



Summary of New Challenges to FERC Interstate Pipelines

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New Challenges to Interstate Natural Gas Pipeline Takings

The Federal Energy Regulatory Commission (FERC) and its predecessor agency, the Federal Power Commission have been authorizing pipelines under Section 7 of the Natural Gas Act, 15 U.S.C. §717f(c) for more than eighty years. And while the original version of the Natural Gas Act did not confer the power of eminent domain on gas companies, Congress amended the statute in 1950 to authorize companies granted a certificate of necessity and convenience to exercise eminent domain. Yet up until around 2012, there has been just a handful of constitutional challenges to the exercise of eminent domain under the Natural Gas Act. Why?

Part I of this Guide will provide a brief background on the history of the natural gas industry and explore the reasons for the recent spate of constitutional challenges to FERC-regulated gas pipelines. Part II of the Guide will describe the FERC regulatory process for granting certificates of convenience under the Natural Gas Act and the interplay with the eminent domain proceedings that flow from certificate issuance. Part II will also describe how the FERC process differs from the approvals required for interstate oil or hazardous or natural gas liquids pipelines, where eminent domain entitlements are governed by a patchwork of different state laws. Finally, Part III will list and summarize recent decisions involving eminent domain challenges to both FERC pipelines and select oil and hazardous and natural gas liquids pipelines.

I. Fifth Amendment and Due Process Challenges to Interstate Natural Gas Pipelines: Why Now?

To fully understand the acceleration of pipeline development, it is necessary to understand the role that gas pipelines played at the time the Natural Gas Act was adopted, and how that role has changed in light of deregulation and other market changes. Background follows.

A. A Brief History of the Natural Gas Act

Under the Natural Gas Act, FERC regulates both siting and rates for natural gas pipelines that transport gas at wholesale in interstate commerce. Prior to the adoption of Natural Gas Act, pipeline siting and rates were largely unregulated. Local utilities purchased gas service from pipeline companies, which were responsible for both procuring the gas -- either by producing it themselves or purchasing it from affiliated producers¹ -- and transporting it for distribution by local or municipal utilities.

At that time, four companies dominated the gas market² so local utilities were often captive to a single company for gas supply. Yet because pipelines operated in interstate commerce, states could not regulate transportation rates without running afoul of the Commerce Clause. In response to gas pipeline companies' discriminatory and monopolistic practices that "left communities crying for natural gas," in the midst of "overflowing plenty at the points of production, Congress passed the Natural Gas Act to bring interstate gas pipelines within the scope of federal regulation.³

To this end, the Natural Act declared:

that the business of transporting and selling natural gas **for ultimate distribution to the public** is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

Section 1(a), Natural Gas Act, 15 U.S.C. 717(a) (emphasis added). Both the expressed intent of the Natural Gas Act and its legislative history confirm that Congress viewed natural gas pipeline companies as serving a function akin to public utilities in delivery

¹ W. Mogel, J. Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, Energy L.J., V. 4 1983

² Klass, Alexandra B. "Takings and Transmission," 91 N.C. Law Review 1079 (2013). 4:1079-1160.

³ 1938 House Report at 56-57; see also colloquy with Devane "The consumption in the State is secured largely through interstate transmission and the cost of the interstate production is, of course, a very material element in determining the price the local people must pay for their gas. So that if complete regulation is necessary, it would involve interstate regulation. (1938 Congressional Report at 32)]

of a necessary service to serve domestic consumers. The legislative reports accompanying the Act observed that a “very, very substantial part of gas that moves in interstate commerce consumed by the public” and for that reason, pipelines are “affected by a public interest in a sufficient degree to be taken out of the category of private competitive business” and instead, regulated like a traditional public utility.⁴

Given that Congress viewed interstate gas pipelines as utilities of national scale, not surprisingly, the Natural Gas Act adopted a regulatory structure that mirrored that of state public utility commission. Like a state-regulated company, an interstate gas company must apply for a certificate of necessity and convenience from FERC to construct and operate a pipeline. And also like the state process, FERC may grant a certificate upon a finding that the pipeline will serve the present and future convenience.

The original Natural Gas Act Congress did not include condemnation authority for pipelines in the 1938 version of the Natural Gas Act. As a result, railroads and coal companies, which competed with pipelines and states, which resisted serving as pass-throughs for projects with no direct local benefits blocked pipeline development. The problem reached a tipping point during the winter of 1946-7 when opposition to new pipelines culminated in severe natural gas shortages and massive layoffs.⁵ These events prompted Congress to amend the Natural Gas Act to grant eminent domain to any natural gas pipeline company granted a "certificate of public convenience and necessity."

Congress justified the grant of eminent domain as an exercise of its Commerce Clause powers to prevent states from interfering with the flow of gas to markets outside the state:

The usual and ordinary service of an interstate natural gas company is the movement of gas which has been either produced by the natural gas company or purchased from others from the source of

⁴ *Id.*

⁵ *See Takings & Transmissions*, 91 N.C. Law Review 1079 *supra*.

supply in one State **to specified and limited markets of the natural gas company** in another State. Thus, the right of an interstate natural gas pipeline to cross intervening States in which no service is performed is a necessary protection of the free flow of commerce among the States and which can only be furnished by the Congress under its paramount jurisdiction to regulate interstate commerce.⁶

The House Report makes clear that in delegating eminent domain power to gas companies, Congress merely intended to facilitate the types of transactions - supply of gas to limited markets - that were common to the industry at that time and that had been stymied by states and other industry players. There is no indication that Congress anticipated or condoned open-ended use of eminent domain by gas companies for any other purpose than operating as a public utility serving customers in defined markets.

B. 1990's Deregulation of the Gas Industry and the Changing Role of Pipelines

The natural gas industry has drastically changed, largely due to deregulation which has changed the fundamental role of natural gas pipelines. Recall that when back the Natural Gas Act was passed, interstate gas pipelines functioned very much like public utilities - buying gas and transporting it to customers as a single service at regulated rates. But in the 1970s, deregulation began, culminating in FERC Order No. 636 issued in 1991 which unbundled transportation, storage and sales of natural gas.⁷ As a result, most interstate pipelines no longer transport gas linear route to specific customers but instead deliver gas to market hubs -- a physical transfer center point for natural gas at the intersection of major pipeline systems -- where gas is priced, traded and dispatched to other pipeline systems for export, spot market sales or trading. A recent analysis by FERC found that natural gas changes hands nearly three times on average between producer and consumer.⁸

⁶ 1947 House Report on Amendments to Natural Gas Act.

⁷ FERC Order 636, 59 FERC 61,030 (1991).

⁸ FERC State of the Market Report (Winter 2011), online at <https://www.ferc.gov/CalendarFiles/20101021100913-A-3v2.pdf>.

Deregulation also gave rise to FERC's capacity release program, which created a secondary market for firm transportation rights that enables shippers to sell their pipeline capacity to a third party. Services offered in the primary market can be offered in the secondary market by the holder of the primary service. Released capacity offers shippers the opportunity to buy and sell from each other as well as from the pipeline. What a capacity release program means is that shippers can subscribe to more capacity than they may need, betting that they will have future opportunities to sell that capacity to other users.

Finally, deregulation also created a category of industry participants known as gas marketers, which are primarily concerned with selling gas. To this end, marketers undertake all of the intermediary activities that a particular purchase requires; including arranging transportation, storage, accounting, and any other step required to facilitate the sale. Marketers also use their expertise in financial instruments and markets to both reduce their exposure to risks inherent to commodities, and to earn money through speculating as to future market transactions.⁹

Taken together, the changes wrought by deregulation have transformed pipelines from their function of transporting a necessary commodity to a trading platform. To be sure, some pipelines are constructed today with the purpose of enhancing system reliability and providing necessary gas service to local consumers and industries to keep costs low. But many pipelines are also developed with a different purpose in mind that at a minimum, must be examined prior to the grant of a certificate that confers the weighty power of eminent domain.

C. Change in Gas Supply and Market Opportunity

The energy market has also changed considerably since the passage of the Natural Gas Act. At that time, coal was dominant as well as cheap and fueled nearly all of the nation's electric plants. In fact, as recently as 2008, coal powered twice as

⁹ See History of the Natural Gas Market, online at <http://naturalgas.org/naturalgas/marketing/>.

much electricity as gas. But around that time, the balance shifted with the advent of new technology that known as fracking, a process for extraction of natural gas from shale rock. This newly accessible natural gas supply decreased the price of natural gas and by 2016, natural gas overtook coal as America's most prevalent power source.¹⁰ This growth in supply and use of natural gas has also driven pipeline expansion.

New expansion coupled with decreasing demand means that new pipelines are no longer needed. According to the NRDC, the United States now has enough pipeline capacity to carry 180 billion cubic feet of natural gas every day, but last year, average daily U.S. consumption was just 75 billion cubic feet.¹¹ Domestic demand for gas has tapered off, with a modest one percent increase in 2016.¹² The sole source of demand comes from foreign markets: natural gas exports rose sharply in 2015 and continue to grow¹³ and remain one forces that will to govern demand for pipeline infrastructure in the future.¹⁴

FERC policy also drives development of new greenfield pipelines. Currently, FERC allows returns of 14 percent for construction of new pipelines - higher than returns for any other sector of the utility industry which range between 9%-12%. The high returns on equity that pipelines make the pipeline business is an attractive

¹⁰ See *Closing Coal Plants Replaced With Natural Gas Makes Economic Sense*, Forbes (Feb. 2, 2016), online at <https://www.forbes.com/sites/jamestaylor/2018/02/26/closing-coal-power-plants-replacing-with-natural-gas-makes-economic-sense/>

¹¹ <https://www.nrdc.org/experts/amy-mall/natural-gas-industry-admits-new-pipelines-arent-needed>

¹² 2016 FERC State of market report at 6, online at <https://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/2016-som.pdf>.

