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 OPENING BRIEF OF CONSERVATION PETITIONERS AND LANDOWNER PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Conservation Petitioners and Landowner Petitioners certify as follows:

A. Parties, Intervenors, and Amici

Petitioners: Appalachian Voices, Chesapeake Bay Foundation, Inc., 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 (collectively, "Conservation 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 Mai, 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 (collectively, "Landowner Petitioners"); Friends of Wintergreen, Inc., Wintergreen Property Owners Association, Inc., and Fairway Woods Homeowners Condominium Association (collectively, "Wintergreen Petitioners"); North Carolina Utilities Commission; Atlantic Coast Pipeline, LLC.

Petitioner-Intervenors: Lora Baum and Victor Baum.

Respondent: Federal Energy Regulatory Commission.

Respondent-Intervenors: Atlantic Coast Pipeline, LLC; Dominion Energy Transmission, Inc.; Independent Oil & Gas Association of West Virginia, Inc.

Amici Curiae: As of this date, no amici are involved in this proceeding.

B. Rulings Under Review

The Federal Energy Regulatory Commission orders at issue are *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) [JA____], and *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) [JA____].

C. Related Cases

This proceeding consolidates eight petitions for review of the Certificate Order and Rehearing Order. Six of these eight petitions were initially filed in the United States Court of Appeals for the Fourth Circuit and subsequently transferred to this Court pursuant to 28 U.S.C. § 2112(a)(5): *Appalachian Voices v. FERC*, No. 18-1956 (4th Cir.); *Fairway Woods Homeowners Condo. Ass'n v. FERC*, No.

18-2173 (4th Cir.); *Friends of Wintergreen, Inc. v. FERC*, No. 18-2176 (4th Cir.); *Wintergreen Prop. Owners Ass'n v. FERC*, No. 18-2177 (4th Cir.); *Friends of Nelson v. FERC*, No. 18-2181 (4th Cir.); and *Bold Alliance v. FERC*, No. 18-2185 (4th Cir.).

On January 29, 2018, Appalachian Voices, Chesapeake Climate Action Network, Cowpasture River Preservation Association, Friends of Buckingham, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Inc., Virginia Wilderness Committee, Wild Virginia, Inc. and Winyah Rivers Foundation filed a petition for review of the Certificate Order in the Fourth Circuit. *Appalachian Voices v. FERC*, No. 18-1114 (4th Cir.). The Fourth Circuit dismissed the petition for lack of jurisdiction on March 21, 2018.

On March 8, 2018, Appalachian Voices, Chesapeake Climate Action Network, Cowpasture River Preservation Association, Friends of Buckingham, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Inc., Sound Rivers, Inc., Virginia Wilderness Committee, Wild Virginia, Inc., and Winyah Rivers Foundation filed a Petition for a Writ Staying the Certificate Order in the Fourth Circuit. *In re Appalachian Voices*, No. 18-1271 (4th Cir.). The Fourth Circuit denied the petition on March 21, 2018.

One related case is pending in this Court: *Allegheny Defense Project v. FERC*, No. 17-1098. One related case is pending in the Fourth Circuit: *Friends of Buckingham v. State Air Pollution Control Board*, No. 19-1152 (4th Cir.).

D. Rule 26.1 Disclosure Statement

In accordance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Conservation Petitioners and Landowner Petitioners disclose the following:

1. Conservation Petitioners

Appalachian Voices is a 501(c)(3) nonprofit organization dedicated to defending the land, air, and water of the Appalachian region from the worst environmental threats. Appalachian Voices has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Chesapeake Bay Foundation, Inc. is a 501(c)(3) nonprofit organization dedicated to saving the Chesapeake Bay by fighting for effective, science-based solutions to the pollution degrading the Bay and its rivers and streams, and protecting human health. Chesapeake Bay Foundation, Inc. has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Chesapeake Climate Action Network is a 501(c)(3) nonprofit organization dedicated to building and mobilizing a movement to fight global warming and call

for state, national, and international polices to work towards climate stability. Chesapeake Climate Action Network has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Cowpasture River Preservation Association is a 501(c)(3) nonprofit organization dedicated to preserving the natural condition and beauty of the Cowpasture River and its tributaries for present and future generations. Cowpasture River Preservation Association has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Friends of Buckingham is a Virginia corporation dedicated to protecting the natural resources and cultural heritage of Buckingham County, Virginia, and to promoting sustainable social and economic well-being. Friends of Buckingham has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Friends of Nelson is incorporated and under the umbrella of Virginia Organizing, a 501(c)(3) organization, and is dedicated to protecting property rights, property values, rural heritage, and the environment for all the citizens of Nelson County, Virginia. Friends of Nelson has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Highlanders for Responsible Development is a 501(c)(3) nonprofit organization dedicated to the preservation and responsible use of the natural

environment of Highland County, Virginia. Highlanders for Responsible Development has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Piedmont Environmental Council is a 501(c)(3) nonprofit organization dedicated to promoting and protecting the Virginia Piedmont's rural economy, natural resources, history, and beauty. Piedmont Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Shenandoah Valley Battlefields Foundation is a 501(c)(3) nonprofit organization dedicated to preserving the hallowed ground of the Shenandoah Valley's Civil War battlefields, to sharing its Civil War story with the nation, and to encouraging tourism and travel to the Valley's Civil War sites. Shenandoah Valley Battlefields Foundation has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Shenandoah Valley Network is a program of the Alliance for the Shenandoah Valley, which is a 501(c)(3) nonprofit organization. Shenandoah Valley Network's mission is to maintain healthy and productive rural landscapes and communities, protect and restore natural resources, and strengthen and sustain the Shenandoah Valley region's agricultural economy. Shenandoah Valley Network has no parent

companies, and no publicly held company has a 10% or greater ownership interest in it.

Sierra Club, Inc. is a 501(c)(3) nonprofit organization dedicated to the protection and enjoyment of the environment. Sierra Club, Inc. has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Sound Rivers, Inc. is a 501(c)(3) nonprofit organization dedicated to protecting the health and natural beauty of the Neuse and Tar-Pamlico River Basins in order to provide clean water to the surrounding communities for consumption, recreation, nature preservation, and agricultural use. Sound Rivers, Inc. has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Virginia Wilderness Committee is a 501(c)(3) nonprofit organization dedicated to permanently protecting the best of Virginia's wild places for future generations, fostering understanding and appreciation for Wilderness, and promoting enjoyment and stewardship of our last remaining wildlands. Virginia Wilderness Committee has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Wild Virginia, Inc. is a 501(c)(3) nonprofit organization working to preserve and support the complexity, diversity, and stability of natural ecosystems by

enhancing connectivity, water quality, and climate in the forests, mountains, and waters of Virginia. Wild Virginia, Inc. has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Winyah Rivers Foundation is a 501(c)(3) nonprofit organization dedicated to protecting, preserving, monitoring, and revitalizing the health of the lands and waters of the greater Winyah Bay watershed. Winyah Rivers Foundation has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

2. Landowner Petitioners

Bold Alliance is a 501(c)(4) organization formed under Nebraska law that advocates on behalf of impacted landowners and the general public to stop the use of eminent domain for private gain. Bold Alliance has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Bold Education Fund is a 501(c)(3) organization formed under Nebraska law to educate the public about eminent-domain issues and the protection of water and climate. Bold Education Fund includes as members landowners in the Appalachian Region whose property will be subject to eminent domain by the Atlantic Coast Pipeline project. Bold Educational Fund has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Nelson County Creekside, LLC is a privately held corporation that holds real estate. It has no parent corporation, and no publicly held company holds a 10% or greater ownership interest in it.

Rockfish Valley Investments is a limited liability company focused on property investment. Rockfish Valley Investments owns land in Nelson County, Virginia and was developing a resort on that property. It has no parent corporation, and no publicly held company holds a 10% or greater ownership interest in it.

Rockfish Valley Foundation is a 501(c)(3) nonprofit organization whose mission is to preserve the natural, historical, ecological, and agricultural resources of Rockfish Valley. Rockfish Valley Foundation has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

Wintergreen Country Store Land Trust is a land trust whose mission is to preserve and protect historical and natural resources in Nelson County, Virginia. The trust owns several properties in the county. The trust has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

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GLOSSARY

APA	Administrative Procedure Act
Atlantic	Atlantic Coast Pipeline, LLC
Bcf/d	Billion cubic feet per day
Certificate Order	*Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017)
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
Dominion	Dominion Energy, Inc.
DEIS	Draft Environmental Impact Statement
EPA EJ 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
FEIS	Final Environmental Impact Statement
Glick Statement	Statement of Commissioner Richard Glick on Atlantic Coast Pipeline LLC (Aug. 10, 2018)
JA	Joint Appendix

Kelly Testimony	Hr'g Test. of Glenn Kelly, *App. of Va. Elec. & Power Co. to revise its fuel factor*, No. PUR-2017-00058 (June 14, 2017)
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 Mai, 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
NEPA	National Environmental Policy Act
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)
SVN	Shenandoah Valley Network

JURISDICTIONAL STATEMENT

Petitioners seek review of two Federal Energy Regulatory Commission ("FERC") orders issued under Sections 7(c) and 19(a) of the Natural Gas Act, 15 U.S.C. §§ 717f(c), 717r(a), authorizing construction and operation of the Atlantic Coast Pipeline ("Project"). The Natural Gas Act vests original jurisdiction over review of such orders in this Court.

