__-__,__,__,__-__]. As such, the Commission had a full and fair opportunity to address Petitioners' specific concerns.

IV. The Commission's Claimed Inability to Limit Eminent Domain Power for Inactionable Certificate Holders is Contrary to the Text and Intent of 15 U.S.C. § 717f(h) and the Fifth Amendment.[4]

A. The Commission's Interpretation of Section 717f(h) Violates the Fifth Amendment.

This Court is bound to interpret the Gas Act's grant of eminent domain authority consistently with the Takings Clause of the Fifth Amendment. U.S. Const. amend. V; *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (statutes must

[4] HALT argues the Commission cannot grant eminent domain to conduct surveys and must wait for States to issue water quality certifications. *See* Section VII; Pet'rs' Br. 29-38; HALT Rehearing Request at 8-10 [JA__-__]. It does not join any arguments to the contrary.

be interpreted to avoid Constitutional threats). The Commission's grants of certificates are not ministerial agency decision. Certificates carry the power of eminent domain. Thus, this Court must ensure that the Gas Act is administered in a constitutionally sufficient manner; for this judgment, the Commission is accorded no deference. *See Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1179 (D.C. Cir. 2014) ("Petitioners' constitutional challenge is subject to *de novo* review.").

The Commission contends it lacks authority to constrain certificate holders' condemnation power when granting certificates. Resp't's Br. 31. But the express language of 15 U.S.C. § 717f(e) provides otherwise:

> The Commission shall have the power to attach to the issuance 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.

15 U.S.C. § 717f(e) (2012) (emphasis added).[5] Allowing condemnation of land that could never be used legally for a pipeline produces absurd results and violates the Fifth Amendment's "public use" requirement. This Court now bears the constitutional burden of interpreting the Gas Act because the Commission has repeatedly disclaimed jurisdiction to limit eminent domain authority. *See, e.g.*, Resp't's Br. 31. A constitutional reading of the Gas Act requires the Commission

[5] In its Statement of Facts, the Commission conveniently omits the emphasized clause. Resp't's Br. 6.

to preclude construction where all required federal authorizations have yet to be obtained, because a project cannot be assessed as in the public interest prior to receiving, among other things, Clean Water Act authorizations. The Gas Act empowers the Commission to condition "the exercise of the rights granted thereunder" to match the limited scope of that certificate as required by the public interest. 15 U.S.C. § 717f(e). This includes limiting eminent domain to that necessary to seek federal authorizations.[6] This Court should vacate the Commission's order, directing the Commission to implement the Gas Act in a constitutionally sufficient manner for the benefit of all involved.

B. Section 717f(h) Permits the Commission to Limit Condemnation Power.

The Gas Act's inclusion of condemnation power does not require the Commission to confer all eminent domain powers in every scenario. Section 717f(h) and hornbook property law allow the Commission to confine eminent domain to only survey rights—one "stick" in the bundle of property rights.[7] The Commission/PennEast's Gas Act interpretation requires that, in order to ascertain whether a pipeline will ultimately serve a public interest, a qualified pipeline company holding a valid certificate must purchase or condemn *all* the property

[6] *See* State Pet'rs' Br. 35

[7] *See, e.g.*, *United States v. Craft*, 535 U.S. 274, 278 (2002) (describing property as a "'bundle of sticks'—a collection of individual rights"); State Pet'rs' Br. 35.

along its proposed route so that it can survey to determine if the project is consistent with the public's interest in clean water. This happens prior to *any* final determination that the pipeline could be built consistent with the public interest. Contrary to the Commission/PennEast's claims of insurmountable obstruction, the constitutional interpretation Petitioners advance would not enable objecting landowners to simply "freeze" the construction process. *See, e.g.*, Resp't's Br. 29-31, 58-59. It would instead allow the process to move forward at a pace that ensures public benefit. While the Commission may issue conditional certificates, the Gas Act's full eminent domain power cannot constitutionally become actionable until all environmental authorizations are met. To rule otherwise would be to sanction condemnation for a project that cannot legally move forward. A legally prohibited project cannot serve a public use.

Even if the Commission were correct that it must grant a certificate holder ***some*** eminent domain power, this Court acknowledged the Gas Act limits condemnation authority only over private property that is "needed." *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (citing 15 U.S.C. § 717f(h)). The Hopewell Alternative illustrates that 2.5 *miles* of land is likely unnecessary even if the pipeline is built, but the Commission has granted condemnation of those parcels, jeopardizing land earmarked for affordable

housing. Hopewell Reh'g Req. 36 [JA__]; Final Environmental Impact Statement 3-37 [JA__].