¹³ *Id.*

¹⁴ See Reuters, online <http://www.reuters.com/article/us-usa-lng-pipelines-analysis-idUSKBN17E2CH>.

place to invest capital.¹⁵ Moreover, the high returns incentivize development of marginal or entirely unnecessary projects.

II. The FERC Regulatory Process and Eminent Domain

A. Scope of FERC Jurisdiction

Under the Natural Gas Act, the Federal Energy Regulatory Commission (FERC) has jurisdiction over the siting and rates of pipelines that transport natural gas in interstate commerce and foreign commerce. Section 7 of the Natural Gas Act, 15 U.S.C. §717f(e) of the Natural Gas Act governs the siting of interstate natural gas pipelines. Understanding which projects are covered by Section 7 and which are not is critical because *only* pipelines that are subject to FERC's siting authority and obtain a certificate of necessity and convenience under Section 7 are delegated eminent domain powers.

For example, in addition to having the power to site interstate pipelines, FERC also has jurisdiction to site export and cross-border facilities and other projects for foreign commerce. By contrast, authorization of projects for foreign commerce is governed by Section 3 of the Natural Gas Act, 15 U.S.C. §717b,¹⁶ **does not** convey rights of eminent domain.¹⁷

Other types of pipelines are not subject to the Natural Gas Act at all. Specifically, the Natural Gas Act does "not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Section 1(b) Natural Gas Act, 15 U.S.C. 717(b). Because gathering lines - which gather gas from various wells or points of production to a central collection point - are not subject to FERC jurisdiction, the eminent domain provisions of Section 7 of the Natural Gas Act do not

¹⁵ IEEFA Report at 9 (April 2016), online at <http://ieefa.org/two-pipeline-expansion-projects-appalachia-indicate-rush-toward-overbuilding/>.

¹⁶ Under Section 3 of the Natural Gas Act, companies seeking to engage in foreign sales of gas must also obtain authorization from the Department of Energy.

¹⁷ Compare Section 717b with 717f(h) of Natural Gas Act; see also *Weaver's Cove Energy*, 112 FERC ¶ 61,070 at n. 26 (2005)(observing that Section 3 of Natural Gas Act does not convey eminent domain rights).

apply to gathering lines (though companies with gathering facilities may have eminent domain rights under state law).

Interstate pipelines that carry oil, hazardous liquids and petroleum products (collectively, oil pipelines) are not subject to FERC's siting authority under Section 7 of the Natural Gas Act and therefore, no eminent domain rights under the Natural Gas Act attach. FERC has jurisdiction to regulate the rates and practices of oil pipelines under the Interstate Commerce Act, but the fact that oil pipelines are subject to FERC's ratemaking authority does not entitle them to eminent domain under the Natural Gas Act.

B. Substantive Standard for Granting A Certificate and Eminent Domain Under Natural Gas Act and FERC Policy

1. Public Necessity and Convenience Test

Any pipeline seeking to construct or operate an interstate gas pipeline must obtain a certificate of public necessity and convenience from FERC. 15 U.S.C. §717f(c). FERC shall issue a certificate:

to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied...

15 U.S.C. §717f(e).

The Commission implements the Natural Gas Act through its 1999 Certificate Policy Statement ("Certificate Policy") which describes how the Commission evaluates the public convenience and necessity. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶61,128, 61748 (Feb. 9, 2000), *further*

clarified, 92 FERC ¶61,094, 61,373 (July 28, 2000) (“Certificate Policy”). Under the Certificate Policy, the Commission first assesses whether existing ratepayers will subsidize the project (subsidization is permissible only for projects that enhance system-wide reliability). If the Commission determines that a project does not require ratepayer subsidies, it then balances the project’s public benefits (such as project need, increasing competition, improving reliability, lowering gas prices) against its adverse impacts on landowners and the environment. The Commission will find that a project satisfies the public convenience under Section 7 when project benefits outweigh adverse impacts. In balancing benefits and impacts, the Certificate Policy Statement establishes a sliding scale test such that a project with substantial impacts on landowners would require a heightened showing of benefits. Certificate Policy, Slip Op. at 25. In practice, however, the Commission’s balancing test is generic with the Commission invariably concluding that even the most marginal of benefits outweigh substantial impacts. *See e.g., NEXUS Pipeline*, 164 FERC ¶ 61,054 (2018) (finding pipeline serves public convenience even though only 59 percent of capacity is subscribed and hundreds of properties impacted).

A finding of project benefits hinges largely on the need for the project. Under the Certificate Policy Statement, an applicant may demonstrate project need through evidence such as “precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.” Certificate Policy, 90 FERC ¶61,128, 61748 (Feb. 9, 2000). The evidence necessary to establish the need for the project will usually include a market study...[including] available studies by EIA or GRI, for example, showing projections of market growth. *Id.* The Certificate Policy further explains that precedent agreements with multiple parties for most of the new capacity are strong evidence of market demand. *Id.* at 61,749 (emphasis added). But “[u]sing contracts as the primary indicator of market support for the proposed pipeline project raises additional questions

when the contracts are held by pipeline affiliates.” *Id.* at 61,744. Thus, affiliate agreements are considered a less meaningful indicator of need under the Policy Statement than agreements negotiated at arms’ length. *Id.* at 61, 748.

2. Eminent Domain Under the Natural Gas Act

Following the grant of a certificate, the certificate holder is endowed with eminent domain under Section 717f(h) of the Natural Gas Act:

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

Under the Natural Gas Act, Congress’ conveyance of eminent domain flows automatically to the pipeline once the certificate is issued. Courts hold that once a certificate is granted, “the Commission does not have the discretion to deny a certificate holder the power of eminent domain.” *Midcoast Interstate Trans., Inc. v. F.E.R.C.*, 198 F.3d 960, 966 (D.C. Cir. 2000); *also Vector Pipeline*, 87 FERC ¶61, 225 at 61,094 (1999)(explaining that eminent domain is conferred on certificate holder by statute, not by FERC). Thus, FERC frequently declines to condition exercise of eminent domain on satisfaction of other requirements - though it has done so in at least one instance. *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653 (4th Cir. 2011)(denying injunctive relief for immediate access where company failed

to complete surveys which was a condition precedent in the certificate to company's exercise of eminent domain).

The Fifth Circuit upheld the constitutionality of Section 717f(h) in *Thatcher v. Tennessee Gas Pipeline*, 180 F.2d 644 (5th Cir 1950). There, as a defense to a taking by a gas company, the landowner argued that Section 717f(h) was unconstitutional because it impermissibly conveyed the right of eminent domain to a private company. The Fifth Circuit disagreed, finding that a grant of eminent domain was an appropriate exercise of Congress' power to regulate interstate commerce, and further, that transport of natural gas in interstate commerce was "a public business subjected to public control....and cannot be conducted at all unless its operations are determined by the Federal Power Commission to be compatible with the public convenience and necessity." *Thatcher*, 180 F.2d at 647. The constitutionality of Section 717f(h) has not been seriously questioned since *Thatcher*, although as discussed in Part III, several "as-applied" challenges to use of eminent domain by pipelines or to use of eminent domain for specific purposes (*e.g.*, conditioned licenses or export facilities) have been raised.

Moreover, because the Natural Gas Act expressly confers eminent domain powers to "certificate holders", the question of whether eminent domain is available as a general matter has never been in serious dispute. By contrast, gas pipelines, oil and hazardous liquids pipelines lack the federal eminent domain authority that accompanies the FERC natural gas certificate process. For these types of pipelines, eminent domain powers are often tied to a variety of factors such as the product transported by the pipeline, the pipeline's status as a common carrier or public utility and whether the pipeline serves end users within the state. Some states grant eminent domain authority to all pipelines, some to pipelines that are public utilities, some only to crude pipelines, and some provide no eminent domain authority at all.¹⁸

¹⁸ C. O'Rourke, *Oil Pipeline Regulation: The Current Patchwork Model and an Improved National Solution*, Journal of Energy and Law Resources (February 2, 2016), online at <https://jelr.law.lsu.edu/2016/02/02/oil-pipeline-regulation-the-current-patchwork-model-and-an-improved-national-solution/>.

States have even reached different conclusions on whether the same type of pipeline is a public utility or not. For example, Kentucky held that a natural gas liquids pipeline was not a public utility because it is not regulated by the Public Service Commission and therefore not in the public use,¹⁹ while Pennsylvania reached a contrary conclusion.²⁰ The lack of clarity regarding the availability of eminent domain under state law has and will continue to spawn challenges to its use.²¹

By tying eminent domain to the grant of a certificate, Section 717f(h) bypasses much of the confusion that has arisen under state law - but at the same time, makes it far more difficult for parties to argue that an interstate gas pipeline which holds a valid certificate is not entitled to exercise eminent domain. As discussed in Part III, the challenges to eminent domain under Section 717f(h) must either attack the validity of the certificate granted by FERC (which can only be raised in certain forums) or the constitutionality of applying Section 717f(h) to a particular type of certificate holder. For these reasons, statutory and constitutional challenges to eminent domain by gas pipelines under Section 717f(h) are even more complex and more of an uphill battle than many state challenges to eminent domain.

¹⁹ *Bluegrass Pipeline II*, 478 S.W.3d 386 (Ky. Ct. App. 2016); *See* KY. REV. STAT. ANN. § 278.502 (West 2016) (“Any corporation or partnership organized for the purpose of . . . operating oil or gas wells or pipeline for transporting or delivering oil or gas, including oil or gas products, in public service, may . . . condemn the land and material or the use and occupation of the lands.”).