On October 13, 2017, FERC issued a certificate of public convenience and necessity for the Project. *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) [JA____] ("Certificate Order"). Within 30 days, Petitioners timely filed requests for rehearing. JA____-____. On August 10, 2018, FERC denied the requests. *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) [JA____] ("Rehearing Order"). The Certificate Order and Rehearing Order are final agency actions reviewable under the Administrative Procedure Act ("APA").

Within 60 days of the Rehearing Order, Petitioners timely filed petitions for review of the two orders in the Fourth Circuit. *Appalachian Voices v. FERC*, No. 18-1956 (filed Aug. 16, 2018); *Friends of Nelson v. FERC*, No. 18-2181 (filed Oct. 9, 2018); *Bold Alliance v. FERC*, No. 18-2185 (filed Oct. 9, 2018). The petitions were subsequently transferred to this Court pursuant to 28 U.S.C. § 2112(a)(5) and consolidated in this proceeding.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the Addendum.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether FERC's exclusive reliance on precedent agreements with affiliated monopoly utilities to establish market need for the Project, ignoring contrary evidence, was arbitrary and capricious and violated the Natural Gas Act.

2. Whether FERC's authorization of the Project was arbitrary and capricious and violated the National Environmental Policy Act ("NEPA") by:

a. relying on inaccurate and incomplete information to conclude that existing pipeline systems could not meet the purported need for the Project while minimizing environmental impacts;

b. dismissing alternative routes that avoided national forests on the unfounded assumption that off-forest routes provided no significant environmental advantage;

c. failing to adequately consider impacts to aquatic resources while ignoring input from a cooperating agency, the Forest Service;

d. concluding that environmental justice populations would not suffer disproportionate impacts by using an unreasonable methodology to identify minority communities and assuming that compliance with air quality standards guarantees no disproportionate harm; and

e. failing to discuss the incremental impacts or significance of downstream greenhouse gas emissions and failing to use the Social Cost of Carbon without an adequate explanation.

3. Whether Atlantic Coast Pipeline, LLC's ("Atlantic's") use of eminent domain violates the Natural Gas Act or the Constitution where:

a. required conditions of Atlantic's certificate of public convenience and necessity have failed;

b. there has been no determination that just compensation is guaranteed; and

c. the landowners have had no meaningful opportunity to raise their arguments against Atlantic's right to take.

STATEMENT OF THE CASE

In September 2015, Atlantic—a joint venture of Dominion Energy, Inc. ("Dominion"), Duke Energy Corporation, and the Southern Company—applied to FERC for authorization to construct and operate the Atlantic Coast Pipeline ("Project"), a proposed 604-mile pipeline designed to transport up to 1.5 billion cubic feet per day ("Bcf/d") of natural gas from West Virginia to Virginia and North Carolina. *See* Certificate Order ¶ 1 [JA____].

Even though the existing pipeline system had sufficient capacity to meet the region's current and future energy demand, Atlantic proposed a pipeline that would

generate a lucrative revenue stream for its shareholders—while saddling its affiliates' captive utility customers with $5.5 billion in construction costs, *id.* ¶¶ 8, 15 [JA____, ____], plus a guaranteed 15% rate of return. *See* Atlantic Appl. 30 [JA____]; Hr'g Test. of Glenn Kelly 45-49, *App. of Va. Elec. & Power Co. to revise its fuel factor*, No. PUR-2017-00058 (June 14, 2017), http://www.scc.virginia.gov/docketsearch/DOCS/3f%25% 2401!.pdf ("Kelly Testimony").

Atlantic's chosen route—across two national forests and the steep mountains of the central Appalachians—poses serious environmental problems due to erosion-prone mountain slopes, karst geology, and protected lands. *See* Final Environmental Impact Statement ("FEIS") 4-36 to 4-37, 4-452 to 4-475, 4-603 [JA____-____, ____-____, ____]. The route would also locate a compressor station in the African-American community of Union Hill in Buckingham County, Virginia. *Id.* at 4-538 [JA____].

FERC issued a Draft Environmental Impact Statement ("DEIS") for the Project in December 2016. JA____. Over 1,200 parties submitted written comments to FERC, many highlighting significant deficiencies in the DEIS. *See* FEIS, App. Z at Z-i [JA____]. Despite continuing to lack critical information, FERC issued its FEIS in July 2017. JA____. The FEIS summarily dismissed system and off-forest alternatives based on inaccurate and incomplete information,

FEIS 3-4 to 3-5, 3-19 [JA____-____, ____]; concluded aquatic impacts were "largely uncertain," *id.* at 4-129 [JA____]; failed to identify environmental justice populations and assess disproportionate impacts, *id.* at 4-514 to 4-515 [JA____-____]; and declined to assess impacts of downstream greenhouse gas emissions, *id.* at 4-620 [JA____].

In October 2017, FERC adopted the FEIS findings and granted Atlantic a conditional certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). JA____. "[S]ubject to conditions," the certificate authorized Atlantic to construct and operate the Project and approved Atlantic's proposed rate of return. Certificate Order ¶ 4 [JA____]. FERC based its finding of market need for the Project exclusively on Atlantic's precedent agreements—contracts for gas transportation service—with its affiliated monopoly utilities and declined to consider any other evidence as to need, rejecting the request by numerous Petitioners for an evidentiary hearing. *Id.* ¶¶ 23, 55, 63 [JA____, ____, ____]. Only two commissioners signed the Certificate Order; Commissioner LaFleur dissented. *Id.* at 1-5 (LaFleur, Comm'r, dissenting) [JA____-____].

Several parties, including Petitioners here, filed timely requests for rehearing, having previously intervened in the proceedings. JA____-____. In

December 2017, FERC issued a tolling order indefinitely delaying its decision on the requests while permitting construction to proceed. JA____.

In early 2018, courts granted Atlantic's quick-take injunctions against several landowners, allowing Atlantic to take possession of property and cut down trees. *See, e.g.*, *Atlantic Coast Pipeline, LLC v. 5.63 Acres*, No. 6:17-cv-84, 2018 WL 1097051 (W.D. Va. Feb. 28, 2018); *Atlantic Coast Pipeline, LLC v. 0.25 Acre*, 2018 WL 1369933 (E.D.N.C. Mar. 16, 2018).

Finally, on August 10, 2018, FERC denied all rehearing requests except for Atlantic's, which it granted in part. Reh'g Order ¶ 5 & p. 150 (2018) [JA____, ____]. Again, only two commissioners joined, with Commissioner LaFleur dissenting, *id.* at 1-10 [JA____-____]. Commissioner Glick issued a separate statement explaining that to facilitate judicial review he did not participate, but he did "not believe that the ACP Project has been shown to be in the public interest." Statement of Comm'r Richard Glick on Atlantic Coast Pipeline LLC (Aug. 10, 2018), http://www.ferc.gov/media/statements-speeches/glick/2018/08-10-18-glick-ACP.asp ("Glick Statement").

Eight petitions for review of the Certificate Order and Rehearing Order were timely filed under Section 19(b) of the Natural Gas Act: six in the Fourth Circuit and two in this Court. The six Fourth Circuit petitions were subsequently

transferred to this Court and consolidated with the two D.C. Circuit petitions in this proceeding. Dkt. 1762216.

In December 2018, the Fourth Circuit vacated a United States Forest Service permit authorizing the Project to cross two national forests, finding the Forest Service's adoption of FERC's FEIS arbitrary and capricious due to the FEIS's incomplete analysis of off-forest alternatives and impacts to aquatic resources. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 173, 174, 178 (4th Cir. 2018). The court observed that "[t]he lengths to which the Forest Service apparently went … to accommodate the ACP project through national forest land on Atlantic's timeline are striking, and inexplicable." *Id.* at 166.

Several other federal approvals upon which FERC conditioned its Certificate Order have failed to withstand judicial scrutiny. Since 2018, the Fourth Circuit has also vacated authorizations issued by the United States Fish and Wildlife Service, *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018); National Park Service, *id.*; and United States Army Corps of Engineers, Order (Dkt. 67), *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1743 (4th Cir. Jan. 25, 2019).

SUMMARY OF ARGUMENT

FERC's authorization of a pipeline that serves no demonstrated need, causes irreversible environmental impacts, and uses eminent domain to take private

property was—like the federal agency approvals for the Project that have been vacated—"striking and inexplicable." *Cowpasture*, 911 F.3d at 166.

The Natural Gas Act requires FERC to authorize only those pipelines required by public convenience and necessity. By basing its finding of market need for the Project solely on precedent agreements between the Project's sponsor and its affiliated monopoly utilities—notoriously unreliable indicators of actual demand—FERC abdicated its duty. In the process, FERC contravened its own guidance and disregarded ample evidence that the Project is not needed.