The Commission/PennEast's position establishes an absurd system whereby a pipeline must purchase or condemn land and pay just compensation *prior* to any final determination that the pipeline can be built in the public interest. This is bad for pipeline companies and the public alike. The Commission's reading of the Gas Act requires unnecessary land acquisition, on which construction may later be prohibited by law. The Fifth Amendment requires more.

V. The Commission's Asserted Legal Standard Contravenes the Fifth Amendment's Public Use Requirement.

A. The Commission Cannot Issue Certificates Which Allow Full Condemnation Without Integral Federal Authorizations

Despite this Court's endorsement of the Commission's practice of issuing certificates prior to Clean Water Act certifications, the Court has explicitly questioned the relationship between such required federal authorizations and *when* the right to eminent domain may be exercised. *See Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 281 (D.C. Cir. 2015) (Rogers, J., concurring in the judgment) ("If permitting eminent domain did not require the approval of construction, then the Commission could authorize the use of eminent domain for projects that are

ultimately rejected by the State under the Clean Water Act."). This is the critical question the Court must now decide.[8]

The Commission concedes that it must consider the Project's environmental impact when evaluating whether it carries a public benefit, *see* Policy Statement ¶¶ 61749, 62745-46 [JA__,__-__], but the Commission cannot conduct a proper balancing test when it lacks the actual findings of the responsible regulatory agencies. *Kelo*, *Midkiff*, and *Berman* do not hold that the public use determination can be non-final. In each case, public benefit was identified and established by proximate, comprehensive legislative redevelopment plans. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 473 (2005) ("These conditions prompted state and local officials to target New London . . . for economic revitalization."); *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229 (1984); *Berman v. Parker,* 348 U.S. 26 (1954).

While *Kelo* does not require *actualized* public benefit, it does require the public benefit be *assessed*. Clean Water Act permits are an integral element of the public benefit assessment because some projects cannot be constructed consistent with the public's interest in clean water.[9] Thus, Respondents' assertion that its

[8] State and Joint Petitioners raised this point repeatedly in rehearing requests. *See, e.g.*, NJCF Reh'g Req. 61-63.
[9] Regulations Implementing the Energy Policy Act of 2005, 71 Fed. Reg. 30632 (May 30, 2006) (to be codified at 18 C.F.R. pts. 153, 157, 375, 385).

review mitigates the lack of federal authorizations, Resp't's Br. 33, subverts a critical element of public benefit analysis, reducing it to mere afterthought.

B. The Commission May Not Rely Solely on Precedent Agreements to Demonstrate Public Use.

The Commission incorrectly suggests that 15 U.S.C. § 717(a) contains the legislative judgment that all pipelines serve a public benefit, satisfying the Fifth Amendment. Section 717(a) makes the legislative determination that *regulating* natural gas transmission is necessary in the public interest. *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 609–10 (1944). Congress never determined *all* pipelines were in the public interest. Further, the Commission promulgated a Policy Statement which detailed the Commission's public use requirements. Policy Statement ¶ 61,227 [JA__-__]. The Commission is bound to follow its own Policy Statement, which establishes a balancing test. *See* Resp't Br. 36-38.

The Policy Statement identifies the modest use of eminent domain as significant harm to balance against project benefits. 88 FERC ¶ 61,748 [JA__]. Here, a ***massive*** exercise of eminent domain was contemplated. Further, petitioners

("[C]ompletion of the Commission's assessment of an application often rests on other agencies reaching favorable determinations on separate authorization requests.").

submitted significant evidence into the record showing substantial harm to property owners, the environment, and ratepayers. *See, e.g.*, NJCF Reh'g Req. 37-46 (citing studies regarding the impact on consumers) [JA__-__]; State Br. 21.

The cases cited by the Commission/PennEast all involved vastly lower levels of harm. The *Minisink, Myersville*, and *Bordentown* line of cases stem from the construction of a single compressor station. These cases did not require an Environmental Impact Statement because there was minimal potential environmental harm, and the projects required minimal land condemnations. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301 (D.C. Cir. 2015); *Township of Bordentown v. FERC*, 903 F.3d 234, 261-63 (3d Cir. 2018). In *Sierra Club*, the plaintiffs presented no evidence that the pipeline would harm consumers, and the state utility commission certified need. *Sierra Club* at 1357. Here, Rate Counsel found otherwise.

