No. 18-1224 (consolidated with Nos. 18-1280, 18-1308, 18-1309, 18-1310, 18-1311, 18-1312, 18-1313)

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

ATLANTIC COAST PIPELINE, LLC, *et al.*,
Petitioners,

LORA BAUM, *et al.*,
Petitioner-Intervenors,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ATLANTIC COAST PIPELINE, LLC, *et al.*,
Respondent-Intervenors.

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

JOINT REPLY BRIEF OF CONSERVATION PETITIONERS AND LANDOWNER PETITIONERS

Mark Sabath
Gregory Buppert
Emily C. Wyche
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
(434) 977-5090
msabath@selcva.org

David Neal
Gudrun Thompson
SOUTHERN ENVIRONMENTAL LAW CENTER
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516
(919) 967-1450

Additional counsel listed inside front cover

Benjamin A. Luckett
Joseph M. Lovett
APPALACHIAN MOUNTAIN ADVOCATES
P.O. Box 507
Lewisburg, WV 24901
(304) 645-0125
bluckett@appalmad.org

Jon A. Mueller
CHESAPEAKE BAY FOUNDATION, INC.
6 Herndon Avenue
Annapolis, MD 21401
(443) 482-2162
jmueller@cbf.org

Counsel for Conservation Petitioners

Christopher S. Johns
JOHNS & COUNSEL PLLC
14101 Highway 290 West
Suite 400A
Austin, TX 78737
(512) 399-3150
cjohns@johnsandcounsel.com

Counsel for Landowner Petitioners

Michael J. Hirrel
1300 Army Navy Dr., #1024
Arlington, VA 22202-2020
(703) 522-8577
mhirrel@law.gwu.edu

Counsel for Petitioner Fairway Woods Homeowners Condominium Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Court Cases

Administrative Cases

Statutes

Regulations

Other Authorities

GLOSSARY

Atlantic	Atlantic Coast Pipeline, LLC
Atlantic Br.	Brief for Intervenors Atlantic Coast Pipeline, LLC, Dominion Energy Transmission, Inc., and Independent Oil & Gas Association of West Virginia, Inc.
Bcf/d	Billion cubic feet per day
Certificate Order	*Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017)
Conservation Br. or Joint Opening Brief	Joint Opening Brief of Conservation Petitioners and Landowner Petitioners
Conservation Petitioners	Appalachian Voices, Chesapeake Bay Foundation, Chesapeake Climate Action Network, Cowpasture River Preservation Association, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Inc., Sound Rivers, Inc., Virginia Wilderness Committee, Wild Virginia, Inc., and Winyah Rivers Foundation
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
EPA Guidance	U.S. Environmental Protection Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis (1998)
FERC	Federal Energy Regulatory Commission
FERC Br.	Brief of Respondent Federal Energy Regulatory Commission

JA	Joint Appendix
Landowner Petitioners	Bold Alliance, Bold Educational Fund, Nancy Kassam-Adams, Shahir Kassam-Adams, Peter A. Agelasto III (individually and as chairman of Rockfish Valley Foundation), Judith Allen, Eleanor M. Amidon, Jill Averitt, Richard Averitt, Richard G. Averitt III, Dr. Sandra Smith Averitt, James R. Bolton, Constance Brennan, Joyce D. Burton, Carolyn L. Fischer, Bridget K. Hamre, Charles R. Hickox, Demian K. Jackson, Janice Jackson, Lisa Y. Lefferts, William Limpert, David Drake Makel, Carolyn Jane Maki, Nelson County Creekside, LLC, Rockfish Valley Foundation, Rockfish Valley Investments, Victoria C. Sabin, Alice Rowe Scruby, Timothy Mark Scruby, Marilyn M. Shifflett, Sharon Summers, Chapin Wilson, Jr., Wintergreen Country Store Land Trust, and Kenneth M. Wyner
NCUC	North Carolina Utilities Commission
NEPA	National Environmental Policy Act
Policy Integrity Br.	Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae*
Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999)
Project	Atlantic Coast Pipeline
Rehearing Order	*Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018)
Shenandoah	Shenandoah Valley Network
Staunton/Nelson Br.	*Amici Curiae* Brief of the City of Staunton and Nelson County, Virginia

STATUTES AND REGULATIONS

Except for 5 U.S.C. § 706 and 40 C.F.R. § 1508.27, which are included in the attached Addendum, all applicable statutes and regulations are contained in the Joint Opening Brief.

SUMMARY OF ARGUMENT

In conditionally approving the Atlantic Coast Pipeline ("Project"), the Federal Energy Regulatory Commission ("FERC") strayed far from its role as "guardian of the public interest." FERC Br. 18. FERC relied on unsupported assumptions to find market need for the Project and reject alternatives, and performed superficial analyses of impacts on aquatic resources, minority communities, and climate change.