FERC violated NEPA by relying on unsupported assumptions and incomplete information that precluded FERC from taking the required "hard look" at the Project's substantial environmental impacts. FERC arbitrarily rejected existing pipeline systems as viable Project alternatives, and relied on logic criticized by the Forest Service to summarily dismiss alternative routes that would avoid crossing two national forests. FERC's assessment of impacts to aquatic resources similarly ignored the Forest Service's concerns. Further, FERC's failure to apply federal environmental justice guidance to properly identify minority populations prevented FERC from properly evaluating the Project's disproportionately high and adverse health impacts on minority communities. FERC also violated NEPA by refusing to disclose or consider the incremental

environmental impacts of downstream greenhouse gas emissions—despite the availability of a tool designed to help agencies do just that.

Moreover, Atlantic's FERC certificate does not save Atlantic's exercise of eminent domain from violating the Natural Gas Act and the Constitution. First, because required conditions of Atlantic's FERC certificate have failed, Atlantic cannot legitimately take property. Second, as no one has ensured Atlantic's ability to guarantee just compensation, Atlantic's takings violate either the Natural Gas Act's "willing and able" provision or the Just Compensation Clause itself. Third, FERC's denial of a pre-deprivation or prompt post-deprivation hearing on the landowners' challenges to Atlantic's right to take their land deprived them of due process.

STANDING

Conservation Petitioners are non-profit organizations with members who live, work, and recreate in areas that will be affected by the construction and operation of the Project. This Court can address the harm caused to Conservation Petitioners' members by vacating the Certificate Order and remanding to FERC. *See Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994).

Conservation Petitioners have standing to sue on their members' behalf, *see* Decls., ADD54-ADD390; *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002), and standing under the Natural Gas Act. *See* 15 U.S.C. § 717r(b).

Landowner Petitioners are private landowners whose property has been—or will be—taken by eminent domain for Atlantic's Project.

ARGUMENT

I. Standard of Review

FERC's orders are reviewed under the APA's arbitrary and capricious standard. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). Findings of fact, such as FERC's determination of market need, must be "supported by substantial evidence," 15 U.S.C. § 717r(b), that "a reasonable mind might accept as adequate to support a conclusion." *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010). Moreover, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

FERC's compliance with NEPA, including its environmental justice analysis, is also subject to review under the APA's arbitrary and capricious standard. *Sierra Club v. FERC*, 867 F.3d 1357, 1367-68 (D.C. Cir. 2017). "[C]onclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA"; an agency's decision is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem, [or] offered an

explanation for its decision that runs counter to the evidence before the agency." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

II. FERC's Exclusive Reliance on Precedent Agreements With Affiliated Monopoly Utilities to Establish Market Need for the Project Was Arbitrary and Capricious.

Section 7(e) of the Natural Gas Act charges FERC with the duty to protect consumers, landowners, and the environment from unneeded pipelines. *See Sierra Club*, 867 F.3d at 1376 ("fundamental purpose" of Natural Gas Act "is to protect natural gas consumers from the monopoly power of natural gas pipelines"). FERC can approve a new interstate pipeline only if it "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The "public convenience and necessity" analysis has two components. FERC must first determine that the project will "stand on its own financially" because it meets a "market need." *Sierra Club*, 867 F.3d at 1379. If need is established, FERC must find that the benefits of the project outweigh its adverse effects. *Id.*

FERC based its finding of need for the Project solely on the contracts, or "precedent agreements," between Atlantic and prospective gas shippers. Certificate Order ¶¶ 55, 63 [JA____, ____]; Reh'g Order ¶ 52 [JA____]. Under the unique circumstances of this case—where all of the Project's shippers were monopoly utilities or their subsidiaries, and all but one were affiliated with

Atlantic—FERC's uncritical reliance on precedent agreements while ignoring contrary evidence was arbitrary and capricious.[1]

A. Affiliate Precedent Agreements Are Unreliable Proxies for Market Need.

FERC relied solely on precedent agreements where Atlantic's affiliates accounted for 93% of the Project's contracted capacity. Certificate Order ¶¶ 9, 59 [JA____, ____].[2] But FERC has recognized that an affiliate contract inherently is less probative of market need than a contract that is the product of arm's-length negotiations. FERC's own policy cautions that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project … *raises additional issues when the contracts are held by pipeline affiliates*." *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,744 (1999) ("Policy Statement") (emphasis added); *see also id.* ¶ 61,748 ("A project that has

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[1] This Court has not previously considered the question presented here: whether FERC can rely solely on precedent agreements *with affiliated monopoly utilities* as evidence of market need. Accordingly, FERC's reliance on *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014), and *Myersville*, 783 F.3d at 1311, for the proposition that precedent agreements are adequate to demonstrate need is misplaced. *See* Certificate Order ¶ 54 & n.86 [JA____]; Reh'g Order ¶ 46 & n.111 [JA____].

[2] The one unaffiliated shipper, Public Service Company of North Carolina, Inc., was a subsidiary of SCANA Corporation. Certificate Order ¶ 9 & n.19 [JA____]. As a result of the January 2019 merger between Dominion and SCANA, all of the shippers are now Atlantic affiliates. *See* Press Release, Dominion, Dominion Energy Combines With SCANA Corporation (Jan. 2, 2019), https://dominionenergy.mediaroom.com/2019-01-02-Dominion-Energy-Combines-With-SCANA-Corporation.

precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate."). These issues are straightforward: affiliated shippers have incentive to enter into precedent agreements with their corporate parent even where the contracted capacity is not needed, because they profit when the pipeline sponsor profits. *See* Isser Report 24 [JA____]; Wilson Report ¶ 23 [JA____].

Consequently, FERC routinely applies heightened scrutiny to affiliate transactions in other contexts—with a specific emphasis on contracts involving affiliated utilities. *See, e.g.*, *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at ¶ 49 (2009) ("We will apply a higher level of scrutiny when affiliates of the … developer are anchor customers due to the absence of arms' length negotiations … [and] concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate."); Cross-Subsidization Restrictions on Affiliate Transactions, 73 Fed. Reg. 11,013, 11,014 (Feb. 29, 2008) (adopting new restrictions on power sales because "a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders"). FERC's failure to heed its own guidance and apply scrutiny to Atlantic's precedent agreements with its affiliates demonstrates the arbitrariness of its finding of need. *See Am. Rivers v. FERC*, 895 F.3d 32, 46 (D.C. Cir. 2018) (finding Fish and Wildlife Service's

issuance of biological opinion arbitrary where agency "discard[ed] the methodology set forth in its own handbook and its own regulatory definitions").

Further, FERC approved Atlantic's proposed rate of return in part because "[e]ven if ACP has contracted with affiliates, … it remains at risk for … terminated contracts." Reh'g Order ¶ 72 [JA____]. The fact that Atlantic "remains at risk" for termination suggests that those contracts, which were withheld from the public record, are not binding upon the shippers and thus ineffective indicators of need. A contract that can be unilaterally terminated is only an option. Moreover, even if the contracts theoretically bound the affiliated shippers, members of the same corporate family will not likely sue each other to enforce a contract. *Cf. Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) ("complete unity of interest" between parents and subsidiaries). The corporate parent will determine the result of any contractual issue, and its determination will be based on profitability, not legal obligations.

B. Precedent Agreements With Affiliated Monopoly Utilities Are Even Less Reliable Indicators of Market Need.

FERC's sole reliance on precedent agreements was even more arbitrary because all six shippers that contracted for capacity are monopoly utilities or their subsidiaries. *See* Certificate Order ¶¶ 9, 60 [JA____, ____]. Shippers are typically natural gas producers or marketers—entities that FERC observed "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 for the capacity." Reh'g Order ¶ 48 [JA____]. FERC made no such finding with respect to the utility shippers here. Unlike producers or marketers, monopoly utilities need not determine that there is demand for the capacity to make a rational business decision to subscribe; they must determine only that they have a reasonable likelihood of recovering contract costs from their captive ratepayers—here, utility customers in Virginia and North Carolina. *See* Wilson Report ¶¶ 7, 22 [JA____, ____]. This is a fundamentally different risk assessment.

Contrary to FERC's suggestion, *see* Reh'g Order ¶¶ 48, 49 [JA____-____], the fact that state utility commissions have authority to disapprove utilities' pipeline contract costs hardly ensures that precedent agreements with monopoly utilities reflect true market need. First, state commission review considers proposed recovery of *all* of a utility's annual fuel-related costs; costs associated with a single pipeline capacity contract represent only one part. *See* N.C. Gen. Stat. §§ 62-133.2(c), 62-133.4(c); Va. Code § 56-249.6; 20 Va. Admin. Code §§ 5-201-20, 5-201-90. Second, state commissions apply a lower standard of review than FERC; whereas FERC must determine that a project is "required" by public "necessity," 15 U.S.C. § 717f(e), state commissions decide only whether a utility's costs are "prudently incurred," N.C. Gen. Stat. §§ 62-133.2(d), 62-133.4, or "reasonable." *See* Va. Code §§ 56-234 (requiring utilities to furnish service at

"reasonable" rates), 56-249.6(D)(2) (disallowing recovery of electric utilities' "unreasonable fuel costs"). Finally, state commission review is retrospective, occurring only *after* the project is built—and, often, after the utility has incurred billions of dollars in costs. *See* IEEFA Report 11 [JA____]. For these reasons, pipeline cost pass-throughs have been regularly approved by state commissions, regardless of need. *See, e.g.*, Kelly Testimony 45-49 (testifying that an Atlantic-affiliated utility, Virginia Energy and Power Company, expects its ratepayers to pay all Project costs regardless of whether the pipeline's capacity is used).