VI. The Commission Failed to Consider Adequately the Hopewell Alternative

The National Environmental Policy Act requires the Commission's Final Environmental Impact Statement to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a) (2018). The Commission did not require PennEast to submit the evidence necessary for consideration of the

Hopewell Alternative prior to issuing the Certificate. Certificate Order ¶ 215 [JA__]. The Commission's response to Hopewell's claim that the Commission did not consider a specific alternative *prior* to certification—arguing that no harm flowed from this error because PennEast could not construct prior to exploring the alternative—cannot negate this legal error. *See* Pet'rs' Br. 16, Resp't's Br. 75.

Alternatives are at the heart of the National Environmental Policy Act; accordingly, the agency must weigh alternatives prior to any major federal action. 40 C.F.R. § 1502.14 (2018). The Commission should have required PennEast to fully explore and provide the requisite "further analysis" *before* issuing the Order. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (finding that failure by the Commission to consider strong evidence suggesting a contrary conclusion violated the substantial evidence standard). Considering that significant route changes result when alternatives are adopted, a certificate issued without consideration of alternatives both violates the National Environmental Policy Act, and cannot be used for a condemnation, for the reasons detailed above.

VII. The Commission Must Wait for the Agencies With the Authority to Block Construction of the Project.

A. Eminent Domain is for the Construction of Pipelines.

Pipelines approved by the Commission cannot be built if States deny congressionally required water quality certifications. 33 U.S.C. § 1341(a); *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 144 (2d Cir. 2008). The Gas Act acknowledges this preemptive power of States. 15 U.S.C. § 717b(d)(3). Therefore, under the Gas Act and Fifth Amendment, eminent domain cannot be granted until water quality certifications have been obtained. Pet'rs' Br. 29-38;PennEast HALT Statement of Issues (Sept. 24, 2018), Doc. 1752295. Instead of addressing the issue raised, the Commission argues that conditional certificates do not violate various environmental laws. Resp't's Br. 29-36. None of the cases it cites holds that a certificate granting eminent domain can be issued before water quality certifications have been obtained.

The Commission also claims this is not a case of first impression. Resp't's Br. 30, n.3. In *Delaware Riverkeeper*, this Court held that the Commission's certificate did not violate the Clean Water Act. *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 397 (D.C. Cir. 2017). Since Riverkeeper did not challenge the Commission under the Gas Act or the Fifth Amendment, it is inapplicable here. The Commission also relies on *Appalachian Voices.* As an unpublished decision, it

could not answer a question of first impression. *Appalachian Voices* at 1.. In addition, it did not consider the lack of water quality certifications. *Id.* Therefore, whether the Gas Act permits eminent domain prior to the issuance of water quality certifications remains unanswered. *Gunpowder Riverkeeper*, 807 F.3d at 281 ("If permitting eminent domain did not require the approval of construction, then the Commission could authorize the use of eminent domain for projects that are ultimately rejected by the State under the Clean Water Act.").

The Commission wrongly argues that waiting for states to decide "would contravene congressional intent[.]" Resp't's Br. 33-35. In fact, the Gas Act states "eminent domain [is] for construction of pipelines," and construction cannot take place unless the certificate is "in force." 15 U.S.C. §§ 717f(h), 15 U.S.C. § 717f(c)(1)(A).[10] Congress also determined that a State's right to protect water quality represents a higher public interest than the transportation of gas. 15 U.S.C. § 717b(d)(3). The Commission's reliance on *Hoopa Valley* does not alter the balance Congress struck. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (holding that "a coordinated withdrawal-and-resubmission scheme" is contrary to law.). Here the Department denied PennEast's application, [JA__-__], so *Hoopa Valley* is inapposite. Finally, contrary to the Commission's

[10]Contrary to Intervenors' claim, (Br. 35), HALT raised this issue [JA__-__].

claims, States do have the power to veto a Commission-approved project. *Del. Riverkeeper*, 857 F.3d at 394.

B. The Commission Failed to Lead an Integrated Review.

Congress instructed the Commission to lead and coordinate the environmental review for all federal authorizations, set schedules for all agencies, and maintain one record for judicial review. 15 U.S.C. §§ 717n(a)-(d). To comply, the Commission must conduct an environmental review that incorporates all of the information needed by other agencies to make substantive decisions under other laws. That way, all federal authorizations can be synchronized with a final certificate.

Instead of discussing these requirements, Respondents focus on the Commission's right to condition certificates under 717f(e). Resp't's Br. 43-44; PennEast's Br. 36-37. However, the 2005 congressional mandates should be controlling. Pet'rs' Br. 34-36.

> It is elementary that a more recent and specific [section] is reconciled with a more general, older one by treating the more specific as an exception which controls in the circumstances to which it applies.