FERC's response brief, supported by Atlantic Coast Pipeline, LLC ("Atlantic"), effectively concedes many of FERC's errors while seeking to deflect responsibility to state utility commissions, *id.* at 22-23, and to other federal agencies, *id.* at 45-46, 69. But it is *FERC's* duty to determine that a project is required by public convenience and necessity and to take a hard look at the environmental consequences of its decisions. FERC failed to fulfill those duties here, causing irreversible impacts to the environment and to landowners and communities in the pipeline's path—for a project that serves no demonstrated need.

Moreover, having lost permits that were conditions of its Certificate Order, Atlantic cannot use that certificate to exercise the power of eminent domain. And Atlantic's exercise of eminent domain violates due process because landowners are being denied a full hearing and determination of their right-to-take arguments.

For these reasons, FERC's Certificate Order should be vacated and remanded.

ARGUMENT

I. In Relying Exclusively on Precedent Agreements to Establish Market Need, FERC Ignored That Affiliated Monopoly Utilities Are Not "Fully At-Risk" For Capacity Costs.

In finding market need for the Project, FERC mechanically adhered to a practice of relying on precedent agreements while ignoring a material element of the precedent agreements in this case: As indicators of market need, agreements with affiliated *monopoly utilities* are fundamentally different than agreements with *non-utility* shippers. FERC barely acknowledges this distinction in its brief, erroneously implying that the Court has considered the issue before, FERC Br. 20-21, but citing no cases involving precedent agreements with affiliated utility shippers.

In its Rehearing Order, FERC defended its reliance on precedent agreements by arguing that "shippers that are *not* state-regulated utilities, such as producers or marketers … are fully at-risk for the cost of the capacity and would not have

entered into the agreements had they not determined there was a need ….” Reh’g Order ¶ 48 [JA____] (emphasis added). But FERC failed *even to consider* whether shippers that *are* state-regulated utilities face a different level of risk than producers or marketers when they contract with pipeline developers for capacity. This “fail[ure] to consider an important aspect of the problem” rendered FERC’s decision arbitrary and capricious. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

In fact, affiliated utility shippers are not “fully at-risk for the cost of the capacity.” Whereas producers or marketers recover their capacity costs only if they can sell gas (i.e., only if sufficient demand exists), utility shippers recover their costs if they pass those costs on to captive ratepayers—regardless of demand. The Joint Opening Brief identified three reasons that monopoly utilities regularly obtain state utility commission approval to recover capacity costs from ratepayers regardless of need. Conservation Br. 15-16. FERC concedes these reasons by failing to address them. *See CardSoft, LLC v. VeriFone, Inc.*, 807 F.3d 1346, 1353 (Fed. Cir. 2015).

Instead, FERC claims that considering shippers’ ability to recover capacity costs “might infringe on state regulators’ roles in determining the prudence of their regulated utilities’ expenditures.” FERC Br. 23. This is a false choice. State commissions may be obligated to review utilities’ costs, but FERC has an

independent obligation to ensure that new pipelines are required by the public convenience and necessity, *see* 15 U.S.C. § 717f(e)—an obligation FERC impermissibly renounces by "passing the entire issue off onto a different agency." *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015). FERC bases its "public necessity" determination on the assumption that affiliated utility precedent agreements indicate market need, but deflects responsibility for testing that assumption to state commissions, in unrelated proceedings that would occur after the Project is built.[1]

Ignoring the monopoly utility distinction, FERC contends that its market need assessment should be no more searching merely because the proposed shippers are Atlantic affiliates. FERC cites no published case law[2] and conspicuously omits any acknowledgment of guidance in its Policy Statement and precedent directing FERC to give heightened scrutiny to affiliate transactions.

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[1] Similarly, FERC's reliance on the North Carolina Utilities Commission's ("NCUC's") authorizations, FERC Br. 23, is misplaced. NCUC's limited review did not evaluate the need for the Project or address cost recovery. *See* Order Accepting Second Amendment to Affiliate Agreements, *In re Application of Piedmont Nat. Gas Co.*, No. G-9 Sub 655 (NCUC Dec. 19, 2017), https://bit.ly/2XADQLg; Order Accepting Second Amendment to Affiliate Agreements, *In re Advance Notice by Duke Energy Carolinas, LLC*, No. E-2 Sub 1052 et al. (NCUC Dec. 19, 2017), https://bit.ly/2XADFj4.

[2] FERC and Atlantic rely heavily on the non-precedential disposition in *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished). FERC also cites *Township of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018), but that case concerned independent shippers, not affiliates.

While the Policy Statement *generally* provides that precedent agreements "constitute significant evidence of demand," Policy Statement ¶ 61,748, it also *specifically* provides that relying primarily on precedent agreements "raises additional issues when the contracts are held by pipeline affiliates." *Id.* ¶ 61,744. And by failing to respond to Conservation Petitioners' argument, *see* Conservation Br. 13-14, FERC concedes that it routinely applies heightened scrutiny in other contexts to transactions with utility affiliates.[3] FERC acted arbitrarily in disregarding its policy and precedent without explanation. *See Am. Rivers v. FERC*, 895 F.3d 32, 46 (D.C. Cir. 2018).