²⁰ *See e.g., In re Sunoco Pipeline, L.P.*, 143 A.3d 1000 (Pa. Cmmw. Ct. 2016) (“We further conclude that Sunoco is regulated as a public utility by the PUC and is a public utility corporation, and Mariner East interstate service is a public utility service rendered by Sunoco within the meaning of the BCL”) and *Clean Air Council v. Sunoco Pipeline L.P.*, 185 A.3d 478 (Pa. Cmmw. Ct. 2018)(summarizing litany of cases challenging use of eminent domain for Mariner East hazardous liquids pipeline).

²¹ While Part III will, for completeness, briefly mention some of the recent state eminent domain property challenges to pipelines, detailed discussion is outside the scope of this Guide which focuses primarily on the emerging challenges to interstate FERC pipelines.

More recently, landowners have attempted a second type of constitutional challenge to the Section 717f(h) - not with regard to the pipeline's use of eminent domain but with respect to the judiciary's creation of a right of "quick take" which was first affirmed by an appellate court in *Sage v. East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 829 (4th Cir. 2004). As discussed in detail in Part III, recent challenges claim that the judicially created right of quick take violates the separation of powers doctrine of the United States Constitution.

C. The FERC Process for Granting a Certificate

The table below briefly summarizes the FERC process for granting a certificate of convenience and the intersection with landowner issues and the eminent domain process. Note that this "highly reticulated" process²² applies **only** to interstate natural gas pipelines regulated by FERC and not to oil, petroleum products or hazardous liquids pipelines.²³ Familiarity with the different pieces of the process is critical to understanding the evolving new challenges to gas pipelines discussed in Part III.

²² See *American Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602 (6th Cir. 2010) ("The Natural Gas Act sets forth a highly reticulated procedure for obtaining, and challenging, a FERC certificate to build an interstate pipeline.")

²³ Oil, petroleum and hazardous liquids are potentially subject to state siting law (if a state has a siting program) and if crossing state lines, certain federal statutes (*e.g.*, Army Corps of Engineers Section 10 permit program for projects that interfere with navigable waters, Bureau of Land Management or Forest Service lease or special use permits, *etc...*). The details of siting of non-FERC pipelines is beyond the scope of this Guide.

Stage	Time Frame	Description	Landowner Opportunity	Reality
Pre-Filing	Precedes application filing by 6- 12 months.	Informal process for vetting application with public that precedes formal application filing. Company must seek FERC approval to use pre-filing. Company holds open houses for public, shares map showing pipeline location and reports on impacts. <i>See 18 CFR § 157.21.</i>	Can attend open houses and seek alignment change through participation in pre-filing. Company will generally demand survey access in exchange. Landowner can register to receive filings but no intervention since no formal administrative proceeding.	Information provided during pre-filing is vague and incomplete. Process is informal so minimal notice is required; onus on landowners to gather information.
Pre Certificate Surveys	Begin during pre-filing and continue throughout process	FERC encourages, but does not mandate that landowners grant access for pre-certificate surveys. Process governed by state law.	In some states, pipeline has no right to pre-certificate surveys. In others, access is allowed. If landowners are forced to grant access, should demand results of all studies performed and document demand at FERC.	In states where access is allowed, denial simply postpones inevitable and may subject landowners to penalties. In states where unclear or not permitted, denying access may slow the process but to date, has not stopped a pipeline.
Application for Certificate	Formal request for certificate under Section 7 of Natural Gas Act. If pre-filing has taken place, applicant encouraged (but not required) to wait 180 days between pre-filing close and application. <i>See 18 CFR § 157.6</i> (application requirements).	Application is the start of the formal process before FERC. Triggers notice requirements and change in docket number between pre-filing and application.	Directly impacted landowners entitled to notice and opportunity to intervene (<i>see below</i>)	For large projects, applications can be thousands of pages & difficult to navigate. Often difficult to determine from filing whether and to what extent a particular property is impacted (must check alignment sheets). Many of filings also protected as confidential or privileged and landowners must make separate demands for this information.

Stage	Time Frame	Description	Landowner Opportunity	Reality
Intervention	Typically 30 days after Notice of Application. 18 C.F.R. §385.214. BUT, intervention permitted up until deadline for comment on Draft EIS (only EIS, not EA). See 18 C.F.R. §380.10.	Intervention confers party status, affords certain rights to obtain confidential and privileged documents and most importantly preserves right to seek rehearing and appeal under 15 U.S.C. §717r.	Must intervene to retain right to challenge pipeline. Simple “doc-less” process available via FERC website. Ability to challenge certificate may afford leverage. All issues and objections should be raised in motion to intervene, including constitutional challenges and lack of public need. Should also request adjudicative hearing if factual disputes surround question of need.	Intervention is critical to be able to preserve appeal rights. Landowners should not wait until DEIS deadline because FERC may opt to prepare an EA and late intervention at that stage may not be allowed.
CEII and Privileged Docs	May be - and should be sought any time after application is filed. See 18 C.F.R. §388.112-3.	Most pipeline applications contain confidential critical energy infrastructure information (CEII) and privileged information that if analyzed by experts may shed insight on whether a project is overbuilt or bound for overseas.	Process allows landowners to seek CEII and certain privileged information directly from companies; if denied, landowners can obtain CEII from request to FERC or filing FOIA request for privileged information.	CEII information worth pursuing to gain information on need. If challenging lack of notice, should seek landowner lists (access will be denied but if for notice, can likely prevail in court challenge. <i>Columbia Riverkeeper v. FERC</i> , 650 F.Supp.2d 1121 (D.Or.2009)
EA / EIS	Between 30-45 days to file comments on EA and EIS	Under NEPA, parties can comment on draft EA or EIS. The EA and EIS evaluate project alternatives and examine some information on need. EA or EIS will find no significant impact in nearly all cases; may recommend realignments or minor changes as mitigation.	Landowners should comment on EA/EIS - at minimum, the document is full of errors; may also be able to negotiate conditions to mitigate project impacts if project is approved. Review provisions of 18 C.F.R. §380.15 on siting to determine whether FERC complied.	EA/EIS is also rich and overlooked source of information for project damages- contains information on extent of information, diminution of property value (typically erroneous) and project operations.

Stage	Time Frame	Description	Landowner Opportunity	Reality
Safety & PHMSA	Somewhat shockingly, safety issues are not closely examined during FERC process.	FERC merely requires companies to comply with PHMSA safety regulations, and so long as they agree to comply, FERC does not evaluate safety any further.	Serious safety issues should be brought to attention of PHMSA not FERC as FERC will not do anything. PHMSA will occasionally address serious safety concerns.	Courts have affirmed that FERC can rely on applicant's promise to abide by PHMSA regulations - do not require any further inquiry from FERC. See <i>e.g., Murray Energy Corp. v. FERC</i> , 629 F. 3d 231 (DC Cir. 2011)
Other Federal & State Permits	Processes are contemporaneous with FERC certificate process	FERC preempts state and local law except where state implements federal statute like CWA, CAA or CZMA. Other federal permits may be required from Corps Engineers, Forest Service, BLM. See 15 U.S.C. §717(b)(saving clause for CWA, CZMA and CAA under Gas Act)	Very important to participate in corresponding federal and state permit processes as they can kill a project (<i>e.g.</i> , NY denial of CWA permit in <i>Constitutional Pipeline</i> , slow down of MVP and ACP due to FS special use denials - still not final.	Companies often voluntarily submit to local zoning approval - but this is just for show. If local board denies, company will cry preemption (and win) unless it can be shown that local approval is tied up in a non-preempted state or federal process.
FERC Certificate	Typically granted anywhere between 30 to 120 days after EA or EIS.	FERC Certificate confers power of eminent domain. Certificate effective immediately unless stayed (never happens). If other federal permits not issued when FERC certificate is granted, FERC will condition start of construction on permits - but will not condition eminent domain.	If landowners have opposed survey, company can now bring eminent domain action for access.	See Discussion Part III re: challenges to certificate grant and eminent domain
FERC Rehearing Request	Must be filed 30 days after certificate order issues. 15 USC §717r(a). Statutory deadline	Rehearing is jurisdictional prerequisite to seeking judicial review. Only intervenors can file.	Any fact-specific issue related to certificate - availability of alternative routes, failure to co-locate, etc..MUST be challenged on rehearing or waived.	As discussed in Part III, efforts to challenge fact-specific aspects of FERC certificate order during eminent domain proceeding will be deemed impermissible collateral attack on FERC order.