Rather than confronting legitimate concerns about relying on contracts with affiliated monopoly utilities as indicators of need, FERC dodged, maintaining that "issues related to a utility's ability to recover costs associated with its decision to subscribe for service on the ACP Project involve matters to be determined by the relevant state utility commissions." Reh'g Order ¶ 48 [JA____]. By deferring to the backstop review of state commissions, FERC abdicated its statutory responsibility to independently ensure that a new pipeline is required by the public necessity. *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) ("Administrative law does not permit" agency to "pass[] the entire issue off onto a different agency."). Because state commission review attaches little risk to monopoly utilities' assumption of pipeline contract costs, FERC

cannot reasonably look to precedent agreements with such utilities as a proxy for market need.

C. Evidence Beyond Precedent Agreements Demonstrates the Arbitrariness of FERC's Finding of Market Need.

By relying exclusively on precedent agreements, FERC ignored contrary evidence of a lack of need for the Project, *see Universal Camera*, 340 U.S. at 487-88, and contravened its own policy. In its 1999 Policy Statement, FERC departed from its prior exclusive dependence on precedent agreements: "Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project." Policy Statement ¶ 61,747. The Policy Statement provides a non-exclusive list of "relevant factors" FERC "will consider": "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.*

Here, however, FERC did not consider "all relevant factors reflecting on the need for the project," disregarding two of the factors enumerated in its policy: "demand projections" and "a comparison of projected demand with the amount of capacity currently serving the market."[3] Certain Petitioners requested an evidentiary hearing to present evidence addressing these factors and disproving

[3] Two commissioners sharply criticized this omission. *See* Certificate Order 4 [JA____] (LaFleur, Comm'r, dissenting); Glick Statement.

Atlantic's assertion of need. Mot. for Evidentiary Hr'g [JA____]. FERC denied the request. Certificate Order ¶ 23 [JA____].

The evidence FERC refused to consider confirms that the Project is not needed. Atlantic claimed that the Project was needed to transport gas to power plants for electricity generation in Virginia and North Carolina. FEIS 1-3 [JA____]; Atlantic Appl. 5-6 [JA____-____]. But expert analysis in the record demonstrated that demand for natural gas for power generation in the region was projected to remain virtually flat for the foreseeable future. Demand projections in 2017 by PJM Interconnection, the independent operator of the regional electrical transmission grid, indicated that demand in Virginia for electricity would experience minimal growth. Wilson Report ¶ 37 & fig. 4 [JA____-____].[4] Between 2014 and 2017, electric utilities in North Carolina substantially lowered their 15-year load forecasts. *Id.* ¶¶ 40, 44 [JA____, ____]. Independent analyses concurred: the U.S. Energy Information Administration projected that demand for natural gas for electricity generation in the South Atlantic region would decrease from 2015 to 2020 and would not return to 2015 levels until approximately 2034.[5]

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[4] To the extent FERC relied on Atlantic's assertions of a "growing need for natural gas," Certificate Order ¶ 50 [JA____], demand projections by an Atlantic-affiliated utility were recently rejected by the Virginia State Corporation Commission as "consistently overstated … with high growth expectations despite generally flat actual results each year." *In re Va. Elec. & Power Co.'s Integrated Resource Plan filing*, No. PUR-2018-00065, 2018 WL 6524202, at *5 (Va. SCC Dec. 7, 2018).

[5] U.S. Energy Information Administration, *Annual Energy Outlook 2017*,

And when FERC inquired where the Project's gas would be used for electricity generation, Atlantic answered only with vague generalities that the gas could be used to provide "additional sourcing flexibility" or as an "alternative fuel source." Atlantic Data Request Response No. 3 [JA____].

Further, the capacity of existing pipelines, with planned modifications, is more than sufficient to meet the region's projected demand. A 2016 study by Synapse Energy Economics Inc. concluded that the existing pipeline system and its proposed upgrades would provide enough gas to Virginia, North Carolina, and South Carolina to meet demand through 2030—even under an unlikely "high demand" scenario. Synapse Study 3-4 [JA____].[6] And FERC's finding to the contrary in its analysis of system alternatives was riddled with inaccurate and incomplete information about available capacity on existing pipeline systems. *See infra* Section III.A.1.

In making its need determination, FERC ignored this evidence of ample supply and flat demand. Instead, it blindly relied on precedent agreements—a practice FERC itself has recognized as unsound when shippers are affiliated

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http://www.eia.gov/opendata/embed/iframe.php?series_id=AEO.2017.REF2017.CNSM_ENU_ELEP_NA_NG_NA_SOATL_QBTU.A (last visited Apr. 4, 2019) (cited in Shenandoah Valley Network ("SVN") Comments 21 & n.48 [JA____]).

[6] The Certificate Order's "consideration" of the Synapse study amounted to a single unsupported sentence: "Given the uncertainty associated with long-term demand projections, … the Commission deems the precedent agreements to be the better evidence of demand." Certificate Order ¶ 56 [JA____].

monopoly utilities. Because FERC "entirely failed to consider an important aspect of the problem, [and] offered an explanation for its decision that runs counter to the evidence before the agency," its finding of market need for the Project was arbitrary and capricious. *Del. Riverkeeper Network*, 753 F.3d at 1313.

III. FERC's Deficient Environmental Impact Statement Violated NEPA.

NEPA compels federal agencies "to take a hard and honest look at the environmental consequences of their decisions." *Am. Rivers*, 895 F.3d at 49. This "hard look" requires agencies to identify and evaluate environmental impacts and discuss steps that can be taken to mitigate adverse effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). The agency "must consult agencies with 'special expertise with respect to any environmental impact involved'" and must "use the resulting analysis 'to the maximum extent possible.'" *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019). FERC's failure to take a hard look at system and off-forest alternatives and at impacts on aquatic resources, environmental justice populations, and climate change violated NEPA.

A. FERC Failed to Adequately Consider System and Off-Forest Alternatives.

Consideration of alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. The "discussion of alternatives must '[r]igorously explore and objectively evaluate all reasonable alternatives.'" *Union*

Neighbors United, Inc. v. Jewell, 831 F.3d 564, 569 (D.C. Cir. 2016). A federal agency fails to meet its NEPA obligations "when it 'rel[ies] on incorrect assumptions or data' in drafting an EIS or presents information that is 'so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of alternatives.'" *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018). FERC's analysis of system and off-forest alternatives violated this basic requirement.

1. FERC's rejection of system alternatives relied on inaccurate and incomplete information.

Even assuming demand existed for the Project's 1.44 Bcf/d of contracted capacity, the existing Transco pipeline system would provide enough capacity to transport that volume from a "low cost supply hub," FEIS 1-2 [JA____], to Atlantic's delivery points within a similar time frame, and would offer an environmental advantage. FERC arbitrarily rejected Transco as an environmentally preferable alternative on the basis that it would purportedly require construction of 640 to 680 miles of new pipeline. *Id*. at 3-4 to 3-5 [JA____-____]. FERC's discussion of system alternatives, copied almost verbatim from Atlantic's application,[7] was inadequate; the FEIS dramatically

[7] *Compare* FEIS 3-4 to 3-5 [JA____-____] *with* Resource Report 10, at 10-17 [JA____]. Agencies "shall independently evaluate the information submitted." 40 C.F.R. § 1506.5(a); *see Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1265-66 (S.D. Fla. 2009) (finding arbitrary and capricious agency's adoption of

underreported Transco's capacity and neglected to explore whether three other pipelines connected to Transco could supply Atlantic's customers. Thus, FERC failed to adequately consider the viability of an alternative that could make construction of all or part of the Project unnecessary.

a. FERC grossly underreported the capacity of the Transco system.

FERC's assertion that Transco would require capacity upgrades to accommodate the Project's contract capacity, FEIS 3-4 [JA____], relied on demonstrably "incorrect assumptions or data" about the capacity of the Transco system. *Marten*, 883 F.3d at 795. The FEIS claimed, in 2017, that Transco "has a peak design capacity of almost 11 Bcf/d of natural gas." FEIS 3-4 [JA____]. But that figure was three years old, approximating Transco's capacity *in 2014*. *See* Friends of the Central Shenandoah Comments 41 [JA____]. By the time FERC issued the FEIS in July 2017, a suite of expansion projects—each approved *by FERC*—had increased Transco's capacity by over 4.5 Bcf/d.[8] Yet FERC entirely ignored that increase. This point cannot be overemphasized: In rejecting Transco

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applicant's alternatives analysis without independent evaluation).