Making Atlantic's affiliate precedent agreements particularly unreliable indicators of need is the fact that they are either non-binding (because they can be terminated unilaterally) or effectively unenforceable (because affiliates are unlikely to sue each other to enforce a contract). *See* Conservation Br. 14. FERC fails to rebut the former argument, continuing to rely solely on Atlantic's assurance that the contracts are binding, *see* FERC Br. 22, and waives any objection to the latter argument by omission.

Even as it insists that it need not consider factors reflecting on market need beyond precedent agreements—a claim not supported by a single case involving

[3] FERC's practice of applying heightened scrutiny to affiliated utility transactions in other contexts was not raised in either the briefing or the Court's unpublished disposition in *Appalachian Voices*.

affiliated utility shippers—FERC now suggests that it *did* consider other evidence. *See id.* at 25-26. But FERC's fleeting references to record evidence demonstrate that FERC gave it no serious consideration. FERC's claim that "Atlantic's precedent agreements—reflecting actual demand—were better evidence of need" than "theoretical projections," *id.* at 25, is fatally tied to its unfounded assumption that affiliated utility precedent agreements reflect actual demand. And FERC's criticism of the Synapse Study for failing to consider the use of existing pipeline capacity "by shippers outside the region through interruptible service or capacity release" is nonsensical. *Id.* at 25-26. Interruptible service and capacity release—i.e., provision of capacity to shippers who do not have firm capacity contracts—occur only during periods of *non-peak* regional demand. The Synapse Study sensibly evaluated the ability of existing pipeline systems to meet peak regional demand. *See* Synapse Study 1-3, 10-18 [JA____-____, ____-____].[4]

[4] FERC's claim that Conservation Petitioners waived any objection to FERC's one-sentence critique of the Synapse Study lacks merit. The Joint Opening Brief argued that evidence before FERC demonstrated that existing capacity would be more than sufficient, and specifically cited the Synapse Report as support. Conservation Br. 19 & n.6. No waiver has occurred where "the core of [petitioners'] argument … remained the same," but "the manner in which [petitioners] substantiated that argument evolved from its opening to reply brief." *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 748 n.6 (D.C. Cir. 2017).

II. FERC's Environmental Impact Statement Was Deficient.

A. FERC's Analyses of System and Off-Forest Alternatives Were Flawed.

1. FERC underreported existing pipeline capacity and failed to evaluate an interconnected system as a whole or partial alternative.

FERC's review of system alternatives relied on outdated information and failed to consider whether other pipelines could supply Atlantic's customers. FERC's and Atlantic's responses seek to deflect responsibility for FERC's shortcomings.

Neither FERC nor Atlantic disputes that FERC underreported Transco's capacity by over 4.5 billion cubic feet per day ("Bcf/d")—the equivalent of three Atlantic Coast Pipelines. *See* FERC Br. 28-29; Atlantic Br. 10-11. This concession is significant: FERC cannot have taken a hard look at Transco as a system alternative without knowing its capacity. Instead, FERC and Atlantic maintain that any argument regarding Transco's capacity has been forfeited. But Conservation Petitioners met the letter and the spirit of the applicable exhaustion requirement, 15 U.S.C. § 717r(b).

Conservation Petitioners preserved the objection that FERC failed to take a hard look at Transco as a system alternative and ignored the slated 1.7 Bcf/d Transco reversal project known as Atlantic Sunrise. Shenandoah Reh'g Req. 53-54 [JA____-____]. FERC wrongly conflates providing additional *support* for

an argument with raising a new argument. *See Flyers Rights*, 864 F.3d at 748 n.6. Further, the purpose of the exhaustion requirement is to provide sufficient notice of the grounds for rehearing. *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 683 (D.C. Cir. 1978). If any entity should be on notice of Transco's capacity, it is FERC, which approved each expansion project. *See* Conservation Br. 22 & n.8. The "other bases" to which FERC claims Conservation Petitioners have waived objections, FERC Br. 29, are inextricably tied to the capacity issue; without an accurate accounting of capacity, FERC could not properly determine either the impacts or the time frame of a Transco alternative.

The response briefs reprise a fundamental error: FERC's failure to evaluate an interconnected system as a whole or partial alternative. FERC and Atlantic insist that because neither Mountain Valley, WB Xpress, or Atlantic Sunrise would *alone* be a complete alternative, FERC reasonably rejected them. This contention suffers from three critical flaws.

First, Conservation Petitioners explained that *together* the three projects would connect over 3.8 Bcf/d of producer- and marketer-owned capacity to Transco, from which it could be delivered to Atlantic's customers. *Id.* at 23-24. FERC's cabined analysis evaded consideration of the system as a whole. And there is no record evidence demonstrating that FERC took a hard look at Atlantic

Sunrise; FERC points only to a single sentence in Environmental Impact Statement ("EIS") Appendix Z. *See* EIS Z-4286 [JA____].