Thompson v. Calderon, 151 F.3d 918, 929 (9th Cir. 1998) (internal citation omitted).

Here the Commission failed to follow Congress's mandates. The countless conditions in the Certificate Order prove it did not lead an integrated

environmental review. Certificate Order, Appendix A [JA__-__]. The Commission also failed to set a schedule that complies with schedules established by other federal laws. 15 U.S.C. § 717n(c)(1)(B). In fact, the Commission's schedule, [JA__], was issued before PennEast even filed an application with the Department. [JA__].

C. There Have Been Deprivations of Property Without Due Process.

The Commission claims there is no risk of an erroneous deprivation because construction cannot begin until all federal authorizations have been obtained. Resp't's Br. 43-45. However, the issue here is not construction, but the taking of private property through eminent domain. By ignoring the *procedural requirements* of the Gas Act, 15 U.S.C. §§ 717f(c)(1)(A), 717f(h), 717n(a)-(d), the Commission prematurely issued a Certificate Order that was used by PennEast to deprive HALT's members of their property. Add. 93-101, 115-116, 120-129, 145-146. Respondent and Intervenors claim it is not a due process violation because parties may participate in the independent reviews by other agencies. Resp't's Br. 41-45; PennEast's Br. 37-38. However, HALT's members were not able to comment before their land was taken. Add. 92, 104, 119, 132, 150. Thus, they were not able to make their case, as the Commission claims. Commenting after property has been taken is not meaningful. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The Commission's failure to wait for States to make decisions under the Clean Water Act is a due process violation because Congress mandated an integrated environmental review. 15 U.S.C. § 717n(c) (the Commission *shall* establish a schedule for all federal authorizations.). Yet the Commission dismissively ignores these mandates. Resp't's Br. 41-45. As a result, HALT's members have been deprived of their right to exclude others from their property. If the Department denies PennEast's water quality certification, then these become *erroneous deprivations*. No new safeguards are required to protect these sacred property rights because the required procedures already exist. 15 U.S.C. §§ 717f(c)(1)(A), 717f(h), 717n (b)-(c). Thus, all three factors weigh in HALT's favor. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Pet'rs' Br. 36-38.

The Commission's and Intervenors' reliance on *Delaware Riverkeeper* and *Appalachian Voices* is unavailing because due process claims are fact specific. *Id*. Riverkeeper brought a structural bias claim based on the Commission's funding mechanism, which was dismissed for failure to state a claim. *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 106 (D.C. Cir. 2018). In its determination that Riverkeeper had not suffered a deprivation of a property interest, *Id*. at 108-11, this Court discussed two takings cases that are not relevant to the issues raised here. *Id*. at 111. *Bailey* was brought thirty years before the three-factor due process test was established, and merely held that land could be entered *under Virginia law* prior to

the payment of just compensation. *Bailey v. Anderson*, 326 U.S. 203 (1945).[11] The issue here is not just compensation, but the process that is due prior to the issuance of the Certificate Order, which authorizes the taking. *Presley* involved physical takings, not court-ordered easements, so the holding is inapposite. *Presley v. City of Charlottesville*, 464 F.3d 480, 489, n.9 (4th Cir. 2006). In reaching its decision, the Fourth Circuit found "[o]rdinarily, such predeprivation process is required." *Id.* Therefore, *Presley* supports HALT's position.

HALT was formed to protect property interests, not oppose the Project, as Intervenors' claim. PennEast Br. 20. Instead of negotiating fair deals with landowners, they exaggerate problems. *Id.* 16-21, 36-37. Respondents ask this Court to change the law, not enforce it. Resp't's Br. 33-34. The Gas Act authorizes eminent domain for the construction of pipelines, not to conduct surveys in order to determine whether they can be constructed. 15 U.S.C. §§ 717f(c)(1)(A), 717f(h). Therefore, condemnation cannot begin until certificates that can block construction of the Project have been obtained. Therefore, HALT asks this Court to void the Certificate Order *nunc pro tunc,* and declare easements granted since its issuance null. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded…federal courts may use any available remedy to make good the wrong done.").

[11]This is also true of the two cases cited in PennEast's Brief, 38.

CONCLUSION

For all of the aforementioned reasons, the Commission's Order issuing Certificates should be vacated, and remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of December 13, 2018, because this reply brief contains 4661 words, and the State Petitioners' reply brief contains less than 4250 words, adding up to under 9,000 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule32(e)(1). Microsoft Word 2016 computed the word count. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 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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CERTIFICATE OF SERVICE

I certify that on May 2, 2019, the foregoing Petitioners' Joint Reply Brief was electronically filed with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

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