Stage	Time Frame	Description	Landowner Opportunity	Reality
Tolling Order	Issues 30 days after rehearing request is filed or rehearing is denied by operation of law.	Section 717r of the Natural Gas Act requires FERC to act on rehearing request w/30 days or it becomes final by operation of law. Tolling order extends time for FERC to act.	Tolling order creates problems for landowners - property taken even as rehearing pending or permits outstanding. But so far, practice of tolling order has been affirmed (See part III)	To date, courts have affirmed use of tolling order - they admit there could be situations where tolling order violates due process but have yet to find case fitting these facts. See also Part III.
Judicial Review of FERC Certificate	Must be filed 60 days after FERC denies rehearing	Judicial review of FERC order available in DC Circuit or circuit where company is headquartered or has principal place of business.	Judicial review of FERC orders may be only way to raised constitutional challenges. See Part III on evolving legal issues.	Often project is built by the time cases reach court. Legally, this does not render issues moot - but may landowners no longer have drive to fight once pipeline is in service.
Review of federally-required permits	Varies - no hard and fast deadline under 717r.	Under Section 717r(d) of the NGA, review of federally-authorized permits except CZMA lies in federal appeals court where project is located. Can also bring action to review delay by state agency in DC Circuit. Some limited authority provides for review of state admin decision by state court before proceeding to federal court.	Landowners can use challenges to state permits to protect property and/or defeat pipeline.	Recent court decisions narrowing time for states to act on Clean Water Act certificates may make it more difficult for states to act before permit is waived.
Section 717f(h) eminent domain proceedings	Can be filed immediately after certificate issues	Under Section 717f(h), eminent domain action can be brought in federal or state court. Pipelines typically file a condemnation action along with Motion for Partial SJ to Confirm the Right to Take and FRCP 65 Motion for Injunctive Relief for Immediate Access (note - these procedures are not authorized by statute but created by judicial fiat).	See discussion for defenses and arguments. Any issues involving challenge to FERC certificate considered collateral attack but landowners have been successful in limiting scope of rights to that approved by FERC.	Most courts agree that rights granted in eminent domain cannot exceed the scope of the easement. See <i>Tennessee Gas Pipeline Co. v 104 Acres of Land More or Less, in Providence County of State of R.I.</i> , 780 F Supp 82, 85 [D RI 1991]

III. New Challenges to FERC Natural Gas Pipelines

Recent challenges to FERC natural gas pipelines fall into five general categories:

- Opposition to pre-certificate survey access in state court proceedings by pipeline against landowners;
- Statutory, constitutional and administrative-law challenges to the FERC certificate under the Natural Gas Act through rehearing and judicial review under Section 717r;
- Programmatic or statutory challenges to the Natural Gas Act originating in federal district courts;
- Statutory and constitutional challenges in eminent domain proceedings under Section 717f(h) of the Natural Gas Act.
- Environmental challenges to FERC certificates and federally-mandated environmental permits;

A. Pre-Certificate Survey Challenges

Under the Natural Gas Act, condemnation authority to acquire property rights to construct and operate a project conveys only to “certificate holders.” 15 U.S.C. §717f(h). Prior to FERC’s grant of a certificate, a company has no federal right to enter properties along the proposed pipeline route for surveys of denied access by the owner. Therefore, to gain pre-certificate entry, companies must turn to state law with varied results.

Recent cases out of the West Virginia and Virginia Supreme Courts show how survey access turns on the specific terms and intent of the applicable statute. In *Mountain Valley Pipeline v. McCurdy*, 793 S.E. 2d 850 (2016), the West Virginia Supreme Court ruled that an interstate pipeline could not rely on state law to gain entry to properties to conduct surveys for to complete its application for a FERC certificate. The court explained that the West Virginia statute allowed survey access

only for companies “invested with the power of eminent domain,” which in turn required that the “the purpose for which said company desires to appropriate land is for a public use as authorized by W. Va. Code § 54-1-2 (2006).” *McCurdy*, 793 S.E. 2d at 855. Because the MVP pipeline would not serve or otherwise benefit West Virginians, the court concluded that the pipeline did not serve a public use within the meaning of state law and therefore, did not qualify for survey access under the statute.

The Virginia Supreme Court reached a different conclusion under its statute which “provides entry-for-survey power to..any natural gas company...as defined under the Natural Gas Act.” See *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414 (Va. 2017), citing Code § 56-49.01. The court concluded that “the unambiguous language of Code § 56-49.01 establishes the General Assembly's intent that the entry-for-survey privilege be available to foreign natural gas companies [like ACP] that do business within the Commonwealth.”

In a second case, *Barr v. Atlantic Coast Pipeline*, 815 S.E. 2d 783 (2018), the landowners argued that §56-49.01 authorizes ACP to only conduct surveys “as are necessary to satisfy regulatory requirements **and** to select the most advantageous route....” The landowners contended that surveys were not necessary to satisfy regulatory requirements because a FERC certificate could be granted without survey information. Rejecting the landowners’ position, the majority ruled that the statute did not establish two independent prerequisites to a company’s exercise of survey rights (*i.e.*, satisfaction of regulatory requirements and route selection), but merely afforded the company discretion over what types of surveys it might conduct. The dissent disagreed, finding that both statutory preconditions applied, and that the “necessary for regulatory requirements prong” had not been met, since the company’s regulatory obligations to provide survey information would not kick in until after FERC issued a certificate. *Barr*, 815 S.E. 2d at 797-798.

Once a certificate issues, companies may bring suit under Section 717f(h) of the Natural Gas Act to gain entry. At the post-certificate stage, federal courts have not been unreceptive to efforts to block access for surveys - particularly where construction will not take place. *In re Penneast Pipeline Co.*, First Filed Civ. A. No.: 18-

1585 (D.N.J. Dec. 14, 2018), a federal district court rejected landowners' argument that the certificate was non-final because the company had not obtained certain required environmental permits, and as such, did not authorize use of eminent. The court responded that without access, the pipeline could not perform the surveys needed for the pending environmental permits and as a result, the pipeline would never be built, thus rendering the certificate meaningless. *Accord Penneast Pipeline Co. v. 60 Acre ± & Easement of 0.60 Acre ± in Towamensing Twp.*, CIVIL ACTION NO. 3:18-281 (M.D. Pa. Dec. 3, 2018). In both of cases, courts granted immediate possession.

In a case involving Transco's Atlantic Sunrise Pipeline out of the Eastern District of Pennsylvania, Judge Leeson took a slightly different approach. *Transco Gas Pipeline v. Permanent Easement for 2.14 Acres*, No. 5:15-cv-00715 (April 6, 2017). There, the company moved for injunctive relief for immediate possession and in response, the landowners raised constitutional challenges to the use of eminent domain. Judge Leeson deferred the question of Transco's substantive right to condemn, because of the complexity of the constitutional issues and the entry of more parties to the case who had not had an opportunity to brief the issues. Judge Leeson also found that Transco would not suffer irreparable harm if denied immediate possession because it could accomplish its primary reason for seeking access -- to conduct surveys - under state law. *See Transco Pipeline*, Slip. Op. at 11, *citing* 26 Pa. Cons. Stat. § 309 (providing that, upon notice to the landowner, "the condemnor or its employees or agents shall have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals"). Thus, Judge Leeson denied Transco's motion for immediate possession but granted access to the properties under state law to enable Transco to perform surveys.²⁴

B. Challenges to the FERC Certificates Under Section 717r²⁵

1. Overview of FERC Process

²⁴ See Part III.D for more detailed discussion of challenges to eminent domain proceedings under Section 717f(h), including motions for immediate possession prior to payment of compensation.

²⁵ This section highlights those FERC challenges most relevant to landowners and is not intended to be an exhaustive summary of all FERC pipeline cases.

A FERC certificate order takes effect upon issuance, unless a party requests and FERC grants a stay - something that has happened...never! Following issuance of a FERC certificate order, a party may seek rehearing under Section 717r(a) of the Natural Gas Act within 30 days. A rehearing petition is a jurisdictional prerequisite to judicial review. *Myersville Citizens for Rural Community v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2014)(declining to consider argument not raised on rehearing). If FERC fails to act on requests for rehearing within 30 days after filing, rehearing will be deemed denied and the parties can immediately seek judicial review. As a practical matter, FERC cannot act on every rehearing order it receives within thirty days, so instead, it issues a “tolling order” to stop the statutory clock and allow FERC more time to issue a ruling. Once FERC acts on a rehearing request, “[a]ny party ... aggrieved by an order issued by the Commission ... may obtain a review of such order in the court of appeals of the United States ... by filing in such court, within sixty days after the order of the Commission upon application for rehearing.” 15 U.S.C. § 717r(b).

2. Recent Challenges to FERC Certificates

Project Need - To satisfy the public convenience and necessity under Section 7 of the Natural Gas Act, FERC must find a need for the project. *See* Part II.B *supra*. In recent cases, project opponents have argued lack of need for pipelines that rely entirely on affiliate agreements which are not the product of arms-length negotiation and therefore may manufacture need for the mutual benefit of the affiliated pipeline and shippers. But the current FERC majority has rejected these challenges and instead holds that affiliate agreements suffice as proof of project need. *See e.g., Mountain Valley Pipeline*, 163 FERC ¶61,197 (2018)(finding need for MVP pipeline even though based on 100-percent affiliate agreements over dissent of Commissioner Glick finding that affiliate agreements are not probative of need and Commissioner LaFleur expressing that need might be satisfied by other less invasive project alternatives), *appealed sub. nom. Appalachian Mountain Voices v. FERC* Docket 17-1271 (D.C. Cir. argument set for Jan. 28, 2019); *Atlantic Coast Pipeline*, 164 FERC ¶ 61,100 (2018) , *appeals consolidated in Atlantic Coast Pipeline v. FERC*, Docket 18-1224 (D.C. Cir. 2018). FERC has even rejected lack of need arguments where pipelines are under-

subscribed, finding that the project sponsors would not go through with the project unless they perceived a need - and as such, one must exist. *NEXUS Pipeline*, 164 FERC ¶ 61,054 (July 2018)(finding need for project that is only 59 percent, over objection of Commission Glick who found need inadequate and criticized majority for ignoring market studies corroborating lack of need), *appeal sub. nom. City of Oberlin v. FERC*, Docket No. 18-1218 (D.C. Cir. 2018).²⁶

In two earlier cases, the D.C. Circuit affirmed FERC's finding of project need for pipelines with 100 percent subscription by non-affiliated shippers. *Myersville Citizens* 783 F.3d 1301; *Minisink*, 762 F.3d 97. But appellate courts have not yet addressed posed by the above appeals: whether FERC may determine project need based (1) entirely on affiliate agreements or (2) in a situation where pipeline is significantly undersubscribed.