Second, in dismissing the fact as "speculative," FERC Br. 31, FERC concedes that it never considered that over 90% of the capacity on those three projects is owned by producers and marketers looking for end users. FERC refused to evaluate whether this capacity would be available for Atlantic's customers, despite admitting in the Mountain Valley proceedings that these projects do not have end users. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at ¶ 304 (2018) ("unknown" where gas from Mountain Valley will go and "no identifiable end use" for gas).

Third, FERC's position that a partial alternative cannot be a reasonable one is flatly contradicted by FERC itself. As this Court found in *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999), "'alternatives' is not self-defining." Here, FERC explicitly defined a system alternative as one that "would make it unnecessary to construct all *or part of* the projects." EIS 3-4 [JA____] (emphasis added). A system alternative relying on gas delivered into Transco could cut the Project nearly in half, dramatically reducing its impacts. FERC's failure to evaluate such an alternative violated NEPA.

2. As the Fourth Circuit found, FERC failed to analyze off-forest alternatives.

FERC rejected alternatives that avoided national forests based on the unsupported assumption that a shorter route would result in less impact. *See* Conservation Br. 20, 25-27. FERC's and Atlantic's responses discount the special status Congress affords national forests and conflate an EIS impacts analysis with an alternatives analysis. They also invite this Court to disregard the Fourth Circuit's opinion in *Cowpasture River Preservation Ass'n v. Forest Service*, 911 F.3d 150 (4th Cir. 2018), *petitions for cert. filed* (U.S. June 25, 2019) (Nos. 18-1584, 18-1587).[5] But *Cowpasture* is directly relevant. Although it focused on the Forest Service's failure to follow through on its concerns, the Fourth Circuit *also* found nothing in the record indicating that FERC "analyze[d] non-national forest alternatives" or "did anything to address the Forest Service's concerns." *Id.* at 172. That same inadequate analysis by FERC is now before this Court.

FERC recognized that a shorter route could have a greater impact. EIS 3-18 [JA____]. Nevertheless, FERC *assumed* a northern off-forest route would impact equivalent forest, mountains, and waters. *Id.* at 3-19 [JA____]; FERC Br. 40-41,

[5] In their petitions for certiorari on a statutory question not relevant here, the Forest Service and Atlantic do not seek review of the Fourth Circuit's holdings regarding analysis of off-forest alternatives or sedimentation impacts, *see infra* Section II.B.1. *See* Petition for Writ of Certiorari at 11, *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, No. 18-1584 (filed June 25, 2019), https://bit.ly/2Yy1DIm; Petition for Writ of Certiorari at i-ii, *Atl. Coast Pipeline, LLC v. Cowpasture River Pres. Ass'n*, No. 18-1587 (filed June 25, 2019), https://bit.ly/2XtM1t1.

43. FERC provided even less consideration to a southern route. EIS 3-19 [JA____]. Such willful blindness discounted the unique importance of federally protected land. *See Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (National Environmental Policy Act ("NEPA") requires "particular care" when the resource impacted is a "congressionally protected area."). FERC also disregarded comments from the Forest Service and the public documenting the sensitive resources that would be impacted on national forestland. *See* Conservation Br. 26.

FERC's argument that additional pipe would be required to meet Atlantic's receipt and delivery points merely reiterates FERC's assumption that a longer route is more damaging. Other than assumptions, FERC points only to its analysis of Atlantic's preferred route. But as even FERC acknowledges, *see* EIS 3-1 to 3-2 [JA____-____], NEPA requires consideration of the *comparative* merits and drawbacks of the proposed action and alternatives. *See* 40 C.F.R. § 1502.14; *Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1055 (D.C. Cir. 2017) (NEPA requires EIS to "compare[] in detail" environmental impacts of alternatives.). FERC's evaluation of off-forest alternatives fell short of that standard.

B. FERC Did Not Adequately Consider Impacts to Aquatic Resources.

1. FERC's inability to defend its analysis of sedimentation impacts in national forests underscores the inadequacy of its EIS.

FERC's consideration of sedimentation impacts on national forests was incomplete, concluding that "water resource impacts from sedimentation are largely uncertain." EIS 4-129 [JA____]. It was also inaccurate, relying on modeling FERC itself criticized as "presenting statements with no supporting documentation," *id*., and an unrealistic assumption that erosion control devices would be about 96% effective, despite the Forest Service's caution that 55% or less was more realistic. *See* Conservation Br. 28-29. Neither FERC nor Atlantic respond to these specific deficiencies identified in the Joint Opening Brief, effectively conceding them.