[8] *See Transcontinental Gas Pipe Line Co.*, 153 FERC ¶ 61,077, at ¶ 4 (2015) (1.2 Bcf/d); *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, at ¶ 11 (2016) (1.13 Bcf/d); *Transcontinental Gas Pipe Line Co.*, 156 FERC ¶ 61,021, at ¶ 3 (2016) (0.115 Bcf/d); *Transcontinental Gas Pipe Line Co.*, 156 FERC ¶ 61,092, at ¶ 4 (2016) (0.448 Bcf/d); *Transcontinental Gas Pipe Line Co.*, 158 FERC ¶ 61,125, at ¶ 1 (2017) (1.7 Bcf/d).

as a viable alternative, FERC overlooked that the region's largest pipeline system had recently added *three times* the Project's capacity, and never evaluated how much of that added capacity would be available to Atlantic's customers. Therefore, FERC's conclusion that Transco would require upgrades to accommodate the Project's volume was arbitrary.[9]

b. FERC inadequately considered capacity from three projects connecting supply areas to the Transco main line.

FERC also failed to explain why three pipelines connecting supply hubs in the Marcellus Shale to the Transco main line—Transco's Atlantic Sunrise, Columbia's WB XPress, and Mountain Valley—were insufficient to transport enough gas to Transco to meet the Project's purpose. *See* FEIS 1-2, 3-4 to 3-6 [JA____, ____-____]; Certificate Order ¶ 30 n.40 [JA____]; Resource Report 10, at 10-16 [JA____] (map showing Columbia and Mountain Valley connections to Transco). Together, these three projects can accommodate more than 4.2 Bcf/d of natural gas.[10] Critically, over 90% of their collective capacity—3.8 Bcf/d, the

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[9] In a brief filed before the Public Service Commission of South Carolina, Transco confirmed that it "has the infrastructure and pipeline in place to serve the Southeast … for many years" and that the Project would represent "duplicative infrastructure and pipeline." Transco Reh'g Pet. 1 [JA____].

[10] *See Transcontinental Gas Pipe Line Co.*, 158 FERC ¶ 61,125, at ¶ 11 & nn.10-19 (1.64 of 1.7 Bcf/d owned by producers and marketers); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at ¶ 10 & nn.12-16 (2017) (1.74 of 2 Bcf/d owned by producers and marketers); *Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,200, at ¶ 9 (2017) (at least 0.5 Bcf/d eastbound capacity); Letter from John A.

equivalent of more than two Atlantic Coast Pipelines—is subscribed *not* by end users like public utilities or industrial customers, but by producers and marketers that must find end-use customers for the gas. *See supra* note 10; Friends of the Central Shenandoah Comments 42, 51-52 [JA____, ____-____]. FERC summarily rejected Mountain Valley and WB Xpress as alternatives, claiming that neither project would have sufficient capacity to deliver both its own contracted volume (1.3 Bcf/d for WB Xpress, 1.74 Bcf/d for Mountain Valley) and the contracted volume for the Project (1.44 Bcf/d). FEIS 3-6 [JA____]. But nothing in the record indicates that FERC ever considered whether the WB Xpress and Mountain Valley producers and marketers had found end users, or whether some or all of their contracted capacity could serve Atlantic's customers. *See* Certificate Order ¶¶ 9, 60 [JA____, ____]. FERC failed to evaluate the Atlantic Sunrise project at all. *See* FEIS 3-4 to 3-10 [JA____-____].

This alternative—connecting supply areas to the Transco main line using existing pipelines—could have cut the length of the Project nearly in half, eliminating the portion traversing two national forests and the steep slopes of the central Appalachians. *See id.* at 3-7, 1-4 [JA____, ____]. Further, at least four of the Project's six shippers have access to the Transco system. Atlantic Appl., Ex. I

Roscher, Columbia Gas Transmission, LLC, to Kimberly D. Bose, FERC, App. A, *Columbia Gas Transmission, LLC*, Dkt. RP18-1217-000 (Sept. 25, 2018) (FERC eLibrary No. 20180925-5118) (service agreements indicating 0.425 of 0.5 Bcf/d owned by producers and marketers).

at 2 [JA____]. By assuming that none of the Project's customers could be served by Mountain Valley, WB Xpress, or Atlantic Sunrise, FERC "entirely failed to consider an important aspect of the problem," *Del. Riverkeeper Network*, 753 F.3d at 1313, and its conclusion that new pipeline would be required to connect supply areas to Transco was arbitrary.

2. FERC relied on unfounded assumptions in summarily dismissing off-forest alternatives.

The Project's route crosses 21 miles of George Washington and Monongahela National Forests, FEIS 4-36, 4-42 [JA____, ____], requiring clear-cutting and trenching along steep slopes and through numerous sensitive areas. *Id.* at 4-36 to 4-37, 4-452 to 4-475 [JA____-____, ____-____]. The Fourth Circuit recently reviewed the FEIS's off-forest alternatives analysis and found the Forest Service's uncritical adoption of FERC's analysis arbitrary and capricious. *Cowpasture*, 911 F.3d at 173. FERC's reliance on the same analysis to preemptively dismiss all off-forest alternatives likewise violates NEPA.

FERC's NEPA regulations stress that projects should avoid "scenic, recreational, and wildlife lands" and "forested areas and steep slopes where practical," 18 C.F.R. § 380.15(e)(2), (3). Disregarding these directives, FERC's DEIS dismissed alternative routes that would avoid the national forests because off-forest routes would lengthen the pipeline. DEIS 3-19 [JA____]. FERC

recognized that a longer route could be environmentally preferable,[11] but admitted it had not conducted ground resource surveys and claimed it had not received information suggesting that the shorter route through the national forests would impact sensitive resources more significantly. *Id.* In other words, FERC relied on an assumption it recognized may not be true, without obtaining any information to confirm it.

The Forest Service sharply criticized FERC's unsupported assumption, explaining that "[m]iles of line do not necessarily equate to severity of the environmental impact. The nature of the resources to be impacted needs to be considered." Forest Service Comments on DEIS 13 [JA____]. Further, public commenters supplied the information FERC supposedly lacked, identifying adverse impacts the pipeline would have on sensitive resources in the national forests. *See* Virginia Wilderness Committee Comments 1-2 [JA____-____]; Friends of Nelson Comments 85, 89 [JA____, ____]; SVN Comments 56, 65, 76-78, 84-85 [JA____, ____, ____-____, ____-____]; Sierra Club Comments 62-64, 69-70, 78 [JA____-____, ____-____, ____]. Despite this wealth of information undermining its assumption, FERC summarily dismissed off-forest alternatives for a second time, issuing a FEIS that copied the language in the DEIS verbatim—including the admission that ground surveys had not been conducted

[11] In fact, FERC had already accepted a route variation that added 31.8 miles of pipeline to reduce impacts on highly sensitive resources. FEIS 3-21 [JA____].

and the claim that FERC had not received information indicating that the on-forest route would have greater impacts. FEIS 3-19 [JA____].

FERC's failure to obtain information essential to its alternatives analysis and its omission of information contradicting its unsubstantiated assumption are the epitome of arbitrary and uninformed decision-making. *See* 40 C.F.R. § 1502.22(a) (statement must include information "essential to a reasoned choice among alternatives"); *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (agency "cannot ignore evidence contradicting its position"). The FEIS did not even discuss the Forest Service's criticism. *See Nat'l Parks Conservation Ass'n*, 916 F.3d at 1082. FERC's dismissal of off-forest alternatives based on an unsubstantiated assumption violated NEPA.

B. FERC Failed to Take a Hard Look at Impacts to Aquatic Resources.

The Project would require 57 waterbody crossings in national forests and construction through highly erosive soils on terrain susceptible to slope failures. FEIS 4-27, 4-125, 4-128, 4-231 [JA____, ____, ____, ____]. It would also cross 71.3 miles of karst terrain—a landscape characterized by underground sinkholes and caves that provide a direct connection to groundwater. *Id.* at 5-2, 4-95 [JA____, ____]. In violation of NEPA, FERC's analyses of aquatic impacts were replete with missing information and erroneous assumptions.

1. FERC's analysis of sedimentation impacts in national forests was incomplete and based on assumptions undermined by the Forest Service.

In *Cowpasture*, the Fourth Circuit held that the Forest Service violated NEPA by adopting FERC's FEIS for the Project despite its "incomplete and/or inaccurate analysis" of sedimentation impacts and reliance on mitigation plans that had not been proven effective. 911 F.3d at 174, 178. FERC's reliance on the same FEIS also violates NEPA.

In discussing sedimentation impacts on national forests, FERC leaned heavily on a draft biological evaluation prepared by Atlantic that it criticized for "presenting statements with no supporting documentation" that lacked "correlation or reference" to its modeling results. FEIS 4-129 [JA____]. Rather than requiring additional information, *see* 40 C.F.R. § 1502.22, FERC simply concluded that the deficiencies in the biological evaluation left "water resource impacts from sedimentation … largely uncertain." FEIS 4-129 [JA____].