Project Intended for Export Granted Certificate Under Section 7 - Export projects are approved under Section 3 of the Natural Gas Act which does not authorize eminent domain, while interstate projects are subject to Section 7 where eminent domain applies. Interstate and export projects are distinct categories under the Natural Gas Act. *Border Pipeline Co. v. FPC*, 171 F.2d 149 (D.C. Cir. 1948)(holding that FPC cannot extend its authority over interstate gas pipelines under Section 7 to export pipelines governed by Section 3); *Distrigas Corp. v. Federal Power Commission*, 495 F.2d 1057 (1974) (finding that FERC erred by reviewing imports under Section 7 rather than Section 3). Thus, parties have challenged FERC's reliance on exports to demonstrate need for a project under Section 7 and have also argued that use of eminent domain for export projects exceeds the scope of Section 7. *See NEXUS Pipeline*, 164 FERC ¶ 61,054 *supra* (finding that export pipeline will still serve gas to domestic customers and therefore is subject to Section 7 and use of eminent domain is constitutional because interstate transport of gas is a public use)(issue on appeal at DC Circuit); *Town of Weymouth v. FERC*, Docket No. 17-1135 (D.C. Cir. Dec. 27, 2018)(unpublished)(finding, with little explanation, that project that will partly serve export and therefore still advances public convenience [note - case did not involve

eminent domain); *Big Bend Conservation Alliance v. FERC*, 896 F.3d 418 (D.C. Cir. 2018)(declining to address argument that 144-mile intrastate pipeline connected to transborder facility should have been subject to review under Section 3 as export facility because claim was not preserved on rehearing).

Constitutionality of FERC Authorization of Eminent Domain - Parties have challenged the lawfulness or constitutionality of the certificate's conveyance of eminent domain, arguing for a variety of reasons that a particular project does not serve a public use, or that eminent domain is not authorized for export projects. See e.g., *Transco Atlantic Sunrise Pipeline*, 161 FERC ¶ 61,250, P. 33-35 (2017)(holding that FERC is not required to make public use finding because Section 1(b) of NGA declares gas pipelines transportation is in the public interest and therefore takings thereunder are constitutional); *NEXUS Pipeline, supra* (arguing that use of eminent domain for export pipeline violates Section 7 of NGA because Congress did not declare export to be a public use and eminent domain unavailable under Section 3 of NGA); accord *Mountain Valley Pipeline, supra* 163 FERC ¶61,197 (2018)(appealed) and *Atlantic Coast Pipeline*, 164 FERC ¶ 61,100. All of these challenges are currently winding their way through appellate courts. See also Part III.D (describing direct programmatic constitutional challenges in federal district court).

Unconstitutionality of Conditioned Certificates - Because state permit proceedings may take more time than the FERC process, rather than wait for those permits to issue before granting a certificate, FERC typically conditions commencement of project construction on receipt of the state permits. See Discussion III.E.1 (describing statutory challenges to conditioned permits). FERC's conditioned certificate practices raise constitutional concerns because if the state permit is denied, property will have been taken and destroyed for a project that cannot be built and therefore serves no use. Moreover, FERC's authority under Section 717f(e) is limited to an award of certificates for construction and operation of a pipeline. In other words, FERC has no power to issue a certificate simply as a placeholder - yet that is essentially what a conditioned certificate is. Thus, parties have challenged FERC's practice of issuing conditioned certificates that immediately convey eminent domain

authority, because the certificate is itself an incipient authorization. *See also* Part III.D (discussing challenges to conditioned certificates in eminent domain proceedings). FERC has rejected these challenges, insisting that it has authority to use conditioned certificates, and that once a certificate issues, FERC is powerless to condition or otherwise limit the eminent domain powers that flow therefrom. *See Mountain Valley Pipeline, supra* 163 FERC ¶61,197 (2018)(appealed) and *Midcoast, supra* 198 F.3d 960.²⁷

Due Process Denials - A second category of constitutional claims raised at FERC goes to the due process denials that result from FERC's use tolling orders to block parties from seeking judicial review of their claims prior to a taking of their property. In *Allegheny Defense Project v. FERC*, D.C. Cir. 17-1098 - argued before the D.C. Circuit²⁸ -- two landowners argued that FERC's tolling order denied them of a meaningful opportunity to challenge FERC's public use finding at a pre-deprivation hearing by delaying judicial review of the FERC order until after the property had been taken.²⁹ The landowners had attempted to challenge the project's public use at the eminent domain proceeding in federal district court under Section 717f(h). *See Transco Gas Pipeline v. Permanent Easement for 2.14 Acres*, Docket No. 17-3075 (3rd. Cir. October 31, 2018)(affirming district court's holding that challenges to public use is "collateral attack," and that landowners raised arguments in FERC process which could be appealed so no due process denial even with tolling order

²⁷ Landowners have also argued in eminent domain proceedings that a conditioned certificate is inadequate to convey immediate possession, and have challenged the constitutionality of FERC's practice of issuing conditioned certificates in programmatic challenges in federal district court. *See* Part III.C.

²⁸ Argument held on December 7, 2018 and available online at *mountain Valley Pipeline*, 163 FERC ¶61,197 (2018)(finding need for MVP pipeline even though based on 100-percent affiliate agreements over dissent of Commissioner Glick finding that affiliate agreements are not probative of need and Commissioner LaFleur expressing that need might be satisfied by other less invasive project alternatives), *appealed sub. nom. Appalachian Mountain Voices v. FERC* Docket 17-1271 (D.C. Cir. argument set for Jan. 28, 2019); *Atlantic Coast Pipeline*, 164 FERC ¶ 61,100 (2018) , *appeals consolidated in Atlantic Coast Pipeline v. FERC*, Docket 18-1224 (D.C. Cir. 2018).

²⁹ Oral argument held on December 7, 2018, available online at [https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/C2999F378136C8F88525835C006B423C/\\$file/17-1098.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/C2999F378136C8F88525835C006B423C/$file/17-1098.mp3).

delays). The D.C. Circuit panel was very receptive to the landowners' position at oral argument and grilled FERC soundly on its practices. No ruling has yet issued. Landowners raised a similar due process argument in *Appalachian Mountain Voices*, 17-1812, pending review at D.C. Circuit (oral argument set for Jan. 28, 2019).

Conditioned Certificates- FERC certificates typically condition the company's commencement of construction on its receipt of all required federal permits. Parties have argued that FERC's failure to wait for issuance of other federal authorizations prior to issuing the certificate violates the terms of those other environmental statutes and precludes FERC from making a finding that the project serves the public interest. To date, courts have rejected these arguments. *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 398 (D.C. Cir. 2017)(finding conditioned certificate does not violate Clean Water Act because since construction is prohibited until permit issues; no discharges that trigger CWA will occur); *accord Township of Borden v. FERC*, 903 F.3d 234, 238 (3rd Cir. 2018); *Town of Weymouth v. FERC*, Docket No. 17-1135, *supra* (finding conditioned certificate does not violate CZMA which occurs only where activity takes place in coastal zone which will not occur absent construction).

Commencement of Construction Under Conditioned Certificate - FERC's practice of granting conditioned certificates is problematic because most federal district courts allow eminent domain to move forward under conditioned certificates (*see* Discussion, Part III) -- even though the outstanding environmental permits may never be granted, and the project may never be built.

Still, a conditioned certificate has one small saving grace: it prohibits the company from moving forward with construction until applicable permits have been received. In order to commence construction, a company must request a notice to proceed from FERC. *This is so even where the company has been awarded immediate possession in federal district court - the FERC certificate governs commencement of construction, not the court possession order.* In the past, FERC has granted partial notices to proceed - for example, allowing the Constitution Pipeline to begin construction on the Pennsylvania side of the pipeline where permits had been

received, but not on the New York side where that state had not yet acted on the permit. *See Constitution Pipeline Co., LLC*, Docket No. CP13-499-000 (Jan. 29, 2016) (delegated letter order). Ultimately, New York denied the permits, leaving the future of the project uncertain.

Another issue related to conditioned certificates is whether they allow a company to begin tree-clearing without having received permits.³⁰ Some companies have argued with some success that tree-removal is considered pre-construction activity that is not prohibited by a conditioned certificate. There is also some older FERC precedent from the hydro industry to suggest that tree-clearing does constitute construction and therefore would be prohibited by a conditioned certificate. *See City of Vanceberg*, 25 FERC ¶61352 (1983)(suggesting that hydroelectric operator had unlawfully commenced construction when it removed trees prior to complying with certain prerequisites); *accord*, *Long Lake* 36 FERC ¶ 61,101 (1987). Ultimately, landowners should keep in mind that even if their property has been taken, if permits are still outstanding, they may be able to stall or defeat construction or tree-clearing by opposing company's requests to proceed.

C. Programmatic and Direct Review Challenges

During the past two years, project opponents have attempted to challenge FERC's programs or practices directly in federal district court rather than through the review procedures of Section 717r. Direct review could enable parties to obtain immediate declaratory and injunctive relief on constitutional challenges prior to a taking of their property without spending two years or more mired in the FERC review process. But to date, courts refuse to entertain these challenges, finding that the procedures in Section 717r serve as the exclusive remedy for any matters arising out of the FERC process and deprives federal district courts of jurisdiction. *See Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624 (4th Cir. 2018)(affirming dismissal of direct constitutional challenge to eminent domain under FERC certificates because Congress intended process in Section 717r to apply to suits related to FERC certificate

³⁰ Decisions granting notice to proceed or to begin tree clearing are reported in FERC letter orders and can be searched at the FERC online library at its website.

program), *cert petition filed* Oct. 23, 2018; *Bold All. v. Fed. Energy Regulatory Comm'n*, Civil Case No. 17-cv-01822 (RJL) (D.D.C. Sep. 27, 2018)(appeal filed)(dismissing programmatic challenge to lawfulness and constitutionality of various aspects of FERC certificate program, including use of eminent domain under conditioned certificates, failure to ensure adequate security for compensation and due process violations); *accord N.J. Conservation Found. v. Fed. Energy Regulatory Comm'n*, Civ. Action No. 17-11991(FLW) (D.N.J. Oct. 29, 2018).