The same errors were the basis for the Fourth Circuit's finding that FERC's sedimentation analysis for the Project was "incomplete and/or inaccurate"—a finding extending beyond the Forest Service's unexplained reversals. *Cowpasture*, 911 F.3d at 174. In citing *Cowpasture*, Conservation Petitioners are not "re-litigat[ing]" the Forest Service permit, FERC Br. 46, but challenging *FERC's* environmental analysis that supported *FERC*'s Certificate Order. *See* Certificate Order ¶ 325 [JA____] (relying on EIS to issue Certificate Order). As the lead agency, FERC "b[ears] the ultimate statutory responsibility for the Project." *Nat'l*

Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (alteration in original).

Rather than defend its EIS, FERC asserts its authority under the Natural Gas Act to issue certificates conditioned on additional approvals. But this authority does not relieve FERC of its duties under NEPA. FERC implies that *Appalachian Voices* controls, but the statement FERC cites addresses the exercise of eminent domain under conditional certificates, *not* FERC's NEPA analysis. FERC Br. 45 (citing *Appalachian Voices*, 2019 WL 847199, at *1).

Atlantic, for its part, falls back on "other agencies' permitting processes." Atlantic Br. 24-25. But those processes have no bearing on FERC's failure to consider in its EIS the *impacts* to be mitigated, *see* EIS 4-129 [JA____]; to incorporate the concerns of an expert agency, *see Semonite*, 916 F.3d at 1082; or to disclose the shortcomings of the underlying model, *see Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005).

2. FERC failed to fully assess aquatic impacts in karst terrain prior to approving the Project.

FERC's defense of its analysis of aquatic impacts in karst terrain is defined by its reliance on *after-the-fact* measures, disregarding NEPA's requirement that agencies perform a fully informed impacts analysis *before* approving projects. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). FERC issued its EIS and Certificate Order before identifying all karst features and

systems and neglected to inform the public of risks posed. *See, e.g.*, EIS 5-2 to 5-3 [JA____-____] (awaiting studies identifying features with potential connection to groundwater); Staunton/Nelson Br. 4-6 (reporting that localities learned of risk to water supply only after EIS and Certificate Order issued).

FERC's claim that resources will be protected through adherence to Atlantic's Karst Mitigation Plan overlooks that the plan does not require avoidance of karst features. *See* EIS I-17 [JA____]. Nor does it provide for mitigation if construction shifts underground water flows, diverting water supplies miles away. *See id.* at I-5 [JA____]. And if contamination is released into a sinking stream, Atlantic is required only to alert and offer alternative water supplies to downstream users. *Id.* at 4-98 [JA____].

FERC cites certificate conditions requiring Atlantic to complete future studies in consultation with expert state agencies. *See* FERC Br. 50. But FERC has thus far ignored expert advice from such agencies, including Virginia's recommendations that the pipeline route avoid the Valley Center karst area in Highland County, Virginia, and that FERC require dye tracing, not lineament studies, to map karst features. Va. Dep't of Conservation and Recreation Comments 7, 11 [JA____, ____]. Atlantic ignored meeting requests from the City of Staunton and failed to inform the City of results of its studies. *See* Staunton/Nelson Br. 5, 7.

FERC was on notice that the proposed route through karst areas jeopardized significant environmental features and drinking water supplies. Va. Agencies Comments, Attachs. A, B [JA____-____]; Limpert Comments [JA____-____]. By ignoring those risks and relying on after-the-fact identification and mitigation, FERC violated NEPA.

C. FERC's Environmental Justice Review Did Not Meet the Standard Set in *Sierra Club* or Comply With EPA Guidance.

Defending its failure to identify and analyze minority populations along the Project route, FERC wrongly equates its environmental justice analysis for the Project to the analysis reviewed by this Court in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). FERC Br. 64-66. Critical to the *Sierra Club* ruling was FERC's recognition of the demographics of the affected neighborhood, discussion of community features, and integration of demographic data into its alternatives analysis. 867 F.3d at 1369-70. FERC did nothing of the kind for the Project in general, or for Union Hill in particular.

Other than noting that the "nearest residence … is approximately 1,450 feet from the site," FERC's EIS provided no information about Union Hill, the community closest to the Buckingham compressor station. EIS 4-513 [JA____]. This omission stands in stark contrast to the detailed analysis reviewed in *Sierra Club*. There, FERC discussed the neighboring community "extensively … list[ing] community features … along with their distances from the proposed" compressor

station. *Sierra Club*, 867 F.3d at 1369-70. Even without labeling it as an "environmental justice community," "FERC *did* recognize the existence and demographics of the neighborhood in question." *Id*. at 1370. FERC's claim that it similarly recognized Union Hill is false. At no point did the EIS discuss Union Hill's racial demographics or other defining characteristics.

Similarly, unlike in *Sierra Club*, *id.* at 1369, FERC never considered demographic data in its alternatives analyses. *See* EIS 3-58 [JA____] (providing no demographic data for the Midland Road alternative). FERC's argument that it rejected the Midland Road site for reasons unrelated to environmental justice, FERC Br. 65 n.11, misses the point. In *Sierra Club*, FERC was able to conclude that the alternatives "would affect a … similar percentage of environmental justice populations." 867 F.3d at 1369. FERC's failure to consider demographic information for the alternative compressor station site precluded any similar finding here.