Worse, the Forest Service had highlighted to FERC additional flaws with Atlantic's analysis, including (1) adopting desktop assumptions that erosion control devices would reduce erosion by "about 96%," Draft Biological Evaluation App. H at H-7, despite extensive field evidence suggesting that 55% or less was more realistic for construction in mountainous terrain; and (2) relying on water diversion bars for erosion control without analyzing whether they would be

effective for this project. Forest Service Comments on Draft Biological Evaluation 18, 46 [JA____, ____]. Yet FERC did not address (or even disclose) the Forest Service's concerns. *See* FEIS 4-129, 4-240 [JA____, ____]; *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005) (NEPA "requires up-front disclosures of relevant shortcoming in the data or models"). This omission is particularly striking considering the Forest Service's expertise in evaluating sedimentation impacts from construction along steep slopes. Courts "may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise." *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).

FERC's issuance of a FEIS with incomplete analyses and assumptions undermined by an expert agency is "precisely the sort of uninformed agency action that NEPA prohibits." *Cowpasture*, 911 F.3d at 178.

2. FERC failed to properly consider aquatic impacts in karst terrain.

FERC acknowledged that the Project's crossing of karst terrain "could induce sinkhole development, alter spring characteristics, and impact local groundwater flow and quality." FEIS ES-4 [JA___]. FERC's conclusion that the Project would not significantly harm those resources suffers from three flaws.

First, FERC ignored potential impacts from the Project to known karst areas prone to landslides and sinking streams. *See, e.g.*, Limpert Comments [JA____-____].

Second, FERC failed to adequately map areas suspected to contain karst features to determine if the Project could harm groundwater supplies. While there was some mapping of particular karst *features*, there was no mapping of karst *systems* critical to accurately depicting the movement of water through such terrain. *See* Groves Report 9 [JA____]. Instead, FERC merely "recommend[ed]" that Atlantic perform dye tracing prior to construction and provide the results with a subsequent implementation plan. FEIS at 4-12 [JA____].

Third, FERC inappropriately determined that a yet-to-be-drafted *mitigation* plan was sufficient to allow it to authorize the Project to proceed through karst terrain. *Id.* at 4-18 to 4-20, App. I [JA____-____, ____].

Through these failures, FERC is allowing harm to water supplies in the hopes that subsequent efforts can fix that harm, an impossible task. NEPA requires FERC to determine whether harm could be avoided or minimized. *See Robertson*, 490 U.S. at 349.

C. FERC's Flawed Environmental Justice Analysis Failed to Recognize the Project's Disproportionately High and Adverse Health Impacts on Minority Communities.

To evaluate a project's potential harm to environmental justice communities, federal agencies must first identify those minority and low-income communities directly affected by the project. *See Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003). Despite purporting to adhere to federal guidance, FEIS 4-512 [JA____], FERC failed even to identify, let alone analyze, several minority populations throughout the Project route. FERC did so by defining potentially affected areas too broadly and comparison groups too narrowly.

FERC's flawed approach is exemplified by its treatment of Union Hill, a historic African-American community in Buckingham County, Virginia, founded by emancipated slaves and the proposed site of Compressor Station 2. SVN Comments 276 [JA____].[12] FERC recognized that the compressor station would increase harmful nitrogen oxide emissions by 120% and daily fine particle pollution by 69%. FEIS 4-561 tbl. 4.11.1-11 [JA____]. FERC also acknowledged that African-Americans have higher rates of asthma and found it "reasonable to assume" that those communities have a "disproportionate" risk of adverse health effects from increased air pollution. *Id.* at 4-513 to 4-514 [JA____-____]. Yet

[12] Compressor stations pressurize natural gas to move it along a pipeline, generating air pollution. *Sierra Club*, 867 F.3d 1370.

FERC wrongly concluded that Union Hill would *not* suffer disproportionate adverse health impacts, and rejected a more sparsely populated alternative site, Midland Road, *id.* at 4-512 to 4-513, 3-58 [JA____-____, ____], because it arbitrarily determined that Union Hill was not a minority environmental justice population. *Id.* at 4-513 [JA____]. This was error.

FERC identified a minority environmental justice population when its chosen affected area's minority population was "meaningfully greater" (arbitrarily defined as ten *percentage points* higher) than its comparison group. For Compressor Station 2, FERC designated three large census tracts ranging from 24% to 43% African-American as the potentially affected area. *Id.* at 4-512 to 4-513, App. U at U-2 [JA____-____, ____]. FERC's reliance on census-tract data departed from federal guidance cautioning that "minority or low-income communities, including those that may be experiencing disproportionately high and adverse effects, may be missed in a traditional census-tract based analysis."[13] In densely populated counties, each census tract corresponds to a relatively small geographic area that may be an adequate proxy for an area affected by localized environmental impacts. But Buckingham County is large and sparsely populated;

[13] U.S. Environmental Protection Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis § 2.1.1 (1998), https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf ("EPA EJ Guidance").

hence, each census tract is too large to be an adequate proxy for localized harm.[14] The three census tracts FERC designated as the affected area encompass nearly 500 square miles,[15] but only about *0.6%* of those tracts lie within one mile of Compressor Station 2, where the pollution and associated health risks would be concentrated. *See* FEIS 4-514 [JA____]; SVN Reh'g Req. 129 [JA____].

Given the limitations of census-tract data, federal guidance recommends using "local demographic data" when available.[16] Here, such data was available: the results of a door-to-door study of Union Hill, conducted by a Ph.D. anthropologist, revealing that approximately 80% of the residents surveyed within a mile of Compressor Station 2 were African-American or biracial. *See* SVN Comments 282-91 [JA____-____]; Fjord Comments 7 [JA____]. Without explanation, FERC ignored the study. *See Genuine Parts*, 890 F.3d at 312 ("[A]n agency cannot ignore evidence contradicting its position.").

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[14] FERC attempted to have it both ways. Even as it erroneously relied on large census tracts to establish the "affected area," masking the existence of minority populations, FERC maintained that communities five miles from a compressor station would "not be affected by construction or operation of the facility." FEIS 3-58 [JA____].

[15] U.S. Census Bureau, *American FactFinder*, https://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF1/GCTPH1.CY07/0500000US51029 (last visited Apr. 4, 2019).

[16] Federal Interagency Working Group on Environmental Justice, Promising Practices for EJ Methodologies in NEPA Reviews 21 (2016), https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

FERC compounded its error by selecting an unduly narrow comparison group. Agencies should not select a comparison group that may "artificially dilute or inflate" the affected minority population. EPA EJ Guidance § 2.1.1; *see also* *Mid States*, 345 F.3d at 541 ("[A]n agency must compare the demographics of an affected population with demographics of a more general character (for instance, those of an entire state)."). Rather than comparing the affected area to statewide or broader demographics, as it did when identifying low-income communities, FERC arbitrarily selected the county as its comparison group. *See* FEIS 4-512 to 4-513 [JA____-____]. Because Buckingham County has only four census tracts, the African-American population of the three tracts FERC considered (24% to 43%) unsurprisingly resembles the entire county (35%), which is considerably higher than the statewide percentage (19%). *Id.* App. U at U-2 [JA____].[17] This error, and its choice to group all minorities together, also led FERC to ignore disproportionate risks to American Indians in North Carolina, who make up only 1.2% of the state's population but constitute 13.2% of those living within a mile of the Project route. *See* Emanuel Comments § 2.4 [JA____].

[17] Contrast FERC's analysis of Union Hill with its review of the Sabal Trail project in *Sierra Club*, 867 F.3d 1357. There, this Court found that FERC met its NEPA obligations by discussing the characteristics of an African-American community "extensively" even though FERC did not designate the community as a minority population. *Id.* at 1370. Here, FERC did not discuss the characteristics of Union Hill at all. *See* FEIS 4-512 to 4-515 [JA____-____].

Even had FERC properly identified affected minority communities, a separate error further undermined its analysis. FERC maintained that air pollution from Compressor Stations 2 and 3 (in Northampton County, North Carolina) would not cause high and adverse impacts because emissions would "not exceed regulatory permittable levels." *Id.* at 4-514 [JA____]. But whether a polluting facility meets permitting requirements is distinct from whether it has a disproportionately high and adverse effect on environmental justice populations. *See* EPA EJ Guidance § 3.2.2 (even harms that are not "significant" in the NEPA context may disproportionately or severely harm environmental justice communities). Otherwise, consideration of disproportionate harm would be required only for facilities that could not lawfully obtain air permits—an absurd result. Such an approach also ignores that ozone and fine-particle pollutants cause adverse health effects even at levels below national ambient air quality standards. *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 360 (D.C. Cir. 2002); NAAQS for Particulate Matter, 78 Fed. Reg. 3086, 3098 (Jan. 15, 2013) (There is "no population threshold, below which it can be concluded with confidence that $PM_{2.5}$-related effects do not occur."). Like its failure to identify minority populations, FERC's reliance on the illogical assumption that compliance with air quality standards guarantees no disproportionate harm renders its environmental justice analysis arbitrary and capricious.

D. FERC Failed to Take a Hard Look at the Impacts of Downstream Greenhouse Gas Emissions.

Because "[t]he harms associated with climate change are serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), carefully considering a project's climate impacts is critical to any NEPA review—particularly for a pipeline whose purpose is transporting natural gas for combustion in power plants, *see Sierra Club*, 867 F.3d at 1372, thereby emitting carbon dioxide and other greenhouse gases that drive climate change. FERC's superficial analysis of these "downstream" greenhouse emissions in the FEIS—in which FERC merely quantified the tons of emissions and expressly declined to consider either their incremental environmental impacts or their significance—failed to satisfy NEPA.