These decisions are problematic for several reasons. First and most obvious, they deprive landowners of a direct route to raise constitutional claims before a taking occurs. Second, these decisions fail to recognize that only landowners who have intervened in the FERC process have the opportunity to avail themselves of the procedures under Section 717r. Many landowners do not intervene either due to lack of resources to participate in a lengthy process, or because they are not provided with notice that a failure to participate will forever preclude them from challenging FERC's finding of public use and the constitutionality of eminent domain.

More troubling, courts have expanded the scope of Section 717r to prohibit challenges to FERC actions under other federal statutes that allow for private rights of action. *See Adorers of the Blood of Christ v. Fed. Energy Regulatory Comm'n*, 897 F.3d 187 (3d Cir. 2018) (finding that Section 717r deprives the federal district court of subject matter jurisdiction over nuns claim under the Religious Freedom Rights Act that pipeline through their property interferes with free exercise because claim “inheres” in the controversy over the certificate). Because the nuns had no intervened in the FERC process, the *Adorers* ruling left them with no remedy to challenge the certificate. Equally troubling, the RFRA relates to free exercise of religion, a matter over which FERC has no expertise and tangential to the siting process where FERC has full authority. In enacting Section 717r, it seems unlikely that Congress ever intended to block parties from holding FERC accountable under other federal laws that confer a right of private action.

To date, there is only one decision -*Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102 (D.C. Cir. 2018) - where a FERC-related challenge was allowed to proceed in federal district court. In *Delaware Riverkeeper*, the

petitioners alleged due process violations resulting from (1) FERC's reliance on industry funds to operate as required by the Budget Act which biased FERC in favor of industry and (2) FERC's use of tolling orders to delay review of its orders. The D.C. Circuit ruled that that the the review provisions of the Natural Gas Act did not apply because the challenge focused on the Budget Act and not a specific FERC decision. But the D.C. Circuit denied relief on the merits, finding that FERC's collection of fees did not incentivize it to favor industry because FERC was required to immediately credit the funds to the Treasury department and therefore, lacked control over the money. The court also ruled that as a general matter FERC's practice of using tolling orders did not violate the Natural Gas Act (*citing Kokajko v. F.E.R.C., 837 F.2d 524 (1st Cir. 1988)*), nor did the tolling order practice implicate petitioners' due process rights since they could raise claims of unconstitutional delay through a mandamus proceeding.

Although many of the federal district court rulings findings have been appealed and could potentially be reversed, for now, landowners should assume that they must raise all challenges related to a pipeline or FERC program during the FERC certificate process or lose the opportunity to do so.

D. Eminent Domain Cases Under Section 717f(h)

Most pipeline companies bring condemnation complaints in federal district courts under Section 717f(h) shortly after the certificate issues. In addition to a complaint, pipelines nearly always seek immediate possession prior to payment of compensation - which is accomplished by filing a partial motion for summary judgement on the company's substantive right to take the property and a motion for Rule 65 injunctive relief for immediate access. Once a company initiates an action for immediate possession, it is almost impossible to stop the taking at the district court level. That said, landowners have not surrendered and many are now challenging these decisions. Below is a summary of arguments raised in recent condemnation proceedings.

Separation of Powers Arguments - In contrast to most state statutes that expressly grant a power of quick take prior to payment of just compensation, the

Natural Gas Act does not. However, in *Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004), the Fourth Circuit blessed the practice of immediate possession before compensation where companies could (1) demonstrate a “substantive entitlement” to eminent domain and (2) satisfy the criteria for injunctive relief under Rule 65. *Sage*, however, did not address the argument that the judicially-created right of immediate possession which is not present in the Natural Gas Act violates the separation of powers doctrine. Landowners are now raising this arguments in different jurisdictions, with the hope of eventually finding relief at the U.S. Supreme Court. See *Transcon. Gas Pipe Line Co. v. 6.04 Acres*, No. 16-17503 (11th Cir. Dec. 6, 2018)(affirming immediate possession based on *Sage*); *accord In re Penneast Pipeline Co.*, First Filed Civ. A. No.: 18-1585 (D.N.J. Dec. 14, 2018); *Nexus Gas v. City of Green*, Docket No. 18-3225 (6th Cir Dec. 7, 2018); *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres* , No. 17-3075 (3d Cir. Oct. 30, 2018); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate & Maintain a Nat. Gas Pipeline Over Tracts of Land*, Civil Action No. 7:17-cv-00492 (W.D. Va. Jan. 31, 2018)(rejecting challenges to *Sage*), *appealed as Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, No. 18-1159 (argument Sep. 28, 2018); *Columbia Gas Transmission, LLC v. 76 Acres*, No. 15-2547 (4th Cir. Jul. 13, 2017)(expressing receptiveness to *Sage* challenge at oral argument but affirming quick take practice).

Failure To Satisfy Factors for Injunctive Relief - Landowners have also attempted to defeat quick take by showing that the pipeline did not satisfy the standards for injunctive relief under Rule 65. Invariably, the court nearly always defers to the pipeline’s claims of irreparable harm due to penalties or lost profit if the project is delayed in coming on line. Although appeals of a district court’s findings under Rule 65 are rare (given the court’s discretion), the landowners challenged the grant of injunctive relief in *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, No. 18-1159 (argument Sep. 28, 2018), arguing that the the court erred in finding that the pipeline’s financial damages constitute irreparable harm and that the court’s disproportionate reliance on FERC certificate in finding that MVP satisfied all four prongs of the injunctive relief test.

Lack of Good Faith Negotiation - Most courts have found that the Natural Gas Act does not impose a duty of good faith negotiation prior to a taking. *See e.g. In re Penneast Pipeline Co.*, First Filed Civ. A. No.: 18-1585 (D.N.J. Dec. 14, 2018) In *Atlantic Coast Pipeline, LLC v. 11.57 Acres, More or Less, in Nash County, North Carolina, Owned by Walter Marvin Winstead, Jr. et al*, Docket No. 5:18-cv-0013 (March 2018), the court denied a motion for immediate possession without prejudice after determining that the landowner had been subject to deceptive practices including changing information about whether his property was located in the pipeline's path.

No Substantive Right Due To Lack of Permits- In FERC's view,, a certificate that conditions construction on subsequent receipt of environmental permits is a "an incipient authorization without force or effect."³¹ Thus, landowners have argued that a conditioned certificate is inadequate to establish a substantive entitlement to eminent domain. Generally, federal district courts reject this argument. *In re Penneast Pipeline Co.*, First Filed Civ. A. No.: 18-1585 (D.N.J. Dec. 14, 2018) (finding that conditioned certificate does not prevent exercise of eminent domain powers under Natural Gas Act); *Transco v. 2.14 Acres*, CA Nos. 17-715 (ED Pa. Aug. 23, 2017)(finding certificate final even with pending permit).

But a New York state court took a different approach. In *Matter of National Fuel Gas Supply Corp. v. Schueckler*, No. CA17-02021 (4th Dept. Nov. 9, 2018), the pipeline brought a condemnation action for immediate possession in state court to take property for a project that had been awarded a conditioned FERC certificate. At the time the pipeline filed the action, New York Department of Environmental Conservation denied a water quality certificate for the project. The court found that as a result of the permit denial, the

³¹ *See, e.g., Ruby Pipeline*, 133 FERC ¶61,015(2010) at p.18 *citing Crown Landing LLC*, 117 FERC ¶ 61,209, at P 21 (2006)(observing that "[c]onditional Commission orders have been described in the context of constitutional standing analysis as 'without binding effect.'" *Id.* P 21, n.27 (citing *New Mexico Attorney General v. FERC*, 466 F.3d 120, 275 (D.C. Cir. 2006), quoting *DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005)).

pipeline “lost its contingent right to construct the public project that undergirds its demand for eminent domain”(citing *Islander E. Pipeline Co., LLC*, 482 F3d at 91). The court thus concluded that the pipeline no longer has “a valid and operative” certificate from the FERC and therefore “has no right to proceed directly” under New York’s quick-take provision, and must now go back to court to demonstrate taking the Schuecklers’ land is in the public interest. Not surprisingly, the company appealed the New York state court ruling.

Although no federal district courts have adopted the New York court’s approach in *Schuecker*, one court recently agreed to stay an immediate possession proceeding against a landowner in light of an appellate court’s ruling vacating certain key environmental authorizations. See *Atlantic Coast Pipeline, LLC v. 11.57 Acres, More or Less, in Nash County, North Carolina, Owned by Walter Marvin Winstead, Jr. et al*, Docket No. 5:18-cv-0013 (Nov. 28, 2018).

Petition to Vacate Injunction - What happens when property is taken for a project for which a permit is eventually denied? That is the fact pattern facing the Pennsylvania landowners whose maple syrup producing trees were famously razed for the Constitution pipeline which was eventually denied a water quality certificate by the New York Department of Environmental Conservation for the New York portion of the pipeline.³² After the New York permit was denied, all construction activities ceased while the company appealed the water quality certificate denial which was affirmed by the Second Circuit. *Constitution Pipeline Co., LLC v. New York State Dep’t of Env’tl. Conservation*, 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018). Meanwhile, although the landowners property was taken through immediate possession in 2015, and the trees felled in 2016, the court never initiated a compensation proceeding so Constitution never paid for the property nor acquired title. Instead, it retained possession by dint of the injunction order which the landowners have moved to dissolve, citing changed circumstances. See *Motion to Dissolve*, Docket No. 3:14-2458 (July 2018)(pending decision).