FERC's claim that it followed U.S. Environmental Protection Agency ("EPA") guidance rests on an incomplete reading. EPA recommends going beyond census-based tools when a relatively small area, such as Union Hill, faces pollution. *See* EPA Guidance §§ 2.1.1 & 3.2.1.[6] By ignoring community-based

[6] https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf.

data and relying solely on census data, FERC did not comport with EPA's guidance.[7]

Nor did FERC take a hard look at disproportionate health risks. FERC recognized a theoretical possibility of health effects on African Americans from compressor station pollution. But it engaged in no actual analysis of such effects on Union Hill because of its flawed conclusion that no African-American population was present. *See* EIS 4-513 [JA____].

Finally, FERC misunderstands the problem with its sole reliance on National Ambient Air Quality Standards to find no disproportionate adverse impacts on environmental justice populations. *See* FERC Br. 68-69. It was not arbitrary for FERC to consider EPA's expertise in setting air quality standards; it was arbitrary to deem them conclusive in a disproportionate health analysis for pollutants that pose health risks at levels below those standards. *See* EPA Guidance § 3.2.2 (even impacts that are not "significant" may cause disproportionate harm to minority communities). Applying FERC's logic, disproportionate impacts could be considered only for facilities that would violate air quality standards—and thus could not lawfully be built. FERC's brief fails to address this logical flaw.

[7] FERC's other methodological flaws, briefed by Conservation Petitioners and *amici*, are properly before this Court, because their substance was raised to FERC on rehearing. *See* Shenandoah Reh'g Req. 121-34 [JA____-____].

D. FERC Neglected to Consider the Significance and Incremental Impacts of Downstream Greenhouse Gas Emissions.

Having estimated the Project's downstream greenhouse gas emissions, FERC now maintains that it was not required to do so, and that Conservation Petitioners have waived any objection to that determination. In fact, it is FERC that has waived any argument that downstream emissions are not causally connected: After this Court held that downstream emissions *are* causally connected to an interstate pipeline, *Sierra Club*, 867 F.3d at 1373, FERC abandoned this argument in its Certificate Order, calling it "immaterial," Certificate Order ¶ 304 [JA____], and did not raise it in its Rehearing Order. The question is whether FERC's mere quantification of downstream emissions and general description of climate change impacts satisfy its obligation to consider the incremental impacts and significance of such emissions. *See Sierra Club*, 867 F.3d at 1374. They do not.

FERC's claim—unsupported by case law—that it cannot determine significance because no "applicable standard" exists, FERC Br. 73, 77-78, seeks to carve a hole in NEPA's requirement that agencies discuss "[i]ndirect effects *and their significance*," 40 C.F.R. § 1502.16 (emphasis added), and ignores the factors provided for agencies to consider in assessing whether a project's impacts are significant. *Id.* § 1508.27. In fact, FERC repeatedly determined significance in the absence of an "applicable standard" in analyzing the Project. *See, e.g.*, EIS 4-47

(geologic resources), 4-99 to 4-100 (groundwater), 4-170 (forested areas), 4-207 (wildlife) [JA____, ____-____, ____, ____]. FERC's brief does not acknowledge, let alone explain, its inconsistent practice.

FERC also fails to meaningfully respond to the arguments challenging its refusal to use the Social Cost of Carbon—a methodology designed to help agencies make the very assessments that FERC claims it is incapable of making. This Court did not evaluate FERC's reasons for declining to use the Social Cost of Carbon in *Appalachian Voices*, because it determined that the petitioners had not addressed those reasons in their opening brief. 2019 WL 847199, at *2. Under even minimal scrutiny, FERC's explanations fall apart. *See* Conservation Br. 39-40; Policy Integrity Br. 12-13, 19-27. In particular, FERC's attempts to distinguish decisions rejecting FERC's discount rate argument as addressing one-sided cost-benefit analyses only affirms why these cases are persuasive. FERC did exactly that here: monetize the purported benefits of the Project, EIS 4-507 to 4-508 [JA____-____], while refusing to monetize an estimated $1.35 billion per year in climate costs, Reh'g Order ¶ 279 [JA____].[8] FERC lacks an adequate explanation for its own one-sided analysis.

[8] After upholding FERC's determination that uncertainty in 2014 about the discount rate justified FERC's decision not to use the Social Cost of Carbon, *EarthReports v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016), in 2017 this Court ordered FERC to explain whether that reasoning "still holds." *Sierra Club*, 867

III. The Court Should Halt Atlantic's Exercise of Eminent Domain.

A. Because Atlantic Lost Permits That Were Conditions of FERC's Public-Necessity Determination, the Court Should Hold That Atlantic Cannot Exercise Eminent Domain Until Those Permits Are Restored.