1. Quantifying downstream emissions without discussing their incremental impacts or significance is insufficient under NEPA.

Under NEPA, FERC must "quantify *and consider*" a project's downstream greenhouse gas emissions, or explain why it cannot. *Id.* at 1375 (emphasis added). Considering a project's emissions entails more than merely estimating the volume of greenhouse gases emitted; "[t]he key requirement of NEPA … is that the agency consider and disclose the *actual environmental effects* in a manner that … brings those effects to bear on decisions to take particular actions that significantly affect the environment." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 96 (1983)

(emphasis added); *see* 40 C.F.R. § 1502.16(a), (b) (requiring examination of effects and their significance). Therefore, in the context of greenhouse emissions, an environmental impact statement must "include a discussion of the 'significance' of this indirect effect … as well as 'the incremental impact of the action,'" *Sierra Club*, 867 F.3d at 1374.

FERC's FEIS included neither. The entirety of FERC's assessment consisted of three elements: (1) quantifying the Project's downstream greenhouse emissions (an estimated 29.96 million tons per year); (2) discussing the general link between greenhouse emissions and climate impacts without any assessment of project-specific impacts; and (3) comparison to the greenhouse gas inventories for four states. *See* FEIS 4-618 to 4-622 [JA____-____]; Certificate Order ¶¶ 298, 305, 306 [JA____, ____, ____]; Reh'g Order ¶¶ 263, 270-274, 280, 281 [JA____, ____, ____].

Generally describing the impacts of climate change is not an assessment of *this Project's* incremental impacts, which FERC claimed (without support) "cannot be determined." Certificate Order ¶ 306 [JA____] (citing FEIS 4-620 [JA____]).[18] Nor did FERC even attempt to assess the significance of downstream emissions, *see id*., which FERC concedes requires more than merely comparing project

[18] FERC's general discussion is also woefully incomplete, omitting such serious climate impacts as mortalities from heat-related illnesses, property damage from sea level rise, and increased energy demand for heating and cooling. *See* FEIS 4-618 to 4-619 [JA____-____].

emissions to regional and national emissions. *See* FEIS 4-620 [JA____] (admitting that comparing project emissions to state inventories "is not an indicator of significance"); *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189-93 (D. Colo. 2014) (finding insufficient agency's comparison of emissions from proposed mining expansion to state and national emissions). Inexplicably, despite claiming that it could not assess the significance of downstream emissions, FERC asserted (without support) that the project "would not significantly contribute to … climate change," FEIS 4-622 [JA____]—further evidence of the arbitrariness of FERC's analysis.

2. FERC's refusal to use the Social Cost of Carbon without an adequate explanation was arbitrary and capricious.

What makes FERC's claim that it cannot determine the incremental impacts of downstream greenhouse emissions so striking is that a tool exists to help agencies do just that: the Social Cost of Carbon. Developed in 2010 and updated in 2016, the Social Cost of Carbon is a scientifically derived metric to "estimate the monetized climate change damage associated with an incremental increase in [carbon dioxide] emissions in a given year." Reh'g Order ¶ 277 [JA____]. By translating tons of greenhouse gases into the cost of long-term climate harm, the tool puts a project's consequences into an understandable metric (dollars) that can be weighed against other consequences.

Yet despite receiving comments urging its use, Sierra Club Comments 10 [JA____]; Public Interest Groups Comments 101 [JA____], FERC did not even mention the Social Cost of Carbon in the FEIS, then failed to provide a reasoned explanation in its orders for its decision not to use it. In claiming that the Social Cost of Carbon is "not appropriate for … project-level NEPA review," Certificate Order ¶ 307 [JA____], *see also* Reh'g Order ¶ 277 [JA____], FERC offered no explanation as to *why*, and ignored FERC's prior recognition that various agencies have used the tool in project-level reviews. *See Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 (2018), at ¶ 37 & n.76. FERC similarly failed to explain how the withdrawal of Social Cost of Carbon technical support documents by Executive Order 13783 hinders the ability of FERC, an independent agency, to use the methodology. *See* Certificate Order ¶ 307 [JA____].

FERC's argument that agencies should not use the tool because "no consensus exists on the appropriate [discount] rate," purportedly resulting in a range of values too wide to be useful, *id.*, has been rejected by the courts. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) ("[W]hile the record shows … a range of values, the value of carbon emissions reduction is certainly not zero."); *High Country*, 52 F. Supp. 3d at 1192.

FERC's claim that "the tool does not measure the actual incremental impacts of a project on the environment" is simply wrong. Certificate Order ¶ 307

[JA____]; *see also* Reh'g Order ¶ 276 [JA____]. The Social Cost of Carbon does exactly that, assigning to each unit of emissions a cost in terms of climate harm. FERC has rightly abandoned this flawed argument in other certificate proceedings. *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at ¶ 48 (acknowledging that "the Social Cost of Carbon methodology does constitute a tool that can be used to estimate incremental physical climate change impacts").

Finally, in claiming that the Social Cost of Carbon would not be helpful because "there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews," Certificate Order ¶ 307 [JA____], FERC cited no authority, and Conservation Petitioners are aware of none, suggesting that the absence of a defined significance threshold relieves an agency of its duty under NEPA to "include discussions of … [i]ndirect effects *and their significance*." 40 C.F.R. § 1502.16 (emphasis added). Indeed, FERC routinely employs its professional judgment to make qualitative significance determinations in the absence of defined criteria. *See, e.g.*, FEIS 4-170 [JA____] (concluding that the Project's impacts on forests would be "significant" due to fragmentation and the loss of 6,136.6 acres of forest land). Translating 29,957,375 tons per year of greenhouse emissions into approximately $1.35 billion per year in damages[19]

[19] *See* Interagency Working Group, *Technical Support Document* 4 (2016) (central estimate of $42/ton for year 2020 emissions), http://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc_tsd_final_

would have made clear the significance of the actual impacts of the emissions, allowing FERC to fulfill its NEPA responsibilities and meaningfully inform the public. FERC's failure to do so was arbitrary and capricious.

IV. Allowing Atlantic to Exercise Eminent Domain Violates the Natural Gas Act and the Constitution for Multiple Stand-Alone Reasons.

A. Because Atlantic Lost the Permits That Were Required Conditions of Its Certificate, It Cannot Use That Certificate to Exercise Eminent Domain.

In *Appalachian Voices*, this Court stated that FERC has authority to impose conditions of public necessity. *In re Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (per curiam) (unpublished). The Court was right but did not address what happens when such conditions fail. The Natural Gas Act's text answers that question.

Section 717f(e) grants FERC authority "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). The key words are "condition" and "require."

The very definition of "condition" compels what happens when a certificate condition fails. A condition is "a future and uncertain event on which the existence or extent of an obligation or liability depends" and by "which some legal right or duty comes into existence." *Condition*, BLACK'S LAW DICTIONARY (10th ed.

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2014). Thus, FERC's finding of public necessity loses its force—and eminent domain cannot be exercised—when the "future and uncertain event" fails to occur. *See id.*; 15 U.S.C § 717f(e). When "such conditions that public convenience and necessity require" actually fail, a pipeline company cannot "exercise … the rights granted" by the certificate, which includes eminent domain. 15 U.S.C § 717f(e). Congress's use of the word "require" likewise confirms that conditions imposed under § 717f(e) are "necessary or essential" to the determination of public necessity.[20] Such conditions are not merely suggestions; they are requirements essential to FERC's necessity determinations.

Section 717f(e)'s key words—"condition" and "require"—compel the conclusion that, having failed to satisfy the "require[d]" certificate "conditions," a certificate holder cannot exercise rights granted under the certificate. *See In re Nat'l Fuel Gas Supply Corp. v. Schueckler*, 167 A.D.3d 128, 136 (N.Y. App. Div. 2018) (holding eminent domain unavailable where a pipeline company did not satisfy the conditions of its certificate).

Landowner Petitioners' interpretations of "require" and condition" give those terms their ordinary meanings—and do not render an absurd result or thwart the Natural Gas Act's purpose.[21] Congress gave FERC power to issue conditional

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[20] *Require*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/require (last visited Apr. 4, 2019).

[21] Undefined statutory terms take on their "ordinary meaning." *United States v.*

certificates where necessary, but FERC cannot impose "conditions" that are nonessential. Reading § 717f(e) to bless suggested-but-not-essential "conditions" impermissibly contorts the ordinary meaning of the statutory language. When one of the conditions required by public necessity fails, the determination of public necessity itself falls.

Yet public necessity is required—both under the Constitution and the Natural Gas Act—to support the exercise of eminent domain. *See* U.S. Const. amend. V; 15 U.S.C § 717f(e), (h); *W. River Bridge Co. v. Dix*, 47 U.S. 507, 533 (1848) (stating that the power of eminent domain must be exercised "in that degree … deemed commensurate with public necessity); *see also Talley v. Hous. Auth.*, 131 F. App'x 693, 694 (11th Cir. 2005) (calling "public necessity" the *sine qua non* of the state's takings power). The Fifth Amendment's mandate that takings be for a public use means a taking must satisfy an extant public necessity. *See Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (deferring to the legislature on what public needs satisfy the constitutional "public use" requirement).