³² See *Company Cut Trees For Pipeline That Hasn’t Been Approved*, <https://stateimpact.npr.org/pennsylvania/2018/07/12/a-company-cut-trees-for-a-pipeline-that-hasnt-been-approved-the-landowners-just-filed-for-compensation/>

E. Environmental Challenges

1. NEPA Challenges to FERC Certificates

Environmental challenges to FERC are not new, though they have increased in recent years as opposition to pipelines has grown. Although gas companies are private entities, the certificates that they receive from FERC are a federal authorization subject to the National Environmental Policy Act (NEPA). *See* NEPA, 42 U.S.C. § 4321 et seq. NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions through preparation of an environmental impact statement examine the project's impacts consider alternatives and evaluate the adequacy of proposed mitigation. NEPA challenges to FERC certificates are first raised on rehearing of a FERC certificate and thereafter in a petition for review under Section 717r. *See* Part III.B, *supra*.

Even where successful, the effects of NEPA challenges are limited with respect to actually killing a pipeline. First, prevailing on environmental challenges to FERC orders is difficult because of the highly deferential standard of review and most courts' refusal to flyspeck an agency's findings "in search of any deficiency, no matter how minor." *Myersville*, 783 F.3d at 1322-1323. Second, NEPA is "essentially procedural" and "does not mandate particular results to accomplish its ends. *See Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014). So long as FERC's review is adequate and a project's does not have significant adverse impacts, FERC may approve an environmentally inferior project over one that is superior to advance other valid goals such as enhancing competition or system reliability without running afoul of NEPA. *See Midcoast Interstate Trans., Inc. v. FERC*, 198 F.3d 960 (D.C. Cir. 2000)(affirming FERC selection of environmentally inferior project that would advance competition). Moreover, because NEPA is a procedural statute, a win merely results in a "do-over," *i.e.* a remand of the case to FERC to cure any inadequacies in its original environmental assessment.

Recent NEPA challenges to FERC orders that have had some success involved segmentation and failure to review climate change. Summaries follow.

NEPA & Segmentation

Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n, 753 F.3d 1304 (D.C. Cir. 2014) involved the replacement of a 200-mile continuous pipeline which the project sponsor broke up into four different segments, each of which were submitted for approval under separate applications to FERC. Petitioners argued that FERC violated NEPA by failing to treat the separate connected segments as a single project for purposes of environmental review, thereby downplaying the overall impacts of the project. The court agreed, finding that none of the segments standing alone had independent utility and overlapped with each other temporally, operationally and geographically. As such, the four segments should have been considered as a single unit for purposes of environmental review under NEPA. The court remanded the case to FERC to review the project in its entirety and not surprisingly, FERC reached the same conclusion that the project had no significant impacts.

Since *Delaware Riverkeeper*, several parties have challenged FERC certificate orders for NEPA violations based on impermissible segmentation but none have succeeded. See, e.g., *City of Bos. Delegation v. Fed. Energy Regulatory Comm'n*, 897 F.3d 241 (D.C. Cir. 2018)(finding no segmentation where no temporal overlap between two separate connected pipeline sections); *Twp. of Bordentown v. Fed. Energy Regulatory Comm'n*, No. 17-1047 (3d Cir. 2018)(finding no segmentation of pipeline and compressor station where each has independent utility); *Big Bend Conservation All. v. Fed. Energy Regulatory Comm'n*, 896 F.3d 418 (D.C. Cir. 2018)(finding that segmentation doctrine does not require “aggregation of federal and non-federal actions” and therefore, 140-mile intrastate pipeline was not improperly segmented from one-mile jurisdictional cross-border piece); *Minisink Residents for Environ. Preservation and Safety v. Fed. Energy Regulatory Comm'n*, 762 F.3d 97 (D.C. Cir. 2014)(noting that lengthy gap between construction of two compressor stations along same pipeline precluded finding of segmentation).

Review of Upstream & Downstream Emissions

The second category of NEPA challenges to FERC certificates that have gained traction attack FERC’s failure to quantify a project’s impacts on climate change. In *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017), the DC

Circuit struck down FERC's review and authorization of a 500-mile Sabal Trail pipeline for failure to analyze the greenhouse gas emissions from the combustion of the transported gas in the Florida power plants for which the pipelines were built - also known as "downstream impacts." The court found that these downstream impacts were a reasonably foreseeable outcome of the project and therefore, FERC was required to consider these impacts under NEPA and the CEQ regulations. *See* 40 C.F.R. §1502.16(b). The court remanded the case with instructions to FERC to consider the downstream emissions as well as a methodology known as "social cost of carbon" to evaluate the environmental effects. On remand, FERC calculated the greenhouse gas emissions but determined that it could not identify an appropriate method "to attribute discrete environmental effects to the potential GHG emissions." *See Florida Southeast Connection*, 162 FERC ¶61,233 (May 14, 2018). Thus, FERC reinstated the certificate.

For a period of time after the *Sierra Club* decision, FERC - in accordance with the court's ruling - quantified projects' upstream and downstream emissions. *See e.g., Town of Weymouth v. FERC*, Docket No. 17-1135 (Dec. 27, 2018)(finding that FERC properly quantified project emissions). But in the *New Market* ruling, FERC in a 3-2 decision that it would no longer consider reasonably foreseeable upstream and downstream emissions when it lacked evidence of these impacts. Commissioners LaFleur and Glick dissenting, finding that both NEPA and the D.C. Circuit's *Sierra Club* ruling required FERC to consider these impacts and either make educated assumptions regarding impacts or gather necessary information for an analysis of climate change impacts. *See Dominion New Market* 163 FERC ¶ 61,128 (2018). Otsego2000, a local organization and intervenor in the *New Market* case has since filed a petition for review of the decision at the D.C. Circuit. *Otsego2000 v. FERC*, Docket No. 18-1188 (D.C. Cir. July 2018).

Since the FERC's new policy announcement in *New Market*, another petition for review has been filed (*Birckhead et. al. v. FERC*, Docket No. and 18-1218 (D.C. Cir. Aug. 2018) and numerous split decisions have issued, with Commissioners LaFleur and Glick dissenting from the majority's refusal to assess the project's full impacts on

climate change. *See e.g., DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238 (2018) (Glick and LaFleur, Comm'rs, dissenting); *accord Transcontinental Gas Pipe Line Company, LLC*, 165 FERC ¶ 61, 221, at P 4 (2018); *Texas Eastern Transmission, LP*, 165 FERC ¶ 61,132 (2018); *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098, at P 20 (2018) (Rehearing Order).

Although a favorable court ruling requiring FERC to quantify upstream and downstream greenhouse gas emissions will not stop gas pipelines, it would create more transparency regarding the true impacts of gas pipelines, which many continue to view as a benign source of energy. A public understanding of the full life cycle impacts of pipelines could potentially turn the tide against the recent unfettered expansion of gas pipelines.

2. Challenges to Federally-Mandated Environmental Authorizations

Opposition to required federal environmental authorizations from state and federal agencies have proved more fruitful than NEPA in stopping or slowing projects. *See e.g., Islander East Pipeline v. McCarthy*, 525 F.3d 141 (2d Cir. 2008)(acknowledging that denial of water quality certificate would effectively veto FERC certificate). Recent issues and rulings related to challenges to state and federal environmental permits for FERC pipelines are discussed below.

Issue 1: Appropriate Forum for Challenges to Federal and State Authorizations

Section 717r(d)(1) of the Natural Gas Act confers jurisdiction on federal appellate courts to entertain review of federal and state permits (with the exception of a Coastal Zone Management Act consistency finding) issued for projects subject to Section 3 and Section 7 of the Natural Gas Act. *See e.g., Cowpasture River Pres. Ass'n v. Forest Serv.*, No. 18-1144 (4th Cir. Dec. 13, 2018)(finding jurisdiction to review Forest Service permit for FERC pipeline under 717r(d)(1)); *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018) (asserting jurisdiction under 717r over challenge to Virginia water quality certificate). The First and Third Circuits have clarified that the review provisions of the Natural Gas Act only apply to “final” permit decisions and therefore, do not preempt administrative review procedures that may be available under state law. *See Bordentown*, No. 17-1047 (3d Cir. 2018)(finding that

state agency erred in refusing to allow adjudicatory hearing on Section 401 permit based on state's erroneous conclusion that NGA preempted state administrative proceedings); *Del. Riverkeeper Network v. Sec'y of the Pa. Dep't of Env'tl. Prot.*, 870 F.3d 171 (3d Cir. 2017)(holding that Section 401 permit becomes final for review in federal appellate court under 717r if parties fail to timely exercise their right to state administrative procedures); *Berkshire Env'tl. Action Team, Inc. v. Tenn. Gas Pipeline Co.*, 851 F.3d 105 (1st Cir. 2017) (dismissing petition for review of Massachusetts water quality certificate pending completion of state administrative adjudicatory review process).

In one unique case, *Bosley et. al. v. MDE* Case No. 03-C-14-5417, Circuit Court for Baltimore County (2015), project opponents successfully challenged a water quality certificate for a FERC pipeline in state court. Jurisdiction was not disputed and the Maryland Department of the Environment explained that its Section 401 certificate had been issued for a Corps of Engineers permit and not the FERC certificate and therefore, Section 717r(d) did not apply.