FERC and Atlantic do not dispute that FERC attached conditions to Atlantic's certificate of public convenience and necessity. *See* FERC Br. 80; Atlantic Br. 25. Nor do they dispute that the Fourth Circuit has vacated some of the permits that were conditions of Atlantic's certificate. *See* Conservation Br. 44 (listing federal authorizations vacated or stayed).

But critically, neither FERC nor Atlantic responds to the actual statutory argument made by Landowner Petitioners:

- that any conditions "attached[ed] to the … certificate *and to the exercise of the rights granted thereunder*" must necessarily be "require[d]" by "the public convenience and necessity," 15 U.S.C. § 717f(e) (emphasis added);
- that eminent domain is one of the "rights granted thereunder," *id.*; *see id.* § 717f(h); and
- therefore, when one of the required conditions fails, such failure at least suspends the finding of public convenience and necessity and the certificate holder cannot exercise the power of eminent domain until (a) the certificate holder satisfies the condition or (b) FERC, after providing due process to interested parties, issues a new determination dropping the condition.

Conservation Br. 41-43.

F.3d at 1375; *see also* Policy Integrity Br. 25-26 (highlighting growing consensus about appropriate discount rate).

Instead, FERC asserts two arguments: first, that it has no power to withhold eminent domain from a certificate holder, FERC Br. 80-81; and, second, that its finding of public convenience and necessity is all that is needed to "trigger [Atlantic's] eminent domain rights." FERC Br. 82. Both arguments miss the point.

Even if *FERC* cannot revoke eminent-domain power, the *Court* can apply the Natural Gas Act. The Court can hold that Atlantic's failure to satisfy a required condition of its certificate renders it unable, at least temporarily, to "exercise … the rights granted thereunder," 15 U.S.C. § 717f(e), including eminent domain.

FERC's second argument—that the eminent-domain horse already left the stable and cannot be called back—cannot be right. If FERC has no power to suspend the certificate it issued, then the federal courts must ensure that the eminent-domain power is exercised consistent with the Natural Gas Act and the Constitution.

FERC suggests that Atlantic's vacated permits were merely conditions that Atlantic had to satisfy "before commencing construction," not requirements to the finding of public convenience and necessity itself. But FERC's position is inconsistent with the plain language of 15 U.S.C. § 717f(e), which specifies that any certificate conditions must be "require[d]" by public convenience and

necessity. The necessary implication is that failure of certificate conditions undermines the finding of public necessity and suspends the certificate holder's ability to "exercise … the rights granted thereunder." *Id.*; *see* Conservation Br. 41-43.

And allowing Atlantic to continue exercising eminent domain in the face of these suspended permits enables violations of the Fifth Amendment's Just Compensation Clause. "'[T]he owner is entitled to reasonable, certain and adequate provision for obtaining compensation' after a taking." *Knick v. Twp. of Scott*, __ S. Ct. __, No. 17-647, 2019 WL 2552486, at *2 (U.S. June 21, 2019) (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). Landowner Petitioners have no certain assurance of just compensation based on the following facts on the ground:

- Atlantic may never get its required permits and therefore may never be able to construct its pipeline.

- Even so, Atlantic has obtained preliminary injunctions allowing it to bulldoze the landowners' properties and cut down their trees in the proposed easement areas. *See, e.g.*, *Atl. Coast Pipeline, LLC* v. *0.25 Acre*, No. 2:18-CV-3-BO, 2018 WL 1369933, at *5-6 (E.D.N.C. Mar. 16, 2018).

- The Fourth Circuit has blessed the district courts' power to issue such preliminary injunctions. *Mountain Valley Pipeline, LLC v. 6.56 Acres*, 915 F.3d 197, 209 (4th Cir. 2019).

- Atlantic is a single-purpose LLC whose only real asset is the pipeline itself and whose owner-operator admitted insufficient equity to finance Atlantic's activities during the project's construction stage.

- If the pipeline project is canceled, Atlantic will likely shutter operations and leave insufficient money to compensate the landowners for the destruction caused to their land.

As the Supreme Court held just last month, the protections of the Just Compensation Clause are to be taken seriously, not as "'a poor relation' among the provisions of the Bill of Rights." *Knick*, 2019 WL 2552486, at *5. To make the promise of just compensation "reasonable, certain and adequate," *id.* at *2, the Court cannot allow Atlantic to continue exercising the power of eminent domain until it has secured the permits that will actually allow it to build the pipeline.

B. FERC's Process Did Not Provide Landowners Due Process on Their Statutory and Constitutional Challenges to Atlantic's Right to Take.

FERC and Atlantic contend that due process does not require a pre-deprivation hearing so long as a landowner has the opportunity to "offer evidence on the value of the land taken." FERC Br. 85 (quoting *Bailey v. Anderson*, 326 U.S. 203, 205 (1945)). But that argument wrongly conflates (1) Landowner Petitioners' arguments about compensation with (2) their arguments that Atlantic did not have proper power to take their land in the first place.