Santos, 553 U.S. 507, 511 (2008). And the Court "is bound by the literal or usual meaning of [the statute's] words unless this would lead to absurd results … or would thwart the obvious purpose of the statute." *Nat'l Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 827 (D.C. Cir. 1980) (internal quotations and citations omitted).

Hence the problem here. Atlantic has a certificate "subject to conditions." Certificate Order ¶ 4 [JA____]; *see also Sierra Club*, 899 F.3d at 267. Those conditions include holding "all applicable authorizations required under federal law" prior to commencing construction. Certificate Order App. A ¶ 10 [JA____]. But Atlantic lacks effective versions of several of those authorizations, i.e., permits. *See* Order, *Defs. of Wildlife v. U.S. Dep't of the Interior,* No. 18-2090 (4th Cir. Dec. 7, 2018) (staying Fish and Wildlife Service biological opinion and incidental take statement); *Cowpasture*, 911 F.3d at 183 (vacating Forest Service permit); Order, *Sierra Club v. U.S. Dep't of the Interior*, No. 18-2095 (4th Cir. Jan. 23, 2019) (remanding National Park Service permit for vacatur); Order, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1743 (4th Cir. Jan. 25, 2019) (vacating Clean Water Act § 404 permit). Atlantic has thus failed to satisfy conditions of the certificate that "the public convenience and necessity … require[d]." 15 U.S.C. § 717f(e).

The loss of those permits is fatal to Atlantic's ability to exercise eminent domain because FERC's conditions "attach to … the exercise of the rights granted" under the certificate. *Id.* Atlantic's failure to satisfy the required conditions invalidates the exercise of conditional rights the certificate purports to grant, including the power of eminent domain. *See* 15 U.S.C. § 717f(h); Certificate Order ¶¶ 66, 77 [JA____, ____].

To avoid the constitutional problem of a taking with no public necessity, the Natural Gas Act must be interpreted as barring the use of eminent domain based on a conditional certificate whose conditions have failed. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he Court will construe the statute to avoid such [constitutional] problems unless such construction is plainly contrary to the intent of Congress."). If the Court refuses to interpret the statute or the text of the FERC certificate itself to avoid the constitutional problem, then the Court must face the problem and hold the takings unconstitutional.

B. Atlantic's Use of Eminent Domain Under This Certificate Violates the Takings Clause and the Natural Gas Act.

An eminent-domain statute violates the Just Compensation Clause if it does not entitle a property owner to "reasonable, certain, and adequate provision before his occupancy is disturbed." *Sweet v. Rechel*, 159 U.S. 380, 403 (1895) (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). Adequate provision under the Fifth Amendment does not require that compensation be paid before property is taken. *Id.* at 403 (citing *Cherokee Nation*, 135 U.S. at 659). But a provision must "be sufficient to secure the compensation to which, under the constitution, [a property owner] is entitled." *Id.*

Unbacked by the public fisc, a private condemnor like Atlantic must prove (1) its amenability to suit and (2) such "substantial assets" that "just compensation

is, to a virtual certainty, guaranteed." *Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1321 (4th Cir. 1983).[22] The Natural Gas Act does not explicitly hold Atlantic to its burden even though that is what the Just Compensation Clause requires.

The way to save the statute is to interpret § 717f(e)'s "willing and able" provision as requiring FERC to determine whether adequate provision exists; FERC must assess Atlantic's amenability to suit and asset level. Either the Natural Gas Act is unconstitutional because it lacks an explicit requirement ensuring just compensation or, instead, the Court can avoid the constitutional problem by interpreting the statute as requiring FERC to confirm the pipeline company's ability to pay.

But without analysis, the Court in *Appalachian Voices* concluded that FERC does not have the constitutional duty to protect landowners against the risk of nonpayment. *Appalachian Voices*, 2019 WL 847199, at *2. The Court declined to identify who bears that responsibility. *Id.*

This issue has devolved into a game of constitutional-rights hot potato. Deferring to FERC, district courts have refused to evaluate or allow discovery on the pipeline's assets. *See, e.g.*, *Mountain Valley Pipeline, LLC v. Simmons*, 307

[22] When the taker is the government, adequate provision is presumed. But when the taker is a private company, the taker "has neither sovereign authority nor the backing of the U.S. Treasury to assure adequate provision of payment." *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 775 (9th Cir. 2008).

F. Supp. 3d 506, 522 (N.D.W. Va. 2018), *aff'd sub nom. Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197 (4th Cir. 2019) (assuming without evidence that pipeline company would be able to make up difference between ultimate determination of just compensation and bond deposited with district court). FERC also refused the landowners' requests to allow such inquiries. Reh'g Order ¶ 88 [JA____]. With no one protecting landowners against being stiffed by a struggling private company, the landowners' Fifth Amendment rights are violated. *Sweet*, 159 U.S. at 400; *Cherokee Nation*, 135 U.S. at 659; *Wash. Metro.*, 706 F.2d at 1321.

That risk is not hypothetical. Atlantic's owner-operator admitted it "has insufficient equity to finance its activities" during the construction stage of the project. Dominion Form 10-K 211 [JA____]. And FERC itself detailed the Project's serious financial risks, Certificate Order ¶ 102 & nn.150-51 [JA____], yet made no effort to analyze whether Atlantic had such "substantial assets" to guarantee compensation. *See Wash. Metro.*, 706 F.2d at 1321.

Because "every right, when withheld, must have a remedy, and every injury its proper redress," *Marbury v. Madison*, 5 U.S. 137, 147 (1803), the Court should suspend eminent-domain use and remand the matter to FERC. FERC can determine whether just compensation is guaranteed to a virtual certainty. Alternatively, the Court must reach the constitutional question and hold that the

lack of a provision ensuring against the risk of nonpayment renders the Natural Gas Act's eminent-domain provision unconstitutional here.

C. Atlantic's Takings Violate Due Process.

In *Appalachian Voices*, the Court stated that so long as landowners eventually receive just compensation, their due-process rights had not been violated. *Appalachian Voices*, 2019 WL 847199, at *2. The Court also stated that the "eminent domain power conferred to Mountain Valley under the Natural Gas Act, 15 U.S.C. § 717f(h), requires the company to go through the 'usual' condemnation process, which calls for 'an order of condemnation and a trial determining just compensation' prior to the taking of private property." *Id.*

That holding misunderstands the facts on the ground. Atlantic is not going through the "usual" process; it is taking property *before* trials on just compensation. *See, e.g.*, *5.63 Acres*, 2018 WL 1097051.

The Court in *Appalachian Voices* also got the law wrong. Due process requires more than a trial on just compensation. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (finding the "root requirement" of due process is the opportunity for a hearing *before* deprivation of a property interest). Due process is about more than just money. Landowners must be given a meaningful opportunity to challenge the condemnor's right to take their property *before* or *promptly following* the taking. *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

"To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a [taking] can still be avoided—*i.e.*, either before or immediately after [the taking]." *Id.* at 74 (Brennan, J., concurring). Only in "extraordinary situations" that are "truly unusual"—seizures to pay tax debts, support war efforts, or prevent economic disasters—can a taking happen before the hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972). No such disaster loomed here.

Yet before FERC and the courts gave Atlantic permission to invade landowners' properties, cut down their trees, and irreparably alter their landscapes, the landowners asserted right-to-take arguments that were never heard: (1) that Atlantic could not exercise eminent domain when it lost permits required to support the determination of public necessity and (2) that FERC needed to ensure Atlantic's ability to pay just compensation before takings. *See* SVN Reh'g Req. 9-11, 157-59, 166-70 [JA____-____, ____-____, ____-____].

FERC explicitly refused to hear those arguments. Reh'g Order ¶¶ 84-88 [JA____-____]. District courts likewise refused to consider those arguments, concluding that the Natural Gas Act's jurisdiction-stripping provision barred them from doing so and responsibility lay with FERC. *See, e.g.*, *Mountain Valley Pipeline, LLC v. Easements*, No. 7:17-cv-00492, 2018 WL 648376, at *2 (W.D. Va. Jan. 31, 2018). Again, it is constitutional hot potato.

More than a year has passed since Atlantic took some of the landowners' properties. *See, e.g.*, *5.63 Acres*, 2018 WL 1097051; *0.25 Acre*, 2018 WL 1369933. But these landowners have had no meaningful opportunity—either before the takings or in a prompt post-deprivation hearing—to raise their arguments against Atlantic's right to take. That violates due process. The proper remedy is to halt Atlantic's entry and possession of property until a meaningful hearing can be held and the right-to-take arguments can be evaluated.

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 under the certificate.

Respectfully submitted,

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Dated: April 5, 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 11,074 of the 21,800 words allotted to Petitioners other than Atlantic Coast Pipeline, LLC.

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Dated: April 5, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 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.

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Dated: April 5, 2019