Issue 2: Challenges to Delays in Permit Issuance

Section 717(d)(2) of the Natural Gas Act provides that the D.C. Circuit has jurisdiction over "any civil action for review of an alleged failure to act by a federal agency (other than FERC) or a state administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law." In *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238 (D.C. Cir. 2013), the Maryland Department of the Environment refused to process the pipeline's air quality application because the project did not comply with applicable local zoning laws. The pipeline sought relief under Section 717r(d)(2), arguing that the Department impermissibly withheld action on the application in violation of federal law. The D.C. Circuit agreed, finding that the Department must either identify one or more applicable zoning requirements with which the company did not comply, or process the application. The D.C. Circuit reached a similar result in *Tennessee Gas Pipeline v. Paul*, Docket No. 17-1048 (June 29 2017) where the pipeline also argued that the agency unlawfully delayed when it failed to either grant or deny the pipeline's permit application within 18 months as

required by the Clean Air Act. The court found that the agency had improperly withheld action on the clean air permit and remanded the case back to the agency to take action on the permit.

Section 717r(d)(2) does not apply where the pipeline has a remedy for the agency's failure to act. In *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017), the D.C. Circuit dismissed a "failure to act" petition by a pipeline against the New York Department of the Environment for its alleged delay in issuance of a Section 401 water quality certificate. The court reasoned that if the Department had unlawfully delayed, its inaction would operate as a waiver under the Clean Water Act (which requires a state to act on a Section 401 certificate within a year or waive its right to do so), thus enabling the company to bypass the Section 401 certificate requirement entirely. Because the Clean Water Act, in contrast to the Clean Air Act, has a "built in remedy" for agency inaction in the form of waiver, the pipeline was not harmed by the Department's delay and therefore lacked standing to proceed under Section 717r(d)(2).³³

Issue 3: Substantive Permit Challenges

Agency Denials of Water Quality Certificates and Waiver - Over the past few years, project opponents, once focused solely on the FERC certificate process, have taken their fights to the federal and state agencies responsible for other environmental authorizations with mixed results. In New York, the Department of Environmental Protection denied Section 401 water quality certificates for three pipeline projects. One of the denials was affirmed on judicial review in *Constitution Pipeline Co. v. N.Y.S. Dep't of Env'tl. Conservation*, 868 F.3d 87 (2d Cir. 2017).³⁴ The

³³ Millennium subsequently asked FERC to find that the state had waived the Section 401 certificate requirement. FERC determined that the one year timeframe for the state to act on the 401 application began from the date the application was filed and not when it was deemed ready for processing as the state had contended. Because the state did not act on the application within a year after filing, FERC found waiver and its ruling was affirmed on judicial review. *N.Y. Dep't of Env'tl. Conservation v. Fed. Energy Regulatory Comm'n*, 884 F.3d 450 (2d Cir. 2018)(holding that time to act under Clean Water Act begins from date application is filed, not when deemed complete).

³⁴ Constitution unsuccessfully petitioned for certiorari review of the Second Circuit ruling affirming denial of the Section 401 water quality certificate. See *Constitution Pipeline v. NYDEC*, Docket No. 17-1009 (April 30, 2018). Subsequently, Constitution asked FERC to find that water quality

other two denials were deemed invalid by FERC which found that the state failed to act within one year after receipt of the pipeline's Section 401 application and therefore, it was deemed waived. See *N.Y. Dep't of Env'tl. Conservation*, 884 F.3d 450 and *National Fuel Gas*, 164 FERC ¶ 61,084 (2018), pending ruling on rehearing petition by Sierra Club. More recently, the New Jersey Department of Environmental Protection denied a water quality certificate without prejudice for the PennEast Project because the company failed to provide certain information that it could only obtain through surveys of properties to which the landowners had denied access. See *NJDEP Rejects Penn East Water Quality Certificate...Again*, online at <https://www.mcall.com/news/breaking/mc-nws-penn-east-dep-permits-20180202-story.html>.

Opponents' Challenges to Permit Grants - Project opponents have challenged agency permit grants with mixed results. Generally speaking, challenges to Forest Service, Park Service and BLM permits fared better than challenges to grants of water quality certificates. See *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. July. 26, 2018)(finding that Forest Service decision to amend management plan to accommodate Mountain Valley Pipeline (MVP) violated NEPA and terms of management plan and that Bureau of Land Management grant of an easement for the pipeline violated the Minerals Leasing Act; both agency decisions vacated and remanded); *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. Jul. 31, 2018)(affirming Virginia's grant of water quality certificate for MVP); *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1173 (4th Cir. Nov. 27, 2018)(vacating Corps' reinstatement of MVP nationwide water quality permit finding that conditions cannot be satisfied and that individual permit under Clean Water Act is likely required); *Cowpasture River Pres. Ass'n v. Forest Serv.*, No. 18-1144 (4th Cir. Dec. 13, 2018)(finding that Forest Service violated NEPA and Forest Management Act in issuing a special use permit for the Atlantic Coast Pipeline (ACP) and lacked statutory authority under Mineral Leasing Act to grant a pipeline right away across the

certification for the project was waived, which was denied (*Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (2018), and is currently pending review at the D.C. Circuit. See Constitution Petition for Review in U.S. Court of Appeals for the D.C. Circuit, Docket No. CP18-5-000 (filed Sept. 14, 2018).

Appalachian); *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1743 (4th Cir. Aug. 23, 2018)(denying challenge to Corps' finding that ACP will comply with nationwide water quality permit); *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1743 (4th Cir. Aug. 23, 2018)(finding that FWS incidental take statement under Endangered Species Act for ACP was arbitrary and capricious because take limits are unenforceable and that National Park Service's approval of ACP route across Blue Ridge Parkway was arbitrary because agency failed to explain how pipeline is consistent with the purpose of the National Park System); *Del. Riverkeeper Network v. Sec'y of the Pa. Dep't of Envtl. Prot.*, 870 F.3d 171 (3d Cir. 2017)(affirming Pennsylvania grant of water quality permit for pipeline that affects exceptional-quality wetlands based on finding that pipeline was "water dependent" and therefore eligible for permit); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, No. 16-2211 (3d Cir. Sep. 4, 2018)(finding that Pennsylvania may properly condition Section 401 water quality certificate on pipeline's subsequent receipt of other required state permits and denying challenges based on lack of notice); *Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148 (3d Cir. 2017) (affirming Corps permit and finding no NEPA violations when Corps considered compression alternatives to pipeline); *Twp. of Bordentown v. Fed. Energy Regulatory Comm'n*, No. 17-1047 (3d Cir. Sep. 5, 2018)(remanding water quality certificate for to NJDEP to evaluate whether petitioners are entitled to adjudicatory hearing to challenge certificate under New Jersey law); *Bosley et. al. v. MDE* Case No. 03-C-14-5417, Circuit Court for Baltimore County (2015)(vacating water quality certificate for based on agency's failure to provide adequate notice of proceedings).

Issue 4: Preemption

Congress intended to occupy the field to the exclusion of state law by establishing through the NGA a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." *Dominion Transmission, Inc.*, 723 F.3d 238, 248. Thus, the Natural Gas Act preempts most state and local laws unless they are enacted or incorporated by federal statute so as to inoculate them from preemption. *See e.g., Dominion*, 723 F.3d 238, 243 (finding that state law requiring applicants for Clean Air Act permit to show compliance with applicable local law is not

preempted; however, once certificate issues, most “applicable” local law will be deemed preempted); *Del. Riverkeeper Network*, 870 F.3d 171 (involving challenge to state permit that is required as condition of Section 401 certificate and therefore, not preempted).

The preemptive scope of the Natural Gas Act is broad. Even where a pipeline voluntarily submits to local zoning board review, it may subsequently invoke preemption if it does not like the result. In *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570 (D. Md. 2013), a gas company applied to the Town for local zoning approval which was denied. The company went to federal court seeking a declaration that the entire Town Code was preempted by the Natural Gas Act. Although the court refused to preempt the code in its entirety, it held that all of the Town Code provisions affecting siting, construction or operation of pipeline are null and void unless backed by Clean Air Act, Clean Water Act or Coastal Zone Management Act). *Dominion Transmission*, 982 F. Supp. 2d at 581.

Neither state environmental laws nor state constitutional provisions are not immune from preemption. On review of a challenge to FERC order approving a gas compressor station, the petitioners argued that the FERC certificate violated the state’s Green Acres Act by authorizing the pipeline to construct the project on Green Acres properties without first seeking state-level approval to divert the property to non-Green Acres use. Although the Third Circuit did not address the preemption question head on, it ruled that nothing in the Natural Gas Act requires FERC to consider the provisions of the state statute, and therefore, FERC did not err by failing to take it into account or to require the company to comply. *Township of Bordentown v. FERC*, 903 F.3d 234 (3rd Cir. 2018).

In *Commonwealth of Massachusetts v. Tennessee Gas Pipeline*, Civ. No. 16-0083 ((May 2016),³⁵ the gas company asked the court to declare unconstitutional Article 97 of the Massachusetts Constitution which prohibits disposition of land acquired by the

³⁵ Available online at <http://www.lawandenvironment.com/wp-content/uploads/sites/5/2016/05/TN-Gas-Pipeline-Co-v.-Comm-Memo-and-Order-5.9.16.pdf>.

state for conservation purposes without a $\frac{2}{3}$ approval the Legislature. Because the company's proposed pipeline would go through state forest conservation land, the company could not obtain an easement absent a legislative vote. The court granted the company's petition, holding that in enacting the Natural Gas Act, Congress intended to pre-empt the field of regulating natural gas and left no room for state laws -- even those enshrined in the state constitution -- that encroached on the federal pipeline certification program.