Oversight of eminent-domain authority under the Natural Gas Act occurs through a split system: FERC has sole jurisdiction over a pipeline company's right to take, and district courts administer trials on just compensation. *See, e.g.*, *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 778 n.9 (9th Cir. 2008)

("The [Natural Gas Act] does not allow landowners to collaterally attack the FERC certificate in the district court, it only allows enforcement of its provisions."); *Columbia Gas Transmission, LLC v. 252.071 Acres More or Less*, No. ELH-15-3462, 2016 WL 1248670, at *5 (D. Md. Mar. 25, 2016) ("The jurisdiction of this court is limited to evaluating the scope of the FERC Certificate and ordering condemnation as authorized by that Certificate.… This court's role is mere enforcement.").

Landowner Petitioners properly raised statutory and constitutional arguments against Atlantic's right to take with FERC. *See* Shenandoah Reh'g Req. 9-11, 157-59, 166-70 [JA____-____, ____-____, ____-____]. But FERC refused to hear those arguments, leaving them unreviewed. Reh'g Order ¶¶ 84-88, 90-95 [JA____-____]. More than a year has passed since Atlantic took some of the landowners' property, and still the landowners' arguments remain unheard.

The Supreme Court has repeatedly held that due process requires either a hearing before property is taken or, in extraordinary cases, a hearing promptly after the taking. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48-49 (1993) ("Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the [condemnor] deprives them of property."). "To be meaningful, an opportunity for a full hearing and

determination must be afforded" when "irreparable and substantial harm caused by a suspension can still be avoided." *Barry v. Barchi*, 443 U.S. 55, 74 (1979).

The failure to give landowners a full hearing and determination on their right-to-take arguments—either before the takings or promptly thereafter—violates due process.

IV. The Proper Remedy Is Vacatur.

Atlantic's contention that remand, not vacatur, is the appropriate remedy for deficiencies in FERC's Certificate Order, Atlantic Br. 32, ignores both the Administrative Procedure Act's express language and this Court's precedent. Under the Act, a reviewing court "*shall* … hold unlawful *and set aside* agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphases added); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) ("We must vacate FERC's … orders if they are arbitrary and capricious."). Where, as here, FERC's issuance of a certificate was arbitrary, capricious, and not in accordance with law, vacatur is the proper remedy.

CONCLUSION

For these reasons, the Court should vacate the Certificate Order, remand to FERC, and order an immediate halt to Atlantic's exercise of eminent domain.

Respectfully submitted,

/s/ Mark Sabath
Mark Sabath
Gregory Buppert
Emily C. Wyche
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
(434) 977-5090
msabath@selcva.org

David Neal
Gudrun Thompson
SOUTHERN ENVIRONMENTAL LAW CENTER
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516
(919) 967-1450

/s/ Benjamin A. Luckett
Benjamin A. Luckett
Joseph M. Lovett
APPALACHIAN MOUNTAIN ADVOCATES
P.O. Box 507
Lewisburg, WV 24901
(304) 645-0125
bluckett@appalmad.org

/s/ Jon A. Mueller
Jon A. Mueller
CHESAPEAKE BAY FOUNDATION, INC.
6 Herndon Avenue
Annapolis, MD 21401
(443) 482-2162
jmueller@cbf.org

Counsel for Conservation Petitioners

/s/ Christopher S. Johns
Christopher S. Johns
JOHNS & COUNSEL PLLC
14101 Highway 290 West
Suite 400A
Austin, TX 78737
(512) 399-3150
cjohns@johnsandcounsel.com

Counsel for Landowner Petitioners

/s/ Michael J. Hirrel
Michael J. Hirrel
1300 Army Navy Dr., #1024
Arlington, VA 22202-2020
(703) 522-8577
mhirrel@law.gwu.edu

Counsel for Petitioner Fairway Woods Homeowners Condominium Association

Dated: July 10, 2019

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation in the Court's March 13, 2019 Order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this document contains 5,540 of the 10,900 words allotted to Petitioners other than Atlantic Coast Pipeline, LLC.

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

/s/ Mark Sabath
Mark Sabath
SOUTHERN ENVIRONMENTAL LAW CENTER

Dated: July 10, 2019

Addendum

TABLE OF CONTENTS

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Krafsur v. Davenport, 6th Cir.(Tenn.), Dec. 04, 2013

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (4338)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 116-21. Some statute sections may be more current, see credits for details.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.27

§ 1508.27 Significantly.

Currentness

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Credits

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

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).

Notes of Decisions (505)

Current through July 3, 2019; 84 FR 31745.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit through this Court's CM/ECF system, which will serve a copy on all registered users.

/s/ Mark Sabath
Mark Sabath
SOUTHERN ENVIRONMENTAL LAW CENTER

Dated: July 10, 2019